



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



May 8, 2025



**RE: Whether the D.C. Zoning Commission Properly Conducted Its Closed Meetings Under the Open Meetings Act (OOG-2024-003\_AO)**

Dear 

On March 14, 2024, the Office of Open Government (“OOG”) received your complaint (the “Complaint”) alleging violations of the Open Meetings Act (“OMA”)<sup>1</sup> by the District of Columbia’s Zoning Commission (“Commission”). You allege that the Commission has a practice of “routinely holding illegally closed meetings despite a clear OOG Legal Opinion and the unambiguous text of D.C. Official Code § 2-575.”<sup>2</sup> Specifically, you allege that the following twelve (12) meetings of the Commission were illegally closed: February 9, 2023; February 23, 2023; March 9, 2023; March 30, 2023; April 13, 2023; April 27, 2023; May 11, 2023; January 11, 2024; January 25, 2024; February 8, 2024; February 29, 2024; and March 14, 2024.<sup>3</sup>

The Director of Open Government may issue advisory opinions regarding public bodies’ OMA compliance.<sup>4</sup> OOG’s statutory charge is to ensure that meetings of public bodies adhere to the OMA by investigating OMA complaints and taking action to enforce the OMA.<sup>5</sup> The Director and OOG take such action to ensure that “all persons” receive “[f]ull and complete information regarding the affairs of government and the actions of those who represent them.”<sup>6</sup> Further, for a “pattern or practice of willfully participating in one or more closed meetings” in violation of the OMA, OOG may file a lawsuit in D.C. Superior Court and the Court may issue “a civil fine of not

---

<sup>1</sup> Title IV of Pub. L. 90-614, added by D.C. Law 18-350, effective March 31, 2011 (D.C. Official Code § 2-571 *et seq.*).

<sup>2</sup> March 14, 2024, Complaint

<sup>3</sup> *Id.*

<sup>4</sup> D.C. Official Code § 1-1162.05c.

<sup>5</sup> D.C. Official Code § 2-579.

<sup>6</sup> D.C. Official Code § 2-572.

more than \$500 per violation.”<sup>7</sup> OOG has a policy of attempting to resolve matters without resorting to litigation; therefore, in response to this Complaint, I am issuing this advisory opinion pursuant to 3 DCMR § 10400 *et seq.*

## **I. BACKGROUND**

At issue is the Commission’s practice of meeting in stand-alone closed/executive sessions after meeting in an open session where it votes to schedule dates for multiple closed meetings. These closed meetings then take place independent of an open session. There is a long history of correspondence on this issue between OOG and the public bodies which are housed within the Office of Zoning (OZ). As such, I will summarize OOG’s previous guidance on this issue, the details of the instant complaint, and the response provided by the OZ on behalf of the Commission.

### **A. First Advisory Opinion: OOG-0001\_6.1.17\_AO**

On June 7, 2017<sup>8</sup>, OOG issued advisory opinion OOG-0001\_6.1.17\_AO in response to a complaint<sup>9</sup> which alleged that the Board of Zoning Adjustment (“BZA”) failed to properly notice a December 14, 2016, hearing in which the BZA took official action on “a contested case in violation of: (1) the notice of meeting provisions of D.C. Official Code § 2-576; the open meetings provisions of D.C. Official Code § 2-575(a); and, taking action in an improper closed session in violation of D.C. Official Code § 2-575(c)(1-2) and (d).”<sup>10</sup> OOG found, in relevant part, that the December 14, 2016, public hearing of the BZA “was an improper closed session in clear violation of the OMA and BZA regulations.”<sup>11</sup>

### **B. Second Advisory Opinion: OOG-0007\_10.25.17\_AO**

On July 6, 2017, OOG requested electronic recordings as part of a follow-up request to the June 7, 2017, advisory opinion. OZ Director Sara Bardin submitted audio recordings of BZA closed meetings for six (6) dates. Based on review of these closed sessions, OOG found (1) that the BZA held stand-alone closed meetings that were never open to the public; and (2) that the BZA failed to return to an open session to place on the public record, where appropriate, any official action it took during the closures.<sup>12</sup> OOG concluded that these actions violated the OMA.

On October 25, 2017, OOG issued advisory opinion OOG-0007\_10.25.17\_AO which found “the BZA in violation of the OMA’s “open meetings” provisions: (1) for conducting

---

<sup>7</sup> D.C. Official Code § 2-579.

<sup>8</sup> This advisory opinion was originally issued by OOG on June 1, 2017. A revised version of the opinion was issued on June 7, 2017, to correct some incorrect dates as well as references to a *Motion to Stay* which had been improperly noted as a *Motion to Vacate*.

<sup>9</sup> Complaint # OOG-0001\_3.20.17\_AO.

<sup>10</sup> OOG-0001\_6.1.17\_AO. The full text of this Advisory Opinion is found at <https://www.open-dc.gov/documents/oog-000132017-revised-6717oma-ao-makenta-complaint-resolving-whether-bza-failed-properly>

<sup>11</sup> *Id.* at page 13.

<sup>12</sup> OOG-0007\_10.25.17\_AO, page 3. The full text of this Advisory Opinion is found at <https://www.open-dc.gov/documents/oog-007102517ao-whether-oma-authorizes-public-body-meet-stand-alone-closedexecutive>

meetings in improper closed sessions (D.C. Official Code § 2-575(a)); and (2) for failing to strictly adhere to the OMA's protocol for entering closed/executive sessions (D.C. Official Code § 2-575(c))."<sup>13</sup> In its findings, OOG opined "that the OMA mandates that a public body first meet in an open session where it must follow the OMA protocol for entering a closed/executive session. The public body must then return to an open session to put on the record any official action that was taken during the closure if it is appropriate to do so."<sup>14</sup> OOG further advised that "D.C. Official Code § 2-575(c) does not preclude a public body from holding an entire meeting in closure, only that prior to doing so the public body first meet in an open session which it resumes after meeting in closure. Plainly stated, the closed session must be part of a single meeting."<sup>15</sup>

In finding the foregoing, OOG supported its analysis with four points. First, OOG asserted that its legal opinion that a public body may not meet in a stand-alone closed session was a reasonable interpretation of D.C. Official Code § 2-575(c). In support of this assertion, OOG noted: "(1) the OMA's 'Statement of policy' which is to promote transparency (D.C. Official Code § 2-572); (2) the OMA's 'rules of construction' which require interpreting the statute to maximize public access to meetings (D.C. Official Code § 2-573); (3) the OMA's legislative history; and (4) the statutory adoption of OOG's interpretation of D.C. Official Code § 2-575(c) in several jurisdictions."<sup>16</sup>

Second, OOG asserted that public hearing testimony by Robert S. Becker, a drafter of the OMA, included in the Act's legislative history, supported OOG's interpretation of D.C. Official Code § 2-575(c) as being reasonable. OOG quoted the following testimony of Mr. Becker, given during the July 12, 2010, public hearing on the OMA:

The justification for closure is no greater for deliberations than it would be for the hearing or meeting at which the body received testimony and argument about which the body must deliberate. If attendees will be dissatisfied with the public body's decision reached in secret, they undoubtedly will express their feelings when members return to open session to ratify their decision.<sup>17</sup>

It was OOG's contention that this testimony in the legislative history makes it clear that it was never the intent for a public body to meet in a stand-alone open session, but rather that the clear intent was for a public body to always meet first in an open session where it follows the OMA protocol for entering into a closed session. Then, after adjourning the closed session, the public

---

<sup>13</sup> *Id.* at page 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> OOG-0007\_10.25.17\_AO at page 4.

<sup>17</sup> Report of the Committee on Government Operations and the Environment on Bill 18-716, the Open Meetings Act of 2010, Attachment E, D.C. Open Government Coalition Memo of Robert S. Becker at page 8 (Council of the District of Columbia December 2, 2010) (hereinafter OMA Comm. Rpt.).

body must resume the open session and place on the record, if appropriate, any official action taken during the closure.<sup>18</sup>

Third, by way of example, OOG noted BZA's use of D.C. Official Code § 2-575(b)(4)(A), which contains the attorney-client exception to enter closed/executive session. This portion of the statute authorizes a public body, upon request, to waive the attorney-client privilege, thereby allowing the public to attend what is a closed/executive session. OOG noted that BZA's closed session practices rendered moot any exercise of the waiver request of the attorney-client privilege. The logic behind this being that if BZA decided at a stand-alone closed meeting to grant a waiver of the attorney-client privilege, doing so would not benefit the public as the public would not be present if there were no open meeting held in conjunction with the closed meeting. By contrast, this would not be true under OOG's interpretation of D.C. Official Code § 2-575(c), as the public would be present if the meeting or a portion of the meeting was closed in a manner consistent with OOG's guidance.<sup>19</sup>

Finally, OOG noted that its interpretation of D.C. Official Code § 2-575(c) is codified as law in several jurisdictions. Specifically, OOG cited open meetings laws from Florida, Virginia, and Rhode Island as containing provisions which require public bodies to reopen following a closed session.<sup>20</sup>

### **C. The Complaint**

On March 14, 2024, Chevy Chase Voice, Inc. brought the instant Complaint to OOG. The Complaint asserts that the routine practice of the Commission is to close meetings to the public in violation of the OMA and in direct conflict with the guidance provided in OOG advisory opinion OOG-0007\_10.25.17\_AO. The Complaint alleges that a review of the Combined Zoning Case Calendar ("Calendar")<sup>21</sup> shows that the Commission held illegally closed meetings on twelve (12) separate occasions from January 1, 2023, up to the time the Complaint was filed.<sup>22</sup> Specifically, the Complaint alleges that the following meetings were illegally closed: February 9, 2023; February 23, 2023; March 9, 2023; March 30, 2023; April 13, 2023; April 27, 2023; May 11, 2023; January 11, 2024; January 25, 2024; February 8, 2024; February 29, 2024; and March 14, 2024.<sup>23</sup>

The Complaint alleges that on each of the dates listed above, the Commission held a closed meeting which preceded the open public meeting. Closed meetings began at 3:00 p.m. or 3:15 p.m. and public open meetings began later that same day at 4:00 p.m.<sup>24</sup> The Complaint further alleges that no vote was taken on the record at any of the open meetings on the twelve (12) dates between

---

<sup>18</sup> OOG-0007\_10.25.17\_AO, pages 2, 3.

<sup>19</sup> OOG-0007\_10.25.17\_AO, page 5.

<sup>20</sup> *Id.* at pages 5,6.

<sup>21</sup> Office of Zoning website, <https://dcoz.dc.gov/service/zcbza-calendar>

<sup>22</sup> March 14, 2024, Complaint

<sup>23</sup> March 14, 2024, Complaint.

<sup>24</sup> *Id.* at page 2.

February 9, 2023, and March 14, 2024, to go into closed session.<sup>25</sup> Additionally, the Complaint alleges that no statement was made by the chair providing the reason or reasons for going into closed session. The Complaint asserts that the two meetings were essentially treated as separate meetings by the chair.<sup>26</sup> Finally, the Complaint asserts that given the alleged OMA violations, the complainants had concerns about whether proper electronic recordings and minutes were being made by the Commission of each closed meeting as required by D.C. Official Code § 2-578.<sup>27</sup>

#### **D. Commission Response to the Complaint**

OOG provided a copy of the Complaint to the Commission and afforded them the opportunity to respond to the allegations. On April 9, 2024, OZ Director Sara A. Bardin submitted a response to the Complaint on behalf of the Commission. Director Bardin noted that following the receipt of OOG's October 25, 2017, opinion and an accompanying letter from OOG dated November 1, 2017, "thereafter, for some period of time between latter 2017 through latter April 2019, the Commission held closed meetings as advised by OOG in its October 25, 2017, opinion."<sup>28</sup>

Subsequently, the Commission sought advice from its legal counsel, the Office of the Attorney General (OAG) Land Use Section of the Commercial Division, on whether the Commission's closed meeting procedures complied with the Open Meetings Act and whether OOG may make its advisory opinions "binding," or order the Commission to comply with them. The Land Use Section in turn posed these questions to the OAG Legal Counsel Division (LCD).

On July 23, 2019, LCD provided a legal opinion letter ("LCD Opinion") which addressed these questions.<sup>29</sup> Director Bardin asserts that the LCD opinion provided a thorough legal analysis of the Commission's closed meeting procedures and reached the following three main conclusions:

- (1) The Commission's closed meeting procedures comply with the notice, approval, and meeting conduct requirements of the [Open Meetings] Act;
- (2) The Act does not prohibit the Commission from conducting stand-alone closed meetings, and the Act does not require the Commission to return immediately to open session after it finishes a closed meeting to put on the record any official action taken during the closed meeting because the Commission cannot take official action in a closed meeting as §742(a) of the Home Rule Act requires that all official Commission actions be taken at open meetings; and

---

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at page 3.

<sup>28</sup> April 9, 2024, Response to Complaint, page 2.

<sup>29</sup> OZ waived attorney-client privilege and provided a copy of the July 23, 2019, LCD Opinion as part of its response to the instant complaint.

- (3) The Act and the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (“BEGA Act”) confirm that the opinions issued by OOG are advisory opinions and carry no binding force.<sup>30</sup>

Director Bardin reported that “based on the conclusions in the LCD Opinion and the email from legal counsel, both dated July 23, 2019, the Commission continued conducting stand-alone closed meetings, which it started doing in latter April 2019, and has continued this practice to present day. OZ contends that the Commission’s closed meetings comply with the requirements of the Act.”<sup>31</sup>

The OZ response elaborates on the three main conclusions of the LCD opinion. First, OZ notes that it provided notice of the closed meetings to be held in calendar year 2023 in the December 30, 2022, District of Columbia Register (“DC Register”), not less than 48 hours or two business days, before every calendar year 2023 meeting.<sup>32</sup> It goes on to note that it posted notice of the 2023 closed meetings in OZ’s physical office and on the OZ website, in accordance with the notice requirements of D.C. Official Code § 2-576.<sup>33</sup> OZ provided a copy of the notice provided in the DC Register for the 2023 closed meetings as Exhibit D. The notice states that the Commission’s closed meetings will be held at 3:15 p.m. each Monday and Thursday that a public meeting or hearing is scheduled to be held for calendar year 2023, to receive legal advice from counsel, per D.C. Official Code § 2-575(4), and to deliberate, but not to vote, on the contested cases, per D.C. Official Code § 2-575(13). OZ noted that it provided the same notice outlined above for closed meetings to be held in calendar year 2024, except the notice stated the meetings would be held at 3:30 p.m.<sup>34</sup> This notice was published in the December 29, 2023, DC register and attached to OZ’s response as Exhibit E.<sup>35</sup>

Second, OZ asserted that the Act does not require the Commission to first convene an open meeting and vote to hold a closed meeting every time it holds a closed meeting.<sup>36</sup> OZ noted that D.C. Official Code § 2-575(c) requires the Commission to meet in public session, make a statement providing the reason for closure, and vote in favor of closure before a meeting may be closed. It is OZ’s contention that their actions, as described above, satisfy the requirements of D.C. Official Code § 2-575(c). OZ provided transcripts of the Commission’s votes in the December 15, 2022, and December 14, 2023, public meetings at which it voted to hold closed meetings for the 2023 and 2024 calendar years respectively.

Third, OZ asserts that the Act does not require the Commission to immediately reconvene in open session following a closed meeting to put any official action on the record that was taken

---

<sup>30</sup> April 9, 2024, Response to Complaint.

<sup>31</sup> April 9, 2024, Response to Complaint.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at page 3.

in the closed meeting because they assert that no official action can be taken in a closed meeting, pursuant to § 742(a) of the Home Rule Act, which provides that official actions must be taken at open meetings.<sup>37</sup>

Based on the foregoing, OZ asserts that the Commission's closed meeting procedures fully comply with the requirements of the OMA. Further, OZ stated that "OZ and the Commission and its legal counsel accepted the LCD Opinion's conclusion that OOG opinions are advisory opinions, including the OOG October 25, 2017, opinion, with no binding force as confirmed by the Act and the BEGA Act and discussed in detail in the LCD Opinion's analysis."<sup>38</sup> OZ reports that it and the Commission relied on the LCD Opinion as the basis for resuming its practice of conducting stand-alone close meetings from 2019 to present and that "OZ and the Commission did not believe there was an obligation to formally advise OOG when it changed its closed meetings practices in 2019 because it understood OOG's October 25, 2017 opinion to be advisory and non-binding."<sup>39</sup>

The Commission stated that it sought the LCD Opinion and changed its procedure to better serve the public. Specifically, the Commission says that "[b]y holding the closed meeting at fixed times determined in advance before the public meeting begins, the Commission spares interested members of the public from having to wait for an indeterminate amount of time while it receives advice from its legal counsel about each case before beginning the public meetings." They assert that "the Commission then deliberates fully and acts at its public meetings."<sup>40</sup>

Finally, OZ noted that the Complaint raised concerns about whether there were proper electronic recordings and minutes being made by the Commission of each closed meeting as required by D.C. Official Code § 2-578. OZ reported that it records every closed meeting held by the Commission. It noted that the Complaint specifically raised concerns about whether the closed meeting on November 9, 2023, was recorded. OZ stated that this meeting was recorded in accordance with the OMA and attached a Webex Commission meeting's recording log as "Exhibit H" to show that this meeting was recorded. Given that the meeting was closed for OZ to receive legal advice from counsel, OZ noted that the meetings are protected by attorney-client privilege and the Commission elected not to waive the privilege to provide the recordings themselves.<sup>41</sup>

## II. DISCUSSION

As an initial matter, I note there is no dispute that the Commission conducted stand-alone closed meetings on the dates listed in the Complaint and that this practice continues to the present day.<sup>42</sup> The Commission readily admits this in its response. Our disagreement with the Commission stems from two main areas: first, our differing interpretations of the OMA's provisions for entering

---

<sup>37</sup> April 9, 2024, Response to Complaint, page 3.

<sup>38</sup> April 9, 2024, Response to Complaint, page 3.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> April 9, 2024, Response to Complaint, page 4.

<sup>42</sup> April 9, 2024, Response to Complaint, page 2.

into closed session, contained in D.C. Official Code § 2-575(b) and (c); and secondly, whether the Commission may disregard OOG's guidance with respect to proper compliance with the OMA.

**A. The Commission's interpretation of D.C. Official Code § 2-575(b) is an incorrect application of D.C. law.**

The OMA requires meetings to be open but under a limited set of circumstances, a meeting may take place in a closed session.<sup>43</sup> Before a meeting or portion of a meeting may be closed, the public body shall meet in public session at which a majority of the members of the public body present vote in favor of the closure.<sup>44</sup> 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 the statement shall be provided in writing and made available to the public.<sup>45</sup> A public body that meets in closed session shall not discuss or consider matters other than those matters listed under subsection (b) of this section.<sup>46</sup>

As noted above, OOG's consistent guidance has been "that the OMA mandates that a public body meet *first* in an open session where it must follow the OMA protocol for entering into closed/executive session. The public body must then return to an open session to put on the record any official action that was taken during the closure if it is appropriate to do so."<sup>47</sup> We have also consistently advised that "D.C. Official Code § 2-575(c) does not preclude a public body from holding an entire meeting in closure, only that prior to doing so the public body first meet in an open session which it resumes after meeting in closure. Plainly stated, the closed session must be part of a single meeting."<sup>48</sup>

Rather than adhere to the guidance provided by OOG, the Commission has chosen to hold an open meeting each December at which it votes to close a set schedule of meetings for the next calendar year. The Commission's stated purpose for closing those sessions is "for the purpose of obtaining legal advice from counsel on all cases and to deliberate upon, but not vote on, the contested cases scheduled on the Commission's agendas..."<sup>49</sup> The Commission asserts that this practice satisfies the requirements of the OMA. The OOG disagrees.

Under the Commission's interpretation of D.C. Official Code § 2-575(c)(1) there seems to be no rational limit to the word "before" as it appears in the section which states, "[b]efore a meeting or portion of a meeting may be closed, the public body shall meet in public session at which a majority of the members of the public body present vote in favor of closure." The Commission has interpreted this section to mean that they may meet in open session once to vote

---

<sup>43</sup> D.C. Official Code § 2-575(b).

<sup>44</sup> D.C. Official Code § 2-575(c)(1).

<sup>45</sup> D.C. Official Code § 2-575(c)(2).

<sup>46</sup> D.C. Official Code § 2-575(d).

<sup>47</sup> OOG-0007\_10.25.17\_AO, page 2.

<sup>48</sup> *Id.*

<sup>49</sup> April 9, 2024, OZ Response to Complaint, page 3.



to schedule multiple closed sessions so long as that open session occurs at, presumably, *any time* before the closed session. We state, however, that the more reasonable and logical reading of this section is that a public body must meet in public session before a meeting or portion of a meeting is closed *each time* there is a closure. Under the Commission's interpretation, there would be no limit to holding one open session at which a public body schedules a full year or more of closed sessions in advance, so long as it states that it is doing so for one of the reasons enumerated in D.C. Official Code § 2-575(b) and a majority of the members present vote in favor of closure.

As OOG mentioned in its October 25, 2017, advisory opinion, such an interpretation by the Commission is contrary to both the OMA's "Statement of Policy" which is to promote transparency<sup>50</sup> and the OMA's "Rules of Construction" which require interpreting the statute to maximize public access to meetings.<sup>51</sup> Additionally, it strains credulity that the Commission can accurately provide a description of the subjects to be discussed in closed sessions (as required by D.C. Official Code § 2-575(c)(2)) so far in advance of the closed sessions themselves. Indeed, this point alone raises concerns of ongoing deficient notice on the part of the Commission.

I presume that some of the work of the Commission may be predictable to a degree. This possibility may lead them to believe that their stated purpose for entering closed session -- that is, to obtain legal advice from counsel on all cases and to deliberate upon, but not vote on, the contested cases -- will always be an accurate description of their activities in closed session. However, it requires us to assume that at no time in the last year (or the last 6 years since the Commission resumed its closed meeting practices in 2019) has the Commission had to address, in closed session, any issue *other than* advice from counsel about "cases" in general or deliberations about contested cases before the Commission. For instance, has the Commission addressed any disciplinary or personnel issues as contemplated by D.C. Official Code §§ 2-575(b)(9) and (10)? Have there been any instances in which the Commission has had training or development as described in D.C. Official Code §§ 2-575(b)(12)? While it is perhaps possible that the Commission has not undertaken any of these types of activities in closed session in the last six years, the lack of any recent Commission meeting agenda which contain open session items for OOG's review and inspection, only allows me to speculate that the Commission's closed sessions actually conform to the requirements of entering into closed session.. It is not the OOG's practice to speculate about what it is enabled to enforce; but to know through clear observation and proper inspection.

If a judge were to review meeting recordings of the Commission's closed sessions via in camera inspection, would he or she find the Commission addressing, in closed session, issues for which it had not provided proper notice? The OMA requires a description of the matters to be discussed in closed session, not a description of *some* of the matters to be discussed. Any evidence that the Commission has discussed, in closed session, matters other than those covered by D.C.

---

<sup>50</sup> D.C. Official Code § 2-572.

<sup>51</sup> D.C. Official Code § 2-573.

Official Code §§ 2-575(b)(4) and (13) would be a violation of the OMA's notice requirement. Such a scenario is much less likely to occur under OOG's interpretation of the process for entering into closed session. Even the term "closed *session*" denotes *part* of a whole meeting, and not a separate, stand-alone meeting itself. It completes, by logic and necessity, a whole meeting by having an "open" part. By stating the reasons for closure and voting to close in the open [part] of the meeting, the closed session is placed in its proper context and the public receives a current and accurate accounting of the reason(s) for closure and the matters to be discussed.

Contrary to the practical and unambiguous approach recommend by OOG, OZ, through its current practice, asserts the presumption that it can accurately predict every issue they will discuss in each of its closed sessions a full year out. How then would the Commission respond to a pressing personnel issue that arises mid-year, after all closed sessions have been scheduled and noticed? OZ has not provided any evidence that it has issued updated or amended notices to its closed sessions to reflect changes or unanticipated matters that the Commission needs to address. The OOG as well as the public are left only to assume that no such updates, changes, or unanticipated matters have arisen since 2019, which my experience has shown is not likely. By scheduling its closed sessions so far in advance, the Commission creates its own OMA pitfalls by increasing the likelihood that it will fail to properly describe the reasons for closure, the subjects to be discussed or the actual variations/deviations in its discussions in closed session.

Additionally, it is worth noting that the Commission's practices may also be confusing to the public. The Commission contends that its activities in closed sessions pertain to the cases being discussed in the open sessions which immediately follow the closure. However, the instant complaint is evidence that this connection is not as readily obvious to the public as the Commission states. Because the Commission's closed sessions are completely detached from the public open sessions, this gives rise to the appearance - particularly where there are contested cases - that the Commission has already made all its determinations absent any public input or observation. Additionally, it is unclear how, if the Commission fails to complete all its deliberations and consultations with counsel during the time allotted for a specific closed session, the Commission would go about resuming these discussions in subsequent meetings. Presumably, they would either schedule an additional closed session or simply pick up where they left off during the next scheduled closed session. However, the Commission has provided no evidence of notice for additional closed sessions. If they merely pick up during the next scheduled closed session, then they are ostensibly discussing matters that diverge from the purported subject of the open session scheduled for that date.

Setting aside for a moment the issue of notice, OOG has also consistently advised that a public body must return to an open session to put on the record any official action that was taken during the closure if it is appropriate to do so. The Commission's response to this is essentially that the Commission cannot take official action in a closed meeting because §742(a)<sup>52</sup> of the Home

---

<sup>52</sup> D.C. Official Code § 1-207.42.

Rule Act (also known as the “Sunshine Act”) requires that all official Commission actions be taken at open meetings. Thus, the Commission believes there is nothing to report on because they contend no official action can take place in closure. The LCD Opinion upon which the Commission is relying states that:

There is no official action from a closed meeting to put on the record because the Commission cannot take official action in a closed meeting. Section 742(a) of the Home Rule Act – a separate, narrower open meetings provision – requires that all official action by the Commission be taken at open meetings. It states that “[a]ll meetings...of any...commission of the District government...at which official action of any kind is taken must be open to the public,” and that “[n]o resolution, rule, act, regulation, or other official action shall be effective unless taken, made, or enacted at such meeting.” (quoting D.C. Official Code § 1-207.42(a).)<sup>53</sup>

I find this logic to be circular. LCD characterizes § 742(a) as “a separate, narrower open meetings provision.” However, OOG has long opined that the Sunshine Act and the OMA must be read together. In a 2018 advisory opinion, OOG stated that “when two statutes simultaneously relate to the same subject area, judicial rules of statutory construction provide that the two statutes should be construed together. Furthermore, with regards to the applicability of these laws..., the OMA and the Sunshine Act must be considered in tandem.”<sup>54</sup>

Rather than presenting any conflict of law, the OMA augments the Sunshine Act. The LCD Opinion suggests that because the Sunshine Act dictates that official action of any kind shall be open to the public, this negates the need to report, where appropriate, any official action that was taken in closed session. I disagree. First, one of the main reasons the Commission enters into closed session is to deliberate, but not vote, about the cases before it. This deliberation is a precursor to action. While the public is not entitled to see the Committee’s deliberation, it is certainly entitled to know that deliberations took place and to have a reasonable description of the matters being deliberated. By returning after closed session to report on any official action that was taken during the closure, a public body ensures that the public is reasonably informed of the context in which official actions, such as voting, are occurring in open session.

**B. The Office of Open Government is statutorily tasked with providing guidance to public bodies on compliance with the OMA and is empowered to enforce the OMA.**

OOG provides guidance, including formal advisory opinions, to public bodies on compliance with the OMA. Additionally, OOG conducts training and outreach and can also enforce the OMA on the basis of complaints from the public and its own investigations. As a last resort, D.C. Official Code § 2-579 provides, that “[t]he Office of Open Government may bring a lawsuit in

---

<sup>53</sup> July 23, 2019, LCD Opinion.

<sup>54</sup> OOG-0014\_12.14.17-AO\_UMC Board.

the Superior Court of the District of Columbia for injunctive or declaratory relief for any violation of this subchapter before or after the meeting in question takes place...”<sup>55</sup>

As noted in our October 25, 2017, advisory opinion, D.C. Official Code §§ 2-579(g) and 2-593(2) authorize OOG to issue advisory opinions on compliance with the OMA. Doing so requires OOG to provide reasonable interpretations of the OMA. Additionally, language from the OMA’s legislative history indicates that OOG was created to interpret the statute. It reads: “[W]e suggest addition of provision in Title I of Bill 18-777, the Open Government Act of 2010, designating the proposed Open Government Office as the agency with authority to oversee and enforce the open meetings statute. That Office would be a good choice because it is intended as an independent agency headed by a Director who does not serve at the will of the Mayor. It would have the expertise to interpret the open meetings statute...”<sup>56</sup>

In fulfilling its statutory duty to provide guidance on compliance with the OMA, OOG has interpreted the provisions for entering into closed session as described above. This guidance was conveyed to the Commission in a letter and two separate advisory opinions. Rather than adhere to this guidance, the Commission sought an opinion from its legal counsel about whether its closed meeting procedures complied with the OMA and whether OOG could make its opinions “binding” or order the Commission to comply with them. The Commission is entitled to consult with its legal counsel however it sees fit. However, neither the OAG Land Use Section, nor the OAG Legal Counsel Division is statutorily tasked with OMA enforcement. While the OAG Legal Counsel Division took up this matter pursuant to the Attorney General’s authority to provide legal advice to agencies, I respectfully disagree with the 2019 LCD Opinion. If the Commission insists on relying on this outdated legal advice, the only remedy available to the public rests with D.C. Superior Court.

OZ asserts that it accepted the LCD Opinion’s conclusion that advisory opinions issued by OOG are solely advisory in nature and therefore non-binding. This was also the stated reason why OZ and the Commission neglected to inform OOG about its decision to resume the closed meeting procedures that OOG specifically advised OZ to cease.<sup>57</sup> I do not concede that advisory opinions issued by this office are solely advisory in nature. Advisory opinions regarding the OMA that are issued *sua sponte* may be appealed to the Board of Ethics and Government Accountability (BEGA).<sup>58</sup> If OOG’s opinions on the OMA are merely non-binding advice, as the Commission asserts, it stands to reason that there would be no need to create a process to appeal them. Additionally, as Director of Open Government, I am empowered to issue rules to implement the

---

<sup>55</sup> D.C. Official Code § 2-579(a).

<sup>56</sup> Testimony of Robert S. Becker, Society of Professional Journalists, D.C. Professional Chapter, before the Committee on Government Operations and the Environment. July 12, 2010, Attachment E, page 4.

<sup>57</sup> See April 9, 2024, Response to Complaint, page 3: “Further, OZ and the Commission did not believe there was an obligation to formally advise OOG when it changed its closed meetings practices in 2019 because it understood OOG’s October 25, 2017, opinion to be advisory and non-binding.”

<sup>58</sup> D.C. Official Code § 1-1162.05c(c)(2); 3 DCMR § 10407.5

provisions of the OMA.<sup>59</sup> I have not issued rules on this subject, but the fact that I am statutorily empowered to do so lends credence to the idea that this Office is intended to be the expert and enforcer of the OMA. As such, it is curious that LCD, OZ, and the Commission have reached the conclusion that the opinions issued by this Office may be so casually disregarded.

Nonetheless, I need not litigate the force and effect of my advisory opinions here. That is because, as the LCD Opinion notes, "...the Office may pursue litigation against an agency that acts contrary to an interpretation of the Act reflected in an Office-issued advisory opinion."<sup>60</sup> DC law states that where the Director of Open Government concludes there was a violation, the Advisory Opinion shall set forth corrective actions that the Public Body *shall complete* to avoid further legal action as set forth in an Advisory Opinion.<sup>61</sup> If the corrective actions set forth in an Advisory Opinion are not taken or not completed in a timely manner, I may, in my capacity as Director of Open Government, bring a lawsuit in the Superior Court of the District of Columbia for injunctive or declaratory relief pursuant to D.C. Official Code § 2-579.<sup>62</sup> Given OZ and the Commission's consistent disregard for the guidance provided by this office, including their failure to advise OOG of their adoption of meeting procedures which they knew to be contrary to that guidance, this is the type of instance where a lawsuit could be appropriate to resolve the issues and protect the public's right of access because OZ and the Commission have consistently disregarded guidance provided by this office, including failing to advise OOG of their adoption of meeting procedures which they knew contravened official guidance from this Office. As stated in the introduction to this Advisory Opinion, OOG views litigation as a last resort, and this is our final attempt to have this public body cure the OMA violations outlined here without the need for litigation.

### III. CONCLUSION

D.C. Official Code § 2-575(c) lists the protocol that public bodies must follow to lawfully enter into closed/executive sessions. OOG has consistently opined that D.C. Official Code § 2-575(c) requires a public body to begin in an open session where a meeting or a portion of a meeting will be held in closure. We reject the Commission's assertion that their interpretation of D.C. Official Code § 2-575(c) is correct. The Commission is entitled to consult with, and rely upon, its legal counsel as it sees fit, however OOG is the authority on the OMA, and tasked with its enforcement. As such, the Commission, and by extension the OZ, must not rely on the dated, 2019 LCD Opinion to properly conduct its meetings in 2025.

As the District's authority on the OMA and the agency tasked with its enforcement, OOG has consistently provided guidance on the proper protocol for entering into closed session as well as the rationale for doing so. It remains OOG's position that the Commission cannot hold one open

---

<sup>59</sup> D.C. Official Code § 1-1162.05c(a)(3).

<sup>60</sup> July 23, 2019, LCD Opinion, page 10.

<sup>61</sup> 3 DCMR § 10406.2

<sup>62</sup> 3 DCMR § 10406.3

session at the beginning of a year-long meeting period, then conduct repeated closed session meetings thereafter, and be in compliance with the OMA. It is my view that the Commission's persistent disregard for this guidance displays a pattern and practice of willfully participating in one or more closed meetings in violation of the provisions of the OMA. Should the Commission decide to continue this practice, OOG is prepared to exercise its authority under the relevant law to seek enforcement of the OMA.

#### **IV. VOLUNTARY OMA COMPLAINT DIRECTIVES**

To fully comply with the OMA, the Commission should (1) immediately cease its current practice of holding stand-alone closed meetings; (2) strictly adhere to the protocol for entering closed/executive meetings found in D.C. Official Code § 2-575(c) as those provisions have been interpreted by OOG in this and previous advisory opinions; and (3) for the Commission Chair, its legal counsel, secretary to the Commission and members of the Commission attend an Open Meetings Act training within 90 days of the issuance of this advisory opinion.

Sincerely,



---

Niquelle M. Allen, Esq.  
Director of Open Government  
Board of Ethics and Government Accountability

CC:

*Via Electronic Mail*  
Anthony J. Hood, Chair  
District of Columbia Zoning Commission  
441 4<sup>th</sup> Street, NW, Suite 200S  
Washington, DC 20001  
[dcoz@dc.gov](mailto:dcoz@dc.gov)