

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY  
OFFICE OF OPEN GOVERNMENT



November 2, 2017

**VIA ELECTRONIC MAIL**

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**RE: #OMA OOG-00011\_10.31.17\_AO**

Dear Ms. Corman:

The Office of Open Government (OOG) is in receipt of the October 27, 2017, electronic correspondence which proffers the reasons you believe justify a closed/executive meeting of the Sustained Energy Utility Advisory Board (SEUAB) to draft and edit a report on performance under the SEU contract, prior to its submission to the Council of the District of Columbia and its subsequent release to the public.<sup>1</sup> Your correspondence further states, “that not all members are likely to be in attendance, no votes will be taken, no {sic} substantive policy decisions will be made.” Considering the totality of the circumstances, which includes both oral and written communication between you, this office, and DOEE Attorney Hussain Karim regarding this

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<sup>1</sup>The October 27, 2017, email states in relevant part: “[I]t is the view of the SEU Advisory Board that the Open Meetings Act does not apply at all to the situation we are discussing. You and I earlier discussed exclusions to the Open Meetings Act because the Board had obtained one in the past when reviewing a draft RFP. However, we think exclusion would only be necessary if the Act applies, and we wish to be excluded from its reach.” The OOG does not provide exclusion to public bodies from the coverage of the OMA. The OOG did opine that the SEUAB could meet in closed/executive session to discuss a draft RFP. The exception, in essence is D.C. Official Code § 2-575(b)(2) for contract negotiation. At the SEUAB’s September 22, 2017, public meeting, DOEE Attorney Hussain Karim in referring to this opinion incorrectly states, that the OOG opinion was that the SEUAB may enter a closed/executive session under FOIA’s deliberative process exemption. This is a misstatement of fact. The opinion states: “[T]his OOG opinion reaches only the application of the confidential commercial information privilege to the RFP-related documents. In *Hack*, the defendant asserted both the commercial information privilege and the deliberative process privilege as legal justification for withholding documents for which disclosure was sought under the federal FOIA. In ruling the commercial information privilege was applicable; the court found the reports constituted privileged commercial information, thereby making it unnecessary to explore the deliberative process exemption theory. *Id.*, at 1100. Upon finding the RFP-related documents exempt from DC FOIA as confidential commercial information, the OOG will not opine on whether the RFP-related documents in this matter are deliberative.” The September 22, 2017, hearing may be viewed at <https://www.youtube.com/watch?v=SCd2j3LUUJo> (Last accessed 11.2.17).

matter, the OOG will exercise its full authority to seek injunctive relief under D.C. Official Code § 2-579, if the SEUAB intends to skirt the provisions Open Meetings Act (D.C. Official Code § 2-571 *et seq.*) (OMA) to avoid public scrutiny while drafting and editing the report in closure.

Given the great importance of the issues you raise, the OOG herein elects to exercise its authority to issue this binding opinion to the SEUAB on compliance with the OMA pursuant to D.C. Official Code § 2-593(a)(2).<sup>2</sup>

The OOG respectfully disagrees with your interpretation of the OMA and the legitimacy of the SEUAB meeting in a closed/executive session to draft and edit the report after a comprehensive review of the following; (1) the OMA; (2) the OMA's legislative history; (3) the SEUAB's enabling legislation; (4) electronic recordings of SEUAB meetings and; (5) the SEUAB regulations. For the reasons which follow the OMA requires that the SEUAB meet in an open session to draft and edit the aforementioned report.

As discussed below, the OOG's opines the following: (1) that OMA and its legislative history make abundantly clear that drafting and editing the contract performance report by the SEUAB falls within the within the scope of the spirit and letter of actions that constitute public business; (2) the OMA does not include within the list of exceptions for meeting in a closed session drafting and editing a contract performance report; and (3) the regulations adopted by the SEUAB make abundantly clear that editing and drafting of the report must take place in an open meeting.

### **Background**

You have stated that the SEUAB's purpose for seeking to meet in a closed/executive session is the result of article(s) appearing in the Washington City Paper<sup>3</sup> that are critical of the SEUAB and the contract which is the subject of the report the SEUAB must provide to the Council of the District of Columbia. It is felt that a public meeting will stymie frank and candid<sup>4</sup> discussions concerning the report.

The SEUAB is a thirteen-member Board established pursuant to Section 203 of the Clean and Affordable Energy Act of 2008, effective October 22, 2008 (D.C. Law 17-250; D.C. Official Code § 8-1774.03 (2015)) ("CAEA"). Pursuant to D.C. Official Code § 8-1774.03, the Board's purpose is to: "(1) [P]rovide advice, comments, and recommendations to the DOEE and Council regarding the procurement and administration of the of the SEU contract; (2) advise the DOEE on the performance of the SEU under the SEU contract; and (3) monitor the performance of the SEU under the SEU contract." It is clear that the SEUAB's statutory purpose is to serve in an advisory role, an activity which is clearly within the regulatory scope of the OMA.

<sup>2</sup> This provision, which makes it mandatory for the OOG to issue advisory opinions, reads: "(a) [T]he Open Government Office shall: (2) Issue advisory opinions to public bodies on compliance with subchapter IV of this chapter..." Subchapter IV is the OMA.

<sup>3</sup> One such article is found at <http://www.washingtoncitypaper.com/news/loose-lips/article/20974797/dcs-sustainable-energy-utility-misleads-and-falls-short-on-solar>. (Last accessed on 10.30.17)

<sup>4</sup> This was just of the statements made during the September 22, 2017, SEUAB public meeting.

## Discussion

### **EDITING AND DRAFTING THE REPORT BY THE SEUAB FALLS WITHIN THE SCOPE OF ACTIVITIES WHICH THE OMA DESCRIBES AS PUBLIC BUSINESS.**

The issuance of this advisory opinion by the OOG is proper, as this agency has previously determined that the SEUAB is a public body subject to the OMA.<sup>5</sup> The purpose of the OMA is to provide the public with full and complete information regarding the affairs of government and any official actions taken by government officials. Therefore, as provided in the Act, the OOG will strictly construe the application of exceptions to the Act (D.C. Official Code § 2-573).

Your October 30, 2017, electronic correspondence to the OOG cites the OMA’s definition of “Meeting” found at D.C. Code § 2-574(1), which reads:

“(1) Meeting means any gathering of a quorum of the members of a public body, including 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 . . . .” (internal quotes omitted).

Clearly the syntax of the sentence shows that public business includes: “gathering information, taking testimony, discussing, and deliberation, recommending and voting. By no stretch of the imagination do the aforementioned descriptions of public business fail to include what you reference “as a simple mechanical exercise of drafting and editing a report by Board members.” Additionally, the OMA’s legislative history makes abundantly clear that meetings in preparation of official action, or where official action is discussed, are actions by a public body that are within what the Act entails as public business. It is clear from the statements below that drafting and editing a contract performance report by the SEUAB are specifically the type of “decision making” and if not “official action,” “preparation for official action” that falls within the OMA as public business. In particular three, statements from the legislative history are apropos:

“In order to accomplish the twin aims of providing greater transparency into *public officials decision making and preserving high-quality deliberation* the Committee recommends augmenting the District’s open meetings law to define public notice requirements and establish a right to observe . . . .” (Report on the Committee on Government Operations and the Environment on Bill 18-716, the Open Meetings Act of 2010, at page 4 (Council of the District of Columbia December 2, 2010) (hereinafter OMA Comm. Rpt.)

“In defining the term meeting, *the committee print again broadens current law*. The term would include any gathering of a quorum of the members

<sup>5</sup> See, [https://www.open-dc.gov/sites/default/files/OOG-003\\_SEUAB%20Advisory%20Opinion%20Mar%2020202016.pdf](https://www.open-dc.gov/sites/default/files/OOG-003_SEUAB%20Advisory%20Opinion%20Mar%2020202016.pdf)

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 meetings in preparation for official action or where official action is discussed.*” *Id.* at page 5.

Open meeting requirements provide the public with access to observe government decision making so the public is aware not only of the outcome of government decisions, *but also the process by which those decisions are made.* These requirements are a benefit to both the process and outcome of government decision making. The Committee believes that Bill 18-716 offers a significant step in improving the openness and transparency of District government decision-making. *Id.* at page 6. (Emphasis added).

The rules of statutory construction require that in ascertaining the meaning of a statute not plain on its face, one must also consider the measure’s legislative history. Based on the additional information which the OMA’s legislative history provides, the instant situation consists precisely of those activities which the OMA intends to be open to public scrutiny as public business since the activity of the SEUAB will be “a meeting in preparation for official action or where official action is discussed.”

**THE OMA DOES NOT LIST DRAFTING OR EDITING A PERFORMANCE REPORT AS A STATUTORY EXCEPTION FOR CONDUCTING MEETINGS IN CLOSED/EXECUTIVE SESSIONS.**

D.C. Official Code § 2-575(b) contains the exclusive list of exceptions for which a public body may lawfully meet in a closed/executive session. This provision reads:

- (b) A meeting, or portion of a meeting, may be closed for the following reasons:
  - (1) A law or court order requires that a particular matter or proceeding not be public;
  - (2) To discuss, establish, or instruct the public body’s staff or negotiating agents concerning the position to be taken in negotiating the price and other material terms of a contract, including an employment contract, if an open meeting would adversely affect the bargaining position or negotiating strategy of the public body;
  - (3) To discuss, establish, or instruct the public body’s staff or negotiating agents concerning the position to be taken in negotiating incentives relating to the location or expansion of industries or other businesses or business activities in the District;
  - (4)(A) To consult with an attorney to obtain legal advice and to preserve the attorney-client privilege between an attorney and a public body, or to approve settlement agreements; provided, that, upon request, the public body may decide to waive the privilege.

- (B) Nothing herein shall be construed to permit a public body to close a meeting that would otherwise be open merely because the attorney for the public body is a participant;
- (5) Planning, discussing, or conducting specific collective bargaining negotiations;
- (6) Preparation, administration, or grading of scholastic, licensing, or qualifying examinations;
- (7) To prevent premature disclosure of an honorary degree, scholarship, prize, or similar award;
- (8) To discuss and take action regarding specific methods and procedures to protect the public from existing or potential terrorist activity or substantial dangers to public health and safety, and to receive briefings by staff members, legal counsel, law enforcement officials, or emergency service officials concerning these methods and procedures; provided, that disclosure would endanger the public and a record of the closed session is made public if and when the public would not be endangered by that disclosure;
- (9) To discuss disciplinary matters;
- (10) To discuss the appointment, employment, assignment, promotion, performance evaluation, compensation, discipline, demotion, removal, or resignation of government appointees, employees, or officials;
- (11) To discuss 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 from whom the information was obtained;
- (12) To train and develop members of a public body and staff;
- (13) To deliberate upon a decision in an adjudication action or proceeding by a public body exercising quasi-judicial functions; and
- (14) To plan, discuss, or hear reports concerning ongoing or planned investigations of alleged criminal or civil misconduct or violations of law or regulations, if disclosure to the public would harm the investigation.

The aforementioned exceptions for entering into a closed/executive session are unambiguous. On its face, drafting and editing the SEUAB contract performance report does not fall within the list of exceptions for entering a closed/executive session in D.C. Official Code § 2-575(b). To further strengthen the exclusivity of the list of exceptions for entering a closed/executive session, D.C. Code § 2-575(d) provides that: “[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* (Emphasis added). A strict reading of D.C. Official Code § 2-575(b) and (d), in concert with the OMA’s “Rules of construction” (D.C. Official Code § 2-573) limits closures to exceptions stated in D.C. Official Code § 2-575(b) and stresses that the intent of the Act is to maximize public access to meetings.<sup>6</sup> A closed/executive meeting by the SEUAB to draft and edit the contract

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<sup>6</sup> D.C. Official Code § 2-573 reads: “This title shall be construed broadly to maximized public access to meetings. Exceptions shall be construed narrowly and shall permit closure of meetings only as authorized by this act.”

performance report to avoid public scrutiny in closure is not one of these narrowly construed exceptions.

**THE ENABLING STATUTE REQUIRES THAT ALL MEETINGS OF THE SEUAB ARE TO BE OPEN TO THE PUBLIC.**

Section 204(i) of the CAEA (D.C. Official Code § 8-1774.04(i)) reads “(i) [A]ll Board meetings shall be subject to the open meeting provisions contained in § 1-207.42. As you are aware, D.C. Official Code § 1-207.42 is commonly known as the District’s “Sunshine Act.” 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 “Section-by-Section Analysis” in the CAEA’s legislative history provides that the intent of D.C. Official Code § 8-1774.04(i) is “that all Board meetings shall be open to the public.” (Report on the Committee on Public Services and Consumer Affairs on Bill 17-492, the Clean and Affordable Energy Act of 2008, at page 29 (Council of the District of Columbia June 2, 2008). The OMA and the Sunshine Act are two District laws that regulate the same subject, i.e., open meetings of public bodies in the District of Columbia. Case law states, when two statutes simultaneously relate to the same subject area, the rules of statutory construction provide that the two statutes should be construed together.<sup>7</sup> While the OMA relates to the same subject areas as the Sunshine Act, the OMA has additional requirements that the Sunshine Act does not contain. Particularly relevant to a determination in this matter are the closed meeting exceptions under the OMA that are absent from the Sunshine Act. Prior to adoption of the OMA, the CAEA requirement was for all meetings to be open to the public. There were no closed meeting provisions. When construing the two laws together, the SEUAB must adhere to the OMA’s “Open Meetings” provisions which govern the exceptions for conducting an open meeting. As discussed *supra*, the OMA’s closed meeting provisions provide for the limited instances where a public body may meet in closed/executive session and the SEUAB must adhere to these provisions. The reason you gave for the SEUAB to enter into closed session does not fall within these narrowly construed exceptions.

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<sup>7</sup>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.”

**THE REGULATIONS ADOPTED BY THE SEUAB MAKE ABUNDANTLY CLEAR THAT THE EDITING AND DRAFTING OF THE REPORT MUST TAKE PLACE IN AN OPEN MEETING.**

By-laws<sup>8</sup> published for public review on the SEUAB website regulate the proceedings of the SEUAB and make clear drafting and editing the contract report are activities that must occur in an open meeting. Paragraph 1.1 provides, “[T]hese bylaws, upon adoption by a majority vote of the Board, will govern the proceedings of the Sustainable Energy Utility Advisory Board.” Paragraph 2.8 entitled, “Open Official Meetings,” makes clear the SEUAB’s understanding that drafting and editing the report does not fall within the exceptions for holding a closed/executive meeting pursuant to D.C. Official Code § 2-575(b). Paragraph 2.8 reads:

**Open Official Meetings.** Except as required to perform its statutory function as described in Section 1.3, all Board meetings shall be open to the public, and no official action of the Board shall be effective unless taken or made at an open meeting. Section 204(i) of the Act.

Paragraph 1.3 reads:

1.3 The Board shall recommend performance benchmarks for the SEU contract to the Mayor based on the requirements set forth in section 201 of the Act. Section 204(c) of the Act. {sic} The Board shall perform this function consistent with: 1) the need for confidentiality to preserve the competitive bidding process; and 2) the Department of Energy and Environment’s interpretation of the Act,<sup>9</sup> which permits Board review of the RFP for the SEU contract, and associated documents, in a closed session.

Relevant to a determination in this matter is the omission from paragraph 1.3 of meeting to discuss the report in closure. In fact, discussion of the report at issue is in paragraph 1.4 which does not mention a meeting undertaking the drafting or editing of the report as suitable for meeting in closed/executive session. Notwithstanding the legal insufficiency of portions of this provision, it makes clear that drafting and editing the SEUAB report is subject to public observation in an open meeting.

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<sup>8</sup> The OOG last accessed the SEUB By-laws on October 31, 2017 at [https://doee.dc.gov/sites/default/files/dc/sites/ddoe/page\\_content/attachments/BYLAWS%20OF%20THE%20SUSTAINABLE%20ENERGY%20UTILITY\\_Amended120915.pdf](https://doee.dc.gov/sites/default/files/dc/sites/ddoe/page_content/attachments/BYLAWS%20OF%20THE%20SUSTAINABLE%20ENERGY%20UTILITY_Amended120915.pdf)

<sup>9</sup> The plain reading of D.C. Official Code §§ 204(i) and 2-575(b) and (d) nullify the second sentence of this paragraph. The second sentence in paragraph 1.3 is not a law requiring the meeting be held in closure (D.C. Official Code § 2-575(b)(1)). Additionally this provision is at odds with the scope of rulemaking. *See, Chesapeake & Potomac Tel. Co. v. Public Service Com.*, 339 A.2d 710, at 716. “The power of administrative agencies to make rules is not the power to make law but the power to adopt regulations to carry into effect the will of the United States Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.”

**Conclusion**

Exceptions to the OMA are to be narrowly construed, and a public body may not meet in a closed session to discuss or considering matters except as the OMA expressly states. The SEUAB's rationale for meeting in closed/executive session is for the purposes of drafting and editing a report by Board members prior to its issuance to the Council of the District of Columbia, and to avoid public scrutiny in the process. The OMA's list of exceptions to meet in closure does not include the aforementioned. While the SEUAB maintains "not all members are likely to be in attendance, no votes will be taken, no substantive policy decisions will be made," such activities at a gathering of a public body are "meetings in anticipation of official action and meetings where official actions are discussed," which, in the instant case do not fall within the OMA's category of exceptions for meeting in closure. In a prior opinion issued to the SEUAB the OOG found it proper for the entity to meet in a closed/executive session to review draft Requests for Proposals, which is not applicable here. For the reasons stated, the OOG must advise the SEUAB that meeting to draft and edit the report related to the SEU contract must be held in an open session. Failure to conduct the meeting in full view of the public will be a violation of the OMA.

Sincerely,



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Board of Ethics and Government Accountability

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