

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



March 28, 2019

VIA ELECTRONIC MAIL

Mr. Rick Cruz, Chairperson
District of Columbia Public
Charter School Board
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VIA ELECTRONIC MAIL

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RE: #OOG-0003_.11.2.18_AO

Dear Chairperson Cruz:

Pursuant to 3 DCMR § 10400 *et seq.*, the Office of Open Government (OOG) investigated complaint number OOG-003_.11.2.18_AO, which alleged violations of the Open Meetings Act (OMA) (D.C. Official Code § 2-571 *et seq.*), by the District of Columbia Public Charter School Board (DCPCSB). These allegations concerned the DCPCSB's public meetings that were held on October 31, 2018 and December 13, 2017. This legal opinion contains findings of fact and conclusions of law respecting the alleged violations of the OMA.

I. BACKGROUND

On November 2, 2018, the OOG received a complaint that alleged: (1) the DCPCSB met in an improper closed/executive session, on October 31, 2018, to deliberate upon 2018-2019 charter reviews and renewals; (2) the DCPCSB improperly noticed to the public its October 31, 2018 meeting; (3) the DCPCSB failed to timely report to the public the outcome of the vote on charter reviews and renewals that took place during the October 31, 2018, closed/executive session; and (4) the DCPCSB's December 13, 2017 draft meeting agenda did not provide the public with proper notice of the closed/executive session because the DCPCSB did not provide the reason for closure, description of the matters that were to be discussed, or the required citation to the District of Columbia Code.

On November 16, 2018, the OOG transmitted a copy of the complaint to the DCPCSB with a request for any additional records relevant to a determination on this complaint by December 3,

2018. The DCPCSB's Chairperson Rick Cruz timely submitted to the OOG a written response contesting all but one allegation of the complaint.

While investigating the merits of the complaint, the OOG reviewed the following: (1) the DCPCSB's website; (2) the DCPCSB's December 13, 2017 and October 31, 2018, public meeting notices;¹ (3) the District of Columbia School Reform Act of 1995 (SRA); (4) the OOG's central meeting calendar; (5) the DCPCSB's regulations (5-E DCMR § 5-E9); and (6) the DCPCSB's December 3, 2018 response to the complaint.²

Based upon the results of the OOG's investigation and for reasons that follow, I find the following: (1) the DCPCSB violated D.C. Official Code § 2-575 by noticing its October 31, 2018, meeting as closed to the public; (2) pursuant to District case law the DCPCSB is a quasi-judicial public body; (3) the DCPCSB's October 31, 2018, meeting in closure was lawful as a quasi-judicial public body meeting to deliberate upon a decision in an adjudication action or proceeding; (4) the OMA requires a public body to report on the record any official action taken during closure, but only when it is appropriate to do so; (5) the DCPCSB did not vote during the October 31, 2018, closed/executive session; (6) the DCPCSB's decision to not publicly report the outcome of its closed deliberations on the October 2018-2019 charter reviews and renewals was lawful; and (7) the DCPCSB violated the D.C. Official Code § 2-576(5) by failing to provide, in its December 13, 2017 public meeting notice, the requisite D.C. Code citation to the reason for closure and a description of the matters to be discussed in its December 13, 2017 closed session.³

II. DISCUSSION

The purpose of the OMA is to provide the public with full and complete information regarding the affairs of government and the official actions taken by government officials (D.C. Official Code § 2-572). OMA complaints are reviewed by the OOG with the aim of supporting the policy of the OMA. Thus, the OOG will strictly construe the application of exceptions that permit closure of meetings pursuant to D.C. Official Code § 2-573.

The DCPCSB was established pursuant to section 2214 of the District of Columbia School Reform Act of 1995, approved April 26, 1996 (110 Stat. 1321; D.C. Official Code § 38-1802.14) and is a public body subject to the OMA. The DCPCSB's status as a public body that is subject to the OMA is not in dispute.⁴ The SRA's requirement that "all meetings of the Board must be open to the public with a reasonable period of public comment during the meeting"⁵ is unique to the DCPCSB. This requirement appears to conflict with section 405 of the OMA,⁶ which authorizes public bodies to enter closed/executive sessions under specific enumerated circumstances. However, as discussed below, a judicial rule of statutory interpretation requires that these two

¹The complainant and DCPCSB provided copies of these public meeting notices.

²The DCPCSB's December 3, 2018, response to the complaint includes copies of the following: (1) the October 31, 2018 -Notice of Close Meeting; (2) screen shot of the Meeting Notice of October 31, 2018; (3) screen shots of the DCPCSB tweet linking to Meeting Notice of October 31, 2018, and website containing the Meeting Notice of December 31, 2017; and (4) September 2017 email to former OOG Director Hughes.

³DCPCSB admits that the notice did not comply with the OMA.

⁴ See D.C. Official Code § 38-1802.14(b)(3)). See also OMA OOG-0004_7.03.17_AO, https://www.open-dc.gov/sites/default/files/FINAL%20DCPCSB_OMA%20OOG-0004_7.3.17%20%28Issued%208.9.17%29.pdf.

⁵ D.C. Official Code § 38-1802.14(b)(3).

⁶ D.C. Official Code § 2-575.

statutory provisions be construed together. When this rule is applied, the two statutes are not in conflict.

A. The Legislative Intent is for the OMA's Closed Meeting Provisions to Apply to the DCPCSB.

The SRA became law on April 26, 1996. Five (5) years later, the OMA became law on March 31, 2011. When the Council of the District of Columbia (the "Council") enacted the OMA's closed meeting provisions, the legislature was aware of the SRA's requirement that "all meetings of the Board are to be open to the public with a reasonable period of public comment during the meeting," set forth in D.C. Official Code § 38-1802.14(b)(3).

Despite the SRA provision that requires all meetings to be open to the public, the Council, when enacting the OMA, did not exclude the DCPCSB from the list of entities subject to the OMA's provisions. Nor did the Council modify the SRA's open meeting provision. It is evident from the OMA's legislative history that the Council intended for the OMA's closed meeting provision to apply to the DCPCSB. In fact, in defining the term "Public Body," the OMA's legislative history specifically references the DCPCSB:

"Public Body would include any council, board, or commission of the District government established by statute, regulation, or order. This definition would include all boards and commissions defined under D.C. Official Code {sic} section 1-523.016, the District of Columbia State Board of Education, the **District of Columbia Public Charter School Board ...**"⁷ (Emphasis added).

Taken together, the OMA and the SRA control opening meetings. When two statutes simultaneously relate to the same subject area, judicial rules of statutory interpretation provide that the two statutes should be construed together.⁸ When applying this rule of interpretation to the instant matter there is no conflict between the OMA and the SRA. The two statutes may be read in harmony to provide that all meetings of the SRA must be open to the public, apart from those meetings the OMA authorizes the DCPCSB to hold in closure.

The OMA's closed meeting provisions are applicable to the DCPCSB. Therefore, what follows is an analysis of whether the DCPCSB's entry into a closed session during its October 31, 2018, public meeting was for a permissible exception under the OMA.

⁷ Report on the Committee on Government Operations on Bill 18-716, the Open Meetings Act of 2010, at pages 4-5 (Council of the District of Columbia December 2, 2010)

⁸ See *George v. Dade*, 769 A.2d 760, 764 (2001), which held, "[W]here two or more statutes relate to the same subject area, we construe them together."

B. The OMA Authorizes Public Bodies Exercising Quasi-Judicial Functions to Deliberate Upon an Adjudication or Proceeding in a Closed Session.

The OMA lists fourteen reasons for a public body to enter a closed meeting.⁹ (D.C. Official Code § 2-575(b)(1)-(14)). The complaint requests that DCPCSB “refrain from closing meetings unless personnel issues or legal investigations are discussed.” This request does not comport with the OMA. The DCPCSB and any other public body may include a closed/executive session in its public meeting for any of the fourteen reasons stated in the OMA.¹⁰ The DCPCSB’s October 31, 2018 public meeting notice cited D.C. Official Code § 2-575(b)(13), which authorizes a public body, when exercising quasi-judicial functions to enter a closed/executive session to deliberate upon an adjudication action or proceeding as the reason for closing that meeting. At issue is whether the DCPCSB’s is a quasi-judicial body.

District of Columbia statutes do not define the term “quasi-judicial body;” however, District of Columbia case law defines such entities as those that hold formal hearings and issue rulings that are enforceable or appealable.¹¹ Since the SRA provisions below authorize the DCPCSB to hold formal hearings and issue rulings that are enforceable or appealable, the DCPCSB is a quasi-judicial body. D.C. Official Code §§ 38-1802.03(b); 38-1802.12(d)(1); 38-1802.13(c)(1) respectively authorize the DCPCSB to hold hearings to approve or deny petitions, to establish public charter schools and to renew charters or revoke existing charters. Additionally, an aggrieved party may appeal DCPCSB rulings to deny, renew and revoke charters pursuant to D.C. Official Code §§ 38-1802.03(j)(2); 38-1802.12(d)(6); and 38-1802.13(c)(6)(A). Thus, the DCPCSB meets the criteria courts use to define a quasi-judicial body.

As established previously, the OMA’s closed meeting provisions are applicable to the DCPCSB. Therefore, the DCPCSB’s entry into closed/executive session on October 31, 2018, to exercise quasi-judicial functions and to deliberate upon an adjudication action proceeding was lawful. What follows is a discussion of whether a public body may notice a meeting as closed to the public.

C. The OMA does not Authorize a Public Body to Notice a Meeting as Closed to the Public.

DCPCSB included with its response to the complaint a copy of the October 31, 2018 public meeting notice at issue. The heading of the notice reads, “Notice of Closed Meeting” and appears under the topic “Board Meeting Agenda” with the caption “Closed Meeting.”¹² Based upon the analysis below, there is no authority in the OMA for noticing a meeting to the public as closed.

First, a brief overview of the OMA’s public notice requirements is in order. The OMA’s “Notice of meeting” provisions in D.C. Official Code § 2-576 require the following: (1) as much advance notice to the public as early as possible, but not less than 48 hours or 2 business days, whichever is greater before the meeting; (2) a public body to establish an annual schedule of

⁹ D.C. Official Code § 2-575(b)(1)-(14).

¹⁰ The OMA (D.C. Official Code § 2-575(b)) provides fourteen (14) reasons for which a public body may enter a closed session. View D.C. Official Code § 2-575(b) here: <https://code.dccouncil.us/dc/council/code/sections/2-575.html>.

¹¹ See *White v. Fraternal Order of Police*, 909 F.2d 512, 524; 1990 U.S. APP.

¹² The DCPCSB’s response to the complaint in a footnote provides a link to the October 31, 2018, meeting notice.

meetings in the District of Columbia Register; (3) a public body to post the meeting notice in the office of the public body or a location that is readily accessible to the public; (4) posting of the meeting notice on the website of the public body or the District government's website; and (5) publishing the notice of upcoming meeting in the District of Columbia Register.¹³ Additionally, each meeting notice must include the date, time, location, and planned agenda to be covered at the meeting. Finally, if the meeting or any portion of the meeting is to be closed, the notice shall also include, a statement of intent to close the meeting or any portion of the meeting, including citations to the reason for closure under D.C. Official Code § 2-575(b), and a description of the matters to be discussed.

D.C. Official Code § 2-576(5) requires the meeting notice to contain a statement of intent to close the meeting or any portion of the meeting. The purpose of the "statement of intent to close" is to notify the public of any closure to occur during an open meeting. D.C. Official Code § 2-576(5) is the only provision of the OMA that mandates a public body's use of "closed meeting" in its notice to the public and this is in a "statement of intent to close" and not as the meeting notice heading.

Second, with respect to the requirements for entering into closed/executive session, the OMA authorizes a public body to hold closed sessions only after having first convened an open session where a vote is taken to enter closure.¹⁴ The OOG has interpreted D.C. Official Code § 2-575(c)(1) to prohibit noticing to the public a meeting as closed and from holding stand-alone closed sessions independent of an open meeting.¹⁵ D.C. Official Code § 2-575(c) does not preclude a public body from holding an entire meeting in closure. D.C. Official Code § 2-575(c)(1) requires that all meetings of public bodies must first begin as open meetings with the possibility of a portion or the entire remainder of the meeting becoming a closed session. In order for a meeting notice to be proper, it must reflect that the meeting is open to the public until the public body properly votes to close the meeting for a reason permissible under the OMA.

Third, noticing a meeting as closed to the public may deter the public from attending the open portion of the meeting or from remaining at the meeting location to hear of any official action taking during closure that is appropriate for the public body to report on the record once it returns to the open session. This is particularly pertinent to DCPCSB's public meetings because the SRA mandates that all meetings are open to the public with a period of public comment.¹⁶ Even though the period of public comment would occur prior to the DCPCSB's entry into a closed session, noticing a meeting as "closed" could deter the public from attending and participating in the period of public comment. Thus, noticing a meeting as closed to the public is improper because of the chilling impact on public participation.

Last, the OMA and its legislative history do not provide support for noticing a meeting as closed to the public. The OOG has consistently opined that all meetings must begin in an open session. A public body must also provide proper notice of a public body's intent to enter a closed session. In this case, the DCPCSB improperly noticed its October 31, 2018 meeting as closed to

¹³ View D.C. Official Code § 2-576 in its entirety here <https://code.dccouncil.us/dc/council/code/sections/2-576.html>.

¹⁴ D.C. Official Code § 2-575(c)(1).

¹⁵ See OOG advisory opinion here https://www.open-dc.gov/sites/default/files/BZA2%20OOG-007_10.25.17_%20AO_0.pdf.

¹⁶ The OOG notes that the October 31, 2018 DCPCSB meeting lists as an agenda item "Public Comment."

the public in violation of the OMA. The manner of the DCPCSB's notice of intent to close its meeting was improper and the DCPCSB must refrain from noticing to the public any of its meetings as "closed" in the future.

D. After Meeting in Closed Session, the OMA Requires A Public Body to Report on the Public Record Official Action Taken During Closure When Appropriate.

During OMA trainings and in legal opinions, the OOG has consistently opined that, after meeting in closure, the public body must then return to an open session to put on the record, when appropriate, any official action that was taken during the closure.¹⁷ The OMA's statement of policy and rules of construction support this legal position.¹⁸ These two provisions of the OMA provide the public with the right to full and complete information regarding the affairs of government and instruct that the OMA is broadly construed to maximize access to meetings.¹⁹ For the reasons that follow, the DCPCSB did not violate the OMA when it did not put on the record what took place during closure.

The DCPCSB acted properly because there was nothing substantive to report after the closure. In its December 3, 2018 response to the complaint, Chairperson Cruz stated in his response to the OOG that the DCPCSB did not vote on any matters, but solely engaged in deliberations:

"Board did not vote on any charter reviews or renewals during the October 31, 2018, closed session. To be clear, the Board has never voted on any item or taken any official action during a closed public meeting. All Board votes are conducted during meetings that are open to the public.

The Board will make all final decisions on charter reviews and renewals for 2018-19 school year during open meetings held over the course of fall and winter. At the November Board meeting, for example which was open to the public as well as live-streamed on the DC PCSB's website, the Board voted on the charter reviews of two schools."

Since the DCPCSB did not vote during the closed session and only deliberated, there was no result to report to the public. The OOG has consistently opined and instructed public bodies that the OMA only requires a public body to report on the record after closure where appropriate to do so. Many of the reasons for entering closed session by their very nature may preclude reporting to the public what took place in closure. Thus, the DCPCSB did not violate the OMA by failing to report official action after the closed session because no official action was taken.

¹⁷See https://www.open-dc.gov/sites/default/files/BZA2%20OOG-007_10.25.17_%20AO_0.pdf. and <https://www.open-dc.gov/sites/default/files/OMA%20Training.pdf>.

¹⁸ See D.C. Official Code § 2-571 and D.C. Official Code § 2-572.

¹⁹ *Id.*

E. The DCPCSB Admits to Failing to Include the Requisite Citation and Description to the Reason for Closure in its December 13, 2017, Public Meeting Notice.

Pursuant to D.C. Official Code § 2-576(5) each public meeting notice must contain “a statement of intent to close the meeting or any portion of the meeting, including citations to the reason for closure under § 2-575(b), and a description of the matters to be discussed.” In its December 3, 2018, response to the complaint, the DCPCSB admits that due to an oversight it failed to include in its December 13, 2017,²⁰ notice of public meeting the requisite citation and description of the matters to be discussed in closure. 3 DCMR § 10405.4, requires a public body’s response that admits one or more violations of the OMA should include a plan of corrective action. The DCPCSB December 3, 2018, response to the complaint includes a plan of corrective action to ensure future public meeting notices comply with the OMA. The response provided the following:

This was a mistake on DC PCSB’s part that resulted in a one-time failure to provide the requisite citation and description under the OMA. We sincerely regret that this mistake resulted in a failure to provide the public with full and complete information in this instance. However, we have timely published appropriate notice, including complete agendas, for every meeting, both open and closed, since the December 13, 2017 meeting. We will continue to timely post such notice in the future and will assess our internal practices to determine if and how we can implement additional safeguards to ensure such a mistake does not occur again.

The DCPCSB’s plan of corrective action is an acceptable cure to the violation, as it complies with 3 DCMR § 10405.4.

III. RECOMMENDATIONS

To ensure future compliance with the OMA, I make the following recommendations to the DCPCSB: (1) immediately cease to notice any meetings as closed meetings as the notice of intent to close serves to notify the public that after the open session a portion or the remainder the meeting will be closed; and (2) ensure that all meeting notices comply with the OMA’s “Notice of meeting” provisions and where appropriate contain notices of intent to close that reflect the requisite OMA citation and description for entering closed sessions.

IV. CONCLUSION

In summary, the Council’s intent was to authorize the DCPCSB’s entry into closed sessions for one of the statutory reasons, which the OMA enumerates. However, the OMA does not authorize a public body to notice a meeting as closed to the public. All meetings, even those that will enter closure for the entire meeting must first commence in an open session. The OMA

²⁰ This violation occurred more than a year ago. Pursuant to 3 DCMR 10400.2, “[A] complaint shall be submitted by the complainant to the Director within sixty (60) days following the date the complainant knew or reasonably should have known of the alleged violation. The OOG with the information provided was not able to determine when the complainant should have known of this violation.

currently does not authorize standalone closed sessions independent of an open session. Further, the public body's publishing of a meeting notice stating it is "closed to the public" has a chilling effect that discourages the public from attending the open portion of the meeting. In the case of the DCPCSB, this is especially important since DCPCSB's enabling legislation provides for a period of public comment, which would take place during the open portion of its meetings.

During the closed session of the October 31, 2018, public meeting the DCPCSB was acting lawfully as a quasi-judicial public body pursuant to D.C. Official Code § 2-575(b)(13). This provision authorizes a quasi-judicial public body to enter a closed/executive session to deliberate upon an adjudication action or proceeding. No vote was taken during the October 31, 2018 closed meeting. The OMA only requires a public body to place on the record any action taken in closure when appropriate. Thus, the DCPCSB's decision to not publicly report the outcome of its closed deliberations on the October 2018-2019 charter reviews and renewals was lawful.

The DCPCSB admits to a violation of the OMA's "Notice of meeting" provisions by failing to provide the public with the requisite D.C. Official Code citation to the reason for closure and a description of the matters to be discussed (D.C. Official Code § 2-576(5)) in its December 17, 2017 public meeting notice. However, this violation occurred more than a year ago. Pursuant to 3 DCMR § 10400.2, "[A] complaint shall be submitted by the complainant to the Director within sixty (60) days following the date the complainant knew or reasonably should have known of the alleged violation." The OOG, with the information provided, was not able to determine when the complainant should have known of this violation. In fairness to public bodies subject to the OMA, the public must be mindful of 3 DCMR § 10400.2 when filing OMA complaints with the OOG.

With respect to the violation of D.C. Official Code § 2-576(5) in the DCPCSB's conduct of its December 13, 2017 meeting, the OOG accepts the DCPCSB's corrective action plan and the OOG will closely monitor compliance with this plan for six months from the date of this Advisory Opinion.

Sincerely,

/s/

NIQUELLE M. ALLEN, ESQ.

Director, Office of Open Government

Board of Ethics and Government Accountability

cc: Sarah Cheatham, DCPCSB General Counsel at s.cheatham@dc.gov