

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



March 19, 2018

VIA ELECTRONIC MAIL

J [REDACTED] Goode

T [REDACTED]@yahoo.com

RE: # OOG-0003_3.11.18 Resolution of Complaint_BEGA

Dear Mr. Goode:

The Office of Open Government (OOG), pursuant to the authority set forth in section 503(a)(2) of the District of Columbia Administrative Procedure Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-593(a)(2))(OMA), and 3 DCMR § 10400 *et seq.*, has reviewed your complaint, assigned file number OOG_0003.11.18.

The Complaint concerns matters that directly involve OOG Director Traci L. Hughes. As the Complaint was issued to the OOG in its enforcement capacity, Director Hughes would customarily issue a response to the Complaint. However, in this matter Director Hughes, recognizing the conflict of interest is recusing herself from participation.

As discussed below, the OOG's findings are: (1) the Board of Ethics and Government Accountability (BEGA) was authorized by the OMA (D.C. Official Code § 2-575(b)(10)), to enter the February 1, 2018, closed/executive session to discuss a personnel matter; (2) BEGA strictly adhered to the protocol for entering the closed/executive session (D.C. Official Code § 2-575(c)); (3) any discussions by BEGA of the D.C. Open Government Coalition's (Coalition) recommendation on Director Hughes' reappointment during the February 1, 2018, closed/executive session were incidental to the lawful and primary purpose of discussing Director Hughes's reappointment; and (4) any discussion by BEGA during closure of the Coalition's recommendation to reappoint Director Hughes, falls within the scope of D.C. Official Code § 2-575(b)(10) as "employment" and "appointment" matters. Therefore, pursuant to 3 DCMR § 10402.2, the OOG is dismissing and returning your complaint.

BACKGROUND

The Coalition's January 28, 2018, letter addressed to BEGA Chairperson Tameka Collier, *inter alia*, is a recommendation that BEGA reappoint Traci L. Hughes as Director of OOG.

On February 1, 2018, BEGA entered into a closed/executive session to consider various items including a personnel matter¹ pursuant to the D.C. Official Code § 2-575(b)(10). The personnel matter was the reappointment of Director Hughes. On March 12, 2018, the OOG received the instant complaint alleging that while in a closed/executive session to consider the “personnel matter” BEGA improperly discussed the Coalition’s recommendation to reappoint Director Hughes. The Complaint states the following:

On February 1, 2018, the Board of Ethics and Government Accountability met in closed session to discuss the Open Government Coalition’s recommendation regarding the reappointment of OOG Director Traci L. Hughes. The decision to discuss the Coalition’s recommendation in closed session violated D.C. Official Code Section 2-575(b). Acknowledge the mistake and publically release the audio file of the February 1, 2018, closed session. Of course, the Board of Ethics and Government Accountability cannot investigate this complaint or directly supervise the investigation of complaint, as it has an actual and perceived conflict of interest.

ANAYLSIS

D.C. OFFICIAL CODE § 2-575(b)(10) AUTHORIZES BEGA TO ENTER A CLOSED/EXECUTIVE SESSION TO DISCUSS PERSONNEL MATTERS.

BEGA’s February 1, 2018, meeting began with the board adopting the draft agenda without any changes. The relevant language in the draft meeting agenda states that BEGA would enter a closed/executive session to discuss:

[P]ersonnel matters the appointment, employment, assignment, promotion, performance, evaluation, compensation, discipline, demotion, removal, or resignation of government appointees, employees, or officials pursuant to D.C. Official Code § 2-575(b)(10).

A review of the electronic recording of the open session of BEGA’s February 1, 2018, meeting reveals strict adherence by Chairperson Collier to the OMA’s protocol to enter into a closed/executive session (D.C. Official Code § 2-575(c)). The above draft meeting agenda language mirrors D.C. Official Code § 2-575(b)(10), which reads:

(b) A meeting, or portion of a meeting, may be closed for the following reasons:
(10) To discuss the appointment, employment, assignment, promotion, performance evaluation, compensation, discipline, demotion, removal, or resignation of government appointees, employees, or officials.

¹ The draft meeting agenda does not reference that BEGA would consider the reappointment of Director Hughes or discuss the Coalition’s recommendation regarding the reappointment. It is not necessary for a draft agenda to reflect these items with such detail. See https://www.open-dc.gov/sites/default/files/OOG-04_9%207%2016%20OAH%20Advisory%20Opinion.corrected.pdf, where the OOG opines that when a public body enters into closed/executive session, to consider a personnel matter, the OMA does not require specificity as to the identity of the person or the personnel action to be discussed.

It is abundantly clear that a public body may enter a closed/executive session to consider a personnel matter. Therefore, germane to this determination is whether discussion of a third party's employment recommendation is within the OMA category of exceptions to meet in a closed/executive session (D.C. Official Code § 2-575(b)(1-14)); specifically, D.C. Official Code § 2-575(b)(10), which authorizes a public body to enter a closed/executive session to discuss the aforementioned personnel matters. The analysis which follows shows that under the OMA it is permissible.

IF BEGA DISCUSSED THE COALITION'S RECOMMENDATION DURING CLOSURE, THE DISCUSSIONS WOULD NOT CONSTITUTE A VIOLATION OF THE OMA.

For the purposes of this opinion we will assume, arguendo that BEGA's discussions of the Coalition's recommendation to reappoint Director Hughes took place as alleged during the February 1, 2018, closed/executive session. For reasons which follow such discussions would not violate D.C. Official Code § 2-575(d), which strictly limits the subject matter which a public body may discuss during a closed/executive session. D.C. Official Code § 2-575(d) states:

(d) A public body that meets in closed session shall not discuss or consider matters other than those matters listed under subsection (b) of this section.

The Coalition's January 28, 2018, correspondence² to Chairperson Collier requests BEGA reappoint Traci L. Hughes as Director of OOG. D.C. Official Code § 2-575(b) does not list discussion of a reappointment recommendation among the statutory exceptions to holding an open meeting. However, even a narrow reading³ of D.C. Official Code § 2-575(b)(10) reveals that the Coalition's recommendation clearly falls within the scope of the personnel exception for holding an open meeting as an "appointment" and "employment" matter. Additionally, in discussing an individual's employment, there is a clear nexus between the employment and a recommendation for employment, or in the instant matter, a recommendation for reappointment, as the two subjects are interrelated.

Courts recognize that when the primary purpose of a closed session is authorized, any necessary discussion of incidental matters is also authorized. In *Meyer v. Board of Regents of University of Nebraska*, 520 N.W. 2d 450 (1993), the Board entered into a closed/executive session to consider and negotiate the university president's resignation. While in the closed/executive session, the Board's discussions included the appointment of an interim president. A citizen's lawsuit alleged that the appointment of an interim president was not the proper to discuss in a closed/executive session. The appellant Court disagreed. In its decision to uphold the trial court's ruling the appellate court held that "the Board's discussion of an interim president, and the immediate steps the Board was to take in response to the resignation were incidental matters and the proper subject of discussion in a closed/executive session." *Meyer*, at 455.

Additionally, in *Berge v. Heilmann*, 2011 Ill. App. Unpub. LEXIS 1503, 409 Ill. App. 3d 1144, 2 N.E.3d 659, 377 Ill. Dec. 743, the Board entered into closed/executive session under statutory exemptions to discuss: (1) collective negotiating matters; (2) pending litigation; (3) salary schedules for one or more than one classes of employees; and (4) information regarding the appointment, employment, compensation, discipline, performance or dismissal of a specific

² You may review the Coalition's letter at: <http://www.dcoog.org/content/bega-urged-reappoint-hughes-oog-director>

³ D.C. Official Code §2-573 states, "[T]his title shall be construed broadly to maximize public access to meetings. Exceptions shall be construed narrowly and shall authorize closure of meetings only as authorized by this act."

employee or employees. During the meeting, the Board discussed a document listing budgetary savings. A lawsuit charged that the Board's discussions of budgetary matters was an improper subject of the closed/executive session. In upholding the decision of the circuit court below, the appellate decision states: "the budgetary document was secondary to, and inextricably woven into, the primary, excepted topics." *Heilmann*, at 6.

The Coalition's recommendation to reappoint Director Hughes clearly falls within the scope of D.C. Official Code § 2-575(b)(10). Legal precedent recognizes similar discussions as incidental matters that are inextricably woven into, the primary excepted topic. Therefore, the OOG finds that if discussions of the Coalition's recommendation did occur during the closed/executive session, the discussions would not violate the OMA.

THE PUBLICATION OF THE COALITION'S RECOMMENDATION MAKES IT
UNNECESSARY TO REVIEW THE ELECTRONIC RECORDING OF THE
CLOSED/EXECUTIVE SESSION.

When necessary to decide if allegations of meeting in an improper closure have merit, courts may review, *in camera*, the closed/executive meeting records to analyze the discussions. This is because the court, prior to its *in camera* review, is unaware of the content of the discussions. Pursuant to 3 DCMR § 10405.5,⁴ the OOG may review the records of a closed/executive session to determine compliance with the OMA. In the instant matter there is absolutely no dispute as to the content of the Coalition's correspondence to BEGA that was allegedly discussed during the closed/executive session. This is due to public access to Coalition's recommendation via its website. For this reason, it is unnecessary to review the recordings of the closed/executive session to resolve this matter as the content is well known. Even if the BEGA did discuss the recommendations during the closed/executive session, for the reasons stated *supra* it has no effect on this determination.

Finally, the OOG exists as an independent office within BEGA. However, BEGA's statutory mandate is to investigate allegations of unethical behavior by District government employees, and not to investigate compliance with the OMA.

Sincerely,



JOHNNIE I. BARTON, ESQ.

Attorney Advisor, Office of Open Government

Board of Ethics and Government Accountability

⁴3 DCMR § 10405.5 reads: "[T]he Director will maintain the confidentiality of records of a closed meeting of a Public Body, {sic} providing they are submitted with clear markings of the portions to be kept sealed."