

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



December 21, 2016

VIA ELECTRONIC MAIL

Ms. Jennifer Niles
Deputy Mayor for Education
Cross-Sector Collaboration Task Force
1350 Pennsylvania Avenue, NW, Suite 307
Washington, DC 20004
jennifer.niles@dc.gov

RE: #OOG-0007_11.01.16_AO

Dear Director Niles:

Thank you for providing the November 21, 2016¹ responses to the November 4, 2016, Notification of Complaint #OOG-007_11.01.16 (Complaint). As you are aware, the Office of Open Government (OOG) has the statutory charge to ensure meetings of public bodies adhere to the provisions of the Open Meetings Act (OMA) (D.C. Official Code §§ 2-571 *et seq.*). This advisory opinion is written in response to the OOG's investigation of the Complaint and to ensure that future meetings of the Cross-Sector Collaboration Task Force (hereinafter Task Force) strictly adhere to all statutory requirements of the OMA.

COMPLAINT

On November 1, 2016, the OOG received a complaint that alleges the Task Force meetings occurring on October 25, 2016; November 7, 2016; November 22, 2016; and January 10, 2017, were not posted on the Deputy Mayor for Education website. And that the Task Force failed to timely include on its agenda the conference call call-in numbers for the public to attend the October 13, 2016 telephone conference meeting.

¹ Senior Policy Advisory, Jennifer Comey, submitted to OOG Director, Traci Hughes, a response on behalf of the Deputy Mayor for Education, Jennifer Niles. The OOG had requested that the Task Force provide its response by November 18, 2016.

To thoroughly evaluate the Complaint, on November 4, 2016, the OOG requested the following items from the Task Force: (1) documentation as to when the conference call-in numbers were published on the Central Calendar for the October 13, 2016 and October 17, 2016 conference calls; (2) meeting minutes for the October 13, 2016 and October 17, 2016 conference calls; (3) audio recordings for the October 13, 2016 and October 17, 2016 conference calls; (4) the quorum count for the October 13, 2016 and October 17, 2016 conference calls²; (5) final agenda for the October 25, 2016 meeting; (6) meeting minutes for the October 25, 2016 meeting; and, (7) audio recording for the October 25, 2016 meeting.

On November 3, 2016, the OOG took immediate notice of the Task Force publishing meeting notices on the Central Calendar at <http://www.open-dc.gov/public-bodies/cross-sector-collaboration-task-force> for meetings occurring on October 13, 2016; October 17, 2016; October 25, 2016; November 7, 2016; and November 22, 2016. The January 10, 2017 meeting was not published on the Central Calendar during the OOG's November 3, 2016 review.

BACKGROUND

On October 7, 2015, after conducting an investigation in response to a prospective complaint that the Task Force would conduct meetings in violation of the OMA, the OOG issued Advisory Opinion OOG-0002_8.31.15. The findings of that opinion were that the Task Force was a public body required to adhere to the OMA in the conduct of its meetings.³ Since it has been established that Task Force is subject to the OMA, the OOG finds it unnecessary to revisit the issue in this advisory opinion. Once established that the Task Force was a public body, until the filing of the Complaint, there were no indications that the Task Force was failing to comply with the OMA.

The meetings primarily giving rise to the Complaint are the Task Force telephone conference meetings of October 13, 2016 and October 17, 2016. Conducting telephone conferences are lawful under the OMA's Meeting Procedures" as meetings held by electronic means (D.C. Official Code § 2-577(a)). However, telephone conferences and all other meetings held by electronic means must comply with all provisions of the OMA (D.C. Official Code § 2-577(b)). Therefore, in addition to providing a legal analysis of the OMA's "Meeting

² The Task Force provided the following as the quorum count for the October 13, 2016 and October 17, 2016 telephone conference meetings respectively: 9 members of out of 26 total Task Force members participated in the call; and, 8 members out 26 total Task Force members participated in the call.

³ The Advisory Opinion concluded that the Cross-Sector Collaboration Task Force is a public body subject to the OMA. 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

Procedures” (D.C. Official Code § 2-577(a)), this advisory opinion will analyze the “Notice of Meetings” (D.C. Official Code § 2-576) and “Record of Meetings” (D.C. Official Code § 2-578) provisions of the OMA. All of which apply to public body meetings held by electronic means.

Based on its investigation, a review of the Complaint and the Task Force’s responses, the OOG finds the Task Force in violation of the following OMA provisions: (1) D.C. Official Code § 2-577(b) for failing to abide by all provisions of the OMA in the conduct of a meeting held by electronic means; (2) D.C. Official Code § 2-576(1) for failing to publish the dial in number and access code for the October 13, 2016 telephone conference within 48 hours or two business days, whichever was greater; (3) D.C. Official Code §§ 2-577(a) and 2-578(a) for failing to audio record the meetings held by telephone conference on October 13, 2016 and October 17, 2016; (4) an additional violation of D.C. Official Code § 2-578(a) for failing to record the October 25, 2016 meeting by audio or other electronic means; and, (5) D.C. Official Code § 2-578(b) for failing to timely publish the October 13, 2016 and October 17, 2016 meeting minutes and final agendas.

DISCUSSION

WHEN CONDUCTING A MEETING BY ELECTRONIC MEANS A PUBLIC BODY MUST STRICTLY ADHERE TO THE OMA’S “MEETING PROCEDURES”

D.C. Official Code § 2-577, authorizes public bodies to hold meetings by telephone conference, video conference or other electronic means. The statutory scheme contains four (4) requirements which public bodies must strictly follow when conducting a meeting by electronic means. It states:

- (a) A meeting may be held by video conference, telephone conference, or other electronic means; provided, that:
 - (1) Reasonable arrangements are made to accommodate the public's right to attend the meeting;
 - (2) The meeting is recorded; and
 - (3) All votes are taken by roll call.
- (b) All provisions of this subchapter shall apply to electronic meetings.

The initial requirement under D.C. Official Code § 2-577 is for public bodies to make reasonable arrangements to accommodate the public’s right to attend meetings held by electronic means (D.C. Official Code § 2-577 (a)(1)). This requirement ensures strict compliance with the District’s longstanding 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” (D.C. Official Code § 2-572). The Task Force’s accommodations for the public to attend the October 13, 2016 and October 17, 2016 telephone conferences were by means of a dial-in number and access code. On its face, the OOG finds providing a dial-in number and access code for the public to attend telephone conference meetings, are reasonable arrangements to accommodate the public’s right to “attend” a meeting. However, as discussed in detail below, the Task Force did not timely provide the public with the dial-in number and access code to attend the October 13, 2016⁴ telephone conference meeting. Therefore, the OOG finds the Task Force’s arrangements to accommodate the public’s right to attend the October 13, 2016 telephone conference meeting were not reasonable.⁵

Secondly, the “Meeting Procedures” require that meeting held by electronic means are recorded (D.C. Official Code § 2-577(a)(2)).⁶ The OMA Recording of Meeting provisions provide the additional statutory requirements for recording all public body meetings and are discussed *infra*. With respect to recording the two meetings held by electronic means, the Task Force admits that it did not audio record the October 13, 2016 and October 17, 2016 telephone conference meetings, due to technical challenges with understanding the options provided by the conference call service to mute public attendees.⁷

Additionally, D.C. Official Code § 2-577(a)(3) specifies that all votes must be taken by roll call.” However, it is unclear to the OOG as to whether any votes were taken by roll call at the October 13, 2016 and October 17, 2016 telephone conference meetings. The OOG’s review of the Task Force minutes and its November 21, 2016 response to the Complaint did not reveal whether a roll call vote was taken during these meetings. The OOG makes no findings at this time on this issue, and reserves the right to do so at a later date. The OOG respectfully

⁴ The Task Force’s November 21, 2016 response states DME posted the conference call numbers the morning of 10/13 for both the 10/13 and 10/17 calls. The OOG finds the Task Force’s arrangements to accommodate the public’s right to attend the October 17, 2016 telephone conference was reasonable.

⁵ The Task Force’s November 21, 2016 response states [A]s of 10/12 we had not yet determined the best technology to allow the public to call in but be muted.”

⁶ D.C. Official Code § 2-578 also requires that “[All meetings of public bodies, whether open or closed shall be recorded by electronic means”

⁷ In an October 14, 2016 email to OOG Director Hughes, Jennifer Comey wrote, “. . . . we were having some technical difficulties figuring out how to manage the call (i.e., what technology to use since we wanted to make sure we could mute participants.”)

requests that the Task Force provide a written response to this question no later than January 4, 2017.

I. Meetings held by Electronic means must adhere to OMA's "Notice of meeting" provisions.

The final statutory requirement of D.C. Official Code § 2-577(a)(3) is that the meeting conform to all other applicable requirements of the OMA. Since additional OMA provisions are applicable to meetings held by electronic means, a review of these provisions are necessary to determine whether the Task Force meetings at issue were in full compliance with the OMA.

D.C. Official Code § 2-577(b) makes it abundantly clear that “[A]ll provisions of this subchapter shall apply to electronic meetings.” The subchapter to which D.C. Official Code § 2-577(b) refers is Title IV of the District of Columbia Administrative Procedure Act, which comprises D.C. Official Code §§ 2-571 to 2-580, the entire OMA. This includes the OMA’s “Notice of meeting” provisions found in D.C. Official Code § 2-576, which govern the advance public notice a public body must provide prior to holding a public meeting. D.C. Official Code § 2-576 states:

Before meeting in open or closed session, a public body shall provide advance public notice as follows:

(1) Notice shall be provided when meetings are scheduled and when the schedule is changed. A public body shall establish an annual schedule of its meetings, if feasible, and shall update the schedule throughout the year. Except for emergency meetings, a public body shall provide notice as early as possible, but not less than 48 hours or 2 business days, whichever is greater, before a meeting.

(2) Notice shall be provided by posting:

(A) In the office of the public body or a location that is readily accessible to the public; and

(B) On the website of the public body or the District government.

(3) Notwithstanding the notice requirement of paragraph (2) of this subsection, notice of meetings shall be published in the District of Columbia Register as timely as practicable.⁸

(4) When a public body finds it necessary to call an emergency meeting to address an urgent matter, notice shall be provided at the same time notice is provided to members and may be provided pursuant to any method in paragraph (2) of this subsection.

⁸ Due to technical difficulties with the ODAI website, the OOG was not able to determine if the Task Force complied with the D.C. Register publication requirement.

(5) Each meeting notice shall include the date, time, location, and planned agenda to be covered at the meeting. If the meeting or any portion of the meeting is to be closed, the notice shall include, if feasible, 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.

The Task Force provided public notices on the Central Calendar of meetings occurring on October 13, 2016; October 17, 2016; October 25, 2016; November 7, 2016; and November 22, 2016. The January 10, 2017⁹ meeting is not yet published on the Central Calendar. The Task Force may have attempted to duplicate postings of notice of meetings on the DME and Central Calendar websites. However, the OMA requires only publication on the public body's website or the District government website. With respect to the October 17, 2016; October 25, 2016; November 7, 2016; and November 22, 2016 meetings, the OOG finds the Task Force notice was in compliance with the OMA's "Notice of meeting" provisions. However, with respect to the October 13, 2016 meeting the same does not hold true.

This is because the Task Force's October 13, 2016 notice containing the conference call dial in number for the public to attend the electronic meeting was not posted until the morning of the October 13, 2016 meeting. This was not timely notice under the OMA which requires notice as early as possible but not less than 48 hours or 2 business days, whichever is greater, before a meeting. For this reason, the OOG must find the task force in violation of (D.C. Official Code § 2-576(1)).

II. The OMA requires that public bodies record all meetings, including those held by electronic means.

D.C. Official Code § 2-577(a)(2) makes abundantly clear that recording electronic meetings by audio is applicable to meetings held by electronic means. The two OMA provisions that contain the recording requirement are the OMA's "Record of meetings" (D.C. Official Code § 2-578(a) and "Meeting procedures" (D.C. Official Code § 2-577(a)(2)) provisions. While both provisions cite the requirement to record meetings by audio, the OMA's "Record of meetings" also contains the comprehensive provisions regarding making public meeting records, including audio and video recordings. D.C. Official Code § 2-578 states:

⁹ The OMA requirement pursuant to D.C. Official Code § 2-576(1) is that a public body notice its meeting "as early as possible but not less than 48 hours or 2 business days, whichever is greater." Therefore, allegations of a violation of the January 10, 2017, meeting is not ripe for discussion at this time.

(a) All meetings of public bodies, whether open or closed, shall be recorded by electronic means; provided, that if a recording is not feasible, detailed minutes of the meeting shall be kept.¹⁰

(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.¹¹

It is clear from D.C. Official Code § 2-578(a) that an electronic recording of the public and closed portions of every meeting is required. The Task Force meetings occurring on October 13, 2016, October 17, 2016 and October 25, 2016 are at issue. The OOG’s November 4, 2016 Complaint requested the audio recordings for these three (3) meetings. In the November 21, 2016 memo, Jennifer Comey, Senior Policy Advisor for the Deputy Mayor for Education, response to the OOG’s request for audio of the October 13, 2016 and October 17, 2016 telephone conference meetings was “[W]e did not record the calls.” Ms. Comey’s response to the inquiry for the October 25, 2016 meeting was, “[W]e did not record the meeting.”

The Task Force’s admits to failing to audio record the October 13, 2016, October 17, 2016 telephone conference meetings and failing to record by audio or other electronic means the October 25, 2016 meetings. Therefore, the OOG must find the Task Force in violation of D.C. Official Code §§ 2-578(a) and 2-577(a)(2).

III. The OMA requires that public bodies maintain, and timely publish public meeting records, including the records of meetings held by electronic means.

D.C. Official Code § 2-578(b) contains the time frame for public bodies to make available to the public the records of public meetings. The OMA requires that

¹⁰ The OOG has consistently interpreted D.C. Official Code § 2-578(a) to require the recording of all public body meetings by electronic means and that it is feasible for a public body to do so given the readily availability of audio recording technology and/or recording devices.

¹¹ See the OOG’s advisory opinion at <http://www.open-dc.gov/documents/oma-advisory-opinion-posting-meeting-minutes-transcripts-electronic-recordings> for an in-depth analysis of D.C. Official Code § 2-578.

detailed meeting minutes are posted to the website¹² along with the agendas of every meeting. As the majority of boards and commissions are unable to post meeting minutes within the three (3) business days required under the OMA, 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 public body.¹³ Audio and video files of the public portions of meetings need not be posted on the website, but must be made available to the public upon request.¹⁴

If the Task Force does have the capacity to post audio/video files to the website, the files should be posted with meeting agendas and detailed written records (either meeting minutes or complete transcripts) of meetings. Again, if server capacity will be jeopardized, audio and video files may simply be stored by the Task Force and made available upon request. The public is not entitled to access meeting minutes, transcripts, audio or video files of closed sessions.¹⁵

If, however, the Task Force has a complete transcript of the meeting, that transcript may be posted in lieu of detailed meeting minutes.¹⁶ The transcript must be posted within seven (7) business days upon the conclusion of the meeting. The posting of a complete transcript and detailed meeting minutes is redundant and is not required. The Task Force may post one or the other, as long as the minutes or transcripts allow the public to gain a complete understanding of the topics discussed and the actions taken by its members.

All electronic files, meeting minutes and transcripts must be maintained by the Task Force in accordance with its document reschedule, or the document retention schedule for the Office of the Deputy Mayor for Education. If the document

¹² 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 the §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.

¹³ 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 public bodies lack the administrative support to meet the quick turnaround. This difficulty is further compounded by the fact that many public bodies, 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

¹⁴ Many public bodies do not have the server capacity on their respective websites, or their governing agency's website to post and maintain audio files for an extended period of time. The posting of documents in PDF format utilizes far less space and is a commonly accepted means of accessing written materials on the Internet.

¹⁵ D.C. Official Code § 2-575(b)(1-14)

¹⁶ See D.C. Official Code §2-578(b)(2). A transcript of a meeting of a public body is assumed to be a verbatim account of all statements and official actions taken during a meeting, and would therefore provide significantly greater detail than summaries provided in meeting minutes. Although not verbatim, meeting minutes must be detailed enough to provide a full record of a meeting. Bullet points are not considered detailed minutes.

retention schedule is not instructive, all audio and video files, meeting minutes and transcripts should be retained for a minimum of 5 years.¹⁷

In response to the OOG's November 4, 2016 request, the Task Force's November 21, 2016 submission included copies of the October 13, 2016 and October 17, 2016 meeting minutes with the proviso that "[W]e are in the process of posting these on the Cross Sector Collaboration Task Force webpage."¹⁸ The Task Force is in violation of D.C. Official Code § 2-578(b) for failing to timely making available for public inspection the October 13, 2016 and October 17, 2016 meeting minutes.

CONCLUSION

The OMA's "Meeting Procedures" authorizes public bodies to hold meetings by video conference, telephone conference and other electronic means. However, the OMA requires that when conducting a meeting by electronic means, a public body must adhere to all provisions of the OMA.

In addition to several other meetings, on October 13, 2016 and October 17, 2016, the Task Force held two meetings by telephone conference and provided a dial in number and access code to the public to attend these meetings. The OOG finding is that the Task Force, by not timely providing a dial in number and access code for the public to attend the October 13, 2016 telephone conference meeting, did not make reasonable arrangements to accommodate the public's right "attend" the meeting as the OMA requires. In addition, the OOG found the following omissions by the Task Force constitute violations of the cited OMA provisions: D.C. Official Code § 2-577(b) for failing to abide by all provisions of the OMA in the conduct of a meeting held by electronic means; (2) D.C. Official Code § 2-576 (1) for failing to publish the dial in number and access code for the telephone conference within 48 hours or two business days, whichever was greater, of the October 13, 2016 telephone conference meeting; (3) D.C. Official Code §§ 2-577(a) and 2-578(a) for failing to record the meetings held by telephone conference on October 13, 2016 and October 17, 2016; (4) an additional violation of D.C. Official Code § 2-578(a) for failing to record the October 25, 2016 meeting by audio or other electronic means; and, (5) D.C. Official Code § 2-578(b) for failing to timely publish its October 13, 2016 and October 17, 2016 meeting minutes and final agendas.

¹⁷ See the OOG's advisory opinion at <http://www.open-dc.gov/documents/oma-advisory-opinion-posting-meeting-minutes-transcripts-electronic-recordings> for an in-depth analysis of D.C. Official Code § 2-578.

¹⁸ On December 15, 2016 and December 16, 2016, the OOG attempted to access the Task Force's October 13, 2016 and October 17, 2016 meeting minutes at <http://dme.dc.gov/node/1202345> and <http://dme.dc.gov/node/1202357>, respectively. On both occasions the messages "Access denied", and "You are not authorized to access this page" appeared.

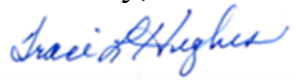
RECOMMENDATIONS

The Task Force states it had difficulty in determining the best technology to allow the public to call in but be muted. The OOG is happy to assist the Task Force in locating such technology if this remains a current issue.

The OOG commends the Task Force for posting its Notice of Meetings to its website and the Central Calendar. However, the OOG noted discrepancies in the information published on the two websites. To avoid confusing the public, the OOG recommends that if the Task Force elects to continue to post on both websites, that it ensures the information is consistent and posted simultaneously. In the alternative, the OOG recommends that the Task Force consider publishing all OMA required information only on the Central Calendar found at OPEN-dc.gov, and simply including a link to the Central Calendar on the Deputy Mayor for Education website.

The OOG also recommends the Task Force immediately consult with OCTO to take corrective measures to grant public access to its October 13, 2016 and October 17, 2016 meeting minutes. When attempting to access these minutes the messages “Access denied”, and “You are not authorized to access this page” appear instead of the meeting minutes for these dates.

Sincerely,



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