BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT

April 7, 2016

VIA ELECTRONIC MAIL
Ms. Sharon Williams Lewis
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Health Regulation and Licensing Administration
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VIA ELECTRONIC MAIL
Mr. [redacted] Mulhauser
[redacted]

RE: #OOG-0005_1.07.15_AO

Dear Deputy Director Lewis:

Thank you for the January 28, 2016 and March 29, 2016 responses to the January 8, 2016, Notification of Complaint #OOG-0005_1.07.15[1]. To fully investigate the merits of the complaint, the Office of Open Government (OOG) reviewed all Board of Medicine (hereinafter, Board) audio and documentary materials on the thumb drives you provided, content from the Board's website, and Board Public Notices of meetings published in District of Columbia Register.

Complaint

On January 7, 2016, the OOG received a complaint from [redacted] Mulhauser alleging the Board has failed to publish meeting notices, agendas and meeting minutes detailing the reasons for closed/executive sessions in violation of the Open Meetings Act (OMA). That next day the OOG electronically transmitted to the Board the Notice of Complaint #OOG-0005_1.07.15, with a written request for the following: (1) all Board meeting dates; draft and final agendas; draft and final meeting minutes of all meetings which have occurred from January 1, 2014 to December 31, 2015 that were not posted on Board's website; and, (2) all audio; video; and transcription

[1] "1.07.15" represents the day, month and year respectively in which the OOG receives a complaint. The date of receipt for this complaint was actually "1.07.16."

recordings of closed sessions.[2] The Board was to comply with the OOG request for this information by January 22, 2016.

On January 22, 2016, the Board provided a written response to the OOG through Sharon Williams Lewis, Interim Senior Deputy Director Health Regulation and Licensing Administration. Enclosed with the Board's response was a thumb drive with a copy of the minutes, agendas and audio recordings of Board meeting sessions. However, while reviewing the thumb drive contents, the OOG did not find the requested closed/executive session draft and final meeting minutes for January 1, 2014, through December 31, 2015[3]; the draft and final open session meeting minutes for December 30, 2015; and, draft and final subcommittee meeting minutes for January, 2014, February, 2014 and May, 2014. Therefore, on March 21, 2016, the OOG electronically transmitted a second written request to Ms. Williams Lewis asking the Board to provide the missing documents to the OOG by March 28, 2016.[4] On March 29, 2016, the Board complied with the March 21, 2016, OOG request by delivering the OOG a second thumb drive containing the missing documents.

As discussed *infra*, because the Board has not strictly adhered to the OMA requirements found at D.C. Official Code § 2-575(c) and D.C. Official Code §§ 2-576 and 2-578, the OOG finds merit in the allegations of the complaint. Hence, it is the opinion of the OOG that the Board has violated the Act.

Discussion

The fifteen member Board was established pursuant to section 203(a) of the District of Columbia Health Occupations Revisions Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Code § 3-1202.03(a)). Pursuant to § 3-1202.03(a)(2), the Board's statutory purpose is to regulate the practice of medicine[5] in the District of Columbia. The Board's authority includes investigating complaints against physicians and taking disciplinary action in respect to these complaints. The Board is a "public body"[6] whose meetings are governed by the OMA. According to its website, the Board meets on the last Wednesday of each month, unless

[2] Except for content that does not meet a statutory exception under the OMA, all closed/executive session documentary materials and recordings are kept in strict confidence pursuant to District of Columbia privacy laws.

[3] An icon on the thumb drive did not provide access to these documents. However, the thumb drive did contain closed/executive session draft and final meeting session minutes for the Board's September 11, 2014, January 28, 2015, July 29, 2015, and November 25, 2015, meetings.

[4] On March 21, 2016, OOG Attorney Advisor Johnnie Barton spoke with Ms. Williams Lewis. During the telephone conversation, Ms. Williams Lewis confirmed receipt of the electronic correspondence document request. During a March 22, 2016, telephone conversation with OOG Attorney Advisor Johnnie Barton, the Board's legal counsel Brian Kim, said it was the Board's intention to meet the March 28, 2016 deadline, but that the number of documents being requested made it difficult for the Board to do so. However, the Board was able to supply the documents on March 29, 2016.

[5] Pursuant to the statute, the Board also regulates the following health occupations in the District of Columbia, acupuncture, anesthesiologist assistants, naturopathic medicine, physician's assistants, surgical assistants, physicians-in-training, and the practice of trauma technologist.

[6] D.C. Official Code § 2-574(3) states, ["P]ublic body means 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. . ."

otherwise noted.[7] The Board's schedule for meetings is as follows: 8:30 a.m., closed/executive session; 10:30 a.m., open session; and at 2 p.m., reconvening of closed/executive session that adjourned at 10:30 a.m.[8]

The purpose of the OMA is to provide the public with full and complete information regarding the affairs of government and any official actions taken by government officials.[9] Therefore, all OMA complaints are reviewed by the OOG with the aim of supporting the policy of the OMA, and will strictly construe the application of exceptions to the Act. The regulations promulgated pursuant to the OMA are found at 3 DCMR § 10400 *et seq.* (2015), and provide the OOG with exclusive jurisdiction to investigate alleged violations of the OMA by a public body. The grant of investigative authority also empowers the OOG to "issue an Advisory Opinion addressing the complaint that a public body violated the Open Meetings Act." 3 DCMR § 10406.1.

At issue is whether the Board has failed to publish meeting notices, agendas and meeting minutes detailing the reasons for closed/executive sessions in violation of the OMA. As discussed *infra*, because the Board has not strictly adhered to the OMA requirements found at D.C. Official Code § 2-575(c) and D.C. Official Code §§ 2-576 and 2-578, the OOG finds that the Board has violated the Act. Therefore, this OOG advisory opinion is binding and also instructive and will provide the Board with mandatory recommendations to implement so future Board meetings comply fully with the OMA[10].

The Board's failure to timely publish all draft and final open meeting session minutes and all draft and final meeting agendas violates the "Record of meetings" and "Notice of meetings" provisions of the OMA.

After reviewing Mr. Mulhauser's complaint on January 8, 2016, that same day the OOG began an investigation into the complaint allegations by undertaking a review of documents on the Board's website. While reviewing the Board's website, the OOG noted the absence of documents that the OMA require a public body to publish. The missing documents were as follows: (1) the final meeting minutes for January 29, 2014, September 11, 2014, November 13, 2014, January 1, 2015, February 25, 2015 and March 25, 2015; and, (2) the Board's meeting agendas. During a subsequent review of the Board's website on March 1, 2016, the OOG did not find posted open session minutes for October 28, 2015.[11] As of April 5, 2016, the Board's had not published draft or final minutes for either October 29, 2014 or the December 30, 2015,[12] public meeting sessions.

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[7] Taken from the Board's website found at http://doh.dc.gov/bomed.

[8] A slight variation of this language appears in Board Public Notices of meetings published in the D.C. Register from January 2014 through December, 2014; and January 28, 2015 through December 30, 2015.

[9] D.C. Official Code § 2-572.

[10] See 3 DCMR 10406.1

[11] The open session meeting minutes for October 28, 2015 and April 29, 2014, are among the documents on the first thumb drive provided by the Board of January 22, 2016.

[12] The open session meeting minutes for December 30, 2015, is among the documents on the second thumb drive provided by the Board on March 29, 2016.

The OOG's review of the draft Board open session meeting minutes for January 29, 2014 and September 11, 2014 also reflect OMA compliance issues. The minutes for these dates contain disclaimer language indicating the minutes are drafts and not yet approved by the Board. However, after the passage of almost two years the Board has not published the final minutes of these two sessions as the OMA requires. [13] The Board's failure to timely publish the agendas and minutes constitute violations of the OMA "Notice of meeting" and "Record of meeting" requirements of D.C. Official Code §§ 2-576 and 2-578.

Specifically, the OMA requires a public body to maintain a detailed record of all meetings,[14] whether the meetings are open or closed sessions. Detailed records are in the form of detailed meeting minutes, electronic recordings, and transcripts.[15] Detailed meeting minutes are required to be posted to the website[16], 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 board or commission.[17] The OOG must find the Board in violation of the OMA for failing to adhere to the Act's Record of Meeting and Notice of Meeting provisions by not timely publishing all draft and final agendas and draft and final open session meeting minutes.

The OMA expressly limits the matters that a public body may discuss or consider while meeting in closed/executive sessions.

"To ensure public entitlement to as full and complete information regarding the affairs of government and those who represent them" (D.C. Code § 2-572), the OMA expressly limits those matters which a public body may discuss or consider while meeting in closed/executive session. Section 405(d) of the OMA (D.C. Official Code § 2-575(d)), states: "[A] public body that meets in closed session shall not discuss or consider matters other than those matters listed

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[13] See December 12, 2013, OOG Advisory Opinion to DHCD. http://www.open-dc.gov/sites/default/files/12.12.13%20OOG%20Opinon_HPTF_Meeting%20Record_Minutes%20Audio%20Video%20Transcripts.pdf.

[14] 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…"

[15] D.C. Official Code § 2-578.

[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.

[17] 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.

under subsection (b) of this section." This means that a public body meeting in closed/executive session may only consider matters which fall within one of the fourteen categories of exceptions found in D.C. Official Code § 2-575(d)). Upon review of the Board's documentary materials, the OOG found that all eleven[18] of the Board closed/executive final meeting session minutes for 2015 contains the following language:[19]

> *"In this segment, additional discussions not planned as part of the agenda can be documented. Presenters may be members of the Board, staff, or department."* [Emphasis added]

Matters discussed in a closed/executive session pursuant to the aforementioned language would violate the letter and spirit of D.C. Official Code § 2-575(d), if the matters do not fall within one of the fourteen categories of exceptions of content that a public body may discuss or consider when meeting in a closed/executive session. Therefore, a thorough review of the Board's written meeting session minutes and audio content for these sessions was necessary to determine the Board's compliance with D.C. Official Code § 2-575(d).

The OOG review of these audio and documentary materials indicates that some content discussed at each of Board's 2015 closed/executive sessions does not fall within the category of exceptions found at D.C. Official Code § 2-575(b). Therefore to discuss or consider such matters in closed/executive sessions violates the Record of Meeting and the Open Meetings provisions of the OMA (D.C. Code §§ 2-575(d) and 2-578). Below are specific examples of the content which the OOG finds volatile of § 2-575(d), and the dates where matters were discussed or considered in closed/executive sessions by the Board.[20]

- January 28, 2015, discussion of the new DOH Director Dr. Laquandra Nesbitt's introductory visit to the Board; the increase in the number of professionals under the Board's purview; the need to develop regulations for each and the many policy related topics the Board had to address; and the need for additional legal and administrative staff to support the work of the Board.
- February 25, 2015, discussion regarding the individuals who would accompany Dr. Rankin at the Council hearing for moral support.
- March 25, 2015, announcement of the Board's executive chair Mayoral appointment as Chief of Staff for the Department of Health; changing the Board's meeting schedule to once a month, and possibly having telephone meetings.
- April 29, 2015, discussion that the Board will likely conduct a nationwide search for the Executive Director's replacement; and, on licensing and discipline statistics, which were repeated in the open session meeting.

[18] The OOG review of Board closed/executive meetings did not include sessions held in 2016. However, if the language and practice is currently ongoing, the OOG must advise the Board to immediately cease this practice. There are no records that support a Board holding an open or closed/executive meeting in August, 2015.
[19] This language is found under the meeting heading, "Board/Staff/Department Reports."
[20] These examples are not exhaustive of the OOG's finding for each closed/executive session.

- May 27, 2015, discussions about the Board changing to once a month meetings; and, the turnaround time for licensing.[21]
- June 24, 2015, discussion on delays in processing applicants to the Lockbox/Citibank in Delaware; and, concern about the number of Board complaints received.
- July 29, 2015, announcement that Johns Hopkins had taken over Sibley Hospital, and is working to get it accredited for its residences and fellowships.
- September 30, 2015, announcement that Dr. Mehta no longer is with the Board and an email from Dr. Nesbitt that Dr. Sharon Lewis is now interim Deputy Director. Discussions about the upcoming symposium.
- October 28, 2015, the Board's formal introduction of Dr. Sharon Williams Lewis. Dr. Lewis shared her background with the Board. Board Chair provided her assessment of the meeting change to once a month.
- November 25, 2015, discussion on Board member's receipt of notification regarding the December meeting date and whether a quorum can be met on certain dates in December. Announcement of a Board member's resignation.
- December 30, 2015, discussion of Board vacancies and the need to recruit for the specific specialties needed.

After reviewing, and strictly construing, the statutory list of categories of allowable exceptions to the OMA, the OOG finds that discussion or consideration of the matters so noted above and found in the Board records are the proper subjects of open meeting sessions. Therefore, it is the opinion of the OOG that the Board's discussions or consideration of these matters in closed/executive session violates the OMA, D.C. Official Code § 2-575(d).[22]

The OMA provides a statutory regime that a public body must follow prior to meeting in a closed/executive session.

The complaint contains allegations that the Board did not detail the reasons for meeting in closed/executive sessions in violation of the OMA. For reasons which follow the OOG finds the Board failed to follow the OMA, (D.C. Official Code §2- 575(c)), which contains the statutory regime that a public body must follow prior to meeting in a closed/executive session. D.C. Official Code §2- 575(c) states:

> (1) Before a meeting or portion of a meeting may be closed, the public body shall meet in public session at which a majority of members of the public body present vote in favor of closure.
>
> (2) The presiding officer shall make a statement providing the reason for the closure, including citations from subsection (b) of this section, and the subjects to

[21] There was no quorum present at the time of these discussions on the following dates: March 25, 2015, October 28, 2015. Therefore the provisions of the OMA would not apply.

[22] The OOG notes that the majority of the matters discussed by the Board during its closed/executive sessions properly fall within the D.C. Code § 2-575(b)(14) category of exceptions, to plan, discuss or hear reports concerning ongoing or planned investigations of alleged criminal or civil misconduct or violations of law or regulations. . . ."

> be discussed. A copy of the roll call vote and statement shall be provided in writing and made available to the public.[23]

After reviewing material on the Board's website, the Board's agendas, Board's Notice of Public Hearing, Board session meeting minutes and audio recordings of its sessions the, OOG concludes the Board is in violation of the OMA by meeting in closed in closed/executive session without strictly complying with the proper protocols as set out in D.C. Official Code § 2- 575(c).

As mentioned previously, the Board's website[24] provides an hourly schedule for the Board's meetings. Pursuant to that schedule, the Board meets first in a closed/executive session after which it adjourns to enter a public session, before reconvening the closed/executive session.[25] The implication from this language, as supported by the review of Board meeting minutes, agendas and audio of the meetings is that the Board never meets in an open session but goes directly into a closed/executive session. In doing so the Board does not follow the requirements of D.C. Code Official § 2-575(c). [26] An example of the Board's repeated practice of beginning its meetings in closed/executive session illustrates the lack of compliance with D.C.Official Code § 2-575(c). During the process of adjourning the January 28, 2016 open meeting session to "reconvene"[27] in closed/executive session, the presiding officer states, "everyone in the public needs to vacate the room."[28] This is one of many times from January, 2014 through December, 2015 that represents the Board's history of failing to follow the statutory regime of D.C. Official

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[23] Public bodies must make a copy of the roll call and presiding officer's statement available to the public to fully comply with the requirements of the OMA.

[24] The specific language taken on the Board's website at http://doh.dc.gov/bomed states: "[T]he Board meets on the last Wednesday of each month, unless otherwise noted. At 8:30 am the Board meets in a {sic} close/executive session. At 10:30 a.m. the meeting is open to the public until 2 p.m. when the Board reconvenes in closed/executive session. . ." The Board's "Notice of Meetings" that were published in the District of Columbia Register from January, 2014 through December, 2015 contains the same schedule of the Board's closed/executive sessions and opening session meetings as the website content.

[25] A review of Public Notice of hearings published in the D.C. Register for several Boards under the purview of the Department of Health contain language which indicates that several Boards may have followed or continue to follow the Board of Medicine practice of meeting in closed/executive session without following the statutory regime of D.C. Code § 2-575(c). These include: the Board of Dentistry (Public Notice for its January 14, 2015 meeting); Board of Chiropractic (November 10, 2015, March 11, 2014, May 13, 2014 and July 8, 2014). The notation at the bottom of page 4 of the February 5, 2014, Open Session Minutes of the Marriage and Family Therapy Board has this notice to be read by the Chairperson at the end of the public session: "This concludes the public open session meeting and pursuant to the {sic} DC Official Code 2-57B and for the purposes set forth therein, the Board will now move into the closed executive portion of the meeting."

[26] At some point, including periods during 2014 the Board met twice monthly. "SC" (subcommittee), was the designation used to distinguish one of the two monthly meetings. The Board met twice a month due to its workload. The agendas for these meetings are a mixture of "open session matters" and investigatory and disciplinary matters. In holding these subcommittee sessions as closed/executive sessions, the Board was required to follow the statutory regime of D.C. Code § 2-575(d).

[27] The OOG opines that to "reconvene" a prior closed/executive session requires strict adherence to the statutory regime in D.C. Official Code D.C. Code §2- 575(c).

[28] On November 13, 2014, the Board meets first in closed/executive session without following the statute, to close the open session and prior to returning to the close/executive session, the presiding officer states "motion to close open session, open session is closed. The closed/executive session was reopened with the statement, "we are back in executive session."

Code §2- 575(c) in conducting its meetings. Based on the foregoing, the OOG finds the Board in violation of the OMA D.C. Official Code §2- 575(c).

Recommendations

To ensure all future Board meetings fully comply with the provisions of the OMA, the OOG makes the following recommendations for immediate implementation by the Board: (1) timely publish all notices, draft and final meeting agendas, and draft and final open session meetings minutes, including the January 22, 2016, December 30, 2015, and April 29, 2014, open session minutes currently in the Board's possession;[29] (2) correct all future Notice of Hearings, agenda and minutes to reflect the Board meetings begin in open session, and include the proper and complete citation to D.C. Code § 2-575(d) for meeting in a closed/executive session; (3) strictly adhere to the statutory regime in D.C. Official Code § 2-575(c) to properly enter into a closed/executive session; (4) review the category of exceptions in D.C. Official Code § 575(c) to ensure that all matters for discussion or consideration in closed/executive session matters fall into one of the category of exceptions; (5) for the Executive Director of the Board of Medicine, its attorney advisor, and all members of the Board to attend an open meeting within ninety (90) days upon the issuance of this binding opinion;[30] and, (6) for the Department of Health to immediately assess OMA compliance of all public bodies under its charge.

Conclusion

In the conduct of it meetings, the Board has failed to timely publish meeting notices, agendas and meeting minutes detailing the reasons for closed/executive sessions in violation of the OMA. These acts and omissions by the Board deprive the public from obtaining "full and complete" information regarding the affairs of government and the actions of those who represent them. The OOG does not find the Board willfully or recklessly disregarded the OMA, and notes the Board fully cooperated with the investigation. The OOG attributes the Board's lack of compliance to misunderstandings, and in some instances, misapplications of the OMA. Equally troubling is that records reviewed by the OOG indicate this problem may be systemic and pervasive to all public bodies under the purview of the Department of Health. It is apparent to OOG that the Board is not alone in the pattern and practice of meeting first in closed/executive session in violation of D.C. Official Code § 2-575(c).

Sincerely,

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

[29] See December 12, 2013, OOG Advisory Opinion to DHCD. http://www.open-dc.gov/sites/default/files/12.12.13%20OOG%20Opinon_HPTF_Meeting%20Record_Minutes%20Audio%20Video%20Transcripts.pdf.

[30] The training could take place on the day of and prior to a scheduled Board meeting.

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