BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT

October 25, 2017

VIA ELECTRONIC MAIL
Frederick L. Hill, Chairman
Board of Zoning Adjustment
441 4th Street, NW, Suite 200 South
Washington, DC 20001
Frederick.hill@dcbc.dc.gov

RE: OOG-0007__10.25.17_ AO

Dear Chairman Hill:

The Office of Open Government (OOG) is in receipt of the electronic recordings submission of Director Sara Bardin in response to the OOG's July 6, 2017, follow-up request to OMA OOG-0001_6.1.17_AO.[1] Director Bardin's submission consists of audio recordings of Board of Zoning Adjustment (BZA) closed meetings for the following dates: June 5, 2017; June 12, 2017; June 19, 2017; June 21, 2017; June 26, 2017; and June 28, 2017. The OOG's appreciates the BZA's cooperation in submitting the recordings.

The legislative intent of the Open Meetings Act (OMA) (D.C. Official Code § 2-571 *et seq*.), is to provide the public with full and complete information regarding the affairs of government and any official actions taken by government officials. (D.C. Official Code § 2-572). Therefore, the OMA is to be construed broadly to maximize public access to meetings, and exceptions are to be construed narrowly to permit closure of meetings only as provided in the statute. (D.C. Official Code § 2-573).

[1]The OOG's findings in this matter are that: (1) the case listed on the Zoning Commission's website as a "Continuation of Case No. 19387" was not a continuation of the matter, but a second public hearing on December 14, 2016; (2) the BZA did not properly notice this second public hearing as required under the OMA, and the lack of proper notice prevented the public from attending; (3) the second public hearing on December 14, 2016, was an improper closed session in violation of the OMA and 11-Y DCMR § 103.2; (4) the BZA failed to follow the established protocol in the regulations governing the conduct of its meetings to grant continuances; and (5) the conduct of the BZA resulted in or created the appearance of violations of its Rules of Ethics, including creating the appearance that the BZA gave preferential treatment to legal counsel representing the applicant, a former BZA Chairperson. The full text of this Advisory Opinion is found at https://www.open-dc.gov/documents/oog-00016117-revised-6717-n-makenta.

At issue is the BZA's procedure of meeting in stand-alone closed/executive sessions after meeting in open sessions where it votes to schedule dates for closed meetings. These future closed meetings take place independent of an open session. Therefore, this advisory opinion resolves the issue of whether the OMA authorizes a public body to meet in a stand-alone closed/executive session distinct from, and unrelated to, an open meeting; and whether a public body must first adjourn an open meeting to meet in a closed/executive session that is part of a single meeting.

The BZA apparently relies upon 11 DCMR Y § 103.2 as the authority to conduct its stand-alone closed meetings. 11 DCMR Y § 103.2 reads:

> The meetings and hearings of the Board shall be open to the public; provided that, for the reasons cited in § 405(b) of the District of Columbia Administrative Procedures Act {sic}, as amended by the Open Meetings Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-575(b)), including obtaining advice from the Office of the Attorney General on legal matters and training, the Board may hold a closed meeting, but only after the Board meets in public session and votes in favor of entering into or scheduling a closed meeting.

However, as discussed *infra* the BZA's practice of conducting stand-alone closed meetings does not comport with the OOG's interpretation of the OMA's protocol for holding closed/executive meetings and that11 DCMR Y § 103.2 contradicts the OMA. The BZA regulations make clear that where the regulations are in conflict with the District of Columbia Administrative Procedure Act (DCAPA), the DCAPA shall govern.[2]

Based on the analysis which follows the OOG opines that the OMA mandates that a public body first meet in an open session where it must follow the OMA protocol for entering a closed/executive session. The public body must then return to an open session to put on the record any official action that was taken during the closure if it is appropriate to do so. D.C. Official Code § 2-575(c) does not preclude a public body form holding an entire meeting in closure, only that prior to doing so the public body first meet in an open session which it resumes after meeting in closure. Plainly stated, the closed session must be part of a single meeting.

After a comprehensive review of the BZA closed session recordings, the BZA website, the central meeting calendar and applicable law,[3] the OOG must find the BZA in violation of the OMA's "Open meetings" provisions: (1) for conducting meetings in improper closed sessions (D.C. Official Code § 2-575(a)); and (2) for failing to strictly adhere to the OMA's protocol for entering closed/executive sessions (D.C. Official Code § 2-575(c)).

---

[2] The OMA amends the DCAPA by adding two new titles IV and V. 11 DCMR 101.3 reads: "[I]n any conflict between this subtitle and the D.C. Administrative Procedure Act, the Act shall govern."

[3] https://www.open-dc.gov/public-bodies/board-zoning-adjustment-bza, https://app.dcoz.dc.gov/Calendar/Calendar.aspx. The OOG last accessed both websites on October 23, 2017.

Background

During the investigation of Complaint OMA OOG-0001_6.1.17_AO, the OOG observed that from approximately June 2016 to July of 2017,[4] the BZA noticed to the public on its website and on the central meeting calendar several of its meeting as closed to the public.[5] On July 6, 2017, the OOG requested that the BZA provide for the OOG to review by July 12, 2017, copies of electronic recordings and written transcripts[6] of the following BZA closed sessions: (1) June 5, 2017; (2) June 12, 2017; (3) June 19, 2017; (4) June 21, 2017; (5) June 26, 2017; and (6) June 28, 2017.

The OOG's systematic review of the aforementioned closed sessions and relevant information reveals: (1) the BZA has held stand-alone closed meetings that were never open to the public; and (2) the BZA does fails to return to an open session to place on the public record, where appropriate, any official action it takes during the closures. As discussed herein, the BZA's failure to do so violates the OMA.

The OOG's legal opinion that a public body may not meet in a stand-alone closed session is a reasonable interpretation of D.C. Official Code § 2-575(c). Courts have held that great deference must be given to the agency's interpretation of its enabling legislation so long as the interpretation is reasonable.

D.C. Official Code § 2- 575(c) enumerates the OMA statutory protocol that a public body must follow to lawfully meet in a closed/executive session. This statute reads:

> (1) Before a meeting or portion of a meeting may be closed, the public body shall meet in public session at which a majority of members of the public body present vote in favor of closure. (2) The presiding officer shall make a statement providing the reason for the closure, including citations from subsection (b) of this section, and the subjects to be discussed. A copy of the roll call vote and statement shall be provided in writing and made available to the public.

The OOG was first staffed in April of 2013. Since that time the OOG's consistent interpretation[7] to public bodies during OMA trainings and when providing legal advice on meeting in closure is

[4]The central meeting calendar and BZA website indicate that the BZA also held closed meetings on September 5, 2017, September 11, 2017, September 18, 2017, October 2, 2017, October 10, 2017, October 16, 2017 and October 23, 2017. See https://app.dcoz.dc.gov/Calendar/Calendar.aspx; and https://www.open-dc.gov/public-bodies/board-zoning-adjustment-bza. If held by the BZA, these meetings also constitute additional violations of the OMA.

[5] The language reads: "Board of Zoning Adjustment Closed Meeting."

[6] The BZA did not provide to the OOG copies of the requested transcripts due to cost constraints.

[7] D.C. Official Code §§ 2-579(g); 2-593(2) authorizes the OOG to issue advisory opinions on compliance with the OMA. Doing so requires the OOG to provide reasonable interpretations of the OMA. Additionally, language from the OMA's legislative history indicates the OOG was created to interpret the statute. It reads: "[W]e suggest addition of provision in Title I of Bill 18-777, the Open Government Act of 2010, designating the proposed Open

that D.C. Official Code § 2-575(c) requires a public body to first adjourn an open meeting that is part of a single meeting to meet in a closed/executive session. After meeting in closure, the public body must then return to an open session to put on the record any official action that was taken during the closure.[8] The OOG has opined that D.C. Official Code § 2-575(c) does not preclude a public body form holding an entire meeting in closure, only that prior to doing so the public body first meet in an open session which it resumes after meeting in closure.

A line of judicial decisions establish that an agency's interpretation of its enabling statute must receive great deference from a reviewing court so long as it is reasonable. See *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-627, 28 L. Ed. 2d 367, 91 S. Ct. 1091 (1971); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969); and *O'Rourke v. D.C. Police & Firefighters' Ret. & Relief Bd*., 46 A.3d 378, 2012 D.C. App. LEXIS 304, 2012 WL 2345103 (D.C. June 21, 2012).

In support of the reasonableness of the OOG's interpretation of D.C. Official Code § 2-575(c) are the following: (1) the OMA's "Statement of policy" which is to promote transparency (D.C. Official Code § 2-572); (2) the OMA's "Rules of construction" which require interpreting the statute to maximize public access to meetings (D.C. Official Code § 2-573); (3) the OMA's legislative history; and (4) the statutory adoption of the OOG's interpretation of D.C. Official Code § 2-575(c) in several jurisdictions. Because of the aforementioned, the OOG is confident that its interpretation of D.C. Official Code § 2-575(c) is reasonable and will withstand judicial scrutiny. As the OMA's public policy and rules of construction are self-explanatory, the analysis of the OMA begins with a review of its legislative history.

Public hearing testimony by a drafter of the OMA included in the Act's legislative history, supports the OOG's interpretation of D.C. Official Code § 2-575(c) as being reasonable.

Testimony in the OMA's legislative history by a drafter of the measure makes abundantly it clear that it was never the intent for a public body to meet in a stand-alone open session. Rather, the clear intent is for a public body to always first meet in an open session where it follows the OMA protocol for entering a closed/executive session in D.C. Official Code § 2-575(c). After adjourning the closed session, the public body must resume the open session and place on the record, if appropriate any official action taken during the closure. Testimony given during the July 12, 2010, public hearing on the OMA states:

> The justification for closure is no greater for deliberations than it would be for the hearing or meeting at which the body received testimony and argument about which the body must deliberate. If attendees will be dissatisfied with the public

---

Government Office as the agency with authority to oversee and enforce the open meetings statute. That Office would be a good choice because it is intended as an independent agency headed by a Director who does not serve at the will of the Mayor. It would have the expertise to interpret the open meetings statute . . . ." Testimony of Robert S. Becker, Society of Professional Journalists, D.C. Professional Chapter, before the Committee on Government Operations and the Environment. July 12, 2010, Attachment E, page 4.

[8] See OOG's Training materials at https://www.open-dc.gov/sites/default/files/OMA%20Training%20copy.pdf

> body's decision reached in secret, they undoubtedly will express their feelings when members return to open session to ratify their decision.
> (Report on the Committee on Government Operations and the Environment on Bill 18-716, the Open Meetings Act of 2010, Attachment E, D. C. Open Coalition Memo of Robert S. Becker[9] at page 8 (Council of the District of Columbia December 2, 2010) (hereinafter OMA Comm. Rpt.) (Emphasis added).

The D.C. Code § 2-575 (b)(4)(A) attorney-client exception to lawfully enter a closed/executive session that is frequently relied upon by the BZA for such purpose, supports the reasonableness of the OOG's interpretation of D.C. Official Code § 2-575(c).

The BZA frequently relies upon D.C. Official Code § 2-575(4)(A), which contains the attorney-client exception to enter closed/executive session. This provision states that a meeting or portion of a meeting may be closed:

> To consult with an attorney to obtain legal advice and to preserve the attorney-client privilege between an attorney and a public body, or to approve settlement agreements; provided that, upon request the public body may decide to waive the privilege.

D.C. Code § 2-575 (b)(4)(A) authorizes a public body, upon request to waive the attorney-client privilege thereby allowing the public to attend what is a closed/executive meeting. However, meeting in a closed session under the BZA's current practice renders moot any exercise of the waiver request of the attorney-client privilege. This is because if the BZA decides at a stand-alone closed meeting to grant a waiver of the attorney-client privilege doing so would not benefit the public since the public would not be present if there were no open meeting held in conjunction with the closed meeting. The same is not true under the OOG's interpretation of D.C. Official Code § 2-575(c), since the public would be present if the meeting or portion of the meeting would be a closed/executive session. The reasonableness of the OOG's interpretation of D.C. Official Code § 2-575(c) is evident when D.C. Code § 2-575 (b)(4)(A) is read in concert with the OMA's "Rules of construction" (D.C. Official Code § 2-573), which requires the Act to be interpreted to broadly maximize public access to meetings.

***The OOG's interpretation of D.C. Official Code* § 2-575(c) *is codified as law in several jurisdictions*.**

Research shows that the OOG's interpretation of D.C. Code § 2-575(c) is not novel. A provision in Florida's open meeting law specifically addresses the attorney-client privilege in the context of closed/executive meetings. This provision does not authorize stand-alone closed meetings and requires the entity to resume in a public meeting after meeting in closure.

[9]Mr. Becker was a drafter of the OMA. See OMA Comm. Rpt. Attachment E, Testimony of Robert S. Becker, at page 1.

Fla. Stat. § 286.011(8) reads:

> (8) Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:
> (a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.
> (b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.
> (c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.
> (d) The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.
> (e) The transcript shall be made part of the public record upon conclusion of the litigation.

In addition to the Florida open meetings law, the OOG's interpretation of D.C. Official Code § 2-575(c) is codified in Virginia and Rhode Island. VA Code § 2.2-3711(B) reads: "No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in a closed meeting shall become effective unless the public body, following the meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation, or motion that shall have its substance reasonably identified in the open meeting." R.I. Gen Laws § 42-46-49(b), states: "All votes taken in closed sessions shall be disclosed once the session is reopened; provided, however, a vote taken in a closed session need not be disclosed for the period of time during which its disclosure would jeopardize any strategy, negotiation or investigation undertaken pursuant to discussions conducted under § 42-46-5(a)."[10]

[10] R. I.§ 42-46-5 in relevant part reads: "(a) A public body may hold a meeting closed to the public pursuant to § 42-46-4 for one or more of the following purposes: (1) Any discussions of the job performance, character, or physical or mental health of a person or persons provided that such person or persons affected shall have been notified in advance in writing and advised that they may require that the discussion be held at an open meeting.

Recommendations

The BZA apparently relies on 11 DCMR Y § 103.2, a regulation it adopted for the conduct of its public meetings and public hearings to meet in stand-alone closed meetings. However, the BZA's stand-alone closed meeting practice does not comport with the OOG's interpretation of the OMA's protocol for holding closed meetings, and 11 DCMR Y § 103.2 contradicts the OMA. The BZA regulations make clear that where the regulations are in conflict DCAPA, the DCAPA shall govern. The OOG's recommendations to the BZA are as follows: (1) immediately cease its current practice of holding stand-alone closed meetings; (2) cease noticing any meeting as closed to the public; (3) strictly adhere to the protocol for entering closed/executive meetings found in D.C. Official Code § 2-575(c) as those provisions have been interpreted by the OOG; and (4) for the Office of Zoning Executive Director, its legal counsel, Secretary to the BZA and members of the BZA attend an Open Meetings Act training within 90 days of the issuance of this binding opinion.

Conclusion

D.C. Official Code § 2-575(c) lists the protocol that public bodies must follow to lawfully enter into closed/executive sessions. The OOG has consistently opined that D.C. Official Code § 2-575(c) requires a public body to begin in an open session where a meeting or a portion of a meeting will be held in closure. Judicial precedent states that an agency's interpretation of its

---

Failure to provide such notification shall render any action taken against the person or persons affected null and void. Before going into a closed meeting pursuant to this subsection, the public body shall state for the record that any persons to be discussed have been so notified and this statement shall be noted in the minutes of the meeting.
(2) Sessions pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation.
(3) Discussion regarding the matter of security including, but not limited to, the deployment of security personnel or devices.
(4) Any investigative proceedings regarding allegations of misconduct, either civil or criminal.
(5) Any discussions or considerations related to the acquisition or lease of real property for public purposes, or of the disposition of publicly held property wherein advanced public information would be detrimental to the interest of the public.
(6) Any discussions related to or concerning a prospective business or industry locating in the state of Rhode Island when an open meeting would have a detrimental effect on the interest of the public.
(7) A matter related to the question of the investment of public funds where the premature disclosure would adversely affect the public interest. Public funds shall include any investment plan or matter related thereto, including, but not limited to, state lottery plans for new promotions.
(8) Any executive sessions of a local school committee exclusively for the purposes: (i) of conducting student disciplinary hearings; or (ii) of reviewing other matters which relate to the privacy of students and their records, including all hearings of the various juvenile hearing boards of any municipality; provided, however, that any affected student shall have been notified in advance in writing and advised that he or she may require that the discussion be held in an open meeting.
Failure to provide such notification shall render any action taken against the student or students affected null and void. Before going into a closed meeting pursuant to this subsection, the public body shall state for the record that any students to be discussed have been so notified and this statement shall be noted in the minutes of the meeting.
(9) Any hearings on, or discussions of, a grievance filed pursuant to a collective bargaining agreement.
(10) Any discussion of the personal finances of a prospective donor to a library. . ."

enabling statute must receive great deference from a reviewing court so long as it is reasonable. In support of the reasonableness of the OOG's interpretation of D.C. Official Code § 2-575(c) are: (1) the OMA's legislative history that makes it abundantly clear that the Act does not authorize public bodies to meet in stand-alone closed meetings; and (2) following the BZA's stand-alone meetings renders moot the waiving of the attorney-client exception in D.C. Official Code § 2-575 (b)(4)(A) by a public body.

Sincerely,

Traci L. Hughes

TRACI L. HUGHES, ESQ.
Director, Office of Open Government
Board of Ethics and Government Accountability