

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY  
OFFICE OF OPEN GOVERNMENT



February 8, 2017

**VIA ELECTRONIC MAIL**

Ms. Patricia C. Thompson-Embrack  
Ombudsman Program Officer for Children and Youth  
Department of Behavior Health  
821 Howard Road SE  
Washington, DC 20020

**RE: #OOG-001\_2.1.17\_AO**

Dear Ms. Thompson-Embrack:

The Office of Open Government (OOG) is in receipt of your February 1, 2017 request for an opinion regarding whether the District of Columbia Department of Behavioral Health Ombudsman Advisory Council (hereinafter, Advisory Council) must adhere to the requirements of the Open Meetings Act (OMA) (D.C. Official Code §§ 2-571 *et seq.*) (2017)). For reasons which follow, the OOG opines that the Advisory Council is subject to the OMA. While the Advisory Council must comport its meeting to the requirements of the OMA, including proper notice, agendas, and detailed records of meetings, (D.C. Official Code §§ 2-575 – 578), the law gives public bodies leeway to have frank and candid discussions outside the watchful eye of the public according to strictly construed exceptions. *Id* at § 2-575(b)(1-14).

**BACKGROUND**

Title IV of the South Capitol Street Memorial Amendment Act of 2012, effective June 7, 2012, (D.C. Law 19-141; D.C. Official Code § 7-1131.01 *et seq.*) (South Capitol Street Act), amended the Department of Mental Health Establishment Amendment Act of 2001, effective December 18, 2001 (D.C. Law 14-56; D.C. Official Code § 7-1131.01 *et seq.*) (Mental Health Act), *inter alia*, by adding a new Section 115d, entitled, “Behavioral Health Ombudsman Program.” The framework of the Behavioral Health Ombudsman Program is set out in section 402) of the of Mental Health Act ). The Mental Health Act defines Ombudsman as:

“(1B)...the individual responsible for administering the Behavioral Health Ombudsman Program.”

The purpose of the Ombudsman Program is to:

“(a)...provide District residents with assistance in accessing behavioral health programs and services.”

The Ombudsman Program may be administered either externally or internally by the Department of Behavioral Health:

(b)(1)...the Department may contract with a qualified private, community-based nonprofit corporation, organization, or consortia of organizations, with offices located in the District, to operate the Ombudsman Program. The Department shall establish the criteria that an entity must meet to operate the Ombudsman Program; provided, that the criteria include:

- (A) A public interest mission;
- (B) Qualified staff and organizational expertise in:
  - (i) Behavioral health services
  - (ii) Behavioral health coverage under health benefits plans;
  - (iii) Public education and community outreach; and
  - (iv) Conflict resolution
- (C) No direct involvement in the licensing, certification, or accreditation of behavioral health facility, a health benefits plan, or with a provider of a behavioral health service;
- (D) No direct ownership or investment interest in a behavioral health facility, health benefits plan, or any behavioral health service;
- (E) No participation in the management of a behavioral health facility, health benefits plan, or any behavioral health service; and
- (F) No agreement or arrangement with an owner or operator of a behavioral health service, a behavioral health facility, or health benefits plan that could directly or indirectly result in remuneration, in cash or in kind to the entity.

(2) If the Department is unable to contract with an outside entity that meets the criteria described in this section, or determines it to be in the best interests of the District, the Department shall operate the Ombudsman Program.

(c)(1) The Ombudsman Program shall be administered by the Behavioral Health Ombudsman, who shall be appointed by the Director of the Department of Mental Health.

(2) The Ombudsman shall be a person:

(A) With substantive experience in the fields of behavioral health and patient advocacy; and

(B) Who is an employee of the nonprofit corporation, organization, or consortia of organizations contracted to operate the Ombudsman Program...”

The role of the Ombudsman or his, or her designee is one of advocate, government liaison, and policy expert on matters pertaining to behavioral health providers.<sup>1</sup> Additionally, the Ombudsman is required to assist consumers in resolving problems concerning behavioral health providers, facilities, and in accessing healthcare services and programs; and must submit, proximate to the end of each fiscal year, a report to the Department of Behavioral Health, the Council and the Mayor on the activities of the Ombudsman Program, and any recommendations to improve access to behavioral health services.<sup>2</sup>

The Ombudsman must act in accordance with all federal and state confidentiality and disclosure laws prohibiting release of medical records; and must formally enter into an agreement with the Department of Healthcare Finance to access information regarding Medicaid eligibility status of consumers.<sup>3</sup>

In addition to establishing the role of the Ombudsman, the Mental Health Act makes mandatory the creation of an Advisory Council to consist of members representing consumers, advocacy organizations, healthcare facilities, health benefits plans, and numerous District Government human support and educational agencies, including the Department of Mental Health, the Department of Youth Rehabilitation Services, the Child and Family Services Agency, DC Public Schools, and the Public Charter School Board. Representation from the Department of Health Care Finance is also required.<sup>4</sup>

The Advisory Council must meet quarterly to, at minimum, advise the Ombudsman on programming and operations; changes to the Ombudsman Program; and to review data on cases and make recommendations based on that data.<sup>5</sup>

## **DISCUSSION**

The OMA reiterates the long-standing public policy of the Government of the District of Columbia (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 OMA “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.

It is the public policy of the OMA that supports the very definition of a public body as “any government council, including the Council of the District of Columbia, board, commission, or similar entity, including a board of directors of an instrumentality, a board which supervises or

<sup>1</sup> Section 402(g)(1) of the Mental Health Act of ( D.C. Official Code 7-1131.19 (e)(1-7).

<sup>2</sup> *Id.* at (f).

<sup>3</sup> *Id.* at (h)(1). Paragraph (i) specifically cites Privacy Rule (45 C.F.R. §§ 160 and 164) adopted pursuant to the Health Insurance Portability and Accountability Act, establishing national standards for protecting individuals’ medical records and personal health information.

<sup>4</sup> *Id.* The full Advisory Council is to include: “(A) Consumers; (B) Three consumer advocacy organizations; (C) The Department of Mental health; (D) The Department of Healthcare Finance; (E) The Addiction Prevention and Recovery Administration; (F) The Child and Family Services Agency; (G) The Department of Youth Rehabilitation Services; (H) Health benefits plans; (I) Health care facilities; (J) The Health Care Ombudsman Program; (K) Health Professionals with expertise in a person’s overall social, emotional, and psychological well-being and development; (L) The District of Columbia Public Schools; and (M) The Public Charter School Board.”

<sup>5</sup> *Id.* at (g)(2).

controls and agency, or an advisory body that takes official action by vote of its members convened for such purpose.” D.C. Official Code § 2-547(3). The OMA 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 gathers 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).<sup>6</sup>

To make a determination regarding the applicability of the OMA to the Advisory Council, the OOG leans heavily on the statutory charge of the Ombudsman; its authority to convene members of the Advisory Council; and the legislative history of the Mental Health Act.

### *Legislative History – Department of Behavioral Health Ombudsman*

The impetus for the legislation giving rise to the formation of the Ombudsman and its Advisory Council under the purview of the Department of Behavioral Health, was the shooting deaths of four teenagers, and the injury of six others, on March 30, 2010 on the 4000 block of South Capitol Street, S.E. It was determined that the city could have done more to prevent the tragedy if there were a system in place to address unmet youth behavioral health needs and youth violence. “The District’s deferred investment in youth behavioral health created conditions that make tragedies like the one on South Capitol Street possible. It became clear that the District lacked the preventative processes needed to connect youth and parents with the behavioral health and truancy prevention assistance they need.”<sup>7</sup>

The comprehensive approach to behavioral health care as contemplated by the bill, relied upon data that showed unmet behavioral health needs were a contributing factor to youth violence.

*“Studies have shown that 9.5% of District children aged 2 to 17 years have a mental or emotional health problem that is serious enough to require treatment. In the District, 12.3% percent of parents reported that getting needed behavioral health care for their child was a ‘big problem,’ and the number was even higher amongst low-income families (19.1%) and amongst those in Wards 7 and 8 (32%)”.*<sup>8</sup>

The South Capitol Street Committee Report makes clear, the legislation was intended to bring cohesion to disparate programmatic efforts among health services agencies, and to offer a way for subject matter experts to rely upon data to make recommendations to the District’s public officials to address the mental health needs of youth and their families.

<sup>6</sup> It is unclear at the time of the issuance of this opinion if the Advisory Council has convened. Ms. Thompson-Embrack submitted an electronic copy of the draft Advisory Council bylaws on February 1, 2017, to Director Hughes, indicating the bylaws are a “working draft, since the entire Council has not been identified.” The draft bylaws call for a quorum count of the body to take official action as required by the OMA.

<sup>7</sup> B19-211, “South Capitol Street Memorial Amendment Act of 2012” Committee Report, Purpose of Legislation at p. 2.

<sup>8</sup> *Id.*

## **THE ADVISORY COUNCIL IS A PUBLIC BODY AS DEFINED BY THE OPEN MEETINGS ACT**

Although the facts leading to the establishment of the Ombudsman and the Advisory Council are compelling, and undoubtedly the work of each impacts the wellbeing of the residents of the District of Columbia, the OOG must (1) look to the legislative history of the law itself; and (2) rely upon the direction of the OMA and its requirement that the OOG construe the OMA broadly with the aim of maximizing public access to meetings.

The Committee Report for the OMA identifies what types of public bodies must comply with the OMA:

*“The public body would include any council, board, or commission of the District government established pursuant to statute, regulation, or order...” ( Report on the Committee on Government Operations and the Environment on Bill 18-716, the Open Meetings Act of 2010, at p. 4 (Council of the District of Columbia December 2, 2010) (hereinafter OMA Comm. Rpt.).*

Of equal import is that with the passage of the OMA, came also a new statement of policy “that all persons shall be entitled to full and complete information regarding the affairs of government.”<sup>9</sup> (Id.)

It is without dispute that the Ombudsman Advisory Council was established pursuant to statute, and therefore falls clearly within the definition of a public body as contemplated by the Council. As such, the inclusion of the Advisory Council as a public body is wholly consistent the premise of the OMA to encourage public access to meetings.<sup>10</sup>

The same analysis is applicable to the Advisory Council should it, and the Ombudsman, reside under the auspices of a non-profit, organization or consortia of such.<sup>11</sup> Should an Advisory Council be formed outside of the Department of Behavioral Health, it too will be deemed a quasi-governmental body subject to the OMA,<sup>12</sup> as it would carry out a government function.

<sup>9</sup> See OOG Advisory Opinion OOG-002\_8.31.15 Resolving a complaint against the Deputy Mayor for Education Cross-Sector Collaboration Task Force [http://www.open-dc.gov/sites/default/files/DME%20Cross-Sector%20Collaboration%20Task%20Force\\_OOG%20OPINION%20%2810.7.15%29%28OOG-0002\\_%28Niles%29.pdf](http://www.open-dc.gov/sites/default/files/DME%20Cross-Sector%20Collaboration%20Task%20Force_OOG%20OPINION%20%2810.7.15%29%28OOG-0002_%28Niles%29.pdf) at p. 3: “...[I]n support of that policy, the Council mandates the Open meetings Act ‘shall be construed broadly to maximize public access to meetings. Exception shall be construed narrowly and shall permit closure of meetings only as authorized. 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.’” (D.C. Official Code §§ 2-572 - 573)

<sup>10</sup> See generally, City Solicitor City of Cambridge Massachusetts, OML 2016-102, finding the Cambridge Broadband Taskforce (CBTF), formed to advise the City Manager on a municipal broadband proposal, is a public body subject to the Open Meetings Law because the advisory body was created by way of order from the City Council, and not of the City Manager’s own volition. The CBTF is comprised of experts, members of the public, government officials and university representatives.

<sup>11</sup> Section 402(g)(1) of the Department of Mental Health Establishment Amendment Act of 2001, effective June 7, 2012 (D.C. Law 19-141: DC. Official Code 7-1131.19 (c)(2)(A-B).

<sup>12</sup> D.C. Official Code § 2-574(3).

Section 402(b)(1). *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90; 312 Wis. 2d 84; 752N.W.2d 295, 2008 Wisc. LEXIS 339.

**CONCLUSION**

The Ombudsman Advisory Council is a public body and must comply with the requirements of the Open Meetings Act. By necessity, the Advisory Council will, from time to time, review confidential records brought to the attention of its members by the Ombudsman who is statutorily required to keep such information confidential “in accordance with all federal and state confidentiality disclosure laws.” In such an instance, the Advisory Council may rely on D.C. Official Code § 2-575(b)(1) to discuss matters in closed session that a law or court order prohibits discussion in public. The OOG recommends that all procedures and bylaws governing the operation of the Advisory Council are consistent with the protocols set out in the OMA.

Sincerely,

---

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