

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



April 18, 2016

VIA ELECTRONIC MAIL

Ms. Terri Thompson, Esquire
Chairman
District of Columbia Housing Authority Board
of Commissioners
c/o Ms. Pat Fagin Scott, Director of Board Relations
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Washington, DC 20002
pfscott@dchousing.org

**VIA ELECTRONIC
MAIL**

Mr. Fritz Mulhauser

RE: #OOG-0004_1.07.16_AO

Dear Chairman Thompson:

Thank you for the March 16, 2016, electronic submission of documents for OOG review in the ongoing investigation of Complaint #OOG-0004_1.07.16.¹ As you are aware, the OOG's March 8, 2016 Advisory Opinion found the District of Columbia Housing Authority Board of Commissioners (Board) in violation of the Opening Meeting Act (OMA). These violations consist of the Board's: (1) failure to provide full records of meeting session minutes, and failing to make meeting minutes easily accessible to the public² (D.C. Official Code § 2-578 (2015)); (2) failure to "address the Complaint #OOG-0004_1.07.16_ (3 DCMR § 10405.4); (3) failure to answer the complaint" within the statutory required thirty days (3 DCMR § 10405.2); and, (4) "willful and reckless disregard of the OMA" (3 DCMR § 10406).³ At issue is the remaining allegation of the January 7, 2016, Complaint of whether the Board has met in closed/executive

¹ The OOG met on March 23, 2016, with Kenneth S. Slaughter, General Counsel to the Board, and Chelsea J. Johnson, Esq., Chief Advisor to the General Counsel. At that time the Board's counsel supplemented the March 16, 2016, email document submission with notes from closed/executive Board meetings.

² The OOG review of the Board's website on April 12, 2016, found agendas posted for all regular monthly meetings from May 2015 through March 2016, excluding August 2015 and January 2016 when the Board did not meet.

³ OOG Director, Traci Hughes, transmitted in writing two requests of the Board for documents on January 7, 2016, and February 11, 2016 with no response. Counsel to the Board stated they only became aware of the Complaint and OOG requests upon issuance of the March 8, 2016 OOG Advisory Opinion. The Board's Counsel offered two reasons for the non-response to the OOG requests and the Board's non-compliance with the OMA. First, due to a communication breakdown within the District of Columbia Housing Authority, the OOG requests were not transmitted from the Board Liaison to the Board chairman or to the Board's counsel. Secondly, the Board's counsel stated that a District of Columbia Housing Authority employee in attendance at an April 8, 2014, OMA training conducted by Director Hughes misunderstood the instruction provided on the OMA. This misunderstanding

sessions in violation of the OMA. For reasons which follow the OOG finds the Board in violation of the “Open Meetings” requirements of D.C. Official Code § 2-575; the “Notice of Meetings” requirements of D.C. Official Code § 2-576; and the “Record of Meeting” requirements of D.C. Official Code § 2-578(a).

Background

The OOG review of the Board’s March 16, 2016 submission, the Board’s website, and information obtained during the March 23, 2016, meeting with the Board’s counsel are the relevant sources used to fully investigate and resolve the remaining complaint issue. An analysis of these sources reveal that the Board’s meeting sessions from February, 2015, through December, 2015, falls within four types of meetings: (1) Pre-Board Monthly Meetings; (2) Regular Monthly Meetings; (3) Committee Meetings; and (4) Board Symposiums.

Pre-Board Monthly Meetings

From February, 2015, through December, 2015, the Board met in what are styled as “Pre-Board”⁴ Monthly Meetings. These meetings took place between the hours of 10:30 AM and 11:30 AM. The record indicates that the Board would meet in Regular Monthly Meetings the same day, at 1 PM. The Pre-Board Monthly Meetings were closed to the public. A quorum of members was present during Pre-Board Monthly Meetings and the items on the Regular Monthly Meeting agenda were the topics of Board discussions. However, the Board’s counsel informed the OOG that voting on these agenda items did not occur during Pre-Board Monthly Meetings. The OOG notes the “Pre-Board Monthly Meetings agendas mirror”⁵ Regular Monthly Meeting agendas in most respects.⁶ There are no records of what took place during Pre-Board Monthly meetings as the Board did not make audio, video or transcriptions of the Pre-Board Monthly Meetings.

Regular Monthly Meetings

After adjourning the Pre-Board Monthly Meetings held in closure, the Board would meet shortly thereafter publically in Regular Monthly Meeting sessions. The record indicates the Board would

was communicated to the Board and was thought to authorize certain Board meeting actions currently under scrutiny, namely the Board’s failure to properly record by audio, video or transcription both open and closed meetings. Also, the OOG notes the Board has been exceptionally responsive and cooperative since issuance of the March 8, 2016, OOG Advisory Opinion. Upon further investigation, and considering the Board’s actions of late, the OOG finds some credibility in the latter of the Board’s representations and therefore no longer interprets the Board’s earlier non-responsiveness as reckless and willful disregard of the OMA.

⁴ The Board’s website refers to the April 13, 2016 Pre-Board Monthly Meeting sessions as “Brown Bag Monthly Meeting.” <http://www.dchousing.org/doc.aspx?docid=201604120901433871>

⁵ The December 9, 2015, Pre-Board agenda lists “briefings” of Resolution 15-32, “To Authorize Implementation of Energy Capital Improvement Program (ECIP) Phase2; and Related Financing”; a Policy Discussion entitled, “Public Housing Household Incomes That Exceed Initial Income Eligibility Limits”; and a “Scattered Site Update.” However, these Pre-Board Monthly Meeting agenda items are not on the December 9, 2015, Regular Monthly Meeting agenda and there is no discussion of these items in the December 9, 2015 Board meeting session minutes. In fact, the “Resolution” section of the December 9, 2015, Board meeting session minutes states: “[T]here was no business resolutions for the December Board meeting.”

⁶The Pre-Board Meeting agendas contain the following sections which the Regular Monthly Meeting agendas omit: “Executive Director’s Update”; “Commissioner’s Issues” and in some instances “Education Session.”

“reconsider” and vote, when necessary, on the matters previously under discussion during the Pre-Board Monthly Meetings. In the conduct of Regular Monthly Meetings the Board was in compliance with the Notice of Meeting requirements of D.C. Official Code § 2-576, by timely publishing and updating its annual schedule of meetings in the District of Columbia Register. However, as the OOG March 8, 2016, Advisory Opinion states, the Board’s failure to provide full records of meeting session minutes and failing to make meeting minutes easily accessible to the public constitutes a violation of the Record of Minutes requirements of D.C. Official Code § 2-578.

Committee Meetings

Also, the Board periodically met as one of five standing committees. Each committee was comprised of three Board members. The Board’s standing committees that met during January, 2015 through December 2015, were the: (1) Committee on Audit and Financing; (2) Committee on Development and Modernization; (3) Committee on Operations; (4) Committee on Education; and, (5) Committee on Resident Initiatives.⁷ The Board’s Counsel informed the OOG that Board members did not vote on any matters during committee meetings.

Symposiums

The provided records show the Board held three symposiums. During the March 23, 2016, meeting with the OOG, the Board’s counsel stated that the symposiums were trainings sessions for the Board and D.C. Housing Authority staff. From January, 2015 through December, 2015, the Board held symposiums on: (1) “Waiting List Reengineering” (March 26, 2015); “Budget” (June 26, 2015); and, “Real Estate” (October 23, 2015). The Board did not provide the OOG with any audio, video or transcriptions of these symposiums.⁸

Discussion

Pre-Board Monthly Meetings are improper closed/executive sessions

At issue is whether the OMA regulates the Board’s, “Pre-Board Monthly Meetings.” A review of the OMA’s definition of the term “meeting” indicates that it does. D.C. Official Code § 2-574(1) defines “meeting” as “any gathering of a quorum of the members of a public body, including hearings and roundtables, whether formal or informal, regular, special, or emergency, at which the members consider, conduct, or advise on public business, including gathering information, taking testimony, discussing, deliberating, recommending, and voting, regardless whether held in person, by telephone, electronically, or by other means of communication.”⁹ What occurs during the Pre-Board Monthly Meetings meets the letter of the OMA definition of “meeting.” Specifically, the presence of a quorum of the members of the Board who gather to discuss and

⁷ The Committee on Resident Initiatives is also referred to as the Committee on Resident Services.

⁸ In a March 23, 2016, email to OOG Director Hughes, Chelsea Johnson, Esq., confirmed that audio, video or transcriptions of the symposiums do not exist.

⁹ D.C. Official Code § 2-574 excludes certain gatherings from the definition of meeting. None of the exclusions apply to the pre-Board Monthly Meetings.

consider items within the purview of the Board’s authority is clearly a “meeting” under the OMA.

An additional characteristic of the Pre-Board Monthly Meetings was closure to the public. The Pre-Board Monthly Meetings are in effect closed/executive sessions of the Board. Therefore, the Board must strictly follow the provisions of the OMA in the conduct of these closed/executive sessions. The provisions of the OMA applicable to the Board’s closed/executive sessions are: the “Open Meetings” requirements of D.C. Official Code § 2-575; the “Notice of Meetings” requirements of D.C. Official Code § 2-576; and the Record of Meeting requirements of D.C. Official Code § 2-578(a). Because of the Board’s failure to follow these provisions with respect to the closed Pre-Board Monthly Meetings, the OOG finds the Board’s closed/executive sessions violate the Act.

D.C. Official Code §2- 575(c), contains the statutory protocol 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 be discussed. A copy of the roll call vote and statement shall be provided in writing and made available to the public.

It is undisputed that the Board did not follow the statutory protocol of D.C. Official Code § 2-575 (c). The sources of information reviewed, including the Pre-Board Monthly Meetings agendas also support the complaint allegation and the OOG’s conclusion that the Board violated D.C. Official Code § 2-575(c).¹⁰ This means the Board may not enter into Pre-Board Monthly Meetings in closure, and must follow enumerated steps as set out in D.C. Official Code § 2-575(c). It is indisputable that the statute requires the Board to first meet in a public session, at which a majority of members present vote for closure and for the presiding officer to recite the specific citation from D.C. Code § 2-575(d) for the closure, and the subjects to be discussed during the closure. Additionally, prior to a public body meeting in a closed/executive session advance notice to the public must be given of the closure. This advance notice to the public is necessary, “to ensure public entitlement to as full and complete information regarding the affairs of government and those who represent them.” D.C. Official Code § 2-572. The OMA, requires that a public body provide advance notice to the public “before meeting in open or closed session.” (D.C. Official Code § 2-576). The OOG finds that the Board did not provide the public advance notice of its closed Pre-Board Monthly Meetings, and the failure to do so is in violation

¹⁰ A review of the Pre-Board Monthly Meeting Agendas reveals that some agenda items may fall into one of the fourteen categories of OMA exceptions to open meetings. Therefore, the Board could possibly meet in closed/executive session to consider these matters. The OOG also notes that while the Board must provide notice of Board Symposiums, these matters may be exceptions to the open meeting requirements of the OMA under D.C. Code § 2-575(b)(12) since the purpose is to “train and develop members of a public body staff.”

of the OMA.¹¹ The OOG’s January 8, 2016, review of the Board’s website supports this conclusion. The OOG found at that time that the Board did post meeting agendas for March, 2015 through February, 2016 along with embedded “pdfs” of resolutions the Board had acted upon during this period. However, these “Regular Monthly Meeting Agendas do not contain any advance notice to the public of the closed Pre-Board Monthly Meetings as the OMA requires.”¹²

The Board did not make audio, video or transcriptions of the Pre-Board Monthly Meetings. The OMA also contains mandatory record requirements for a public body. Records must be maintained whether the public body meets in an open or closed/executive session.¹³ D.C. Official Code § 2-578 contains the OMA “Record of Meetings” requirements. D.C. Official Code § 2-578(a) makes it abundantly clear that:

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. (*Emphasis added*).

Counsel to the Board informed the OOG during the March 23, 2016, meeting that no minutes, audio or video of Pre-Board Monthly Meetings exists. While there may be mitigating factors for the Board’s lack of compliance with the requirements of the OMA, the OOG finds the Board in violation of this provision of the OMA.

Recommendations

The OOG makes the following recommendations for the immediate implementation by the Board, to ensure all future Board meetings fully comply with the provisions of the OMA:

- (1) timely publish all notices, draft and final meeting agendas, and draft and final open session meetings minutes;
- (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. Official Code § 2-575(d) for meeting in closure;
- (3) strictly adhere to the statutory protocol 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 § 2-575(c) to ensure that all matters for discussion or consideration in closed/executive session fall within one of the category of exceptions;
- (5) rectify the Communication problem that precipitated the Board and its counsel

¹¹ The Board also did not provide advance public notice of its committee meetings or symposiums as the OMA requires.

¹² The Board is credited for timely publishing and updating the annual schedule of its 2015 meetings in the District of Columbia Register on February 13, 2015, and its 2016 annual public meeting schedule on December 25, 2015. However, publication of the 2015 annual meetings did not provide the public the advance notice to the public of the Pre-Board Meeting closures pursuant to D.C. Official Code § 2-576.

¹³ The Record of Meetings requirement also holds true for the Board’s Committee Meetings and Board Symposiums. The Board’s March 23, 2016 document submission to the OOG contained Committee Meeting Session Minutes for the Committee on Residential Services (June 25, 2015; September 30, 2015; and, October 29, 2015); and the Committee on Education (March 23, 2015); all Committee agendas for Committee Meetings for the requested period 2015 Calendars for the Committee on Residential Services and the Symposium agendas. Two copies of each of the March 25, 2015 “Waiting List” symposium and the October 23, 2015 “Real Estate Symposiums” were provided to the OOG. These additional agendas both agenda’s contained handwritten notes, apparently from the respective symposiums.

not being made aware of the Notice of Complaint #OOG-0004_1.07.16 and the OOG's request for additional information; and, (6) maintain records of all meetings, whether meetings are styled as committee meetings, symposiums or Pre-Board Monthly Meetings. The OOG notes the Board has already taken steps to correct its past non-compliance issues. This includes the Board's holding an in-house training on the requirements of the OMA on April 13, 2016.¹⁴ Despite this in-house training, the Board, and staff who administratively support the Board, are required to attend an OOG OMA training within 60 days upon this issuance of this opinion.

Conclusion

In the conduct of its 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. The Board also failed to record these sessions. 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 Board's counsel offered two reasons for the non-response to the OOG requests and the Board's non-compliance with the OMA. First, due to a communication breakdown within the District of Columbia Housing Authority the OOG requests were not transmitted from the Board Liaison to the Board and the Board's counsel. The lack of communication between the Board, the Board's Liaison and its legal counsel is a matter outside of the OOG's control but must be rectified. Secondly, counsel states a District Housing Authority's employee in attendance at OMA training either misunderstood or received instructions on the OMA thought to authorize certain Board meeting actions which led the Board to violating the OMA. To rectify any ongoing misunderstanding of the OMA, the Board is advised to undergo training by the OOG.

The OOG notes the Board has been exceptionally responsive and cooperative since the issuance of the March 8, 2016, OOG Advisory Opinion. As a result of the Board's candor and willingness to provide all requested records allowing OOG to conduct a thorough investigation, the OOG finds credibility in Board's representations of lack of knowledge of the Complaint, and considers this a mitigating factor in finding that the Board no longer stands in reckless and willful disregard of the OMA and the regulations which implement the OMA.

Sincerely,



TRACI L. HUGHES, ESQ.

Director, Office of Open Government

Board of Ethics and Government Accountability

¹⁴ Chelsea J. Johnson, Esq., consulted with OOG Director Hughes on several OMA related matters prior to the Board's April 13, 2016 in-house training on the OMA.

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