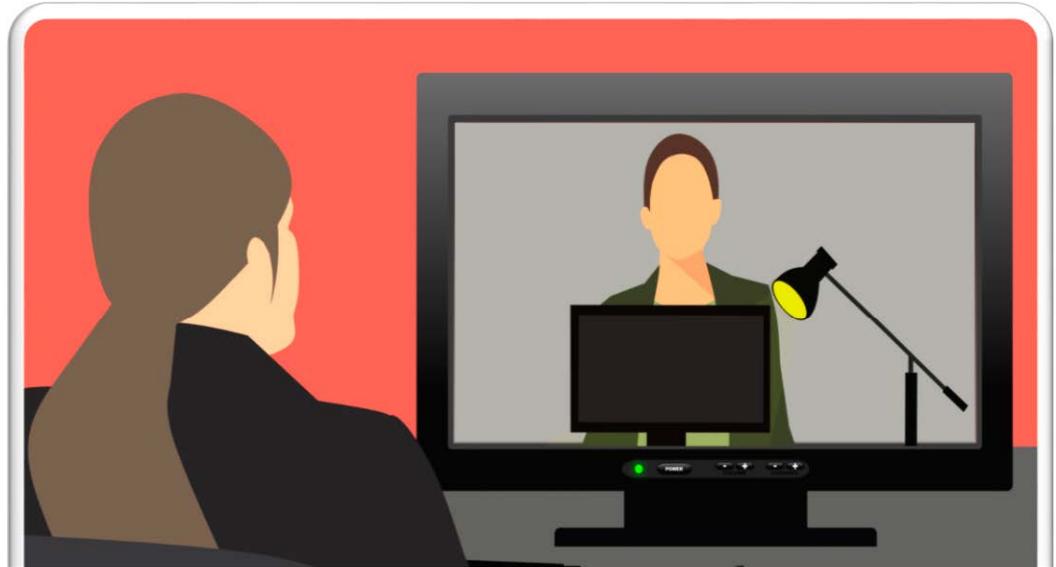


JULY 26, 2020



THE OPENGOVIST



OFFICE OF OPEN GOVERNMENT
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
441 4th Street NW, Washington, DC 20001

Director of Open Government's Message

Since its inception, the Office of Open Government has solidified its standing as a reliable resource for District Government on Freedom of Information Act (FOIA) compliance, government transparency policies and legislation, and Open Meetings Act compliance and enforcement. With the advent of a global pandemic, you came to rely upon us to guide you through these unprecedented times and help you by providing advice on processing FOIA requests, holding electronic meetings, and getting you the tools you need to provide access to our government, even when its physical doors are closed. Despite the current state of affairs, our aim is still to make our government easy to navigate, and access. We hope you enjoy this latest edition of The Opengovist newsletter. In it, you will find information on legal and policy trends on government transparency, related to the public health emergency. We also provide updates on the activities of the Office of Open Government.

As always, please reach out to us. We always want to hear from you (even if you just want to talk while you are quarantined at home). The Office of Open Government is a small, but mighty staff and we are here to navigate you through the pandemic and beyond!

Sincerely,
Niquelle Allen
Director of Open Government

Legislative Update



COVID-19 Response Emergency Amendment Act of 2020 (A23-0247). On March 17, 2020, the Council enacted the COVID-19 Response Emergency Amendment Act of 2020. The Emergency Act was signed by the Mayor on March 31, 2020 and remains effective until June 15, 2020. A23-0247 impacts both the conduct of open meetings and the processing of FOIA requests during the pandemic as follows:

- Requirement for meetings is waived, unless the Mayor deems it is necessary for the public body to meet remotely.
- The OMA requirement physical posting of meeting notices is waived.
- A meeting is considered open to the public during a public health emergency if the public body takes steps reasonably calculated to allow the public to view or hear the meeting in real time, or if it is not technologically feasible, as soon as reasonably practicable after the meeting.
- Tolls the schedule for making meeting records available.
- Tolls the clock on processing FOIA requests for the period the public health emergency is in effect.

View the introduced bill here: [COVID 19 EMERGENCY Bill](#).

OOG Issues Guidance on Legislative Changes Due to COVID-19. On March 20, 2020, the Office of Open Government issued a special notice to FOIA Officers and Administrative Points of Contacts for Boards and Commissions of the Legislative changes to the Open Meetings Act and the Freedom of Information Act as a result of the COVID-19 pandemic. The notice provided instruction on the nature of the changes to the law and how government operations must change to ensure public safety while maintaining government transparency. This guidance was also prominently featured on open-dc.gov. View the Guidance here: [COVID-19 Open Government Guide](#).

Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 (B23-0825). On July 23, 2020, the Mayor signed this Emergency Bill, B23-0825, into law. It required that DC Police release body-worn camera footage and the names of officers involved in deadly use of force cases by August 15, 2020. Families of the decedent have the right to prevent the public release of the video footage. The law takes effect immediately, for 90 days, read it [here](#).

Freedom of Information Act

Michigan FOIA Litigation. On May 21, 2020, the Michigan Court of Claims upheld the Michigan Governor's Executive Order 2020-38, which tolls the processing of FOIA requests during the COVID-19 emergency. The Michigan court's findings were: (1) there was no FOIA violation because the state only delayed FOIA request processing, which was not a FOIA denial; (2) Michigan law authorized issuance of the Governor's Order; and (3) the Governor's Order was not an unconstitutional delegation of legislative authority. On June 3, 2020, Governor Whitmer announced that Executive Order 2020-38, which extends certain FOIA deadlines due to COVID-19, will be rescinded at 12:00 am on June 11, 2020. The District of Columbia has taken similar action through legislation. The Michigan case is instructive on the issue of tolling FOIA processing during the public health emergency.

The National Archives and Records Administration's (NARA's) FOIA Advisory Committee Recommendations. The NARA FOIA Committee is a federal government entity tasked with "fostering dialogue between the Administration and the requester community, soliciting public comments, and developing consensus recommendations for improving FOIA administration and proactive disclosures." On May 7, 2020, NARA released 22 recommendations to improve processing of federal FOIA requests. The recommendations that are germane to the District of Columbia's FOIA laws are as follows: (1) Enhancing Online Access. OOG's federal counterpart, OGIS, should undertake an assessment of the information agencies make publicly available on their FOIA websites to facilitate the FOIA filing process. (Note: OOG conducted a FOIA audit concerning information that must be made publicly available.) (2) Improving Training: Offer targeted training in selected topics in federal records management to FOIA officers and FOIA Public Liaisons in federal agencies, and otherwise include a FOIA module in selected records management training courses open to all federal employees. (3) Embracing New Technologies: Provide further guidance on the use of e-discovery tools to assist agencies in meeting their obligations to conduct an adequate search of electronic records; and (4) Providing alternatives to FOIA requests: OGIS and the Department of Justice, Office of Information Policy should have agencies identify common categories of records requested frequently under the FOIA and/or Privacy Act, by or on behalf of individuals seeking records about themselves. They recommend establishing an alternative method, other than FOIA, for more efficiently providing access to these records. (Note: DC does not currently have a counter-part to the federal privacy act or have any law that addresses first party FOIA requests. OOG issued advisory opinions concerning this issue.)

Deliberative Process FOIA Exemption Case. The U.S. District Court for the District Columbia, in *Center for Investigative Reporting et al v. U.S. Department of Interior* (decided April 7, 2020), examined whether the Department of the Interior ("Department") demonstrated that the disclosure of the withheld information would result in reasonably foreseeable harm to the Department's deliberative processes. The Court concludes that the Department did not. The Court recited a 2016 amendment to FOIA that applies "even if a record would otherwise be exempt." That amendment allows an agency to withhold information under [FOIA] only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law. To satisfy its obligations, the agency must articulate both the nature of the harm and the link between the specified harm and specific information contained in the material withheld. The Court

stated that this task "requires more than speculation"— "[t]he question is not whether the purported harms could" occur, but whether "it is reasonably foreseeable" that they will occur. The Court held that the Department had established a reasonably foreseeable link between these harms and the specific information contained in the withheld records.

Open Meetings Act

OMA Remote Meeting Guidance During the Pandemic. The COVID-19 pandemic prompted an immediate shift from in-person meetings to virtual meeting practices. The Open Meetings Act already provides for what it calls “electronic meetings.” OOG in conjunction with the Mayor’s Office of Talent and Appointments issued a Memorandum concerning best practices concerning remote meetings on March 20, 2020. The document was updated later to provide enhanced advice on topics such as “zoombombing.” Read the Memorandum here: https://www.open-dc.gov/Best_Practices_Electronic_Meetings_COVID19

Remote OMA Compliance Monitoring. OOG continues to ensure the public’s right of access to public meetings by monitoring public body compliance with the OMA as amended by the “COVID-19 Response Emergency Amendment Act of 2020.” We are: (1) monitoring public meeting notices to ensure they provide remote meeting access information for the public to observe: and (2) attending meetings remotely. Once the public health emergency ends, the OOG will compile a report on its findings. Attending and monitoring meetings has allowed the OOG to immediately identify compliance issues and instantly respond with advice to board administrators.

Curtain Call

Featured Public Body Profile. The Alcohol Beverage Control Board (ABC Board) is an independent body that meets once each week to adjudicate, administer and enforce alcoholic beverage laws in the District of Columbia. Board members are appointed by the Mayor and confirmed by the DC Council for a four-year term. There may be as many as seven members on the ABC Board, with three members constituting a quorum. The ABC Board is responsible for:

- Approving all applications for new alcoholic beverage licenses, renewals, transfers of ownership or location, substantial changes, suspensions, revocations, the safekeeping of licenses, and voluntary agreements.
- Enforcing District alcohol laws.
- Issuing new alcoholic beverage regulations and policies related to the sale and distribution of alcohol.

- Referring violations of the law to the Office of the Attorney General and other legal authorities for investigation and prosecution.
- Overseeing the Alcoholic Beverage Regulation Administration.

The ABC Board convenes every Wednesday except when in recess. Due to the coronavirus (COVID-19), all meetings will be by teleconference until further notice. Their meetings commence at 10:00 a.m. For more information visit: <https://www.abra.dc.gov>

Upcoming Trainings

The D.C. Open Government Coalition is hosting an online program Tuesday, Sept. 29, 2020, from 12 -1:30, on public access to the video from cameras most patrol officers wear today, including in D.C. MPD. Director Allen is a featured panelist. For additional information visit: www.dccogc.org

The Board of Ethics and Government Accountability (BEGA) is hosting Ethics Week 2020 "Ethics and Open Government in a Virtual World" from October 19-23, 2020. OOG will be presenting several instructional webinars on OMA and FOIA during the weeklong training session. Registration information and the full calendar of events may be accessed here: <https://bega.dc.gov/event/begas-2020-ethics-week>

OOG provides OMA and FOIA training courses upon request. Please contact us at open.govoffice@dc.gov to schedule a training session. ***All training courses will be conducted remotely due to the COVID-19 pandemic until further notice.***



Contact Information

OOG provides advice to agencies, public bodies and the public on compliance with FOIA and the OMA. Please contact us at (202) 481-3411 or email open.govoffice@dc.gov for assistance.

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OUR PHYSICAL OFFICE IS CLOSED UNTIL FURTHER NOTICE DUE TO THE COVID-19 PANDEMIC

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