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Mayor Adrian Fenty
The Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

All Members
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

VIA EMAIL

Re: B18-344, "Information Sharing To Improve Services For Children And Families Act Of 2009" and B18-356, "Jacks-Fogle Family Preservation Case Coordination Authorization Act Of 2009"

July 8, 2010

An open letter to Mayor Fenty and all members of the Council:

On June 29, the Council voted unanimously in favor of B18-356, "Jacks-Fogle Family Preservation Case Coordination Authorization Act Of 2009." On July 13, the Council may be asked to consider B18-344, "Information Sharing To Improve Services For Children And Families Act Of 2009." Understood by some as "loosening" "confidentiality" in the Family Court of the District of Columbia, in fact, neither bill shines light on Family Court or District of Columbia Executive Branch agencies. Indeed, the most significant consequence of B18-356 will be, to the contrary, *expansion of the zone of secrecy*. For its part, B18-344 demonizes children and youth, while shielding government officials – adults – from answering for their conduct.

Both bills obscure the real questions at issue by obstructing, rather than promoting, transparency, accountability, and open government. As the Washington Post Editorial Board intimated regarding B18-356 on June 22, in "Secrecy Run Amok," these proposals do not "go far enough." As a result, the bills will harm children, youth, and the community. I urge you, Mr. Mayor, to reject B18-356 when it reaches your desk, and urge the Council to reject B18-344 if it is not substantially modified.

I wish to be as clear as possible, and to correct any misimpression about these bills: B18-344 and B18-356 are *not* "open government" bills. The bills do *not* give the public what it needs and deserves: genuine access to information. The bills do *not* allow for press oversight by reporting on activities of the Child and Family Services Agency, Department of Youth Rehabilitation Services, or the Family Court. The Court stays closed. Children stay behind the walls of secrecy. The public stays in the dark.

B18-356 and B18-344 should be rejected. Instead, D.C. Code 16-2331 and 2332 should be amended by enactment of the following language:

> **Family Court proceedings and records shall be open to the public, unless the court finds, by clear and convincing evidence, that closure is required to avoid substantial harm to the child, in which event the Court shall order closed or sealed that portion of a hearing or record required to avoid harm.**

Enactment of *this* provision would place the District of Columbia in the mainstream of best practices across the country with open family courts and the sun shining in. In other states, open courts serve as a safe and secure foundation to protect the best insterests of children in the government's custody. Consistent with public statements made by a number of you, if the public could access all of Family Court, the walls of secrecy no longer would hide the actions of the city's agencies. (I am most familiar with the Child and Family Services Agency, and repeatedly have testified and been quoted in news articles regarding that agency's deficiencies. I do not have direct knowledge about practices of DYRS, but understand that recent events have caused concern about that agency's practices.) In contrast, as discussed below, B18-344 and B18-356 put children at even greater risk at the hands of the adults who are supposed to protect them.

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B18-344 is the "Information Sharing To Improve Services For Children And Families Act Of 2009." B18-356 is the "Jacks-Fogle Family Preservation Case Coordination Authorization Act Of 2009." These bills would allow the police and some service providers to have access to information in court records, information which they are not permitted to access under current law. The intention of the bills is to help adults coordinate services being provided to children, thereby helping the children and the community. It is possible that the bills will help us inch closer to that objective (though I believe that the Jacks-Fogle bill was the subject of extensive testimony by experienced local service providers who were dubious that the bill's design promises success). According to recent news reports, B18-344 is being modified to permit the tightly-controlled, public airing of a small amount of information about a few youth under narrowly circumscribed circumstances.

But the real story is what the bills leave out. The bills ignore the crying need for accountability, transparency, and system reform. And without these subjects being addressed, the bills will harm children, rather than help them.

For example, with respect to ***accountability***, vulnerable children need those whose actions affect their lives to be accountable for the consequences of their actions and omissions. If, as at present, lawyers, judges, social workers, and politicians do not have to answer for their choices and decisions that affect children, those decisions will continue to be haphazard,

capricious, and neglectful to children. (If I didn't have a boss watching over my shoulder, I'd spend more time at the beach, and would clock out at 4:30 p.m. much more often. The quantity and quality of my work would suffer. Because you are required to run for reelection, you are attentive to the needs of your consitutents, and in your legislative work, attuned to their views and needs. Shouldn't those making decisions about children and providing them care have the incentives that you do? Shouldn't children receive the same sort of attention and care that you give to voters?)

Transparency is another concept unaddressed by the bills as they currently stand. "Secrecy" is what children endure without it. The bills allow delinquency and child welfare cases to remain behind totally closed doors, through which voters, taxpayers, concerned citizens, and the press cannot see.

So we will continue to wonder why Renee Bowman, who killed and then froze her foster/adopted daughters, was allowed to have the children in her home – because we can't review the files or listen to the transcripts of the court hearings at which the decisions were made to place the children in her home.

Next door in Maryland, a 12 year old female foster child was found last October to have been prostituted for several years by her Maryland foster parent. Maryland's court hearings and records are closed, too, so we can't know what evidence was considered when the decision was made to put her in his home, or whether social workers continued to check on her after the placement. Are CFSA and the Family Court overlooking the same factors in a D.C. child's life? Our secret proceedings mean that we won't know until it is too late.

More than 60% of the children in my law students' cases were returned home from foster care without being found abused or neglected, but no one (other than my students and myself) can see the flimsiness of the evidence used to support tearing the children from their families and housing them with strangers in foster care for up to three months.

Reform, change, improvement. Whichever word you use, it is another concept the bills ignore. If system actors are deprived of incentive to provide effective care because they will not face consequences for nonfeasance or malfeasance, and if we cannot learn from our failures -- and successes, when those happen – our children will remain mired in the swamp of governmental dysfunction which victimizes the children and leaves them damaged irreparably. (Consider CFSA and national data regarding the sky-high rates of unemployment, homelessness, teen pregnancy, and incarceration among youth who "age-out" of the foster care system, for example.) Federal court intervention in the LaShawn A. v. Fenty litigation will not disappear. Without open court hearings and records, we will always be where we are now.

In sum, then, my concerns with B18-344 and B18-356 are two-fold. First, in light of the persistent failure of our Executive Branch to care adequately for children and the community, and the inability of the Family Court to hold back the tide of the Executive's harmful actions, the time is overdue to establish the foundational elements of a responsive, effective system. By ignoring concepts such as accountability, transparency, and improvement, the bills fall far short

of what the city really needs. Second, B18-356 *expands* the current, dangerously-flawed system. As I wrote on November 4, 2009, in legislative testimony about B18-344, by increasing the number of police and service providers who have access to information about children, but ignoring the need to monitor and oversee their use of the information, "this bill will, despite its good intentions, actually *exacerbate* the dangers our most vulnerable children already face, by imbuing more and more unaccountable adults with more and more unchecked power." (emphasis in original). That B18-344 reportedly will be modified so that a limited amount of information will be available about youth who commit two "serious" offenses misses the point: it is the adults' conduct about which we must be most vigilant.

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Consider this from Howard Kurtz, quoting John Guardiano of Frum Forum in the June 25 Washington Post: "Journalists and bloggers routinely complain about how difficult it is to cover the Pentagon and the U.S. military, and with good reason: The veil of secrecy that surrounds most military offices -- even ones that have no business being shrouded in confidentiality -- allows the Pentagon to be more secretive than perhaps any other American institution."

But Guardiano is wrong. In fact, in accordance with venerated traditions of American government, the Pentagon understands that it has a legal and moral obligation to disclose information about its operations. With few exceptions, everything the Defense Department does is open to public scrutiny and oversight. Journalists are embedded with troops at war, for goodness' sake, and file reports that quote the troops, describe their location, and detail their actions in battle.

No, it is Family Court – in D.C. and other holdout states, though not in New York, Michigan, Minnesota, and more than a dozen other states that already have opened and call it "the best thing we've ever done" – that should be called "more secretive than any other American institution."

The National Coalition for Child Protection Reform makes this point vividly in Civil Liberties Without Exception: NCCPR's Due Process Agenda for Children and Families (2008):

> *Suppose, when he was attorney general, John Ashcroft had proposed anti-terrorism legislation with the following provisions: Special anti-terrorism police could search any home without a warrant – and stripsearch any occupant -- based solely on an anonymous telephone tip. Any occupant of the home could be detained for 24 hours to two weeks without so much as a hearing – and they'll probably be detained far longer because, in the special anti-terrorism court set up by this legislation, all the judges are afraid to look soft on "terrorists."*
>
> *At that first hearing the detainees may – or may not – get a lawyer just before the hearing begins, and they almost never get effective*

> *counsel. At almost every stage, the standard of proof is not "beyond a reasonable doubt" or even "clear and convincing" but merely "preponderance of the evidence," the lowest standard in American jurisprudence, the same one used to determine which insurance company pays for a fender-bender.*
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> *And in most states, all the hearings and all the records are secret.*
>
> *Had Ashcroft proposed such legislation, civil libertarians would have been in an uproar. Yet this is, in fact, the law governing child welfare. And sadly, many who in other circumstances are quick to defend civil liberties either stand silent or support it.*

Bill 18-344 and Bill 18-356 perpetuate a dangerous, destructive state of affairs. By doing so, these bills hurt children and families in the District of Columbia, and consign the District's low-income residents (who comprise 100% of the child welfare system) and people of color (97%) to unnecessary harm.

I urge you to reject the antiquated, ineffective approaches embodied in these bills and, instead, to work together to enact a statute that lets the sun shine on Family Court and on D.C.'s children.

Sincerely,

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Cc: Council staff (via email)
Attorney General Peter Nickles