

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



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VIA ELECTRONIC MAIL

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RE: OOG-004_9.7.16_AO

Dear Ms. Torrez:

On August 18, 2016, you met with Attorney Advisor Johnnie Barton regarding compliance by the Commission on Selection and Tenure (the COST) with the Open Meetings Act (OMA).¹ The questions and concerns raised at that time were: (1) whether scheduling of meetings by a quorum of members of the COST by telephone conference would constitute a meeting; (2) whether strict compliance with the OMA's "Open Meeting" requirements by the COST would compromise the identity of an administrative law judge facing adverse personnel action, if the judge was present during the COST's transition from an open session into a closed/executive session that was not held by electronic means; and (3) whether the COST should be exempt from the OMA. The OOG thought it prudent to offer a formal reply setting out our analysis and proper application of the OMA in light of the issues and concerns raised with Mr. Barton.

I. THE OMA DEFINES A MEETING AS OCCURRING WHENEVER A QUORUM OF THE MEMBERS OF THE COST SCHEDULE MEETINGS BY TELEPHONE CONFERENCE

The OMA's definition of a "Meeting" is "any gathering of a quorum² of the members of a public body, including hearings and roundtables, whether formal or informal, regular, special, or emergency...including gathering information, taking testimony, discussing, deliberating,

¹ After the August 18, 2016, meeting you electronically transmitted to Attorney Barton a copy of 6B DCMR § 3730, the regulations which govern investigations by the COST. As discussed *infra*, the OOG's review of these regulations finds that the COST is fully capable of carrying out these regulations while remaining in compliance with the OMA's provisions regarding closed/executive sessions.

² D.C. Official Code § 2-1831.07(a) provides: "[t]he Commission shall consist of 3 voting members." D.C. Official Code § 2-1831.07(b) states: "[a] majority of the Commission's voting members shall constitute a quorum." Therefore, two members of the COST constitute a quorum to conduct of public business.

recommending and voting, regardless of whether held in person, by telephone, electronically, or by other means of communication...” (D.C. Official Code § 2-574(1)).

D. C. Official Code § 2-577(a)(1-3), expressly provides that public bodies may hold meetings by electronic means³ which includes video conferences and telephone conferences, “...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.” Regardless of the form or forum of the meeting, it is the intent of the OMA to protect the public’s right to observe and be present during meetings of all public bodies.⁴

The OMA defines meeting broadly⁵ as any gathering of a quorum of a public body to “consider, conduct, or advise on public business.” The aforementioned language clearly encompasses the activities members of the COST would engage in while reaching a consensus on its meeting schedule when conducted by telephone conference.⁶

Further, the language in the OMA’s legislative history confirms the soundness of this interpretation. The committee report for the OMA, Council of the District of Columbia, Committee on Government Operations and the Environment, Bill 18-716, (“Open Meetings Act of 2010”)(Comm. Rpt.) states:

In defining the term meeting, the committee print again broadens the current law. **The term would include any gathering of a quorum of the members of a public body where the members consider, conduct, or advise on public business.** Thus, not only would this include any meeting where official action is taken, **but would also include any meeting in preparation for official action or where official action is being discussed.** (Comm. Rpt. at 5) (Emphasis added).

The statutory language and the legislative history of the OMA leave no ambiguity as to the types of actions which constitute a meeting. Members of the COST gathering by telephone conference to schedule meeting dates clearly fits within the category of “any meeting in preparation for official action or where official action is being discussed” (Id.), and that such meetings are governed by the OMA. Therefore, the members of the COST may not use telephone conferences to schedule meeting dates without providing public notice,⁷ and making and publishing a record of such meetings.⁸

³ The OMA specifies that emails between members of a public body do not constitute an electronic meeting. (D.C. Official Code § 2-577(c)). However, public bodies should not utilize email to circumvent the provisions of the OMA by conducting official business as doing so would be in violation of the OMA.

⁴ Whether the COST is a public body is not at issue, and is not reached by this opinion.

⁵ The Rules of Construction for the OMA which are found at D.C. Official Code § 2-573 supports the broad interpretation of the OMA which states: “[T]he law is to be construed broadly to maximize public meeting access. Exceptions shall be construed narrowly and shall permit closure of meetings only as authorized.”

⁶ As you indicated during the meeting on August 18, 2016, COST members would not only discuss, recommend or advise on dates and times of meetings during a telephone conference, but also would discuss, recommend and advise on locations where meetings would take place.

⁷ D.C. Official Code § 2-576(1)(2) requires all meetings to be noticed within 48 hours or two business days, and that the notice be published online, and in the location in which the meeting is to occur.

⁸ D.C. Official Code § 2-578 requires all meetings, open and closed sessions, to be recorded.

II. THE OMA’S CATEGORY OF EXCEPTIONS PROVIDE SUFFICIENT PROTECTIONS TO ENSURE THE CONFIDENTIALITY OF MATTERS THE COST WOULD LIKELY DISCUSS IN CLOSED/EXECUTIVE SESSIONS

There were also concerns raised about maintaining confidentiality – specifically when the COST transitions from an open session to a closed/executive session to discuss personnel matters. The OMA’s category of exceptions found at D.C. Official Code §2-575(b) ensure the confidentiality of those matters the COST would most likely discuss in closed/executive sessions. These exceptions include discussions on: personnel matters; disciplinary matters; and, plans to discuss, or hear reports concerning ongoing or planned investigations or alleged criminal or civil misconduct or violations of law or regulations. However, a review of the COST’s March 3, 2016, and June 21, 2016, “Notice of Public Meeting,” indicates that the COST is not relying upon any of the exceptions to the OMA when it is necessary to enter closed/executive sessions. In fact, the agendas reveal the judges’ names and the specific personnel action to be discussed in the closed/executive session. This is contrary to the requirements of the OMA and potentially violative of personal privacy interests under the District’s open records law.⁹ The OMA does not require such detailed specificity in either the “Notice of Public Meeting” or the statement to be made by the presiding officer for entering into a closed/executive session.¹⁰

If there are concerns regarding the logistics of using telephone conferences for holding public meetings and the public’s right to observe the meeting, please know that several public bodies currently hold public meetings by telephone conference and seamlessly transition from an open session into a closed/executive session using readily available technology and processes that ensures confidentially.¹¹ The OOG is available to provide further guidance as it relates to this concern if necessary.

III. THE COST IS CAPABLE OF CARRYING OUT ITS STATUTORY DUTIES WITHOUT BEING EXEMPT FROM THE OMA

During the August 18, 2016, meeting you also raised the issue of whether the COST may be exempt from the requirements of the OMA. One of the stated reasons for the COST exploring such an exemption from the OMA is that the Judicial Nominating Commission (the JNC), the public body which makes recommendations to the President of the United States to fill judicial vacancies on the D.C. Superior Court and D.C. Court of Appeals, which you find analogous to the COST’s duties, is exempt from the OMA.¹² However, a review of the legislative history of the JNC indicates that the OMA does not expressly exempt the JNC from its provisions.

⁹ District FOIA prohibits the release of personnel information to anyone other than the employee to whom the information pertains or to the employee’s legal designee. D.C. Official Code § 2-534(a)(2).

¹⁰ The OOG has opined that descriptions of a general nature satisfy the notice requirements under D.C. Official Code §§ 2-575(c)(1) and 2-576(5). The aforementioned does not apply to the 6 DCMR § 3705.7, which require publication in the D.C. Register that the COST is “soliciting the views of litigants, attorneys and members of the public on whether the Administrative Law Judge should be reappointed.”

¹¹ One suggestion is for the COST to have two teleconferencing dial-in numbers, one used to conduct the open session and available to the public, and a different number used to convene the closed/executive session.

¹² The definition of “public body” excludes the District of Columbia courts; governing bodies of public charter schools; the Mayor’s cabinet; and, Advisory Neighborhood Commissioners. (D.C. Official Code §2-574 (3)(A-F)).

The JNC was created by an act of Congress in the District of Columbia Self Government and Government Reorganization Act, approved December 24, 1973 (87 Stat. 795, Pub. L. 93-198, title IV), which is part of the District of Columbia Charter. The list of nominees which the JNC develops is ultimately sent to the President of the United States for consideration to fill judicial vacancies on the D.C. Superior Court and D.C. Court of Appeals. Such nominees are subject to Senate confirmation. D.C. Code § 1-204.34(c)(1), which establishes the JNC also comprises part of Title C of the District of Columbia Charter. The relevant language of D.C. Official Code § 1-204.34(c)(1) originally stated:

(c)(1) The Commission shall act only at meetings called by the Chairman or a majority of the Commission held after notice has been given of such meeting to all Commission members.

In section 9 of the District of Columbia Judicial Efficiency and Improvement Act of 1986, approved October 28, 1986 (100 Stat. 3233; D.C. Official Code § 1-204.34(c)(1))¹³, Congress amended D.C. Official Code § 1-204.34(c)(1) to exempt the JNC from what is commonly known as the District's "Sunshine Act." The amendment consists of the additional language at the end of the existing text of D.C. Code § 1-204.34(c)(1) referenced above, and states: "Meetings of the Commission may be closed to the public. Section 742 of this Act shall not apply to meetings of the Commission." As you may know Section 742 (D.C. Code § 1-207.42) states:

(a) All meetings (including hearings) of any department, agency, board, or commission of the District government, including meetings of the Council of the District of Columbia, at which official action of any kind is taken, shall be open to the public. No resolution, rule, act, regulation, or other official action shall be effective unless taken, made, or enacted at such meeting.

(b) A written transcript or a transcription shall be kept for all such meetings and shall be made available to the public during normal business hours of the District government. Copies of such written transcripts or copies of such transcriptions shall be available, upon request, to the public at reasonable cost.

The OMA and the Sunshine Act are two District laws that regulate the same subject area, i.e., open meetings of public bodies in the District of Columbia.¹⁴ When two statutes simultaneously relate to the same subject area, judicial rules of statutory construction provide that the two statutes should be construed together.¹⁵ Therefore, in determining if the JNC is exempt from the OMA, the OMA and the Sunshine Act must be considered in tandem.

¹³ Section 8 of the District of Columbia Judicial Efficiency and Improvement Act of 1986, states, "Information, records, and other materials furnished to or developed by the Commission in the performance of its duties under this section shall be privileged and confidential. Section 552 of title 5, United States Code (known as the Freedom of Information Act), shall not apply to any such materials."

¹⁴ Both laws have similar names. Section 742 of the Home Rule Act is entitled "Open Meetings." D.C. Law 18-350 (D.C. Official Code § § 2-571- 580), is entitled the "Open Meetings Amendment Act of 2010."

¹⁵ See *George v. Dade*, 769 A.2d 760, 764 (2001), which held, "[W]here two or more statutes relate to the same subject area, we construe them together."

Congress has exempted the JNC from the following requirements of the Sunshine Act:

(1) opening its meetings to the public; and, (2) maintaining a written transcript of its meetings, copies of which are to be made available upon request to the public, during normal business hours at a reasonable cost. While the OMA relates to these same subject areas as the Sunshine Act, the OMA has additional requirements that the Sunshine Act does not contain.¹⁶

It is clear that the JNC is exempt from the District's Sunshine Act and by implication does not have to adhere to similar provisions in the OMA. However, when the two statutes are construed together, the JNC must follow those provisions of the OMA that are not within the scope of its exemption from adherence to the Sunshine Act. A review of the two statutes together reveals that the Sunshine Act does not require the public notice requirements that the OMA contains. Therefore, the JNC must adhere to the "Notice of Meeting" requirements of the OMA (D.C. Official Code § 2-576), which historically the JNC has followed.

It is indisputable that the COST is a public body created by the Council pursuant to section 9 of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-076; D.C. Official Code § 2-1831.06(a)), at a time when the Sunshine Act was the District's only open meetings law until the OMA became law on March 31, 2011. However, the Council did not at that time elect to exempt the COST from the Sunshine Act, when considering its enabling legislation or subsequently from the provisions of the OMA.¹⁷ By not previously exempting the COST from the Sunshine Act or the OMA, the legislature may have conveyed its strong support for the District's public policy of openness and transparency, and also that such exemption is unnecessary.

It is worth noting, the OMA begins with a strong statement in support of transparency and openness in government, which states: "[I]t is the public policy of the District of Columbia 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. Additionally, Mayor's Memorandum 2011-1 and Mayor's Order ~~2014-170~~ 2016-094 also stress the District's public policy and need for greater, rather than less, openness and transparency in government. Indeed, it is true that no public body, including the JNC, is exempt from the OMA in conforming to this public policy. It is only the subject matter discussed that may be shielded from public view as long as the subject matter meets the strict criteria of OMA exceptions. Therefore, based on the content of discussion held with the OOG and the legal analysis and recommendations made herein, the OOG firmly believes that the COST is fully able to carry out its statutory mandate without the need for an exemption from the OMA. The OOG would vigorously oppose legislation exempting the COST from the OMA.

¹⁶ See D.C. Official Code § 2-575(a) and 2-578.

¹⁷ The Council revisited the enabling legislation for the COST in 2004, by adding subsection (d) to D.C. Official Code § 2-1831.06, to protect members from liability.

It is the opinion of the OOG that the proffered analysis resolves the issues and concerns presented regarding the COST's compliance with the OMA. However, if additional information or clarification is necessary, please feel free to contact me directly or Attorney Advisor Johnnie Barton.

Sincerely,



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