



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



March 7, 2024

VIA ELECTRONIC MAIL

[REDACTED]
Washington, D.C.
[REDACTED]

**RE: Science Advisory Board Request for Advisory Opinion
(# OOG-2023-0006)**

Dear [REDACTED]

On October 27, 2023, you requested an advisory opinion on behalf of the Science Advisory Board (the “SAB”),¹ which the Office of Open Government (OOG) assigned advisory opinion # OOG-2023-0006 (the “request”). In your request, you sought detailed advice regarding four specific Open Meetings Act (OMA)² issues, which are detailed and addressed in this advisory opinion below. As Director of Open Government, I am authorized to issue advisory opinions on the OMA pursuant to a public body’s request.³

I. BACKGROUND

In the request you posed the following inquiries:

- “Can a proposed agenda be modified by the SAB at the beginning of an open meeting to include additional agenda item(s) without violating the [OMA]? . . . [A]re there any boundaries or limitations . . . to modify[ing] a proposed agenda?”

¹ The SAB “[a]dvise[s] the Director [of the Department of Forensic Sciences (the “DFS”)] or the Mayor and Council[of the District of Columbia] . . . on matters relating to the [DFS], forensic sciences services, or public health laboratory services.” See D.C. Official Code § 5-1501.12(5). Section 2(o)(2), (3) of the Restoring Trust and Credibility to Forensic Sciences Amendment Act of 2022 (D.C. Law 24-348; D.C. Official Code § 5-1501.11(a-1)) would reconstitute the SAB as the Science Advisory and Review Board, but this provision remains unfunded.

² Title IV of Pub. L. 90-614, effective Mar. 31, 2011 (D.C. Official Code § 2-571 *et seq.*).

³ See D.C. Official Code §§ 1-1162.05c(a)(1), 2-579(g) (section 205c(a)(1) of the Government Ethics Act of 2011, section 409(g) of the OMA).

- “Is the DFS prevented, by statute or regulation, from providing to the SAB reports, studies, or other related information about [its] preparation for accreditation^[4] and information about . . . examination or analysis methods . . . ?”
- “Are there any prohibitions or restrictions that prevent documents and statements the SAB feels are relevant to our agenda topics, or related to our responsibilities under Section 12 of [the] Department of Forensic Sciences Establishment Act of 2011,^[5] from being posted on our web page by the DFS?”
- “Are there any prohibitions or restrictions for the SAB [or a committee of the SAB] to meet with the DFS staff to assess their accreditation readiness, to offer suggestions, or to have a dialog . . . so that the SAB has understanding and context to which it can carry out its responsibilities and offer advisement and assistance to the DFS?”

As analyzed in full below, I concluded as follows: (1) the SAB may modify the planned agenda if an unanticipated item of new business arises; (2) the OMA does not restrict the exchange of information between a public body and the DC agency that assists the public body; (3) the OMA does not constrain the DFS’ use of its own website, but other District of Columbia laws and policies may inform or restrict what it may post online; and (4) the OMA does not prohibit any particular District of Columbia government (the “District”) entity from meeting with any other District entity.

II. ANALYSIS

A. The OMA permits the SAB to modify its agenda through the addition of unanticipated items of business.

Your first question is whether a public body, having announced the planned agenda of a particular meeting, may then modify it at the beginning of the meeting without violating the OMA’s notice provision. The answer is yes. The meeting notice requirement under the OMA does not require a final agenda. The language of the statute itself states “planned,” which implies the agenda is subject to change. The OOG regulations also imply that it is an acceptable practice to modify the agenda, where the agenda item was unknown ahead of time.

⁴ You state that the SAB’s “recent focus has been trying to ensure the [DFS] has proper advisement and assistance relating to its effort to become reaccredited by” the American National Standards Institute’s National Accreditation Board.

In her January 24, 2024, e-mail to OOG, the DFS’ General Counsel wrote that “records pertaining to preparation for reaccreditation are moot,” because the “DFS received accreditation in forensic chemistry and forensic biology in December 2023.” However, this assertion is less than complete, because the DFS’ laboratory functions also include a ballistics/firearms unit, which did not achieve reaccreditation. *E.g.*, [“DC Crime Lab Appears To Regain Partial Accreditation After Losing Ability To Process Evidence in 2021.”](#)

⁵ D.C. Law 19-18, effective Aug. 17, 2011 (D.C. Official Code § 5-1501.11).

1. *Required elements of a meeting notice include the “planned agenda.”*

As a general principle, the OMA demands advance notice as a component of transparency. “The public policy of the District is that all persons are entitled to full and complete information regarding the affairs of government and the actions of those who represent them,” and the OMA “shall be construed broadly to maximize public access to meetings.”⁶ Specifically, the OMA requires public bodies to include four elements in a meeting notice: the date and time, the “location” (or access-link, for remote or hybrid meetings), and the “planned agenda”⁷ in order to ensure the meeting is transparent and the public receives full access.

As for your concern, note that the “agenda” included in the notice need only be the “planned agenda.” The OMA recognizes that (1) many public bodies prefer to wait until the beginning of the relevant meeting to *adopt* the proposed agenda; and (2) new and urgent issues sometimes come to a group’s attention between posting the notice and convening the meeting. As a practical matter public bodies tend to determine the date, time, and location long before the last agenda item materializes. Fortunately, this reality is accommodated by the OMA and its regulations, which distinguish between the “planned” or “draft” agenda and the final version.

2. *The legislative history and regulations of the OMA recognize and accept the practice of changing the order of business between notice and meeting.*

During the OMA’s drafting process, the D.C. Council’s Committee on Government Operations and the Environment amended the requirement to post a meeting’s “agenda” to apply merely to a “*planned* agenda,” which the full D.C. Council approved and which remains the current language.⁸ This demonstrates that the D.C. Council recognized that transparency favors posting of the notice “as early as possible,”⁹ in order to inform the public of the *existence* of the meeting and its date, time, and location, even if the precise *contents* are still in flux.

Similarly, OOG’s regulation on “Meeting Records” contemplates a difference between the planned and the final agenda. Subsection 10409.1 reads, in relevant part, “The records for all . . . meetings shall contain a *draft and final* . . . agenda,” and subsection 10409.2 requires that “[t]he final agenda shall contain any *changes* adopted by the Public Body.”¹⁰

⁶ See D.C. Official Code §§ 2-572, 2-573 (sections 402 and 403 of the OMA).

⁷ See *id.* § 2-576(5) (section 406(5) of the OMA). OOG regulations further require public bodies to include language at the bottom of each agenda advising the reader to send any complaints to OOG. 3 DCMR § 10409.2 (statement reads: “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 opengovoffice@dc.gov.”).

Also, I note a specific detail applicable to *closed* sessions: where the public body intends to close, to the public, any portion of a meeting, the advance notice must also “include, if feasible, a statement of intent to close . . . , including citations to the reason for closure . . . and a description of the matters to be discussed.” See D.C. Official Code § 2-576(5).

⁸ During consideration of what would become the OMA, then-Councilmember Mary Cheh offered, and the committee adopted, a committee print that replaced “Each notice shall include . . . the **agenda** to be covered at the meeting” with “Each meeting notice shall include the . . . **planned agenda** to be covered at the meeting.” Compare Bill 18-0716 Intro. at 7 *ll.* 5, 6 (Mar. 16, 2010) (emphasis added) with Comm. Print of Bill 18-0716 at 6 *ll.* 19, 20 (Dec. 2, 2010) (emphasis added).

⁹ See D.C. Official Code § 2-576(1).

¹⁰ (Emphasis added.)

In short, District law recognizes that the agenda distributed with an OMA-compliant meeting notice might vary from the precise subjects that the public body covers during the meeting itself.

3. *A public body should announce each item of business as early as possible.*

While, as a general matter, a public body may depart from the planned agenda, the OMA still requires “notice as early as possible.”¹¹ As such, any business that *may* be anticipated should be listed on the agenda, as soon as the requesting member knows about that item. A public body should not wait until the meeting itself to add a matter to the agenda that *could* have been announced to the public earlier, as a general practice. As a practice pointer, the Administrative Point of Contact or other person selected by the agency to support the public body should set an internal deadline for the public body members’ addition of agenda items that is (1) reasonable, (2) consistent with the public body’s internal parliamentary practices, and (3) preserves the OMA’s policy of providing notice of the agenda “as early as possible.”

However, even with a set internal deadline, a subject that *is* listed on the agenda might trigger others that the public body may not anticipate in time for detailed inclusion on the advance agenda. The public body may pursue subjects *related* to those announced in the advance agenda. For a recent example, in *Hirschfeld v. Turnpike Authority*, Case No. 120,981, 2023 Okla. 59 (May 31, 2023), a governor’s spontaneous informal remarks, related to a turnpike expansion, during a meeting of his state’s Turnpike Authority (he was both the governor and a member of the Authority) did not violate the state’s Open Meeting Act despite the lack of notice.¹²

Finally, the SAB, as with any public body must take care to comply with any law beyond the OMA that might apply,¹³ including any internal rules that it might adopt for itself regarding the thoroughness of the agenda.

B. The OMA does not prohibit the exchange of records and other information between District entities, but D.C. FOIA may provide a legitimate justification for maintaining the confidentiality of a record.

You also raised this question: “[i]s the DFS prevented, by statute or regulation, from providing to the SAB reports, studies, or other related information about [its] preparation for

¹¹ *See id.*

¹² (Slip op. at 5–7, 9, 10, 16–21.) According to the minutes, the Authority’s Executive Director had “invited the Governor to make any comments,” [pikepass.com/pdf/February 2022 Authority Meeting Minutes.pdf](https://pikepass.com/pdf/February%202022%20Authority%20Meeting%20Minutes.pdf) at 10, though this detail was not listed in the agenda, [pikepass.com/pdf/February 22 2022 Agenda.pdf](https://pikepass.com/pdf/February%202022%20Agenda.pdf).

¹³ For example, an amendment by section 2(q) of the Restoring Trust and Credibility to Forensic Sciences Amendment Act of 2022 (D.C. Law 24-348; D.C. Official Code § 5-1501.12a) would enable the SAB (reconstituted as the Science Advisory and Review Board) to “conduct[] an investigation or review” of “professional negligence, misconduct, misidentification, or other testing errors,” upon “communicat[ing] its decision in writing” to investigate or review “within 10 business days after” receiving certain documents from the Forensic Sciences and Public Health Laboratory. However, as of January 17, 2024, this amendment remains unfunded. dccouncilbudget.com/legislation-passed-s2a.

accreditation and information about . . . examination or analysis methods . . . ?” It appears that this question arises out of the SAB’s request for certain documents from the DFS, related to accreditation, and the agency’s lack of response to SAB’s request.

On January 12, 2024, an OOG attorney wrote to the General Counsel of the DFS, requesting “the DFS’ perspective, to inform our research and possible advice,” on the questions: “(1) are there any categories of DFS records that the DFS would be prohibited by law from producing for review by the SAB; and, if so, (2) what would be the most likely legal basis for such a bar or withholding?”¹⁴ On January 24, 2024, the General Counsel of the DFS responded and proffered that 27 DCMR § 4202.2 would prohibit the DFS’ contracted consultant from “disclos[ing a] document, record, or other information to any person other than an authorized District employee or agent,”¹⁵ where such disclosure would be “prohibited by any District or federal law or regulation.” The DFS’ response did not include any extrinsic authority to bar the DFS from sharing records with the SAB. The response did not indicate whether a specific “District or federal law or regulation” exists that prohibits the agency’s release of the information. The DFS’ response indicated that the record that a DFS contractor prepared for the agency was proprietary and based on the agency’s advice from the Office of Contracting and Procurement, the DFS did not release the record to the SAB or make it public.

1. *Based on the facts available, the OMA does not prevent the DFS from withholding the records regarding accreditation.*

The OMA does not address the exchange of information between the supporting agency and the public body. The OMA addresses records that the public body, in this case the SAB, must provide regarding a meeting covered by the OMA.¹⁶ The facts presented are that the DFS refused to provide a record that an SAB member requested during its October meeting. Since the DFS did not provide the record, the record itself is not part of the meeting record. The OMA does not apply to this circumstance and does not address whether the DFS must provide the requested record.

2. *D.C. FOIA may provide a legitimate justification for the DFS’ refusal to release records.*

Under the Freedom of Information Act of 1976 (D.C. FOIA),¹⁷ an agency may withhold records requested if certain exemptions from disclosure apply.¹⁸ For example, D.C. FOIA permits an agency to withhold records that are specifically exempted by statute.¹⁹ I will note that it does not appear that the DFS treated this request as a FOIA request. I am providing this analysis under D.C. FOIA because it was a request for records by an entity other than the agency. In the DFS’ response, it did not provide a federal or District statute that would exempt the record from public release. However, DFS referenced that the requested record was prepared by a contractor. The

¹⁴ (Format changed.)

¹⁵ (Emphasis omitted.)

¹⁶ D.C. Official Code § 2-578(b).

¹⁷ Title II of Pub. L. 90-614, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*).

¹⁸ D.C. Official Code § 2-534.

¹⁹ *Id.*

trade secrets exemption²⁰ could apply, but I do not have enough information to advise on whether the DFS refused to provide the accreditation record based on this D.C. FOIA exemption. If the DFS had treated the request as a D.C. FOIA request, the agency may have withheld its release under this or another relevant exemption. If the SAB had made the request pursuant to D.C. FOIA and the DFS denied it, the remedy to gain access to records would be an administrative appeal with the Mayor’s Office of Legal Counsel or a civil action to compel release of the records in D.C. Superior Court. However, the facts provided in your letter and the DFS’s response do not indicate that either party formally treated this matter as a D.C. FOIA request.

Accordingly, I conclude that the OMA does not address the exchange of records between an agency and the public body it services; however, D.C. FOIA may provide a legitimate justification for withholding a record from public release. The DFS’ reports, studies, or other related information about the agency’s preparation for accreditation related information may be the type of records that could legitimately be withheld from public release under D.C. FOIA.

C. The OMA and D.C. FOIA do not explicitly restrict content publication on an agency’s website, but D.C. FOIA and District policy provide justification for doing so.

You asked, “Are there any prohibitions or restrictions that prevent documents and statements the SAB feels are relevant to our agenda topics, or related to our responsibilities under Section 12 of [the] Department of Forensic Sciences Establishment Act of 2011, from being posted on our web page by the DFS?”

The OMA does not *restrict* posting. The OMA has affirmative requirements for an agency to provide information to the public on behalf of the public body, as mentioned earlier in this advisory opinion. The OMA does not restrict the provision of information. It encourages providing as much information as possible to maximize the public’s access. The OMA requires public bodies to post notices of meetings on its website.²¹ It also requires the publication of meeting records and agencies supporting public bodies meet this obligation by publishing content on its website.²² The OMA is silent on other obligations to publish information regarding public bodies on agency’s websites. However, an agency may be required to post certain meeting records on its websites under D.C. FOIA, if those records are the type of records that the agency must make available without the need of a D.C. FOIA request.²³ As discussed above, D.C. FOIA exemptions could provide justification for limiting or withholding the public release of certain information on an agency’s website²⁴.

Further, the Office of the Chief Technology Officer (OCTO) establishes the parameters that agency’s must follow when publishing information on its DC.GOV website. DC agency

²⁰ D.C. Official Code §§ 2-502(9), 2-534(a)(1), 2-539(a)(8) (permitting withholding of “trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person [(defined as including ‘private organizations’)] from whom the information was obtained”).

²¹ D.C. Official Code § 2-576(2)(B).

²² D.C. Official Code § 2-578(b).

²³ D.C. Official Code § 2-536.

²⁴ DFS’ website is www.dfs.dc.gov.

employees must follow OCTO’s policies when determining what is appropriate to publish on its website and those policies may restrict DFS from publishing certain content. Some of OCTO’s relevant policies include: “Internet Access and Use Policy;” “Access Control Policy;” and “Acceptable Use Policy.”²⁵ If the documents related to the SAB agenda topic legitimately run afoul of OCTO’s policies, then DFS could decline to publish. For example, if the documents contained information related to fund-raising, DFS could not publish it on its website under the “Acceptable Use Policy.” However, I have no facts to suggest whether or not such a justification was presented in this matter.

While OMA and D.C. FOIA impose requirements on agencies to post information on its website, these laws do not restrict posting. D.C. agencies may justifiably decline to post information on its website if a D.C. FOIA exemption applies. Agencies must also consider and follow OCTO’s policies concerning website content on DC.GOV and may be restricted from posting certain content based on those policies.

D. The OMA does not bar any particular entities from meeting with each other.

You asked whether there are “any prohibitions or restrictions for the SAB [or a committee of the SAB] to meet with the DFS staff to assess their accreditation readiness, to offer suggestions, or to have a dialog . . . so that the SAB has understanding and context to which it can carry out its responsibilities and offer advisement and assistance to the DFS?”

The OMA does not prohibit a District entity from meeting with a different District entity, but whether this conflicts with your entities’ governing law is a question to resolve with the DFS or the City Administrator.

III. CONCLUSION

For the reasons discussed above, I conclude that: (1) the SAB may modify the planned agenda if an unanticipated item of new business arises; (2) D.C. FOIA may preclude the release of certain non-public information to public body members; (3) the laws under OOG’s scope do not constrain the DFS’ use of its own website, but D.C. FOIA and OCTO policies could provide a legitimate justification for declining to publish information; and (4) the OMA does not prohibit any particular District entity from meeting with any other District entity.

Thank you for your inquiry. Contact me at niquelle.allen@dc.gov or Chief Counsel, Louis Neal, at louis.neal@dc.gov, at any time for further information.

²⁵ <https://octo.dc.gov/page/district-agency-support>

Sincerely,



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