

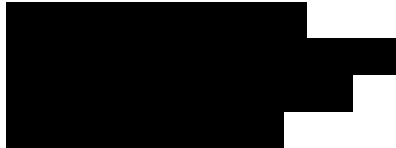


**BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
GOVERNMENT OF THE DISTRICT OF COLUMBIA**



VIA ELECTRONIC MAIL

February 17, 2023



RE: Resolution of Complaint Concerning the Alcoholic Beverage Control Board
(#OOG-2022-0005-M)

Dear [REDACTED],

On August 30, 2022, the Office of Open Government (“OOG”) received the Open Meetings Act (“OMA”)¹ complaint, #OOG-2022-0005-M (“Complaint”) that you submitted verbally and in writing. The allegations concerned the Alcoholic Beverage Control Board’s (“ABC Board”) public body meeting held on January 26, 2022. The Complaint alleges the ABC Board met in an improperly closed meeting to deliberate upon a previously concluded investigation concerning Dave Flannery Restaurant, LLC, trading as the Big Board, an establishment in the District of Columbia that is licensed by the Alcoholic Beverage Regulation Administration (“ABRA”) to sell and distribute alcoholic beverages and holds a Retailer’s Class CT License (hereinafter “the Big Board”).²

The Director of Open Government may issue advisory opinions regarding public bodies’ OMA compliance.³ OOG’s statutory charge is to ensure that meetings of public bodies adhere to the OMA by investigating OMA complaints and taking action to enforce the OMA.⁴ The Director and OOG take such action to ensure that “all persons” receive “[f]ull and complete information regarding the affairs of government and the actions of those who represent them.”⁵ Therefore, in response to this Complaint, I am issuing this advisory opinion pursuant to 3 DCMR § 10400 *et seq.*

¹ D.C. Official Code § 2-571 *et seq.*

² See [ABRA Board Order Affirming Summary Suspension](#).

³ D.C. Official Code § 1-1162.05c.

⁴ D.C. Official Code § 2-579.

⁵ D.C. Official Code § 2-572.

I. BACKGROUND

ABRA is an independent quasi-judicial agency that assists the ABC Board with its many functions. The ABC Board consists of 7 members nominated by the Mayor of the District of Columbia.⁶ The ABC Board directs the day-to-day functions of ABRA and meets weekly to adjudicate cases and conduct hearings.⁷ The ABC Board notifies the public of their weekly dispositions and cases are placed on the appropriate agenda.

The ABC Board has several complex responsibilities but one of their main responsibilities is that of issuing, transferring, and renewing licenses to qualified applicants.⁸ With this responsibility also comes a priority of ensuring the safety and security of District residents who patronize establishments with liquor licenses. As such, the ABC Board has the authority to conduct investigations to identify violations.⁹

Prior to this Complaint, you initially submitted to OOG, complaint, #OOG-2022-0004-M arising out of the same facts and circumstances of this complaint, which I dismissed on August 26, 2022, by issuing an advisory opinion and dismissal.¹⁰ The findings of the advisory opinion addressed the allegation that the ABC Board violated the OMA by not allowing the owner of an establishment under ABRA's investigation to attend, in-person, its public body meeting, which included a closed session, on January 26, 2022.¹¹ I dismissed the complaint because when the ABC Board held a virtual meeting and did not permit in-person attendance due to restrictions concerning the Covid-19 pandemic, the public body did not violate the OMA. I found the following: (1) the ABC Board did not have to provide in-person access to the January 26, 2022, meeting while simultaneously conducting a virtual meeting; (2) the ABC Board properly notified the public of the virtual meeting and included in its meeting notice the citation to enter a closed meeting;¹² and (3) the closed session was in fact lawful. This advisory opinion does not alter the findings and dismissal of the initial complaint, #OOG-2022-0004-M.¹³

After receiving the dismissal, you immediately contacted OOG. I, along with OOG staff, met with you virtually, on August 30, 2022, to address your concerns regarding the dismissal of OOG complaint, #OOG-2022-0004-M.¹⁴ During the virtual meeting and via email, you raised different issues and concerns regarding the meeting that was the subject of the initial complaint. Your concerns focused on the justification for the closed meeting to discuss an investigation you

⁶ D.C. Official Code § 25-201(a).

⁷ D.C. Official Code § 25-201(c).

⁸ D.C. Official Code § 25-201(c)(3).

⁹ D.C. Official Code § 25-201(c)(6).

¹⁰ DCMR § 10403.1(b). "The Director may dismiss a complaint when the action complained of does not violate the Open Meetings Act." See also [Dismissal of ABRA Complaint](#).

¹¹ D.C. Official Code § 25-202. ABRA was established "to provide professional, technical, and administrative staff assistance to the ABC Board." ABRA is supervised by the ABC Board.

¹² The public meeting notice included OMA citation 405(b)(14), "to plan, discuss, or hear reports concerning ongoing or planned investigations of alleged criminal or civil misconduct or violations of law or regulations if disclosure to the public would harm the investigation."

¹³ OOG Complaint #OOG-2022-0004-M also addressed the lawful closed session during the ABC Board's January 26, 2022, public body meeting.

¹⁴ On August 30, 2022, I, along with OOG's legal team, met with Complainant to address the additional concerns.

believed was complete.¹⁵ Following that meeting and OOG's receipt of the Complaint, OOG commenced an investigation of the new allegations.

On August 31, 2022, OOG contacted ABRA's General Counsel's office and provided a copy of the new complaint and afforded ABRA an opportunity to respond to the allegations. ABRA responded to the Complaint on October 11, 2022. ABRA proffered that the ABC Board entered into a closed session to review violations committed by the Big Board.¹⁶ ABRA argued that the ABC Board properly entered into the closed session to preserve the integrity of the Big Board investigation and to avoid further damage to the reputation of the Big Board while the establishment is under investigation.¹⁷ ABRA remains steadfast that its decision to discuss suspending the Big Board's liquor license during a closed meeting on January 26, 2022, was proper under the OMA.

As part of OOG's investigation, OOG reviewed the ABC Board Orders associated with this matter. The ABC Board Orders detail actions taken during the adjudicatory process concerning the Big Board. ABC Board Order, 2022-057,¹⁸ specifically addresses the allegations of the Big Board not complying with the emergency mask-wearing, proof of vaccination check requirements, and proper signage indicating masks should be worn while patronizing the establishment. The ABC Board Order indicates the Big Board's noncompliance occurred between January 14, 2022, and January 22, 2022.¹⁹

OOG also reviewed ABRA's regulations regarding summary suspensions that set forth the procedures for the initial investigation and post-suspension investigation. The ABC Board may decide to suspend or restrict the license of the Big Board during a summary suspension hearing.²⁰ ABRA investigators are authorized to ensure establishments that sell and distribute alcoholic beverages in the District comply with COVID-19 mitigation measures.²¹ The Big Board received a number of citations from ABRA investigators because employees and patrons were not wearing masks, vaccination checks were not being implemented and proper signage of mask requirements were not posted.

On January 15, 2022, ABRA investigators observed the Big Board employees and patrons not wearing masks and ABRA investigators observed the employees of the Big Board were not

¹⁵ Complainant's August 26, 2022, Email: "No justification for why closing the meeting would harm any investigation was given in the notice by the agency (nor did your initial investigation cover this). The inspections were completed enough for the agency to issue a summary suspension of the license. I don't understand how it is possible that disclosure to the public of the results of the investigation would harm the already completed investigation."

¹⁶ D.C. Official Code § 25-823(a)(1). "The Board may fine, suspend, or revoke the license of any licensee during the license period if the licensee violates any of the provisions of this title, the regulations promulgated under this title, or any other laws of the District, including the District's curfew law."

¹⁷ See ABRA's October 11, 2022, response to Complaint, page 2.

¹⁸ See [ABRA Board Order Affirming Summary Suspension](#).

¹⁹ *Id.*

²⁰ 23 DCMR § 1613.1. Summary Suspension and Summary Revocation Hearings: "In rendering a decision on a summary suspension hearing, the Board may suspend or restrict the license of the licensee. Additionally, the Board may keep the licensee in the summary suspension proceeding to monitor the licensee to make a determination if the conditions placed by the Board on the licensee are effective."

²¹ D.C. Official Code § 25-802.

requesting proof of vaccinations. ABRA investigators also noticed signage requesting patrons to wear masks was not visible in the establishment. On January 18, 2022, employees of the Big Board were observed not wearing masks, proof of vaccination was not requested, and the required signage was not posted. The Big Board continued to be non-compliant concerning COVID-19 measures on January 20, 2022, and January 22, 2022. Once again, employees and patrons were not wearing masks, requests for proof of vaccinations were not taking place and proper signage stating masks are required were not located in the establishment.²²

After issuing warnings and imposing monetary penalties for noncompliance, the Big Board was added to the ABC Board's agenda for the January 26, 2022, public body meeting. The ABC Board notified the public of its public body meeting. The ABC Board's notice included the meeting agenda which listed dispositions and cases that would be discussed during the meeting. The ABC Board met in the public meeting and voted to enter a closed meeting. The agenda stated which cases would be discussed in the closed session. The ABC Board voted to enter a closed session to address the violations and repeated attempts to get the Big Board to comply with COVID-19 mitigation measures in the District.²³

After reviewing your Complaint, ABRA's response to your complaint, the OMA, ABRA's Board Orders, and ABRA's regulations, I find that the ABC Board failed to cite the proper justification for entering a closed session of a meeting to discuss the Big Board on January 26, 2022. The use of the OMA citation to enter a closed session of a meeting to discuss an ongoing investigation²⁴ concerning the Big Board was not the correct citation to justify entering a closed session. In this instance, the ABC Board should have provided proper notice of the closed meeting by listing the OMA citation which addresses closing a meeting to exercise quasi-judicial functions.²⁵

Public bodies may only discuss matters in closed sessions that are properly noticed to the public and are restricted to discuss only those properly noticed matters in the closed session of a meeting. I find the ABC Board violated the OMA's "Notice of meeting"²⁶ requirements because it failed to provide the public notice that it would meet on January 26, 2022, in a closed session "[t]o deliberate upon a decision in an adjudication action or proceeding by a public body exercising quasi-judicial functions."²⁷ I discuss my findings below.

II. DISCUSSION

The OMA requires meetings to be open but under a limited set of circumstances, a meeting may take place in a closed session.²⁸ On January 26, 2022, the ABC Board held its weekly public body meeting that included notice of open and closed meetings.²⁹ The ABC Board's reason for entering into a closed meeting concerning the Big Board was "to plan, discuss, or hear reports

²² See [ABRA Board Order Affirming Summary Suspension](#).

²³ D.C. Official Code § 25-826.

²⁴ D.C. Official Code § 2-575(b)(14).

²⁵ D.C. Official Code § 2-575(b)(13).

²⁶ D.C. Official Code § 2-576(5).

²⁷ D.C. Official Code § 2-575(b)(13).

²⁸ D.C. Official Code § 2-575(b).

²⁹ D.C. Official Code § 2-576.

concerning ongoing or planned investigations of alleged criminal or civil misconduct or violations of law or regulations.”³⁰

The Complaint asserts that the ABC Board’s investigation of the Big Board was complete before the closed meeting took place on January 26, 2022. The Complainant states, “I don’t understand how it is possible that disclosure to the public of the results of the investigation would harm the already completed investigation.”

The ABC Board incorrectly notified to the public and entered a closed session with the intent to discuss an ongoing investigation. The investigation of the Big Board was not ongoing on January 26, 2022. ABRA investigators began monitoring the Big Board establishment on January 14, 2022. The monitoring began to ensure the Big Board was adhering to the COVID-19 mitigation measures put in place by the Mayor of the District of Columbia. The ABC investigators would continue to investigate the Big Board and on January 15, 2022, the Big Board received its first warning that the establishment was not compliant with COVID-19 mitigation measures. The citations from ABRA would continue on January 18, 2022, January 20, 2022, and January 22, 2022.

After the numerous violations, the ABC Board concluded the Big Board’s intent was not to abide by the COVID-19 mitigation measures. Specifically, requirements that employees and patrons wear masks while in the establishment, requirements that the establishment request proof of vaccination, and the requirement to post signs instructing patrons to wear masks.

The ABC Board added the Big Board to the agenda for the January 26, 2022, public body meeting. The ABC Board properly informed the public of the open portion of the meeting. The ABC Board erred when it notified the public of its intent to enter a closed session. The January 26, 2022, agenda indicated the following: “In accordance with Section 405(b) of the Open Meetings Amendment Act of 2010, the meeting will be closed “to plan, discuss, or hear reports concerning ongoing or planned investigations of alleged criminal or civil misconduct or violations of law or regulations.” The investigation of the Big Board was not ongoing on January 26, 2022. The investigation of the Big Board was completed on January 22, 2022. The Big Board received its final citation on January 22, 2022. The ABC Board held the summary suspension hearing on January 26, 2022.

While the closure of the meeting was lawful, the justification for the closure was incorrect. The ABC Board closed its public meeting to deliberate regarding the summary suspension of the Big Board’s Class CT license and did not provide the public with the proper justification for closure. This violated the OMA. I discuss the issues in turn below.

A. The investigation of the Big Board.

One of the key responsibilities of the ABC Board is to monitor establishments and conduct investigations, on its own or due to a valid complaint.³¹ The ABC Board also has the authority to

³⁰ D.C. Official Code § 2-575(b)(14).

³¹ D.C. Official Code § 25-201(c)(6).

suspend or revoke a license and impose civil fines.³² The ABC Board utilizes ABRA investigators to conduct the investigations on their behalf. ABRA investigators have the responsibility of issuing citations for civil violations committed by establishments who are licensed to sell alcohol in the District.³³ ABRA investigators gave the Big Board warnings, provided information on COVID-19 mitigation measures, and issued citations during the period from January 15, 2022, until January 22, 2022. Despite the attempts to enforce compliance, the Big Board intentionally defied adhering to the COVID-19 mitigation measures.³⁴

The ABC Board entered a closed session³⁵ to discuss a summary suspension case³⁵ involving the Big Board. Summary suspension cases involve possible fines, suspension, and revocation, to ensure compliance with the ABC Board's stipulations for the establishment.³⁶ According to ABRA's response to the complaint, "the summary suspension case is not the end of the matter, but rather an interim stage at which the Board would continue to discuss and review the ongoing investigation related to the licensee and the events that brought the matter to the Board's attention."³⁷

During summary suspension hearings, it is the ABC Board's practice to decide whether further action is needed.³⁸ Further action by the ABC Board may be to refer matters to the Office of the Attorney General (OAG) to review evidence to determine whether further action is needed. The OAG may decide to move forward with misdemeanor or felony prosecutions.³⁹ The ABC Board may also refer evidence of criminal misconduct to the Inspector General of the District of Columbia for investigation and prosecution.⁴⁰

On January 26, 2022, the ABC Board's investigation of the Big Board was not ongoing. The investigation of the Big Board was complete on January 22, 2022. The ABC Board incorrectly cited the "ongoing or planned investigation" exception to open meetings.⁴¹ The ABC Board utilized its quasi-judicial functions when it entered the closed session on January 26, 2022. The ABC Board considered the evidence obtained by ABRA investigators concerning violations committed by the Big Board and made the decision to suspend the Big Board's liquor license. In this matter, the correct justification to enter a closed session is "to deliberate upon a decision in an adjudication action or proceeding by a public body exercising quasi-judicial functions."⁴²

³² D.C. Official Code § 25-201(c)(7).

³³ D.C. Official Code § 25-801(b).

³⁴ See [ABRA Board Order Affirming Summary Suspension](#).

³⁵ D.C. Official Code § 25-826(a). "If the Board determines, after investigation, that the operations of a licensee present an imminent danger to the health and safety of the public... the Board may summarily revoke, suspend, fine, or restrict, without a hearing, the license to sell alcoholic beverages in the District."

³⁶ 23 DCMR § 1613.1. Summary Suspension and Summary Revocation Hearings: "In rendering a decision on a summary suspension hearing, the Board may suspend or restrict the license of the licensee. Additionally, the Board may keep the licensee in the summary suspension proceeding to monitor the licensee to make a determination if the conditions placed by the Board on the licensee are effective."

³⁷ See ABRA's October 11, 2022, response to Complaint, page 3.

³⁸ D.C. Official Code § 25-826(a).

³⁹ D.C. Official Code § 25-801(d)-(e).

⁴⁰ D.C. Official Code § 25-201(c)(8).

⁴¹ D.C. Official Code § 2-575(b)(14).

⁴² D.C. Official Code § 2-575(b)(13).

B. The OMA authorizes the ABC Board to deliberate or discuss matters in a closed meeting involving investigations conducted by ABRA.

The intent of the OMA is to maximize public access to meetings,⁴³ but this is not an absolute right. The OMA gives public bodies the authority to enter closed meetings under certain circumstances.⁴⁴ This Complaint questions whether the ABC Board’s reason for closing the meeting on January 26, 2022, was justified.

The OMA requires that a public body provide advance notice to the public “before all open or closed meetings.”⁴⁵ The advance notice to the public is required so that “all persons are entitled to full and complete information regarding the affairs of government and those who represent them.”⁴⁶

In this instance, the ABC Board notified the public of all meetings and/or hearings that would take place on January 26, 2022. The ABC Board also notified the public as to which meetings and/or hearings would be discussed in closure. The ABC Board provided notice to the public that its meeting concerning the Big Board would include a closed session to discuss “ongoing or planned investigations of alleged criminal or civil misconduct or violations of law or regulations, which the OMA permits.”⁴⁷

The Big Board was listed as an establishment that would be discussed during the closed session.⁴⁸ During the closed session, the ABC Board discussed the violations committed by the Big Board and the “merits of Investigative Case Report No. 22-CMP-0006, pursuant to D.C. Official Code § 2-575(b)(14).”⁴⁹ The ABC Board asserts that its regular practice is to close meetings when it reviews and discusses the investigative reports that are listed on its weekly public body meeting agendas.⁵⁰

The Complaint discussed concerns with the OMA provision⁵¹ cited by the ABC Board to close the meeting. The Complaint alleges the ABC Board did not give justification as to why the investigation would be harmed. The Complaint states, “It seems to me like this meeting was improperly closed and as such a violation of the requirements to allow the public to be present at the meeting. I had hoped this would be looked into during the initial investigation, but if you need to consider this a separate complaint then I so complain.”⁵²

⁴³ D.C. Official Code § 2-573.

⁴⁴ D.C. Official Code § 2-575(b)(1)-(16A).

⁴⁵ D.C. Official Code § 2-576. *See also* OOG’s 2016 Advisory Opinion regarding closed meetings: #OOG-0004_9.07.16_AO; [OOG-0004_9.07.16](#).

⁴⁶ D.C. Official Code § 2-572.

⁴⁷ D.C. Official Code § 2-575(b)(14).

⁴⁸ *See* page 16 of ABRA’s agenda for the January 26, 2022, public body meeting: [The Big Board](#).

⁴⁹ *See* ABRA’s October 11, 2022, response to Complaint, page 2.

⁵⁰ D.C. Official Code § 25-823. *See* ABRA’s October 11, 2022, response to Complaint, page 2.

⁵¹ D.C. Official Code § 2-575(b)(14).

⁵² Complaint sent via email on August 30, 2022.

On January 26, 2022, the ABC Board deliberated in a closed session to discuss the Big Board’s noncompliance with the District’s COVID-19 mitigation measures. The disposition of the closed meeting resulted in a referral to the OAG to draft a summary suspension notice.⁵³ The ABC Board concluded during the closed session that the owners of the Big Board intentionally failed to comply with emergency mask provisions, vaccination check requirements, and posting signage indicating masks are required in the establishment to help contain the spread of COVID-19.⁵⁴

The OMA requires that a public body provide advance notice to the public before an open meeting or closed meeting takes place.⁵⁵ The ABC Board notified the public of its intent to hold a public meeting on January 26, 2022 and the ABC Board notified the public of its intent to enter a closed meeting to discuss an “ongoing investigation” concerning the Big Board. The ABC Board erred in listing the “ongoing or planned investigation” citation. The ABC Board should have notified the public of its intent to enter a closed session in order to exercise its quasi-judicial functions.

During the closed session, the ABC Board determined the “operations of the Big Board presented an imminent danger to the health and safety of the public” and the ABC Board “summarily suspended the Big Board’s license to sell alcoholic beverages in the District.”⁵⁶ The ABC Board cited proper notification of the open meeting but the intent to enter a closed meeting was not properly cited. The ABC Board public meeting notice should have included the closed meeting exception and citation, “to deliberate upon a decision in an adjudication action or proceeding by a public body exercising quasi-judicial functions.”⁵⁷

The ABC Board entered the closed session to deliberate on whether to summarily suspend the Big Board’s Retailer’s Class CT License. The ABC Board did not notify the public of its intent to use its quasi-judicial functions on January 26, 2022, during the closed meeting.⁵⁸

III. CONCLUSION

Based on the foregoing analysis and investigation, I find that: (1) the ABC Board failed to cite the proper justification for entering into a closed session of a meeting to discuss the Big Board on January 26, 2022; (2) the ABC Board’s use of the OMA citation to enter a closed session of a meeting to discuss an ongoing investigation was improper; (3) that the proper citation for the ABC Board to enter closure on January 26, 2022, concerning the Big Board, was to deliberate upon a decision in an adjudication action or proceeding by a public body exercising quasi-judicial functions; and (4) the ABC Board violated the OMA’s “Notice of meeting” requirements because it failed to provide the public notice that it would meet on January 26, 2022, in a closed session “[t]o deliberate upon a decision in an adjudication action or proceeding by a public body exercising quasi-judicial functions.”

⁵³ See page 16 of ABRA’s Supplemental Investigative Agenda here: [The Big Board](#).

⁵⁴ See [ABRA Board Order Affirming Summary Suspension](#).

⁵⁵ D.C. Official Code § 2-576.

⁵⁶ D.C. Official Code § 25-826; 23 DCMR § 1613.1.

⁵⁷ D.C. Official Code § 2-575(b)(13).

⁵⁸ See page 16 of ABRA’s Supplemental Investigative Agenda here: [The Big Board](#).

I strongly recommend that the ABC Board schedule an OMA training with OOG or schedule a time to meet with our office to discuss open and closed meetings and what is required to be OMA compliant. If you have any questions regarding this Advisory Opinion or require assistance with your meetings, do not hesitate to contact me or the OOG's legal staff.

Sincerely,

/s/

Niquelle M. Allen, Esq.
Director of Open Government
Office of Open Government
Board of Ethics and Government Accountability

cc: Martha Jenkins
General Counsel
Alcoholic Beverage Regulation Administration
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Enclosure