

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



August 29, 2019

VIA ELECTRONIC MAIL

Mr. Paul Kihn, Deputy Mayor for Education
Government of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, NW, Suite 307
Washington, DC 20004
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RE: Complaint Concerning Maury Elementary School LSAT Compliance with the OMA
Complaint #OOG-2019-0004-M

Dear Deputy Mayor Kihn:

On May 23, 2019, the Office of Open Government (the “OOG”) received Complaint #OOG-2019-0004-M (“Complaint”), which alleged Open Meetings Act (the “OMA”) violations by the Maury Elementary School Local School Advisory Team (the “Maury LSAT”). The OOG provided you with a copy of the Complaint and on July 5, 2019, you submitted a written response to the OOG.¹ The following Advisory Opinion is issued by the OOG, pursuant to its statutory authority, to resolve OMA complaints.

As you are aware, the OOG’s statutory charge is to ensure that meetings of public bodies adhere to the OMA.² The OMA reiterates the District government’s long-standing public policy “that all persons are entitled to full and complete information regarding the affairs of government and the actions of those who represent them.”³ To support this policy, the OMA requires the recording, by electronic means, of all meetings of public bodies; the taking of detailed meeting minutes;⁴ and, that copies of these records are made publicly available pursuant to a specific

¹ DCPS response included the following three documents as attachments: (1) the 2018-2019 Local School Advisory Guidelines; (2) the April 23, 2019, email from Maury LSAT Chairperson Dillion containing the summary of name change survey results; and (3) a June 9, 2019, email from the complainant regarding cancellation of an upcoming Maury LSAT meeting.

² D.C. Official Code § 2-571 *et seq.*

³ D.C. Official Code § 2-572.

⁴ D.C. Official Code § 2-578(a).

statutory schedule.⁵ To further stress the importance of public access to public body meeting records, the District of Columbia Freedom of Information Act (D.C. FOIA),⁶ requires the minutes of all proceedings of public bodies are made publicly available on the Internet or by other electronic means.

After a comprehensive investigation of this matter, I find the Maury LSAT in violation of the OMA's "Recording of meetings" provisions (D.C. Official Code § 2-578). As detailed below, these violations are as follows: (1) failing to make "a copy of the full record publicly available no later than 7 business days after the meeting"; and (2) failing to record the meeting by electronic means. The Maury LSAT is also in violation of D.C. FOIA for failing to make publically available the detailed minutes of its April 23, 2019 meeting (D.C. Official Code § 2-536(a)(7)).

The Advisory Opinion sets forth the rationale for this finding below. It accomplishes the following: provides a background on the complaint; reviews the OOG's prior finding on the status of DCPS and Local School Advisory Teams ("LSATs") under the OMA; determines whether the Maury Name Change Survey ("Maury Survey") meets D.C. FOIA's definition of public information which must be publicly made available without the need for a FOIA request; and discusses the OMA's recording and publication requirements. The Advisory Opinion concludes with a discussion and analysis of the issues and provides directives for future compliance with the OMA.

I. BACKGROUND

A. The Complaint and DCPS' Response to the Complaint.

The OOG received the Complaint on May 23, 2019, which alleges, *inter alia*, the Maury LSAT violated the OMA by failing to make public records of its April 23, 2019, meeting.⁷ In relevant part the complaint states:

At the April 23rd {sic} Meeting at 7:30 am, Sean Dillion passed out a double-sided piece of paper containing the survey results from the School Name Change Survey conducted by the LSAT. He gave a copy to every member of the LSAT present, and to me (not a member, attending/observing). At the conclusion of the meeting, I tried to keep my copy of the paper, but I was physically cornered by [REDACTED], and told I could not keep it. I then tried to take a photograph of both sides of the paper but was denied. Sean Dillion said to me, "We voted not to let you have the paper-it is preliminary"; he also said, "We could have closed the meeting to you, {sic} If we wanted-we called it an Exec Session." I question where and how this so-called vote occurred, because there is nothing in the meeting minutes from any LSAT

⁵ D.C. Official Code § 2-578(b)(1).

⁶ Pursuant to D.C. Official Code § 2-536(a)(7) minutes of all proceedings of all public bodies "are specifically made public information, and do not require a written request for information."

⁷ The complaint also mentions the possible entry of the Maury LSAT into improper closed meetings. However, the OOG is unable to issue findings on this issue.

Meeting about a vote; I also attended the previous LSAT Meeting in March, and no such vote occurred. It has been related by other members of the LSAT Sean Dillion's statements to me are untrue (and blatantly ultra vires)

In response DCPS contends that it is an agency pursuant to D.C. Official Code § 2-574(3)(A) and is therefore statutorily exempt from the requirements of the OMA.⁸ The DCPS response also discusses the role of the LSATs within DCPS. The response stated that there is an individual LSAT within each DC public school that exists to advise school principals and make recommendations on matters related to student achievement. According to DCPS, the matters the LSATs provide advice on are “budget decisions, school organization, allocation of school resources, and personnel decisions.” Most notably, DCPS contends that “[t]he LSATs do not take official actions on behalf of DCPS. Principals are required to consider, but not necessarily adopt, the recommendations of the LSAT when making final decisions about school matters . . . [t]he LSATs operate as an extension of DCPS and are therefore not subject to the requirements of the OMA.”

Subsequent to filing this complaint, the complainant filed a FOIA request to obtain from DCPS a copy of the Maury Survey. According to DCPS, the Maury LSAT Chairperson has not provided the Maury Survey to the school principal or to other LSAT members.⁹ He also refused to provide the document to the DCPS FOIA Officer, in response to the Complainant's FOIA request.¹⁰

On August 5, 2019, the Director of Open Government found that DCPS, as an agency, is exempt from the OMA and LSATs are public bodies subject to the OMA. Since this determination that LSATs are subject to the OMA is recent and relevant to the instant matter, an overview of the OOG's findings in Advisory Opinion #OOG-2019-0002-M follows.

B. Review of the Director of Open Government's Findings that LSATs are Public Bodies Subject to the OMA.

On August 5, 2019, the OOG issued Advisory Opinion #OOG-2019-0002-M finding that LSATs are public bodies that must adhere to the OMA.¹¹ What follows is a summary of the Director of Open Government's analysis of the issue.

1. The District of Columbia Public Schools (“DCPS”) is an agency and therefore not subject to the OMA.

In Advisory Opinion #OOG-2019-0002-M, the Director found that pursuant to D.C. Official Code § 2-574(3)(A),¹² DCPS is an agency and therefore exempt from complying with

⁸ July 5, 2019, letter to the OOG in response to the Complaint from Paul Kihn, Deputy Mayor for Education.

⁹ *Id.*

¹⁰ *Id.*

¹¹ View the opinion here <https://www.open-dc.gov/documents/whether-local-school-advisory-teams-lsats-are-public-bodies-subject-oma>.

the OMA. However, the OOG's analysis made clear that exempt agencies such as DCPS may create entities like LSATs that are subject to the OMA.

2. *LSATs are public bodies based upon the plain meaning of the statute.*

The Director also found that LSATs are “an advisory body that takes official action by the vote of its members convened for such purpose.” This is because LSATs advise school principals and, subsequently, DCPS, by considering, debating and recommending on school plans, budgets, and staffing issues. The OMA defines public body to mean 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 controls an agency, or an advisory body that takes official action by the vote of its members convened for such purpose.

3. *LSATs operate as a public body.*

The OOG found that the OMA's legislative history supports the creation of a public body by directive. The legislative history states that the definition of public body includes “any other entity that is created by and exercises authority delegated by the District of Columbia government.”¹³ The school budget, organization, allocation of school resources and personnel matters that DCPS has delegated for LSATs to consider, conduct and advise principals is public business. Therefore, the LSATs are public bodies pursuant to the OMA.

II. DISCUSSION

The Maury LSAT has followed the school year 2018-2019 Local School Advisory Team Guidelines (DCPS Off. of Family and Pub. Engagement, Washington, D.C.) (2018)(the “Guidelines”) to conduct its meetings. Relevant to this matter are the Guidelines' requirement that all LSAT meeting minutes be posted on the school's website or otherwise made available to the school community within 20 school days following the meeting.¹⁴ As discussed below, this provision of the Guidelines conflicts with the OMA's “Recording of minutes” provisions (D.C. Official Code § 2-578). Therefore, this Advisory Opinion instructs public bodies on the OMA's “Recording of minutes” requirements, which includes the schedule for publishing meeting records, the types of records that must be published; and D.C. FOIA's requirement that the minutes of all proceedings of public bodies must be made publicly available on the Internet or by other electronic means. The discussion follows.

¹² The relevant provision of D.C. Official Code § 2-574(3)(A) provides: “[T]he term public body shall not include (A) A District agency or instrumentality (other than the board which supervises or controls an agency or the board of directors of an instrumentality).” (internal quotes omitted).

¹³ Report of the Committee on Government Operations and the Environment on Bill 18-716, the Open Meetings Act of 2010, at 4-6 (Council of the District of Columbia Dec. 2, 2010).

¹⁴ The Guidelines, at 11. The publication may be accessed here: <https://drive.google.com/drive/folders/1s2wPHt17HW7sEhKDr7ZGoYI8OzRE3z0S..>

A. The OMA’s “Recording of meetings” provisions provide the types of records that public bodies must maintain and the schedule for the public release of these records.

1. Discussion of the OMA’s recording and public release of records requirements.

D.C. Official Code § 2-578 requires a public body to maintain a detailed record of all meetings,¹⁵ whether the meetings are open or closed sessions. This provision of the OMA states:

(a) All meetings of public bodies, whether open or closed, shall be recorded by electronic means, and the recording shall be preserved for a minimum of 5 years; provided, that if a recording is not feasible, detailed minutes of the meeting shall be taken and preserved for a minimum of 5 years.

(b) Copies of records shall be made available for public inspection according to the following schedule; provided, that a record, or a portion of a record, may be withheld under the standard established for closed meetings pursuant to [§ 2-575\(b\)](#):

(1) A copy of the minutes of a meeting shall be made available for public inspection as soon as practicable, but no later than 3 business days after the meeting.

(2) A copy of the full record, including any recording or transcript, shall be made available for public inspection as soon as practicable, but no later than 7 business days after the meeting.

Pursuant to D.C. Official Code § 2-578 and as opined by the OOG, the following are detailed records and constitute the full record: (1) detailed meeting minutes; (2) electronic recordings; (3) transcripts; (4) the full record; and (5) documents distributed to and considered by a public body during the open session of a meeting.

Detailed meeting minutes must be posted to the public body’s website or the District government’s website,¹⁶ along with the agendas of every meeting. As the majority of boards and

¹⁵ D.C. Official Code § 2-574(1). “[A] ‘[m]eeting’ is a gathering of a quorum of the members of a public body, including hearings and roundtables, whether formal or informal, regular, special, or emergency...”

¹⁶ Although D.C. Official Code §2-578(b) states copies of records shall be made available for public inspection, the Office of Open Government interprets public inspection in concert with D.C. Official Code § 2-576(2)(B) where notice shall be provided by posting on the website of the public body or the District government. Notice of meetings, to include the posting of agendas, must be provided in each format and location practicably relied upon by the public: via print publication, posting of a notice in the physical location where the meeting will take place, and on the Internet.

commissions are unable to post meeting minutes within the three (3) business days required under the OMA, the OOG has advised in a previous Advisory Opinion¹⁷ that draft meeting minutes must be posted within three (3) business days upon the conclusion of the meeting, with a notation at the top of the document that full meeting minutes will be posted to the website on the next meeting date of the board or commission.¹⁸

An electronic recording of the public and closed portions of every meeting is required.¹⁹ Audio and video files of the public portions of meetings need not be posted on the Internet, but must be made available to the public upon request.

2. *The Maury LSAT violated the OMA when it failed to include documents discussed in the public meeting in the meeting minutes.*

The OMA requires that public bodies provide the public with “full and complete information” regarding the public business it conducts.²⁰ The full record of a public body’s meeting includes documents provided to its members for consideration during an open session. In this matter, the Maury LSAT did not include the Maury Survey in its meeting record. The exclusion of this information by this public body is not permitted under the OMA.

It is uncontroverted that during the April 23, 2019, Maury LSAT meeting, Maury LSAT Chairperson Sean Dillion distributed to LSAT members and the complainant the Maury Survey and that the survey was discussed during the meeting by the Maury LSAT.²¹ The OOG has previously addressed this issue in a December 12, 2013 Advisory Opinion and advised that under D.C. Official Code § 2-578(b)(2),²² documents distributed to and discussed by a public body during an open meeting are part of the full record and must be posted along with the meeting agenda and a detailed written record of the meeting.

In the December 13, 2013 Advisory Opinion, the OOG provided advice to the Housing Production Trust Fund Board (HPTF) regarding the posting of detailed meeting minutes. This Advisory Opinion detailed the various formats of meeting minutes that meet the OMA requirement of posting detailed meeting minutes. The Advisory Opinion presented the following instruction concerning the type of meeting minutes that meet the requirement of detailed meeting minutes:

¹⁷ See OOG’s December 12, 2013 Advisory Opinion, “Posting of Meeting Minutes, Transcripts, Electronic Recordings,” at <https://bit.ly/30FniPC>.

¹⁸ D.C. Official Code § 2-578(b)(1). The recommendation is intended to assist all public bodies with compliance with the Open Meetings Act. It is the finding of the Office of Open Government that a great many boards and commissions lack the administrative support to meet the quick turnaround. This difficulty is further compounded by the fact that many boards and commissions, particularly if there are several members, do not reach majority consensus on finalizing meeting minutes until the next scheduled meeting date. The intermediary step of posting draft meeting minutes allows public bodies to generally inform the public of actions taken, with the expectation that a detailed record will be provided upon final adoption of meeting minutes or approval of meeting transcripts.

¹⁹ D.C. Official Code § 2-578(a).

²⁰ See D.C. Official Code § 2-572: The OMA’s “Statement of policy” provides that “all persons are entitled to full and complete information regarding the affairs of government and the action of those who represent them.”

²¹ The Office of the Deputy Mayor for Education July 5, 2019, response to the OOG, at 2, states, “[T]he LSAT Chair acknowledge taking the document back from Mr. ██████████ but denies there was any force involved.”

²² See OOG’s December 12, 2013 Advisory Opinion, “Posting of Meeting Minutes, Transcripts, Electronic Recordings,” at 2, here: <https://bit.ly/30FniPC>.

If there are documents provided to the HPTF and discussed during the public portion of the meeting, those documents must be posted along with the meeting agenda and a detailed written record of the meeting ; and if feasible, the electronic recording.²³

Thus, the full record of a public meeting is absent when documents that were distributed to and discussed by members of a public body are withheld from release to the public.

The Maury LSAT's failure to include the Maury Survey in the meeting minutes violates the OMA. Since the Maury LSAT presented the document in the public meeting, it must be included in the public record of the meeting. While the Maury LSAT did make the April 23, 2019, meeting minutes available within 3 business days of its April 23, 2019, as the OMA requires, the meeting minutes did not comport with the OMA because the Maury Survey was not included and is not now publicly available. Therefore, I find the Maury LSAT's failure to publish the full record is in violation of D.C. Official Code § 2-578(b)(2).

3. *The Maury Survey is public information that D.C. FOIA requires must be publicly available without a FOIA request.*

As discussed below D.C. FOIA also mandates the public release of the Maury Survey. In lieu of making publicly available the actual Maurey Survey, on April 25, 2019, a summary of the survey results was distributed via email by Maury LSAT Chair Dillion to the Maury community. In the excerpt below from the DCPS July 5, 2019, response to the Complaint, DCPS corroborates the complainant's allegation that he was not allowed to retain the Maury Survey.

The LSAT Chair released a summary of the survey results in an email to the LSAT Listserv (see attachment #2). He claims it is generally the same information that was on the document he took back from Mr. [REDACTED]. He has never provided any of the underlying survey data to the Principal or the other LSAT members, and he refused to provide it to the DCPS FOIA Officer in response to Mr. [REDACTED]'s FOIA request for it.

At issue is whether under D.C. FOIA the Maury Survey is "public information" and therefore must be made publicly available without the need of a FOIA request. For reasons that follow I find that the Maury Survey is public information as defined by the statute.

Among the categories of information listed in D.C. Official Code § 2-536(a) that are specifically deemed "public information" is "the minutes of all proceedings of public bodies."²⁴ The Maury LSAT is a public body and its April 23, 2019 meeting was a proceeding. The Maury Survey should have been included in the Maury LSAT's meeting minutes because it was

²³ *Id.*

²⁴ D.C. Official Code § 2-536(a)(7).

distributed during the public meeting. Therefore, the Maury Survey is public information that must be made available without FOIA request pursuant to the OMA²⁵ and D.C. FOIA.²⁶

4. *The OMA requires that all meetings whether open or closed shall be recorded by electronic means.*

D.C. Official Code § 2-578(a), requires that “all meetings of public bodies, whether opened or closed shall be recorded by electronic means. . .” There is no indication that the Maury LSAT recorded the April 23, 2019, meeting by electronic means. Its failure to do is a violation of D.C. Official Code § 2-578(a).

The instant matter also is an example that underscores the importance of compliance with the OMA requirement to record all meetings by electronic means. Here the OOG without an electronic recording of the meeting cannot determine certain allegations that were raised concerning the meeting in question.

III. CONCLUSION AND COMPLIANCE DIRECTIVES

A. Conclusion

In the past, the Maury LSAT’s meetings were conducted by the Guidelines issued by DCPS. However, the OMA is the controlling law for the conduct of public body meetings, not the Guidelines. A prior advisory opinion issued by the OOG and the OMA’s “Statement of policy” makes it clear that documents distributed to and discussed by a public body during the open session of a public meeting are part of the full record that must be publicly available, under D.C. Official Code § 2-578(b)(2).

Further, pursuant to D.C. FOIA, the Maury Survey is public information and therefore the entity must make the survey publicly available without the need of a FOIA request. A public body’s meeting records cannot contain “full and complete information” when documents discussed during an open session are withheld from the public. There is also no indication that the Maury LSAT made an electronic recording of its April 23, 2019, meeting.

The Council has emphasized the importance of a public body making public meeting minutes publicly available. The statutory mandate to do so appears expressly in both of the District of Columbia’s transparency statutes.²⁷ This fact cannot be overstated.

Based on the forgoing, I find that the Maury LSAT is in violation of the OMA’s “Recording of meetings” provisions (D.C. Official Code § 2-578). The violations consist of: (1) failing to make “a copy of the full record publicly available no later than 7 business days after the meeting”; and (2) failing to record the meeting by electronic means. In addition, the Maury LSAT is in violation of D.C. FOIA for its failure to make publicly available the minutes of its April 23, 2019, meeting (D.C. Official Code § 2-536(a)(7)).

²⁵ D.C. Official Code § 2-578(b)(2).

²⁶ D.C. Official Code § 2-536(a)(7).

²⁷ See D.C. Official Code § 2-578(b)(2) and D.C. Official Code § 2-536(A)(7).

B. Compliance Directives

1. The Maury LSAT must immediately make publicly available the Maury Survey that was distributed and discussed during the April 23, 2019 meeting. The summary of the survey distributed to the Maury community is not a portion of the full record and therefore insufficient for compliance with the OMA and D.C. FOIA.

2. In addition the Maury LSAT must: (1) publish a yearly²⁸ schedule of its meetings and provide as much advance notice to the public as possible, but not less than forty-eight hours or two business days, whichever is greater, before the meeting (D.C. Official Code § 2-576(1)); (2) physically post and electronically post meeting notices (D.C. Official Code § 2-576(2)); and (3) publish notice of meetings in the District of Columbia Register (D.C. Official Code § 2-576(3)); (4) record all meetings whether open or closed by electronic means (D.C. Official Code § 2-578(a)); and (5) make a copy of meeting minutes publicly available within three business days of the meeting, and any recording with a full transcript within seven business days (D.C. Official Code § 2-578(a)(1-2)).

3. All Maury LSAT members must undergo OMA training with the OOG on dates to be determined by this office.

Sincerely,



NIQUELLE M. ALLEN, ESQ.
Director of Open Government
Board of Ethics and Government Accountability

cc: Complainant

Eboni J. Govan, Esq.
Attorney Advisor
DCPS Office of the General Counsel

²⁸ LSATs are currently encouraged by the Guidelines “to schedule all meetings for the school year at the beginning of the year.” *Guidelines*, at 11.