

**COUNCIL OF THE DISTRICT OF COLUMBIA  
COMMITTEE ON EXECUTIVE ADMINISTRATION AND LABOR**



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**COUNCIL OF THE DISTRICT OF COLUMBIA**

**PUBLIC HEARING**

**AGENCY BUDGET OVERSIGHT HEARING**

**FISCAL YEAR 2025**

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**Testimony of Niquelle M. Allen, Esq.**

**Director of Open Government**

**Board of Ethics and Government Accountability**

**Monday, April 8, 2024**

**9:00am**

**Virtual Meeting Platform**

**1350 Pennsylvania Avenue, N.W.**

**Washington, D.C. 20004**

Good afternoon, Chairperson Bonds and members of the Committee on Executive Administration and Labor, and staff. I am Niquelle Allen, Director of Open Government, and I lead the Office of Open Government or the OOG. The OOG is an office within BEGA that enforces the Open Meetings Act, which I will refer to as “the OMA,” and provides guidance on the implementation of the District of Columbia Freedom of Information Act, which I will refer to as “FOIA.” I am here today to discuss the Board of Ethics and Government Accountability’s (BEGA) budget needs for OOG during FY25.

## **INTRODUCTION**

As public servants, whether we hold the highest office or are a new employee, our responsibility is to use the taxpayers’ dollars to sustain this community and make it better. The public’s trust in the government’s ability and willingness to execute our duties in a manner that respects their role as the ultimate stakeholder undergirds the idea of government transparency and accountability. When the public’s reasonable expectations of their government’s functioning and behaviors are not met, this agency is expected to provide some resolution and relief. That is why BEGA was created.

I respectfully request that the Committee craft the FY25 budget to provide sufficient funds to ensure that OOG can meet the needs of the District government and the public respecting government transparency. The District government’s financial commitment to OOG’s budget reflects its overall commitment to maintaining an open and transparent government. The proposed FY25 budget must be improved to better reflect a commitment to open government. Furthermore, legislative changes are necessary to ensure government transparency, most importantly the adoption of meaningful enforcement mechanisms to ensure compliance with open meetings laws. I will begin my testimony by discussing the necessary legislative changes that must be made to secure transparency.

## **REQUESTED LEGISLATIVE CHANGES**

I will first discuss the District’s need to have meaningful enforcement of the OMA. Second, I will briefly discuss the need to create and fund a Commission to revise and modernize the District’s

open government laws.

## OMA ENFORCEMENT

BEGA's need to revise the OMA to provide meaningful enforcement mechanisms was reported to the Council by the BEGA Board in BEGA's FY23 Best Practices Report.<sup>1</sup> I will review what we advised as support for the legislative change I am requesting today. To enforce the Open Meetings Act, OOG is authorized to bring a lawsuit in the Superior Court of the District of Columbia to petition the court to grant injunctive or declaratory relief either before or after the meeting.<sup>2</sup> The statute also provides that the court "may impose a civil fine of not more than \$250 for each violation" upon a finding that "a member of a public body engages in a pattern or practice of willfully participating in one or more closed meetings" in violation of the OMA.<sup>3</sup> A review of the monetary penalties for violations of state open meetings laws indicates that the District's maximum \$250 civil penalty for violations of the Open Meetings Act is on the lower end of civil penalties authorized in other jurisdictions for comparable violations.

In comparison to neighboring states, the District's \$250 civil penalty, which is only available after a judicial finding of a "pattern and practice" of violations of the OMA, is significantly lower than the penalties available in Maryland, Virginia, and West Virginia. Violations of Maryland's Open Meetings Act for public bodies that "willfully meet" in violation of the act are subject to a civil penalty of up to \$250 for the first violation and \$1,000 for subsequent violations within 3 years of the initial violation. In Virginia, a court could impose a civil penalty of not less than \$500 and up to \$2,000 for an officer, employee, or member of a public body for "willfully and knowingly" violating the state open meetings law, with the penalty for additional violations of at least \$2,000 up to \$5,000.<sup>4</sup> "Willfully and knowingly" violating the provisions of the West Virginia open meetings law can result in a civil penalty of up to \$500 for the initial violation and an additional \$100 to \$1,000 for subsequent violations.<sup>5</sup>

Only a handful of states do not include a civil penalty for either the public body or individuals

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<sup>1</sup> BEGA FY23 Best Practices Report, Pg. 19-21. <https://bega.dc.gov/publication/2023-best-practices-report>

<sup>2</sup> D.C. Official Code § 2-579(a).

<sup>3</sup> *Id* at § 2.579(e).

<sup>4</sup> Va. Code § 2.2-3714.A. The court could also impose a civil penalty of up to \$1,000 for the public body. *Id* at § 2.2-3714.B.

<sup>5</sup> W.Va. Code § 6-9A-7(a).

associated with the public body for violations of the open meetings law, although injunctive or other relief may be available – Alaska, Colorado, Delaware, New York, North Carolina, South Carolina, Tennessee. Seventeen states allow for penalties of up to \$500 – Arkansas, Florida, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Montana, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, South Dakota, Texas, Vermont, Wisconsin. Wyoming has a \$750 civil penalty for “knowingly or intentionally” violating the state’s open meetings law. The remaining 23 states allow for penalties \$1,000 or more for either the initial or subsequent violations of their respective open meetings laws. I will also note that some states, most notably Florida, have criminal penalties for violating open meetings laws that include fines and imprisonment.

As you can glean from the assessment of the enforcement of open meetings laws nationwide, the current state of OOG’s ability to sue a public body and recover monetary fines for OMA violations is insufficient given the enforcement methods in other states. Our laws are a mild deterrent for OMA violations.

As I previously stated, under the existing law, the monetary penalty for an OMA violation is limited in three critical ways: (1) it is limited to “a civil fine of not more than \$250,” which has not been updated since former Councilmember Cheh proposed it in 2010; (2) that fine only applies to improper closure (not advance-notice or recordkeeping violations) and; (3) the court must find “a pattern or practice” of improper closures, implying that OOG cannot seek a fine unless it has waited and observed multiple (if not several) violations taking place—in order to establish the evidence of “a pattern or practice.”

For the OMA to work early, effectively, and comprehensively to enable OOG to continue to ensure full access to the affairs of District government, the maximum fine available must be increased, and its applicability broadened to cover any violation of OMA (if serious or deliberate enough to warrant a fine). I am proposing that the Council amend the enforcement provisions of the OMA in the following ways to provide sufficient enforcement that is in line with other jurisdictions:

- Increase the maximum fine from \$250 to \$1000;
- Broaden the applicability of the fine, from covering only improperly closed meetings, to covering all requirements of the OMA;
- Change the standard of intent for judgments of fines under the OMA, from “a pattern or

practice of willfully participating in” improper closure, to “willfully and knowingly violating [the OMA]”; and

- Authorize the award of costs of litigation, including attorneys’ fees.

I am requesting that the Council include legislation to effect this change in the FY25 Budget Support Act, as it is necessary for OOG to effectively enforce the OMA. I have provided draft legislation for the Committee’s consideration.

### OPEN GOVERNMENT TASK FORCE OR COMMISSION

During BEGA’s FY23 Performance Hearing, the D.C. Open Government Coalition requested that the Committee support legislation to create an “Information Technology and Transparency Commission comprised of executive and legislative branch representatives. and outside experts in records management and security, public engagement technology, and transparency.” I am requesting again, as I did in my FY24 budget testimony, that the Committee create and fund this Commission and make it a reality by enacting the D.C. Open Government Coalition’s proposed legislation.

I will now discuss BEGA’s budget needs for FY25 respecting OOG.

### FISCAL YEAR 2025 BUDGET PROPOSAL

BEGA was not provided with adequate resources for OOG when it was created in Fiscal Year 2013. Despite financial challenges, since that time, OOG’s staffing levels and resources have increased, but has never reached the baseline staff level required to adequately provide training and advisory services to FOIA Officers, Boards and Commissions, government employees, and the public on the OMA and FOIA. However, without sufficient resources, OOG has still increased its training capacity and the courses offered to FOIA Officers and Administrative Points of Contact for Boards and Commissions. We have provided live webinars, online webinars via open-dc.gov, and stood up a training portal. Investments in OOG’s budget have paid the dividends of a more transparency in government; however, there is much more that could be done.

The proposed FY25 budget includes cuts to OOG's already insufficient budget. If adjustments need to be made due to shortfalls, it should not come at the expense of government transparency. In fact, OOG's mission is more critical now to ensure the public receives information about government operations. With the FY25 budget that was provided for BEGA, cuts to the agency's non-personnel fund will eliminate OOG's ability to provide its training portal, which has become a valuable resource for on-demand training on the Open Meetings Act and Parliamentary Procedure. BEGA requested enhancements to its non-personnel services budget to make up for the budget cut that will negatively impact OOG's already lean budget. Without this funding, OOG will not have the capability to provide on-demand training. OOG's budget should be restored to at least the FY24 level, which was still insufficient. BEGA has a great need to replenish its non-personnel services fund in order for OOG to fully perform its mission and provide training, among other things. Due to increases in the agency's overall budget for personnel, the difference was made up for by cutting BEGA's program budget. As the agency is historically underfunded, this was particularly devastating for OOG.

BEGA also needs to enhance its budget respecting OOG to provide sufficient oversight and training to educational public bodies, which include Local School Advisory Teams and Public Charter School Boards of Trustees. An additional full-time attorney position is required to adequately provide oversight and training to these entities and their staff. BEGA requested a budget enhancement of \$110,000 to fund an additional full-time Attorney for OOG. Here is why this request is important to fund in FY25. OOG has a niche legal practice area that is of great interest to the public. The addition of new legal talent to the OOG will have an immediate positive impact on the public bodies that serve the needs of our public and charter school community. We hope that you will consider providing BEGA with the funds to ensure OOG's continued success and operation.

## **CONCLUSION**

In summary, the Council must revise the OMA to provide for meaningful enforcement of the OMA in the manner suggested in our proposed legislation. This should be part of the FY25 budget support act. The Council should also enact and fund D.C. Open Government Coalition's legislation to create an open government commission to recommend other necessary reforms to

the District's government transparency laws.

The funds provided currently in FY25 budget proposal are insufficient for BEGA to fulfil its statutory mission. BEGA requires that OOG receive the requested budget enhancements in order for the office to continue to provide its services to the public and the government.

Thank you for the opportunity to testify today regarding the FY25 budget. I am happy to answer any questions you or the Committee members may have.

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<b>FY 2025 Budget Support Act Subtitle Summary</b>	
<b>1. Short title</b> Provide a proposed short title (i.e., X Amendment Act of 2024) for the subtitle	<b>Open Meetings Enforcement Amendment Act of 2024</b>
<b>2. Location in BSA</b>	Title I (Government Direction and Support) Subtitle --
<b>3. Agency name</b>	Board of Ethics and Government Accountability
<b>4. Agency contact person</b> Provide the name, title, agency acronym, email address, and phone number of the agency staff member who can answer questions about the proposed subtitle	Niquelle Allen Director of Open Government, BEGA niquelle.allen@dc.gov 202-557-0087
<b>5. Short description</b> Provide a one-sentence description of the subtitle	This subtitle would amend the Open Meetings Act (“OMA”) to increase and broaden fines for violations of the OMA, and permit the court to award attorneys’ fees.
<b>6. Detailed background information and policy rationale</b> Provide detailed information that explains why the subtitle is being proposed. If a program or policy is being amended, provide detailed background information on the program or policy.	<p>The OMA guarantees the transparency of meetings of the District’s “public bodies” (boards, commissions, advisory councils, and the like).</p> <p>Public bodies are required to take a few common-sense but important steps to ensure that District residents can watch official business being discussed and decided. They must (1) post advance notice of meetings; (2) allow the public (or at least the media) access to each meeting; (3) close a meeting only for a valid, enumerated, reason; (4) keep and, in some cases, post records, including recordings, of each meeting; and (5) take annual training to review the applicable law and regulations.</p> <p>The Office of Open Government (“OOG”) monitors public bodies for compliance; offers training and guidance; and enforces the OMA through advisory opinions and, if necessary, the Superior Court.</p>



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	<p>Although enforcement in court is a last resort, even the existence of OOG’s power to sue—and recover monetary fines—deters violations and encourages public bodies proactively to contact OOG for advice and guidance.</p> <p>However, under the existing law, the monetary penalty for an OMA violation is limited in three critical ways: (1) it is limited to “a civil fine of not more than \$250,” which has not been updated since then-Councilmember Cheh proposed it in 2010; (2) that fine only applies to improper closure (not advance-notice or recordkeeping violations) and; (3) the court must find “a pattern or practice” of improper closures, implying that OOG cannot seek a fine unless it has waited and observed multiple (if not several) violations taking place—in order to establish the evidence of “a pattern or practice.”</p> <p>For the OMA to work early, effectively, and comprehensively to enable OOG to continue to ensure full access to the affairs of District government, the maximum fine available must be increased, and its applicability broadened to cover any violation of OMA (if serious or deliberate enough to warrant a fine).</p>
<p><b>7. Detailed description</b> Provide a detailed description of each element of the proposed subtitle, in a bullet-point format</p>	<p>This subtitle would:</p> <ul style="list-style-type: none"> <li>○ Increase the maximum fine from \$250 to \$1000;</li> <li>○ Broaden the applicability of the fine, from covering only improperly closed meetings, to covering all requirements of the OMA;</li> <li>○ Change the standard of intent for judgments of fines under the OMA, from “a pattern or practice of willfully participating in” improper closure, to “willfully and knowingly violat[ing]”; and</li> <li>○ Authorize the award of costs of litigation, including attorneys’ fees.</li> </ul>
<p><b>8. Budget rationale</b> Why is this subtitle needed to support the FY2025 budget?</p>	<p>OOG is charged by statute with enforcing the OMA, including, when necessary, in court against noncompliant public bodies. Any costs of litigation and additional fines, that OOG would recover due to the proposed amendment, would be deposited in the O-Type Open Government Fund and used to offset the staff-hours spent monitoring, investigating, and litigating noncompliant public bodies.</p>
<p><b>9. Fiscal impact</b> What is the fiscal impact of the proposed subtitle?</p>	<p>OOG estimates a \$1000 fiscal impact of the proposed subtitle.</p> <p>This estimate is based on:</p> <ul style="list-style-type: none"> <li>○ An increase of 5 attorney staff-hours and 5 paralegal</li> </ul>

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	<p>specialist staff-hours spent on education and outreach;</p> <ul style="list-style-type: none"> <li>○ No increase or decrease in staff-hours due to litigation, including preparation and discovery; and</li> <li>○ 150 staff-hours spent bringing and concluding any lawsuit in FY25 that recovers fines, fees, or costs; less the amount of the judgment equal to any fines plus the costs of litigation, which would remain available without fiscal-year limitation.</li> </ul>
<p><b>10. Prior legislative proposals</b> Has your agency proposed similar legislation in the past? If so, did the City Administrator/Mayor/Council support the legislation?</p>	<p>No.</p>
<p><b>11. Q&amp;A</b> Insert questions that Councilmembers may ask about the subtitle, along with draft answers.</p>	
<p><b>a.</b></p>	<p><b>Question:</b> <i>The proposed legislation says “willful and knowing.” How do you establish a “willful and knowing” violation?</i></p> <p><b>Answer:</b> OOG interprets the “willful and knowing” standard for this amendment to mean, not merely that the physical acts of the violations are deliberate and not accidental, but also that the defendants performed those actions with a mindset that those actions were against the law. A goal of our training is that all members of public bodies should be aware of the law, because they are required to complete OMA training within 60 days of appointment and annually thereafter.</p> <p>Through its investigation, if OOG staff determine that a violation appeared “willful and knowing,” OOG would petition for a civil fine (this would not be a criminal charge or punishment), and would then need to persuade the trier of fact.</p> <p>OOG’s research found that the “willful and knowing” standard is shared by six states, including Maryland and Virginia.</p>
<p><b>b.</b></p>	<p><b>Question:</b> <i>If we remove “pattern or practice” to provide for a penalty for an individual violation, how do you establish that a single incident is “willful and knowing” without a pattern?</i></p> <p><b>Answer:</b> Even without multiple occurrences, or a direct</p>

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	<p>admission, circumstantial evidence can prove the intention behind just one violation, such as cautions from certain members or administrative staff, or an e-mail exchange showing the exaggeration of the seriousness of an emergency.</p>
<p>c.</p>	<p><b>Question:</b> <i>What are the most common violations of the OMA? What is the relationship between the type of violation and the size of the fine?</i></p> <p><b>Answer:</b> OOG does not disaggregate its enforcement data among different kinds of violations—and some involve multiple provisions of the OMA, e.g., a meeting closed without a public vote of the membership, which might trigger the access requirement and the minutes/recording/recordkeeping requirement, even apart from the most obvious violation, the breach of closure procedure.</p> <p>OOG does not view any violation as lesser than another, as a general matter, but would proportion its demand for fines to the seriousness of the individual facts. The size of the fine is ultimately up to the discretion of the court, including any personal and mitigating considerations.</p> <p>All OMA provisions direct themselves to transparency and accessibility, and a fully compliant system depends on all components of openness operating functionally and reliably—notice before, procedure during, and recordkeeping after.</p>
<p>d.</p>	<p><b>Question:</b> <i>How do you track whether members of public bodies have been trained? What is the current percentage trained?</i></p> <p><b>Answer:</b> In the case of virtual training, OOG can capture attendance through third-party platforms’ attendance records. For in-person attendance, OOG would develop a physical sign-in sheet. Such attendance records can be compared against the roll of members derived from appointment-information sources such as Mayor’s Orders, Council resolutions, and the Mayor’s Office of Talent and Appointments Dashboard.</p> <p>OOG does not have a current compliance percentage, in part because the number of public bodies is evolving. In the education cluster alone, OOG is working to identify and monitor a much greater number of public bodies, many of whom have annual turnover among their members.</p>
<p>e.</p>	<p><b>Question:</b> <i>Couldn’t fines deter recruiting into the District’s boards and commissions?</i></p> <p><b>Answer:</b> In most cases, these positions are voluntary and are for “community members seeking to engage in civic</p>

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	<p>participation,” as stated on the application form by the Mayor’s Office of Talent and Appointments. Although the possibility of a fine could be daunting, these fines would be for willful and knowing misconduct, not honest mistakes. OOG will constantly work to ensure that all appointees are trained and have available the best advice and plain-language educational materials to comply with an amended OMA.</p>
<p><b>f.</b></p>	<p><b>Question:</b> <i>What is the range of fines in other jurisdictions? Do they have the same requirements?</i>  <b>Answer:</b> OOG internally compiled raw data on each of the fifty states. The open-meetings provisions varied from state-to-state, with the fines generally varying from \$0 (only injunctive relief—voiding of actions taken by the body) to \$5000.</p>
<p><b>12. Text of BSA subtitle</b>          Provide the legislative text of the proposed subtitle.</p>	

**SUBTITLE --. OPEN MEETINGS ACT ENFORCEMENT**

Sec. XXX1. Short title.

This subtitle may be cited as the "Open Meetings Enforcement Amendment Act of 2024".

Sec. XXX2. Section 409 of the Open Meetings Act, effective March 31, 2011 (Title IV of Pub. L. No. 90-614; D.C. Official Code § 2-579), is amended as follows:

(a) Subsection (e) is amended to read:

"(e) If the court finds that a defendant willfully and knowingly violated this title, the court may impose a civil fine of at most \$1,000 per violation against the defendant in the defendant's individual capacity."

(b) Subsection (f) is amended to read:

"(f) If the Office of Open Government prevails in whole or in part, the court may award costs of litigation, including attorneys' fees, and other relief."

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the Open Meetings Act to increase and broaden penalties for violations  
and to provide for attorneys' fees.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF  
COLUMBIA, That this act may be cited as the "Open Meetings Enforcement  
Amendment Act of 2023".

Sec. 2. Section 409 of the Open Meetings Act, effective March 31, 2011  
(Title IV of Pub. L. No. 90-614; D.C. Official Code § 2-579), is amended as  
follows:

(a) Subsection (e) is amended to read:

"(e) If the court finds that a defendant willfully and knowingly violated this  
title, the court may impose a civil fine of at most \$1,000 per violation against the  
defendant in the defendant's individual capacity."

(b) Subsection (f) is amended to read:

"(f) If the Office of Open Government prevails in whole or in part, the court  
may award costs of litigation, including attorneys' fees, and other relief."

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Chief Financial Officer  
as the fiscal impact statement required by section 4a of the General Legislative

31 Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official  
32 Code § 1-301.47a).

33 Sec. 4. Effective date.

34 This act shall take effect following approval by the Mayor (or, in the event  
35 of veto by the Mayor, action by the Council to override the veto), a 30-day period  
36 of congressional review as provided in section 602(c)(1) of the District of Columbia  
37 Home Rule Act, approved December 24, 1973 (87 Stat. 814; D.C. Official Code §  
38 1-206.02(c)(1)), and publication in the District of Columbia Register.