

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



June 21, 2017

VIA ELECTRONIC MAIL

Lt. Ronald T. Wilkins
Metropolitan Police Department
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Sam Zimbabwe
District Department of Transportation
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RE: OOG-0003_6.21.17_AO

Dear Lt. Wilkins and Mr. Zimbabwe:

On June 6, 2017, the Office of Open Government (OOG) was asked to provide direction to the Major Crash Task Force (Task Force) to conduct closed meetings “due to the sensitive information they will review and the recommendations they are asked to provide to the Mayor.”¹ The advice of the OOG is sought prior to the Task Force meeting to review confidential records.² To make a determination on the appropriate means of Task Force compliance with the Open Meetings Act (OMA), the OOG has reviewed section 802 of the Bicycle and Pedestrian Safety Amendment Act of 2016 (BPS Act), effective October 8, 2016 (D.C. Law 21-0155; D.C. Official Code § 50-1831).

The foregoing binding opinion is issued by the OOG, pursuant to the authority set forth in section 503(c) of the District of Columbia Administrative Procedure Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code §2-593(c)), may issue advisory opinions on implementation of Subchapter II, the Freedom Of Information Act (D.C. Official Code § 2-531 *et seq.*) (FOIA); and OMA (D.C. Official Code § 2-571 *et seq.*), pursuant to sections 409(g) and 503(a)(2) (D.C. Official Code §§2-579(g); 2-593(a)(2)) and 3 DCMR § 10408.1.

¹ June 6, 2017 email to Director Traci L. Hughes from Marchan Richmond, Legal Intern with the District Department of Transportation.

² June 13, 2017 email to Director Hughes from Ms. Richmond in which Ms. Richmond confirms that the Task Force has been formed, “to the extent the members have been identified. However, the members have not begun reviewing confidential information.”

BACKGROUND

The Task Force is a statutorily created body intended to “review every crash handled by the Major Crash Unit of the Metropolitan Police Department (MPD) and recommend to the Mayor and the Council changes to the District’s statutes, regulations, policies, and infrastructure that the Task Force believes would reduce the number of crashes in the District resulting in serious injury or death.” BPS Act at section 802(b)³. Additionally, it is clear the Task Force was established to “facilitate full public access to collision and moving infractions data, and to make such data available on government websites.”⁴ This is reiterated in the establishing statute requiring the Mayor to publish crash data and moving infraction data, that the findings of the Task Force are intended to be made public.⁵

The OMA defines a public body as "any government council, including the Council of the District of Columbia, board, commission, or similar entity, including a board of directors of an instrumentality, a board which supervises or controls an agency, or an advisory body that takes official action by vote of its members convened for such purpose." D.C. Official Code § 2-574(3). The OMA includes within the definition of a public body those entities whose establishment was pursuant to statute or Mayor's Order. However, the OMA also looks to the nature of the meeting, and whether the public body is gathering to "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." Id. at § 2-574(1).

DISCUSSION

The Task Force is a public body as contemplated by the OMA. D.C. Official Code § 2-575(3). So that it may fulfill its statutory mandate, the Task Force will be required to review “every crash handled by the Major Crash Unit of the MPD” and make recommendations to the Mayor and the Council on ways in which the District may improve pedestrian and vehicular safety with the aim

³ The Task Force is made up of the following members: (1) the Chief of the MPD, or designee; (2) the Director of the District Department of Transportation, or designee; (3) the Director of the Office of Planning, or designee; (4) a representative of the Bicycle Advisory Council; (5) a representative of the Pedestrian Advisory Council; and (6) a representative from the Multimodal Accessibility Advisory Council. BPS Act, sec. 802(a)(1-6).

The OOG has previously found that a task force convened to “consider, advise, gather information and ultimately make recommendations to the Mayor intended to affect government operations...” is a public body that must abide by the requirements of the OMA. See August 31, 2015 OOG-002 Opinion Deputy Mayor for Education Cross-Sector Collaboration Task Force.

⁴ June 1, 2016 Committee Report Bill 21-335 the “Bicycle and Pedestrian Safety Amendment Act of 2016”, at page 2. The BPS Act requires District Department of Transportation to publish monthly collision data on the agency website. Section 904(a) makes mandatory that MPD release video or photographs from automated traffic enforcement cameras, or other MPD cameras (sans body worn cameras), to individuals involved in collisions, and to retain such records for a minimum of six months provide the footage is not evidence in a criminal proceeding.

⁵ BPS Act, sec. 802(b)

of reducing the number of crashes and fatalities.⁶ The Task Force will only review crash records upon notice from the United States Attorney's Office for the District of Columbia and the Office of the Attorney General for the District of Columbia of a declination to prosecute, or if there is a criminal proceeding against a person involved in the crash, [or] issuance of a judgment in a criminal proceeding.⁷

At issue is whether the Task Force is required to review such records in an open session as required under D.C. Official Code § 2-575(a), which sets out fourteen general categories of exceptions to the OMA.

Since the Task Force is required to review video and photographic records memorializing vehicular, pedestrian and other model collisions, it necessarily follows that such records may reveal images of such a personal and graphic nature that revelation in an open meeting would violate the personal privacy interests of the individuals involved. D.C. Official Code § 2-575(b)(1) allows for a meeting, or portion of a meeting of a public body to be closed when a "law or court order requires that a particular matter or proceeding not be public."

Therefore, the District of Columbia Freedom of Information Act (FOIA), D.C. Official code § 2-531, *et seq.* is dispositive. Although FOIA creates the right of any member of the public to inspect public records (D.C. Official Code § 2-532(a)), that right is not absolute. FOIA restricts from disclosure certain records. Specifically, D.C. Official Code § 2-534(a)(2) prohibits release of information that is of such a personal nature where public disclosure would be an unwarranted invasion of personal privacy; and D.C. Official Code 2-534(3)(C) prohibiting the release of investigatory records compiled for law enforcement purposes where release of the records would "constitute an unwarranted invasion of personal privacy."

The Task Force may reasonably rely upon the protections of personal privacy afforded under FOIA to review collision records in closed session. This does not, however, absolve the Task Force from noting on the record in open session any formal action taken as a result of review undertaken in executive session.

⁶ Id. at sec. 802(b)

⁷ Id. at sec 802(c)(1)

CONCLUSION

As the Task Force is a public body that must conduct itself in accordance with the Open Meetings Act, it may rely upon D.C. Official Code § 2-575(b)(1) to review sensitive collision related records as directed under the BPS Act.

Sincerely,



TRACI L. HUGHES, ESQ.

Director, Office of Open Government

Board of Ethics and Government Accountability

Cc: Marchan Richmond

DDOT Legal Intern

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