

JULY 5, 2019



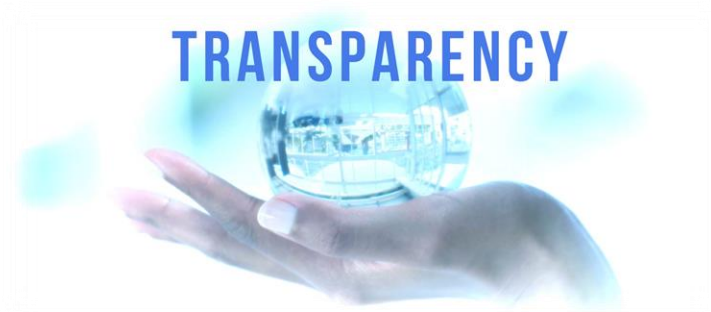
## BIANNUAL NEWSLETTER

OFFICE OF OPEN GOVERNMENT

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY  
GOVERNMENT OF THE DISTRICT OF COLUMBIA  
441 4th Street NW, Washington, DC 20001

# From the Director of Open Government

I am proud to present the Office of Open Government's Biannual Newsletter and hope that it informs you on issues concerning openness and transparency in our District of Columbia government. Our office was formed as a result of the District of Columbia's commitment to maintaining an open and transparent government that is accountable to the people it represents. The Office of Open Government (OOG) continues to execute its mission to ensure that the conduct of government business conforms to the Open Meetings Act and that information and records concerning government operations are accessible as required by the Freedom of Information Act. OOG intends for the information contained in this Newsletter to increase the readers' awareness of open government issues and we encourage our readers to join us in our efforts to increase and preserve transparency in D.C. government operations.



# Legislative Update

**Introduction of Bill 23-0199.** On March 19, 2019, Councilmembers Allen, Che, Bonds, Nadeau, and Silverman introduced the “Public-School Transparency Amendment Act of 2019.” In part, this measure requires: (1) greater transparency in public charter school administration regarding contracts greater than \$25,000; (2) the Public Charter School Board to deliver a report to the Council describing the number and cost of Freedom of Information Act (FOIA) requests; (3) that public charter schools and the Board of Trustees of public charter schools comply with FOIA; and (4) the Office of Open Government to provide training regarding obligations under the Opening Meetings Act and FOIA to employees of public charter schools and members of the Board of Trustees. View the introduced bill here: [Public School Transparency Bill](#).

**OOG adopts new regulations.** On May 16, 2019, the Director of Open Government adopted as final rules amendments to the Office of Open Government’s (OOG) regulations at 3 DCMR § 104000. These rules, which became effective on May 31, 2019, make conforming changes to ensure that the Office of Open Government’s rules are consistent with the newly added section 205c of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, which took effect on October 30, 2018. In part, the newly adopted rules:

- Authorize aggrieved party appeals to the Board of Ethics and Government Accountability for reconsideration of Open Meetings Act opinions issued by the Director of Open Government when the opinion was requested by a public official or government employee or issued *sua sponte*.
- Provide that public bodies, unless otherwise provided by law or its own by-laws, may conduct public meetings using the latest edition of Robert’s Rules of Order.
- Provide that the Director of Open Government may provide advice and training on parliamentary procedure.
- Require public bodies to include following statement at the end of all draft and final meeting agenda: “This meeting is governed by the Open Meetings Act. Please address any questions or complaints arising under this meeting to the Office of Open Government at [open.govoffice@dc.gov](mailto:open.govoffice@dc.gov).”
- Permit OOG to accept anonymous OMA complaints.
- Set forth the process and procedures for public bodies to follow for conducting public meetings by electronic means.
- State the components of detailed meeting minutes.
- Require the retention of electronic recordings of meetings and written minutes pursuant to District of Columbia law and the General Records Retention Schedules.

# Freedom of Information Act

**The U.S. Supreme Court Issues a FOIA Decision.** On June 24, 2019, *In Food Marketing Institute v. Argus Leader Media*, 588 U.S. \_\_\_\_ (2019), the Supreme Court of the United States (SCOTUS) held that where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is “confidential” within the meaning of 5 U. S. C. § 552(b)(4), the federal Freedom of Information Act’s Exemption 4. The SCOTUS ruled 6-3 to reverse and remand the 8<sup>th</sup> Circuit’s decision in this case, in an [opinion](#) by Justice Gorsuch. Justice Breyer filed an opinion concurring in part and dissenting in part, in which Justices Ginsburg and Sotomayor joined. By this decision the SCOTUS overruled the 45-year federal precedent set forth in *National Parks & Conservation Assn. v. Morton*, 498 F. 2d 765, 770 (D.C. Cir 1974), which held that in order to withhold confidential information, the federal government's release of the information must cause "substantial harm to the competitive position of the person from whom the information was obtained.”

**Social Media and FOIA in 2019.** The Director of Open Government facilitated an online training session on April 9, 2019, entitled, “Social Media and FOIA in 2019.” ArchiveSocial hosted the online course, which included 75 participants from all over the country. The participants were government attorneys and public information officials. View the Webinar here: [Social Media and FOIA 2019](#)

**Annual FOIA Reports.** Pursuant to D.C. Official Code § 2-538(a) & (c) the Council has received the annual FOIA reports (report of the public –record-disclosure activities) of each District of Columbia public body and the listing of FOIA cases that were in litigation for the preceding fiscal year.

FOIA Public Record Activity Report from the Mayor of the District of Columbia: [FOIA Activity Report](#)

FOIA Litigation Report from the Attorney General of the District of Columbia: [OAG FOIA Litigation Report](#)

**FOIA Exemption by Statute.** District of Columbia government agencies may refuse to release a requested record because a statute requires the agency to withhold that record. [Riley v. Fenty, 7 A.3d 1014 \(2010\)](#) is a case that illustrates the exempt by statute provision of FOIA (D.C. Official Code § 2-534(a)(6)). In this case, the District of Columbia Court of Appeals upheld the Department of Youth and Rehabilitation Services’ (DYRS) decision to withhold records from a requester because the requested records concerning juveniles were exempt from disclosure by statute.

**OOG Issues FOIA Advisory Opinion Regarding Public Charter Schools.** OOG’s most recent FOIA Advisory Opinion (AO) was issued on May 1, 2019. The AO provided guidance on the following issues: (1) whether FOIA applies to Local Education Agencies and District of Columbia public charter schools; and, (2) whether public charter schools

are private contractors that perform a public function, whose records, through FOIA, are accessible pursuant to D.C. Official Code § 2-532(a-3). Read the Advisory Opinion [here](#).

## Open Meetings Act

### OMA Q&A.

**Question:** *Does the OMA permit a public body to exclude its staff or its legal counsel from a public body's closed sessions of a meeting?*

**Answer:** *The OMA shows support for both the inclusion and exclusion of staff and legal counsel during closed sessions of meetings. In short, the answer depends on the provision the public body relies on to enter into closure.*

D.C. Official Code § 2-575(b) authorizes a public body to close a meeting or a portion of a meeting to the public. The definition of open meeting in D.C. Official Code § 2-575(a) does not define the term “public” as a term of art, so the plain meaning of the word applies. The Merriam-Webster Dictionary defines the term “public” as a noun that means “the people as a whole.” So, when a meeting is closed to the public, under the plain meaning of the term, a public body may exclude staff and legal counsel as members of the public or people as a whole.

However, the OMA's justification for meeting closures clearly states that the public body's counsel and/or staff should be present during the closed session in certain circumstances. D.C. Official Code §§ 2-575 (b)(2), (b)(3), (b)(4)(A), (b)(8), and (b)(12) expressly provide for the presence of staff and/or legal counsel during closed meetings for contract negotiations, negotiating incentives, discussing actions to protect to the public, legal advice, and training. A public body may reasonably interpret these provisions as requiring the presence of the staff and legal counsel only in those instances. The remaining provisions of D.C. Official Code § 2-575(b) that justify closure do not specifically mention the presence of staff and legal counsel as a pre-requisite for closure. This supports the idea that a public body may exclude staff and legal counsel from the closed session in every instance other than those set forth in subsections (b)(2), (b)(3), (b)(4)(A), and (b)(12). To illustrate, a public body may justifiably exclude staff and legal counsel from a closed session where the public body is meeting to discuss disciplinary action against a staff member or legal counsel (D.C. Official Code § 2-575(b)(9)).

Further, OOG's review of recordings of closed sessions in the course of investigating complaints regarding improperly closed meetings reveals that both staff and legal counsel have been present when the public body met in closure for reasons other than those stated in subsections (b)(2), (b)(3), (b)(4)(A) and b(12). This supports the idea that a public body, in its discretion, may exclude or include staff and counsel, depending on the circumstances. The definition of a meeting requires a quorum of the members of a public body (D.C. Official Code § 2-574(1)). So, when a meeting is closed to the public, only a quorum of the members of the public body are required by law to be present to conduct that meeting. Thus, a public body may exclude its staff and/or legal counsel from a

closed session only when the justification for the closed session does not fall under D.C. Official Code §§ 2-575(b)(2), (b)(3), b(4)(A),(b)(8) or (b)(12).

**Welcome to the Child Support Guideline Commission.** The Child Support Guideline Commission is the most recent public body to join the exclusive group of entities that publish on OPEN-DC.GOV, the District’s only central meeting calendar for public bodies. OOG maintains this central calendar for public bodies and the public bodies may meet all OMA “Notice of meetings” (D.C. Official Code § 2-576) and “Record of meetings” (D.C. Official Code § 2-578) requirements by publishing online at OPEN-DC.GOV. The site is user-friendly, and allows secure publishing from a desktop. The site also allows entities to list its member’s names and roles within the public body. A password and login information is necessary to publish on OPEN-DC.GOV. Please contact Tiffany Montgomery at [tiffany.montgomery@dc.gov](mailto:tiffany.montgomery@dc.gov) for assistance with the central meeting calendar.

**Resolved Open Meeting Act Complaints.** OOG issues binding advisory opinions on compliance with the OMA. The OMA complaints resolved by an advisory opinion are listed below and you may access the opinion by clicking on the text, which is a hyperlink to the advisory opinion on open-dc.gov.

- I. [OOG-006\\_10.01.17\\_AO](#) Whether the Mayor’s Advisory Board on Veterans Affairs: methods to cancel meetings; failure to record meeting minutes; and conduct of a meeting by electronic means comport with the requirements of the OMA.
- II. [OOG-0012\\_10.13.17\\_AO](#) OOG dismissed an OMA complaint and resolved whether a subcommittee is subject to the OMA.
- III. [OOG-0013\\_11.14.17\\_AO](#) Whether COST failed to properly notice meetings in violation of D.C. Official Code § 2-576(1)(2)(A)(B); and, whether OOG may nullify COST's meetings that violated the OMA.
- IV. [OOG-0014](#) and [0015\\_12.14.17\\_AO](#) Whether the United Medical Center Board of Directors properly entered into closed/executive session during its December 13, 2017, meeting to vote to close the hospital's obstetrics unit.
- V. [OOG-0002\\_2.6.18\\_AO](#) Dismissed Complaint resolving whether COST's FOIA processing fee was reasonable and denial of FOIA waiver was lawful; and, whether OOG may nullify hearings and sanction a public body's employees for violating the OMA and FOIA.
- VI. [OOG-0003\\_3.11.18\\_AO](#) Dismissed Complaint resolving whether the discussion of a recommendation for re-appointment is the proper subject of a closed/executive session.
- VII. [OOG-0001-1.30.18\\_AO](#) Complaint resolving whether the UMC Board’s failure to make available to the public an electronic recording of its February 21, 2017, Strategic Planning Committee Meeting violated the OMA.

- VIII. OOG-0004\_4.20.18 Dismissed Complaint resolving whether a pharmacy is a public body subject to the OMA.
- IX. OOG-0006\_5.24.18 Dismissed Complaint resolving whether the OMA empowers the OOG to seek disciplinary action against employees of a public body for alleged violations of the OMA; and whether the OMA empowers the OOG to nullify a public body meeting.
- X. OOG-0007\_6.06.18 Dismissed Complaint resolving whether the OMA regulates the conduct of public meetings of ANCs.
- XI. OOG-0008\_6.26.18 Dismissed Complaint resolving whether the D.C. Public Charter School Board's failure to provide 30-day's notice to the ANC of their intent to consider a matter involving the Statesman Public Charter School violates the OMA.
- XII. OOG-002.8.1.18\_SILC\_AO Compliance with the "Notice of Meetings" and "Record of Meetings" directives of the Open Meetings Act. The OMA requires specific forms of notice to the public before public bodies may lawfully conduct meetings (D.C. Official Code § 2-576). The OMA also requires public bodies to publish an annual schedule of public meetings and notice of public meetings in the DC Register. The OMA requires timely publication of draft or final meeting minutes and meeting agendas (D.C. Official Code § 2-578).
- XIII. OOG-0003\_11.2.18\_AO Whether the DCPCSB: (1) met in an improper closed/executive session; (2) improperly noticed to the public its October 31, 2018, meeting; (3) failed to timely report to the public the outcome of a vote taken in closure; and (4) draft meeting agenda did not provide the public with proper notice of the closed/executive session.
- XIV. OOG-2019-0001-M Dismissed Complaint resolving whether the OMA extends to the Department of Veterans Central Internal Review Board, a federal agency.

## Welcome Aboard!!!

OOG welcomes the new BEGA Board Chairperson, BEGA Board Members, Computer Systems Analyst, and Summer Law Fellow to the Board of Ethics and Government Accountability.

### **BEGA Profiles:**

Norma Hutcheson, BEGA Board Chairperson. Please read Chairperson Hutcheson's biography here: <https://bega.dc.gov/biography/norma-b-hutcheson>

Charles "Chip" Nottingham, BEGA Board Member. Mr. Nottingham is a licensed attorney who, since 2014, has managed a small DC-based law firm, which focuses on regulatory and administrative law impacting the transportation sector. He has extensive

executive, legal and governmental experience that includes work in the U.S. Congress for former Congressman Tom Davis; a U.S. Senate-approved Executive Branch appointment, as the Chairman of the federal Surface Transportation Board; service as the Chief Executive Officer of the Virginia Department of Transportation (VDOT), the second largest state agency in the Commonwealth of Virginia; service as the VDOT Chief Ethics and Compliance Officer; and service as the Vice Chair of the Commonwealth's Transportation Board. Mr. Nottingham has a Juris Doctorate from George Mason University and a Bachelor of Arts from Wesleyan University. He is a member of the District of Columbia Bar Association and the Virginia State Bar Association. Mr. Nottingham is a native Washingtonian and resides in Ward 3.

Melissa Tucker, BEGA Board Member. Ms. Tucker is a experienced government attorney currently serving as an Attorney-Advisor with the U.S. Department of Health and Human Services, Office of the Inspector General, Office of Congressional Affairs. Ms. Tucker has extensive legal experience serving in the District of Columbia government, federal government, and Providence, R.I. government. From 2015 – 2018, Ms. Tucker served the District as Associate Director of the Mayor's Office of Legal Counsel, where she oversaw the analysis and determination of all FOIA appeals submitted to the Mayor of the District of Columbia. Ms. Tucker also served as an Attorney Advisor for the U.S. Commission on Civil Rights and as Assistant General Counsel for the Council of the District of Columbia. She also served six years as Assistant City Solicitor in Providence as the Chief Public Records Officer and Ethics Officer. Ms. Tucker received her Juris Doctorate from Fordham University School of Law and her Bachelor of Arts from the University of Pennsylvania. She is a member of the Bar Associations of the District of Columbia, Pennsylvania, Rhode Island, and Massachusetts. Ms. Tucker resides in Ward 3.

Tiffany Montgomery, MBA, MS, Computer Systems Analyst. Ms. Montgomery is BEGA's new Computer Systems Analyst and she is primarily responsible for all of BEGA's information technology systems and projects. She has served as a professor of Information Systems and instructor of Computer Science at Johns Hopkins University, where she also obtained her education. Ms. Montgomery has extensive Information Technology experience in both the private and public sector. She is honored to once again to serve the public interest in government and is very happy to be a part of the BEGA family.

Anthony Scerbo, Law Fellow. Anthony Scerbo is the Summer Rauh Legal Fellow with the BEGA's Office of Open Government. A long-time District resident, he is a rising 2L at University of the District of Columbia David A. Clarke School of Law. He is also an Army veteran who served in Afghanistan and a professional consulting futurist. Mr. Scerbo has also worked on Capitol Hill, in publishing, broadcasting and business development. He believes strongly in the missions of both OOG & OGE and is looking forward to expanding his legal and knowledge training with the BEGA attorneys.



# Curtain Call

**Featured Public Body Profile.** Want to know more about biking in DC? The District of Columbia Bicycle Advisory Council (BAC) represents the interests of bicyclists in the District of Columbia. BAC is an official public body that advises elected and appointed officials on bicycle-related transportation matters. As specified in D.C. Official Code § 50–1604, the purpose of BAC is to “serve as the advisory body to the Mayor, Council of the District of Columbia, and District agencies on matters pertaining to bicycling in the District and to make recommendations to the bicycle coordinator on the budget and focus of the Comprehensive Bicycle Transportation and Safety Program.” BAC evaluates legislation and transportation infrastructure, providing analysis and technical expertise to the legislative and executive branches of D.C. government. BAC is comprised of 13 D.C. residents who are voting members. Members of the Council of the District of Columbia each appoint one resident to serve on BAC. Their meetings are held at 6:00 p.m. on the first Wednesday of odd-numbered months at 441 4th St NW, 11th floor. Meetings are open to the public, but identification is required to enter the building. For more information visit: <http://www.bikedcbike.org/p/about-bac.html>.

## Upcoming Trainings

OOG is conducting two trainings on the OMA and OOG’s new regulations, which took effect on May 31, 2019. These training sessions are scheduled from 10:00am to 12:00pm on July 25, 2019, and August 8, 2019, at 441 4<sup>th</sup> Street, NW, Suite 540S, Washington, DC 20001. Please register by emailing OOG at [open.govoffice@dc.gov](mailto:open.govoffice@dc.gov).

OOG also provides OMA and FOIA trainings upon request. Please contact us at [open.govoffice@dc.gov](mailto:open.govoffice@dc.gov) to schedule a training session.

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## **Got Questions? We have Answers.**

**OOG provides advice to agencies, public bodies and the public on compliance with FOIA and the OMA. Please contact us at (202) 481-3411 or email [open.govoffice@dc.gov](mailto:open.govoffice@dc.gov) for assistance.**



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