

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY  
OFFICE OF OPEN GOVERNMENT



October 7, 2015

**VIA ELECTRONIC MAIL**

Ms. Jennifer Niles, Deputy Mayor for Education  
Government of the District of Columbia  
John A. Wilson Building  
1350 Pennsylvania Avenue, NW  
Suite 307  
Washington, DC 20004

**RE: Complaint #OOG-002\_8.31.15**

Dear Deputy Mayor Niles:

The Director of the Open Government Office, pursuant to the authority set forth in § 503(a)(4) of the District of Columbia Administrative Procedure Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-593 *et seq.* (2015), and 3 DCMR §§ 10400 *et seq.* (2015)), investigated an Open Meetings Act (D.C. Official Code §§ 2-571 *et seq.* (2015)) complaint regarding the Cross-Sector Collaboration Task Force (*hereinafter*, *Task Force*). Specifically, the complainant asks the Office of Open Government to address whether the Task Force is a public body subject to the Open Meetings Act.

**Background**

On August 19, 2015, the Office of the Deputy Mayor for Education (DME) announced the Cross-Sector Collaboration Task Force.<sup>1</sup> Specifically, the task force is “charged with developing clear and fair recommendations to the Mayor on how to improve the coherence and collaboration across and among public schools to improve effectiveness and efficiency.”

The Task Force will be in place for two years, and will be chaired by the Deputy Mayor for Education, Ms. Jennifer Niles; and will be comprised of 23-25 members representing Local Education Agencies (LEAs), district agencies and public school parents.<sup>2</sup> Meetings are scheduled October 2015 through July 2017, and will be closed to the public.

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<sup>1</sup> DME Launches Cross-Sector Collaboration Task Force, <http://dme.dc.gov/release/dme-launches-cross-sector-collaboration-task-force> (last visited October 5, 2015)

<sup>2</sup> DC Cross-Sector Collaboration Task Force, <http://dme.dc.gov/node/1106612> (last visited October 5, 2015)

The DME notes in the press release that in an effort to “support transparency and trust with the public, all meeting materials and meeting minutes will be posted to the DME website.” Additionally, “a public engagement calendar will be developed by the Task Force that will outline the timeline and opportunities for public engagement.”<sup>3</sup>

The goals of the task force include:

- Developing a framework for coordinating processes on school openings, closing, and facilities planning
- Developing methods for information sharing with the public and across public school sectors
- Promoting enrollment stability
- Identifying educational challenges that need to be addressed through cross-sector collaboration
- Improving the experience of parents and families understanding and navigating their public school options

Task force members may be nominated via submission to [collaboration@dc.gov](mailto:collaboration@dc.gov), and will be notified by the DME of their participation.<sup>4</sup> The DME will make the final determination regarding the members of the Task Force.

### **Complaint**

On August 31, 2015, the Office of Open Government received a complaint from F. Mulhauser alleging the operational structure of the Task Force, as announced by the DME, is in violation of the Open Meetings Act (D.C. Official Code §§ 2-571 *et seq.* (2015)).

In response to the September 4, 2015, Notification of Complaint, the Deputy Mayor for Education, Ms. Jennifer Niles, through the Mayor’s Office of Legal Counsel, asserted that the “Task Force is not a public body, the meetings are not subject to the laws concerning open meetings, and the public and press can be excluded from their proceedings.” To support this position, the DME avers:

- The Task Force is not a public body required to hold open meetings because it is not taking official action
- The purpose of the Task Force is to issue a report to the Mayor and provide recommendations on how to improve certain aspects of public education
- The Task Force is not established by statute or executive order, and has no authority to take official action or implement recommendations
- The sole purposed of the Task Force is to make recommendations without the necessity of a vote

In addition to the press announcement, the DME supplied as part of its response to the Notice of Complaint a document entitled *DC Cross-Sector Collaboration Task Force Frequently Asked Questions*.<sup>5</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> DC Cross-Sector Collaboration Task Force Frequently Ask Questions, <http://dme.dc.gov/sites/default/files/dc/sites/dme/publication/attachments/Task%20Force%20FAQ.pdf> (last visited October 5, 2015).



It is the position of the DME that the complaint is without merit, and therefore no corrective action by the Office of Open Government need be taken.

### Discussion

There are two threshold inquiries to determine whether the Open Meetings Act is triggered in this instance: (1) is the Task Force a public body and (2) are the gatherings of the members of the Task Force considered “meetings” as defined by the Act. To make this determination, it is important to first consider the legislative history of the Open Meetings law.

The committee report for the Open Meetings Act (*Council of the District of the District of Columbia, Committee on Government Operations and the Environment, B18-716, (“Open Meetings Act of 2010”)(Comm. Rpt.)*) specifically included *task force* within the meaning of “public body”, and established that public bodies are to be created by mayoral orders, regulation or statute:

*“Public body” means any council, task force, board, or commission of the District government established pursuant to statute, regulation or order, including any committee, subcommittee, ad hoc committee or advisory body thereof, the Council...” (Comm. Rpt. at 2-3).*

However, the Open Meeting Act as adopted, omitted “task force,” but did include “similar entity,” within the definition of public bodies. Additionally, the Open Meeting Act as adopted excluded the requirement that public bodies be “established pursuant to statute, regulation or order.”

In the absence of clarity in the legislative record as to why the term “task force” and the establishing requirements were removed from the language of the final adopted legislation, the Office of Open Government must make a determination on this matter (1) in keeping with the letter of the law as memorialized in the Open Meetings Act. (D.C. Official Code §§ 2-571 *et seq.* (2015)), and (2) consistent with the spirit and intent of the legislation which was to balance greater transparency into public official decision making while preserving the ability of government to engage in quality deliberations.<sup>6</sup>

### **Whether the Task Force May be Considered a Public Body Thus Requiring Its Meetings to be Open to the Public**

The Open Meetings Act reiterates the long-standing public policy of the District of Columbia government (“the District”) that all persons shall be entitled to full and complete information regarding the affairs of the District and those who represent them. D.C. Official Code § 2-572. Moreover, in support of that policy, the Council mandated the Open Meetings Act “shall be construed broadly to maximize public access to meetings. Exceptions shall be construed narrowly and shall permit closure of meetings only as authorized.” *Id.* at § 2-573. This language clearly demonstrates that the Council of the District of Columbia intended to pull back the curtain on the District to provide the public greater access to meetings, and the ability to be present when public bodies are discussing and deciding upon matters affecting government operations and policy.<sup>7</sup>

<sup>6</sup> B18-716, “Open Meetings Act of 2010” Committee Report Background and Committee Reasoning, at p. 3.

<sup>7</sup> This is further supported by the notice and meeting recording requirement of the Open Meetings Act allowing the public ample opportunity to attend and/or hear, view or read recordings of public body meetings. (D.C. Official Code §§ 2-575(a)(1-3), 2-576, 2-578.



In its September 25, 2015 Response to Complaint Notification, the DME asserts that because the members of the Task Force are invited to participate, rather than appointed by the Mayor; and that the Task Force will offer advice rather than take formal action on behalf of the District, it therefore cannot be considered a public body and is exempt from the requirements of the Open Meetings Act.<sup>8</sup>

The Open Meeting Act defines a public body as “any government council, including the Council of the District of Columbia, board, commission, or *similar entity* [emphasis added], including a board of directors of an instrumentality, a board which supervises or controls an agency, or an advisory body that takes official action by the vote of its members convened for such purpose.” D.C. Official code § 2-574(3). Furthermore, the Open Meetings Act does not require that a public body be established by statute or Mayor’s Order, but looks to the nature of the meeting, and whether the public body is gathering to “consider, conduct, or advise on public business, including gathering information, taking testimony, discussing, deliberating, recommending, and voting, regardless whether held in person, by telephone, electronically, or by other means of communication.” *Id.* at § 2-574(1).

By the DME’s admission, the sole purpose of the Task Force is to develop a report for the Mayor with recommendations on how to improve certain aspects of public education<sup>9</sup> including recommending policy to the Mayor to decrease student mobility, and the centralization and automation of the Universal Healthcare Certificate and the residency verification process.<sup>10</sup> The Task Force is to be chaired by the DME, and made up of representatives of District agencies, including the District of Columbia Public Schools which oversees 100 campuses and nearly 50-thousand public school students.<sup>11</sup> The recommendations of the Task Force, whether accepted or rejected by Mayor Bowser, will most certainly be intended to impact District operations and inform policy.<sup>12</sup> Given the DME’s description of the purview of the Task Force, and its potential far-reaching impact on education policy, the only plausible determination is that it is an entity similar to a board or commission, and is a public body as contemplated under the Open Meetings Act.

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<sup>8</sup> September 25, 2015 Jennifer Niles Memorandum, Response to Complaint Notification #OOG-0002\_8.31.15.

<sup>9</sup> September 25, 2015 Jennifer Niles Memorandum, Response to Complaint Notification #OOG-0002\_8.31.15

<sup>10</sup> See DC Cross-Sector Collaboration Task Force Frequently Asked Questions.

<sup>11</sup> DCPS at a Glance: Enrollment <http://dcps.dc.gov/node/966292> (last visited October 5, 2015).

Also, the Task Force will include 62 public charter local education agencies (LEAs) with over 100 school campuses (SY15-16) (See DC Cross-Sector Collaboration Task Force Frequently Ask Questions).

<sup>12</sup> See DC Cross-Sector Collaboration Task Force Frequently Asked Questions: “**Who has the authority to implement recommendations?** It depends on the nature of the recommendation. The Mayor has authority over DCPS, the Office of the State Superintendent for Education (OSSE), and the Office of the Deputy Mayor for Education (DME) and can implement most policy changes affecting these agencies. Some policy changes may trigger a change in the DC Municipal Regulations (DCMR) and would therefore need to adhere to the applicable process. Others may require action by the City Council. Recommendations impacting public charter schools would be made to the Public Charter School Board (PCSB) and would be considered by members of the Board and charter school community.”



The DME states that “[t]he mere giving of advice, even about governmental matters, is not itself an official action....because advisors or members of an advisory committee, do not have the right to exercise any of the powers of the sovereign.” Although this is correct, it is not dispositive here. An advisory body within the context of the Open Meetings Act is not the only government comprised entity. The Task Force will be a formally convened public body, chaired by the DME and made up of representatives from several District government agencies and members of the public whose sole purpose will be to consider, advise, gather information and ultimately make recommendations to the Mayor intended to affect government operations and guide educational policies. The Open Meetings Act<sup>13</sup> is therefore applicable, and the meetings of the Task Force must be properly noticed and recorded.

### **Whether the Task Force May Conduct Closed Sessions**

The Task Force has not yet convened.<sup>14</sup> Therefore, this opinion will not reach the requirements of the Open Meetings Act as it pertains to the subject matter which may be properly discussed in a closed session. (D.C. Official Code § 2-575(b)(1-14)). However, the Office of Open Government is compelled to address the DME’s rationale for closing Task Force meetings to the public. The DME states in its Frequently Asked Questions:

**“Are the Task Force meetings open to the public?”** The Task Force meetings are closed to the public. After considerable thought, the decision was made in order to ensure we establish a safe and productive environment for Task Force members to have an open and honest dialogue with each other. This dynamic is compromised when there are non-member observers acting as an audience. While task force meetings are closed to the public, we believe that transparency is vital to ensuring a successful process. For this reason, all meeting materials and summaries of discussions will be posted on the DME website. Sharing all materials coupled with holding focus groups and community meetings, will ensure that the public remains informed and has multiple opportunities to engage and provide input.”

The Open Meetings Act does not turn a blind eye to the necessity of public bodies to be able to have frank and candid discussions. It is for that reason the Open Meetings Act shields from discussion in an open forum matters such as proprietary interests, contract negotiations, or matters that require confidentiality pursuant to law or court order.<sup>15</sup> Also, the DME should be aware that the Open Meetings Act does not mandate that members of the public be afforded an opportunity to address the Task Force, only that the public be able to attend. D.C. Official Code § 2-575(a)(1).<sup>16</sup> Therefore, any concern by the

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<sup>13</sup> D.C. Official Code § 2-574(1)

<sup>14</sup> September 25, 2015 Jennifer Niles Memorandum, Response to Complaint Notification #OOG-0002\_8.31.15, notes the “Membership of the Task Force has not yet been decided and we don’t anticipate holding the first meeting of the Task Force before the end of October 2015.”

<sup>15</sup> D.C. Official Code § 2-575(b) establishes ten general categories of exemptions to the Open Meetings Act. The Office of Open Government will provide formal binding advice to any government entity seeking direction on whether a particular subject matter may be exempted from discussion in a public meeting.

<sup>16</sup> Although the Open Meetings Act does not require public participation, the Office of Open Government encourages public bodies, when feasible, to provide the public the opportunity to offer comment during the open session of a meeting. The Office of Open Government applauds the commitment of the DME/Task Force to offer multiple means of engagement with the community.

DME that Task Force meetings will be interrupted by attending members of the public should be quelled. The DME may rely on the boundaries set by the Open Meetings Act in this regard.

**Conclusion**

It is the binding opinion of the Office of Open Government that the DC Cross-Sector Collaboration Task Force is a public body as contemplated by the Open Meetings Act. It must therefore comply with all provisions of the law.

Sincerely,



TRACI L. HUGHES, ESQ.

Director, Office of Open Government

Board of Ethics and Government Accountability

Cc: Steven Walker, Mayor's Office of Talent and Appointments  
Sarah Jane Forman, Mayor's Office of Legal Counsel