

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

**DRAFT MEETING MINUTES – June 3, 2021**

The District of Columbia Board of Ethics and Government Accountability held a meeting on June 3, 2021 at 12:00 p.m. The meeting was held remotely via WebEx. The Board’s Chairperson Norma Hutcheson participated as well as Board Members Charles Nottingham, Felice Smith, Darrin Sobin, and Melissa Tucker. These draft minutes must be approved by the Board. Full meeting minutes will be posted after the next Board meeting. Questions about the meeting may be directed to [bega@dc.gov](mailto:bega@dc.gov).

Members of the public were welcome to attend, and a recording of the meeting will be made available on open-dc.gov and BEGA’s YouTube channel.

**I. Call to Order**

**II. Ascertainment of Quorum**

Quorum established.

**III. Adoption of the Agenda/Approval of Minutes**

Board Members unanimously approved the Agenda and May 6, 2021 minutes.

**IV. Report by the Director of Open Government**

Good afternoon Chairperson Hutcheson and Members of the Board. I am Niquelle Allen, Director of Open Government. I am pleased to present this report on the activities of the Office of Open Government (“OOG”). Since the last Board meeting, the OOG has continued to fulfill its mission of ensuring that all persons receive full and complete information regarding the affairs of the District government and the actions of those who represent them.

**A. Open Meetings Act (“OMA”) and Freedom of Information Act (“FOIA”) Advice**

1. Advisory Opinion (FOIA): OOG has not issued any advisory opinions since the last Board meeting.
2. Formal FOIA Advice: OOG’s legal staff and OGE’s General Counsel, Rashee Raj, continue to provide BEGA’s pending FOIA requesters with a letter detailing the COVID-19 related changes to FOIA requirements and the impact of those changes on processing FOIA requests. Currently, all FOIA requests received by BEGA’s FOIA Officer, Sheree DeBerry, on or after January 16, 2021, will be processed under the normal FOIA rules. However, if the request requires BEGA to search for records located in BEGA’s physical office, BEGA’s response to the FOIA request will not be due until 45 days after the public health emergency has concluded.

3. Informal OMA/FOIA Advice: Since the last Board meeting, OOG responded informally, via e-mail or telephone, to requests for assistance as follows:

- The Office responded to 17 requests for OMA advice;
- The Office responded to 8 requests for FOIA advice; and
- The Office responded to 36 requests for technical assistance with open-dc.gov.

B. Training/ Outreach:

1. Joint OOG and OGE Training: On May 12, 2021, Chief Counsel Barton and OGE Attorney Stewart-Michell conducted a joint OMA and ethics training for the Health Benefits Exchange Authority. The training was well received. I and Attorney DeBerry were also in attendance.

2. Archive Social Media and the 1<sup>st</sup> Amendment Webinar: On May 18, 2021, Chief Counsel Barton, and Attorney DeBerry, attended a webinar presented by Archive Social: “*Social Media and the 1<sup>st</sup> Amendment: Learning to Avoid Facebook Foibles and Twitter Trip-ups.*” It was an inciteful presentation on government forums application of the 1<sup>st</sup> Amendment, use of social media, viewpoint discrimination, and social media policies.

3. The Leadership Institute for Women of Color Attorneys, Inc., webinar: On May 13, 2021, Attorney DeBerry attended the second phase of the Leadership Institute for Women of Color Attorneys, Inc., 16<sup>th</sup> Annual Leadership Conference. The webinar focused on strategies to ensure diversity, equity & inclusion of women of color in the workplace.

4. American Society of Access Professionals (“ASAP”) National Training Conference 2021: On May 25-27, 2021, I, along with OOG’s legal staff, attended ASAP’s National Training Conference. ASAP is a nongovernmental, independent, educational, not-for-profit association that provides training on information access through the FOIA, the Privacy Act, and laws and regulations. OOG attended the following trainings: “FOIA Procedural Overview: Key Elements”; “FOIA Exemptions Overview: One-Nine”; “Exemption 4: It’s Proprietary”; “What is a Federal Record?”; “The Requesters; Exemption 6 & 7 (C)”; “The Privacy Interest; Exemption 3”; “Innovations in State Laws; FOIA in the COVID Environment”; “Exemption 7; Fees, Categories and New Schedule”. On day 3, I instructed on Innovations in District of Columbia FOIA law along with my co-presenter, Michael Morisy, from the FOIA advocacy organization MuckRock.

C. Litigation and Legislative Update:

1. Litigation: OOG is monitoring FOIA-related cases in D.C. Superior Court. The agency is not a party to either of the lawsuits. I am providing this information for the Board’s awareness of litigation that may impact the operation and interpretation of

D.C. FOIA law.

a. TPM Lawsuit update: This is an update on the FOIA case filed against the District of Columbia on July 13, 2020, by Terris, Pravlik & Millian, LLP ("TPM"). The FOIA lawsuit alleges that the District of Columbia government failed to produce, and post online various budget-related documents as required by FOIA. The Complaint alleges that the Executive Office of the Mayor failed to produce documents related to the Office of the State Superintendent of Education and District of Columbia Public Schools (Civil Action No. 2020 CA 003087 B).

On May 14, 2021, the District of Columbia filed its cross-motion for summary judgment and opposition to TPM's motion. The District argues that preliminary budget submissions to the Mayor from the Office of the State Superintendent of Education and District of Columbia Public Schools, should be shielded from public view. The District believes that FOIA does not require the publishing of preliminary budget submissions that contain the agencies' initial budget advice and recommendations to the public on the internet. The District argues that the documents are protected under the deliberative process privilege, which is an exemption to release under D.C. FOIA. The District also maintains that the budget submissions are protected from disclosure by the executive communications privilege and requiring their release would violate the principle of separation of powers under the District Charter. The District further argues that plaintiff's lack standing to challenge the District's decision not to post documents online because prospective publication is not an available remedy. Copies of the motions are in DropBox for your reference.

b. Stop and Frisk FOIA lawsuit: On February 16, 2021, the American Civil Liberties Union ("ACLU") filed suit against the District of Columbia (*ACLU of DC v. District of Columbia, No. 2021 CA 000452 B*) seeking records concerning stop and frisks by the Metropolitan Police Department ("MPD"). MPD is required to retain stop and frisk statistics pursuant to the Near Engagement Archives Result Act (D.C. Official Code § 5-113.01(a)(4B)). The *Complaint* seeks declaratory and injunctive relief to compel the District to provide the documents.

On March 9, 2021, Plaintiff filed a Praecipe withdrawing its pending *Motion for a Preliminary Injunction*. The issue became moot because the District published the data requested by the Plaintiff on March 5, 2021.

On April 15, 2021, the District submitted *Defendant's Consent Motion to Stay Litigation* so that parties may discuss the possibility of settlement on the attorney's fees, the only remaining issue. On April 20, 2021, the Court granted the *Defendant's* motion and *Order Granting Consent Motion to Stay* the proceeding was entered on the docket. The Initial Scheduling Conference scheduled for May 21, 2021 was cancelled. A status hearing has been scheduled for July 23, 2021. The parties have been instructed to file a praecipe of dismissal if a settlement is reached before that time. The OOG will continue to monitor these matters.

## 2. Legislation:

a. On May 20, 2021, OOG Staff attended Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, and the Committee of the Whole's joint public hearing to hear testimony on the following law

enforcement reform legislation:

(i) Bill 24-0094: The “Bias in Threat assessments Evaluation Amendment Act of 2021”, would amend the Attorney General of the District of Columbia Clarification and Elected Term Amendment Act of 2010 to require the Attorney General to conduct a study to determine whether the MPD engaged in biased policing when conducting threat assessments of assemblies within the District of Columbia and to grant the Attorney General subpoena power as needed to carry out the study.

(ii) Bill 24-0107: The “Metropolitan Police Department Requirement of Superior Officer Present at Unoccupied Vehicle Search – No Jump-Out Searches Act of 2021”, would prohibit MPD from conducting searches of unoccupied vehicles unless a superior officer is present, all officers present at the search have their body cameras on and functioning, the officer requesting the search provides a verbally stated reason to the superior officer to conduct the search, and the superior officer at the search is viewed giving verbal authorization to conduct the search, to require a report by an officer present at the search to file the results of the search and that the owner of the vehicle be notified as to why the owner’s vehicle was searched, and to provide that the owner of the vehicle has the right to sue the individual officers not adhering to the requirements of the act in their individual capacities.

Board member Sobin had a question about the intention behind this legislation.

(iii) Bill 24-0112: The “White Supremacy in Policing Prevention Act of 2021”, would require the Office of the District of Columbia Auditor to initiate an assessment into any ties between white supremacist or other hate groups and members of its members that suggest an individual cannot enforce the law fairly, and to recommend reforms to MPD policy, practice, and personnel to better detect and prevent ties to white supremacist or other hate groups in the Department that may prevent fair enforcement of the law in order to increase public trust in the Department and improve officer and public safety.

(iv) Bill 24-0213: The “Law Enforcement Vehicular Pursuit Reform Act of 2021”, would prohibit District of Columbia law enforcement officers from engaging in vehicular pursuits of an individual operating a motor vehicle, unless the officer reasonably believes that the fleeing suspect has committed or has attempted to commit a crime of violence and that the pursuit is necessary to prevent an imminent death or serious bodily injury and is not likely to put others in danger of death or serious bodily injury; and to prohibit the use of dangerous vehicular pursuit practices.

The D.C. Council did not require OOG to provide testimony on this legislation as a Government Witness. However, throughout the hearing members of the DC Police Reform Commission referenced the OOG’s BWC advisory opinion regarding increased transparency in MPD’s FOIA processing. As the Board recalls, the Commission’s April 1, 2021 report to the Council recommends changes to FOIA law regarding BWC footage processing and to implement the OOG’s findings and recommendations. OOG will continue to monitor this legislation. Copies of the legislation are in DropBox for your reference.

D. Administrative Matters:

1. New OOG Attorney-Advisor and Trial Attorney: On May 24, 2021, the OOG welcomed 2 new attorneys to our legal staff. I am pleased to introduce, Ms. Zita Orji, OOG's Trial Attorney and Mr. Nicholas Weil, OOG's Attorney Advisor.

Zita Orji is from Birmingham, AL and attended the University of Alabama at Tuscaloosa where she attained a bachelor's degree. She received the Juris Doctorate from Tulane Law School in New Orleans, LA. Zita spent most of legal career as counsel for a non-profit organization and specialized in civil litigation. She is a self-described very obsessive plant mom and enjoys long distance running. She looks forward to meeting everyone and is excited to work for the OOG.

Nicholas Weil has worked in private practice and at all levels of government. Most recently, he was a litigator and researcher-writer who contracted with client firms across the United States.

Nick began his legal career as a clerk for Justice Steven Levinson of the Supreme Court of Hawaii. Nick also worked as a codification lawyer for the U.S. House of Representatives, helping to edit and publish the U.S. Code. After returning to graduate school, Nick entered private practice as a litigator (mostly appellate). Nick has a Juris Doctor from Washington University, where he was editor-in-chief of the Washington University Journal of Law & Policy and parliamentarian for student government; a Master of Arts degree in Forensic Linguistics from Hofstra University, and a Bachelor of Arts degree in Linguistics from Harvard University. His free-time preoccupations include hot peppers, backgammon, indoor cycling, outdoor walking (including golf), and animal welfare (including that of his and his wife's own pets).

We are thrilled to welcome our new attorneys to the BEGA family.

2. Return to the Workplace: BEGA has elected to remain in full situational telework status for the remainder of FY21. BEGA alerted the City Administrator regarding the agency's participation in Mayor Bowser's return to the workplace plan. Agencies under the Mayor will return to in-office service on July 12, 2021. Given BEGA's office space constraints, Acting Director Cooks and I decided to remain in full situational telework status. BEGA employees may provide in-office service with the permission of either Director. BEGA's leadership has committed to working in the office periodically and administrative staff is also working in the office periodically. We are currently considering future plans for employees to return to the Barry building, as the pandemic eases, sometime in FY22.

3. FY22 Budget: The Mayor released the FY22 Budget on [insert date]. As part of our planning, the Office of Open Government requested a paralegal specialist position to assist agency attorneys and to serve as a fact witness in OMA cases. The Mayor's FY22 budget did not provide for this position. Since FY18, BEGA has requested a budget enhancement to move into office space that is adequate for the agency's staff size and other requirements. We also sought additional funds for office administration and training platforms. Unfortunately, Mayor Bowser did not provide the agency with

the requested funding in her budget proposal. I plan to address these issues with the Council on Human Services in my public statement. These budget enhancement requests are required to improve the operations of the agency and its ability to perform its mission.

**This concludes the Office of Open Government’s June 3, 2021 report.**

**V. Report by the Director of Government Ethics**

Good afternoon Chairperson Hutcheson and Members of the Board. My name is Ashley Cooks, I am the Acting Director of Government Ethics. I am pleased to present this report on the activities of the Office of Government Ethics (OGE).

- A. Update on Status of OGE Operations: The information reported today regarding OGE’s cases will not reflect any status changes that may will occur as a result of actions taken by the Board during today’s meeting.

<b>OPEN INVESTIGATIONS BY STATUS</b>	
Open	59
Open - Negotiations	0
Open - Show Cause Hearing	0
Grand Total	59

<b>OPEN "UNDOCKETED MATTERS"</b>	
Grand Total	0

<b>PENDING/STAYED INVESTIGATIONS BY STATUS</b>	
Closed - Pending Collection	29
Closed - Pending DC Superior Court Case	1
Stayed - OAG False Claims Act Case	4
Stayed - OIG Investigation	9
Stayed - US District Court Case	1
Grand Total	44

<b>REGULATORY MATTERS BY STATUS</b>	
Closed - Pending Collection	24
Open	0
Grand Total	24

	<b>Current</b>	<b>Last month</b>	<b>April</b>
Investigations Currently	59	62	55
Investigations Stayed	13	12	12

The number of open preliminary investigations includes 4 new matters opened since the Board last met. The investigative team resolved 7 preliminary investigations since the Board last met.

B. Trainings/Outreach:

1. Professional Development Trainings Attended by staff:

During the month of June, OGE Attorneys attended the National Association of Government Communicators' 3-day virtual Communications School and the Society of Corporate Compliance and Ethics workshop on Compliance and Ethics Essentials. GC Raj also completed a mandatory Sexual Harassment Officer update training.

BEGA's Auditor took the following trainings:

- Excel 2019 for Windows; Using Basic Formulas
- The Requirements Life Cycle Management Knowledge Area
- Impact on Stakeholders and Benchmarking for Six Sigma
- Determining Process Performance and Capability in Six Sigma
- Registered for the Certified Fraud Examiners (CFE) Certification

2. Conducted by staff:

Since the last Board meeting, OGE attorneys conducted 7 total ethics trainings, which includes: two of the Monthly Ethics Training; general ethics trainings for: the Department of Corrections and Department of Consumer and Regulatory Affairs; Board and Commissions trainings for: DC Public Charter School Board and the Health Benefit Exchange; and an ethics training for ANCs. OGE did not hold a virtual brown bag ethics forum discussion this month but will host our next session on June 28<sup>th</sup>.

In addition, 567 employees completed our online ethics training via PeopleSoft.

C. Advisory Opinions/Advice:

1. Informal Advice: approximately 45, which is 6 less than the 51 reported at the May meeting. This number does not include responses we have provided to questions regarding the Lobbyist and FDS e-filing systems. OGE has not issued any advisory opinions since the last meeting.

D. Legislation Updates:

Council member Allen intends to introduce the Pro Bono Legal Representation Clarification Amendment Act of 2021, as an amendment to Section 223 of the Ethics Act by adding a new subsection which will allow employees to represent persons of

limited-income, in affiliation with a non-profit organization, before District courts and federal courts, and District and federal agencies. The amendment allows for pro bono representation, in affiliation with a non-profit, provided that: (A) the matter does not involve a claim against the District; (B) a criminal proceeding; (C) the District does not have a direct or substantial interest in the matter; (D) the employee has not participated personally and substantially in the matter as an employee; and (E) the representation does not violate federal or District law or any applicable rules of professional conduct or responsibility. The bill emphasizes that an employee must act in his/her personal capacity, not receive compensation for that legal representation; and be affiliated with a covered organization. It also includes the language from DPM 1807.7 which allows an employee to provide legal representation to family members or an estate which an employees serves as guardian or administrator if the employee has not participated in the matter as a part of their official duties.

We have been involved in the drafting process and look forward to continuing our engagement with the Council on this matter.

A copy of the most recent draft amendment has been uploaded to the BEGA Box.

#### E. OGE Administrative Matters:

##### **OGE Staffing:**

OGE interviewed candidates for the two vacant Attorney Advisor positions and is planning to extend an offer to one individual this week. The Senior Attorney Advisor position remains vacant at this time. Attorney Advisor Asia Stewart-Mitchell has been temporarily promoted to Supervisory Attorney Advisor of Advice and Education. Ms. Stewart Mitchell has been an incremental member of the FDS and advice and training teams. I am confident that she will continue those efforts as she leads OGE's advice and education efforts.

**Reporting:** As discussed at the last Board meeting, OGE is unfortunately still working to post the finalized outstanding quarterly complaint reports. We have been delayed in publishing the Quarterly Complaint Reports because our draft reports have been consistently inaccurate based on our knowledge of our case dockets. OGE will continue to prioritize getting the reports published soon.

**Budget:** The agency's budget hearing is set for June 16, 2021. GC Raj and I have been working with OOG on budget enhancements. We have also been meeting with OCFO to ensure that all the requisite documents are provided to the Council. So far, we have been awarded the money to purchase a Learning Management System that will allow for BEGA to independently provide access to ethics training to the Districts 35,000 plus employees. OGE intends to seek enhancements to priorities that we believe are essential for continuing to improve agency functionality.

##### **Operational Needs**

OGE is seeking to enhance and modernize agency operations to allow us to better meet the changing needs of the District's remote work force. This decision comes after reviewing agency administrative and personnel functionality with Director Allen and GC Raj, and consulting with DCHR and



other independent agencies on their approach to administrative and human resources related matters.

As Council Member Charles Allen suggested to BEGA in the past, we will be seeking a funding enhancement for a Chief of Staff, who would oversee administrative work, serve as a budget, performance, and strategic planning expert, and supervise administrative support and human resources matters and staff.

After consulting with DCHR, we will also seek an enhancement to fund a dedicated, full-time Human Resources professional position to best assist the agency with developing a strategic plan to modernize and standardize BEGA recruiting, staffing, performance, retention, and professional development. BEGA has specialized and unique personnel needs, given the broad, multifaceted nature of OOG and OGE's missions. Moreover, OGE has had persistent vacancies in various positions since 2017. Being consistently understaffed, has had a significant impact on agency morale and performance.

#### **Modernization and Program Improvements**

We will also be seeking an enhancement to fund the development of a payment portal. We have met with OCTO to discuss both a short-term web form payment option as well as developing the payment option within the agencies e-filing systems.

#### **Return to Work Issues and Building Issues**

The Mayor has set forth a plan for District workers to begin a voluntary, gradual return to working in office full time. At this time, the goal is to return to work by mid-July. We have informed the Mayor and DGS that given our significant space constraints, that we would not be following the Mayor's plan at this time for a full-return and will continue our practice of allowing employees to work in the office voluntarily on an ad hoc or regular basis, with pre-approval. OGE and OOG plan to meet to discuss a return to work plan which will accommodate employees given the limited amount of office space and public health concerns.

### **F. Financial Disclosure/Lobbyist Matters:**

**Lobbying Registration and Reporting (LRR) System** – In May 2021, the Lobbyist Registration Team received did not receive any Activity Reports, 6 New, 2 Renewal, and 2 Termination reports. The team also answered 5 emails and 2 Support Tickets. The Lobbyist Team continues to work on the website and enforcement of late and non-filers.

**Financial Disclosure** – On April 15, 2021, the Financial Disclosure Team noticed 3,760 employees, board members, commissioners, and former employees designated as public filers. These notices took the form of emails and physical USPS mailing sent April 21 due to printing delays. We are currently sending weekly email reminders to filers.

For the period May 1 to May 28, the notices netted 779 Public Filers (year to date 1,948 filers have filed). This represents a 35% increase in filers over the previous year same period. Further, Support Tickets over the same period are down 70% from 133 to 40. As with April, many support tickets are due to incorrect information/ email addresses on the user profile. Overall, we are seeing more filing with fewer issues this season.

**Confidential Filer Pilot Program** – As mentioned during the last meeting, OGE has developed a Pilot Program for Confidential Filers in an effort to modernize, standardize, and automate the financial disclosure process for both public and confidential filers across all District agencies.

80 of 160 participating in the Confidential Filer Pilot Program have filed successfully and remain securely confidential. The goal is to allow CFDS and PFDS to use the same e-file system District wide. This will allow agency ethics counselors to more easily maintain ethics related records, analyze agency compliance, and more easily access information to address possible conflicts of interest

BEGA is also in the process of refunding some confidential filers, who claimed they filed timely, and so far, 62 employees have been refunded \$18,214. A refund for 8 more employees, totaling \$2,416, is still pending.

**Thank you. This concludes the Office of Government Ethics' June 3, 2021 report.**

**VI. Acknowledge of Public Comment – if received:**

I'm not sure whether submitting yet another public comment regarding the lack of quarterly reporting for the entirety of 2020 (which quarterly reporting is mandatory per DC Code) is going to do much here, but--suffice it to say--I and others have some significant concerns about the functioning of this agency based upon the apparent lack of investigative activity and multiple resignations that I hope will be thoroughly addressed in council oversight hearings. I suppose the only route now is to submit a FOIA request to get information that is required by law to be made publicly available without a FOIA request. In any event, I don't know how proper oversight is possible without such public reporting.

Michael J. McDuffie

**VII. Executive Session (non public)**

**VIII. Super Executive Session – personnel matters**

**IX. Resumption of Public Meeting**

**X. Adjournment**

The Board will meet again on July 1, 2021.

UNAPPROVED