



**BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
GOVERNMENT OF THE DISTRICT OF COLUMBIA**



November 9, 2023

Via Electronic Mail

Terri Stroud
General Counsel
District of Columbia Board of Elections
1015 Half St. S.E., Ste. 750
Washington, D.C. 20003
tstroud@dcboe.org

RE: Comments on the D.C. Board of Elections Notice of Proposed Rulemaking

Dear Ms. Stroud:

I am writing on behalf of the D.C. Office of Open Government (OOG) to comment on the District of Columbia Board of Elections (DCBOE) Notice of Proposed Rulemaking released on October 13, 2023. OOG is commenting on subsections 102.4 to 102.8, which cover DCBOE's notice/agenda, closed-session, and minutes procedures. As currently written, these subsections do not comport with the Open Meetings Act (OMA) in certain respects, specifically: (a) permissible reasons to close meetings, (b) the timing of notices of meetings, and (c) the timing of posting of minutes/draft minutes.

OOG's comments on each individual subsection follow.

Subsection 102.4:

The last sentence of the proposed language reads (no change from the current language): "Notice of additional meetings or notice of changes to regularly scheduled meetings shall be published on [DCBOE]'s website at least forty-eight . . . hours in advance, except in the case of emergency."

COMMENT: This language departs from the OMA, which requires "notice *as early as possible*, but not less than 48 hours *or 2 business days, whichever is greater*, before a [non-emergency] meeting." See D.C. Official Code § 2-576(1) (section 406(1) of the OMA) (emphasis added).

Subsection 102.4 is likely intended to paraphrase D.C. Official Code § 1-1001.05(a-1)(1) ("at least 48 hours' notice of any additional meeting"). However, the new regulation does not take into account the "as early as possible" or "2 business days" phrases of the OMA.

Subsection 102.5:

The proposed language reads (no change from the current language):
“The meetings of the Board shall be open to the public, with the exception of executive sessions pursuant to D.C. Official Code § 1-1001.05(a-1)(3) and the rules of this title.”

COMMENT: The rule correctly reflects that public bodies meetings must generally be open to the public. However, the bases for closed sessions in D.C. Official Code § 1-1001.05(a-1)(3) do not align with those permitted under the OMA. For instance, “[r]elat[ing] solely to the internal personnel rules or practices of [DCBOE]” does not correspond to any of the enumerated reasons for closure in the OMA. *Cf.* D.C. Official Code § 2-575(b) (section 405(b) of the OMA).

This subsection is also likely intended to paraphrase D.C. Official Code § 1-1001.05(a-1)(3). But, such paraphrasing of the controlling statute is prohibited where the rules’ language would enlarge the statute. *E.g., District v. Brookstowne Comm’y Dev. Co.*, 987 A.2d 442, 449 (D.C. 2010); *Getty v. Carroll County Bd. of Elections*, 926 A.2d 216, 226 n.17 (Md. 2007); Office of Documents, RULEMAKING HANDBOOK § 1.11 (2023). The proposed (and current) subsection 102.5 goes beyond the statute by permitting closure under “the rules of this title”—*i.e.*, Title 3 of the DCMR, which includes DCBOE’s own rules, including whatever rules it might promulgate in the future, emergency or otherwise.

Accordingly, OOG recommends removing subsection 102.5 from the regulations or, in the alternative, revising it to track the OMA.

Subsection 102.6:

The proposed language reads (no change from the current language):
“The Board may hold a pre-meeting executive session immediately prior to commencing a regular meeting for the sole purpose of administrative action, which does not include the deliberation or taking of official action.”

COMMENT: The OMA does not contemplate “administrative action” as distinct from “official action,” and “sole[ly]” convening for “administrative action” does not itself permit closure under the OMA.

Even if DCBOE characterizes a particular gathering as a “pre-meeting,” the discussion of District of Columbia government business makes such a gathering a “meeting” for purposes of the OMA. Normal closure procedures apply to that gathering. The OMA defines meetings under its scope to include “any gathering[s] of a quorum . . . of a public body . . . , whether formal or informal, regular, special, or emergency, at which the members consider . . . public business, including gathering information . . . [or] discussing” *See* D.C. Official Code § 2-574(1) (section 404(1) of the OMA).

Such a closed “administrative action” gathering would require standard closed-meeting protocol, including notice, where feasible; a public vote to enter closure; and an audio or video

recording retained for possible *in camera* review. *See, e.g., id.* §§ 2-575(c), (d), 2-576(5), 2-578(a) (sections 405(c), (d), 406(5), 408(a) of the OMA).

Subsection 102.7:

The proposed language reads (no change from the current language):
“The proposed agenda for each Board meeting shall be posted on its website at least twenty-four (24) hours prior to the meeting. Copies of the agenda shall be available to the public at the meeting. Nothing in this section shall preclude the Board from amending the agenda at the meeting.”

COMMENT: The 24-hour notice period is shorter than that required by the OMA. The OMA requires “notice as early as possible, but not less than 48 hours or 2 business days, whichever is greater, before a meeting,” and such notice must include a planned agenda. *See* D.C. Official Code § 2-576(1), (5).

Subsection 102.8:

The proposed amendment reads, in part (additions to current language are underlined; deletions from current language are stricken through):

“Meeting minutes are a matter of public record and shall include the vote of each member on each action. A draft of the mMinutes from each Board meeting shall be posted on the Board’s website prior to the next regular meeting....”

COMMENT: The OMA and its regulations require posting of minutes (at least the draft (pre-approval) version) within 3 business days (except for meetings of boards of charter schools). *See* D.C. Official Code § 2-578; 3 DCMR § 10409.5.

Contact Director Niquelle Allen or me at any time to discuss OOG’s comments further before DCBOE promulgates these rules as final.

Sincerely,

NIQUELLE M. ALLEN
DIRECTOR OF OPEN GOVERNMENT

By: */s Nicholas H. Weil*
Nicholas H. Weil
Trial Attorney
Office of Open Government
Board of Ethics and Government Accountability