

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

DRAFT MEETING MINUTES – FEBRUARY 2, 2023

The District of Columbia Board of Ethics and Government Accountability held a meeting on February 2, 2023 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, Darren 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.

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

The meeting was called to order at 12:03 p.m.

II. Ascertainment of Quorum

A quorum was established with four Board members, Chairperson Hutcheson, Charles Nottingham, Darren Sobin, and Melissa Tucker, present at the start of the meeting.

III. Adoption of the Agenda/Approval of Minutes

The Board voted unanimously to adopt the agenda and approve the minutes from the January 5, 2023 meeting.

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, OOG has continued to fulfill its mission of ensuring that all persons receive full and complete information regarding the affairs of the District of Columbia government and the actions of those who represent them.

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

1. Advisory Opinions

I have not issued an advisory opinion since the Board’s last meeting. The Office has rendered formal, written legal advice, which is as follows:

a. OMA Quorum Advice

On January 9, 2023, I responded to an agency's request for advice concerning the quorum requirement for District government boards and commissions when quorum is not stated. The Office of the Attorney General's ("OAG") legal opinions, the language in other District laws, and Robert's Rules of Order supports OOG's position that a quorum is met when a simple majority of the members of a public body are present when a public body's enabling legislation, Mayor's Order, or bylaws do not specify the number of members required for a quorum. Below I summarize the advice that was given.

OAG provides advisory memoranda to Advisory Neighborhood Commissioners ("ANCs") as part of OAG's general authority to advise on the laws of the District of Columbia (D.C. Official Code §§ 1-301.81(a); 1-309.12(d)(4)). OAG has advised ANCs that in the absence of a statutory provision stating otherwise, a simple majority constitutes a quorum based on common law. It is OOG's view that OAG's opinions on quorum also applies to public bodies subject to the OMA.

Additionally, there are several District of Columbia Code provisions and public bodies' enabling legislation that codify the D.C. common law rules concerning quorum recited in the OAG opinions. OOG also relies on these provisions as illustrative provisions to advise public bodies that a simple majority constitutes a quorum.

Finally, OOG also refers non-legislative public bodies to Robert's Rules of Order, Newly Revised ("RONR") regarding issues concerning meetings not covered in the OMA. Section 40:2 of RONR explains, "4) In any other deliberative assembly with enrolled membership whose [organic law does] not specify a quorum, the quorum is a majority of all the members."

b. Entity's Status as a Public Body

On January 13, 2023, I responded to the Tax Revision Commission's ("Commission") inquiry of whether its statutory creation exempts it from the applicability of the OMA. It does not exempt this public body. The Commission's creation by statute, per the OMA's legislative history is one of the indications that Council's intent is for the entity's meetings to be subject to the OMA. It states: "[I]n defining the term public body and meeting the committee print clearly identifies what is covered under the District's open meetings law. Public body would include any council, board, or commission of the District government established pursuant to statute, regulation, or order." Additionally the Commission's enabling legislation (D.C. Official Code § 47-462 (a)) states the Commission's mandate, in part, is: "to prepare comprehensive recommendations to the Council and the Mayor which: (1) Provide for fairness and equity in the apportionment of taxes and promote progressivity; (2) Broaden the tax base; (3) Make the District's tax policy more competitive with surrounding jurisdictions; (4) Encourage business growth and job creation; and (5) Modernize, simplify, and increase

transparency in the District’s tax code.” These activities clearly have far-reaching and significant impacts on the citizens of the District of Columbia and constitute public business by entities whose meetings the OMA is to regulate.

Since there is no specific statutory exclusion from all or part of the OMA, the Commission is subject to the requirements of the OMA in full.

c. Cancellation of Public Body Meetings

On January 11, 2023, we responded to a public body’s request for advice about canceling public meetings under the OMA. The public body had adopted a practice of consistently starting meetings 30 minutes after the posted/noticed time, because it waited for all members to arrive. The public body asked (1) whether, under the OMA, it *could* cancel a meeting after its appointed time—because, for example, not enough members joined; and (2) whether it *must* cancel a meeting after a certain delay, because the public would have relied on its order of business beginning at the announced time. We advised them that the answer is yes to both questions.

Parliamentary law does not require a quorum to *start* a meeting. The presiding officer can (and should) start the meeting at the announced time but may defer the transaction of business—for a reasonable time—if awaiting a quorum. But, once the delay becomes unreasonable, the public body must adjourn to a later date (and give updated notice in line with the OMA). In this case, the delay was unreasonable. If the public is expecting the public body to begin its agenda items at the announced time, to push everything back by as much as a half an hour is to deprive the public of meaningful notice.

Relatedly, the OMA *does* permit cancellation of meetings. While 48 hours or two business days’ notice of the cancellation is ideal, as much advance notice as possible of the cancellation is acceptable in some instances.

2. Informal OMA/FOIA Advice

Since the last Board meeting, OOG has responded informally, via e-mail or telephone, to requests for assistance as follows:

OOG responded to ten (10) requests for OMA advice.

OOG responded to ten (10) requests for FOIA advice; and

OOG responded to twenty-six (26) requests for technical assistance with open-dc.gov.

B. Remote Meeting Monitoring

OOG attorneys attend remote public meetings to ensure compliance with the OMA and inspect public body websites and the OOG’s central meeting calendar for public meeting notices and records. We provide legal advice on OMA compliance and take corrective action if necessary.

During January 2023, OOG attended ten (10) remote public body meetings. As a result of the monitoring, twelve (12) instances of written corrective measures were taken. The public bodies failed to post agendas along with the OMA regulatory statement. The OMA requires each meeting notice to include the date, time, location, and planned agenda to be covered at the meeting. *D.C. Official Code § 2-576(5)*. Public bodies must post the OMA regulatory statement, “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,” on all draft and final meeting agendas. 3 DCMR §10409.2.

C. Training/Outreach

1. OMA Training for the Department Science Advisory Board

On January 17, 2023, Chief Counsel Barton conducted a remote OMA training for the Science Advisory Board, a public body within the Department of Forensic Sciences. The training was well received. The OOG legal staff also attended the training.

2. Distribution of OOG Newsletter

This year’s first issue of the OOG’s newsletter, “The Opengovist”, is currently available for view on our Twitter account and is being distributed by email to agencies and public bodies. This edition contains summaries of FOIA and OMA advisory opinions issued by OOG, legislative updates and information on upcoming FOIA and OMA trainings. We are aiming to issue the newsletter quarterly this year.

3. Open Government Advisory Group (“OGAG”) meeting

On January 11, 2023, I, along with Attorney DeBerry, attended the OGAG meeting. The meeting included a lengthy discussion on the Board's Best Practices report that was recently published. The OGAG will use it as a resource moving forward on DC FOIA issues. The meeting also included a discussion on OGAG’s meeting schedule. It was suggested that OGAG members meet monthly to work toward completing recommendations for the Mayor on improvements to DC FOIA.

4. ANC Orientation, Ethics and FOIA Training Organizational Meeting

On January 17, 2023, I along with Attorney Asia Stewart-Mitchell, met with the Office of ANCs Executive Director Kent Boese to discuss BEGA's training of ANCs. The Office of Open Government will be offering two opportunities for ANC Commissioners to receive training on their FOIA obligations on February 15, 2023. The training sessions will occur via WebEx and will be facilitated by Chief Counsel Johnnie Barton and me.

D. Litigation and Legislative Update

1. Litigation

- a. Chicago Justice Project lawsuit re: Metropolitan Police Department (“MPD”) Gang Tracking and Analysis System (Super. Ct. Case No. 2022 CA 001175 B).

As I have reported, the Chicago Justice Project (“CJP”) sued the District to compel the release of certain MPD records concerning the Gang Tracking and Analysis System.

On January 23, 2023, CJP filed a motion to enforce judgment and a declaration that the District’s demand for \$420,000 in prepaid fees for producing the public records, and a five-year schedule for doing so, contravenes D.C. FOIA.

The motion is in the Dropbox.

- b. Washington Post FOIA lawsuit re: records arising out of Capitol insurrection (Case No. 2021 CA 002114 B (Super. Ct. D.C.)).

I have reported on this case, in which *The Washington Post* seeks certain records relating to the Capitol insurrection, including certain 911 recordings and a report concerning the death of Capitol Police Officer Brian Sicknick. The Post’s opposition to summary judgment, and the District’s reply, have now been filed and are in the Dropbox.

With respect to Exemption (2) (concerning “information of a personal nature where . . . public disclosure . . . would constitute a clearly unwarranted invasion of personal privacy”), *The Post* argues that, while it “agrees that the privacy interests of Officer Sicknick’s family members justify withholding certain portions of the report,” Exemption (2) implies a *balancing* of “the privacy interest in the information against the public interest in disclosure” and “does not permit the District to withhold the report as a whole.” (Opp. at 12.)

As for Exemption (3)(A)(i) (concerning “[i]nvestigatory records . . . to the extent that . . . production . . . would . . . [i]nterfere with . . . [law-e]nforcement”), *The Post* “does not dispute that these recordings qualify as ‘law enforcement records’ as a threshold matter, but” argues that “the District has failed in two separate ways to demonstrate that releasing any of these of records would interfere with law enforcement proceedings.” (Opp. at 9.)

The case remains set for mediation on July 26, 2023.

c. Barber v. District (Case No. 2020 CA 001022 B).

Since February 1, 2020, Claudia Barber is suing the District to compel disclosure of certain records surrounding her employment with, and termination from, the Office of Administrative Hearings. The District's position is essentially that every one of the plaintiff's multiple requests is either moot as fulfilled, and/or that her complaint does not state a claim for relief by identifying records and challenging the District's usage of a D.C. FOIA exemption, and/or that she did not pre-pay fees.

The Superior Court held a hearing on December 13, 2022, and disposition of the District's motion for dismissal or summary judgment is pending.

The substantive filings (including the most recent amendment of her complaint (Sept. 17, 2021)) are in the Dropbox.

d. Campaign Legal Ctr. lawsuit re: records surrounding citizenship question on 2020 Census (Case No. 1:18-cv-01771-TSC (D.D.C.))

This case remains in the cross-motions-for-summary-judgment stage in District court on remand. On January 20, 2023, the Campaign Legal Center filed its reply/response (available in Dropbox), arguing the extent of the deliberative-process privilege and the "foreseeable harm" test.

2. Legislation

a. Procedural Rules and Oversight Schedules

The Council of the District of Columbia Committee of the Whole, and our new oversight committee, the Committee on Executive Administration and Labor, ("EAL"), have all approved their organizational rules and the tentative schedules for performance and budget oversight.

BEGA is scheduled to participate in the EAL Committee's March 1, 2023, performance-oversight hearing. Also, the EAL Committee has FY2023 budget hearings tentatively scheduled for March 28th and 30th, and April 3rd, 5th and 12th. The markup will take place on April 27th at 11:30 am.

b. Revised Criminal Code Act of 2022

On January 17, 2023, the Council of the District of Columbia overrode the Mayor's veto of the Revised Criminal Code Act of 2022. (The measure must still undergo a 60-day congressional review.)

c. Comprehensive Cannabis Legalization and Regulation Act of 2023 (Bill 25-0052).

On January 19, 2023, seven D.C. Councilmembers introduced the Comprehensive Cannabis Legalization and Regulation Act of 2023. Section

13 would amend D.C. FOIA so as to add a new exemption, permitting withholding of “(18) [i]nformation related to the location of the premises owned by a cultivator or manufacturer licensee.” However, in the current version of D.C. FOIA, “cultivator,” “licensee,” and “manufacturer licensee” are not defined, and this new legislation does not include those definitions.

This exemption language originally appeared in the last Council Period, in Bill 24-0118.

- d. HB 2007 Virginia Freedom of Information Act – Posting of Fee Policy
On January 11, 2023, the Virginia Legislature introduced Bill HB 2007 which impacts FOIA fees. The bill’s intent is to add clarity to the FOIA Fee structure and abolish subjective fees and costs incurred by FOIA requesters.

OOG will continue to monitor the legislation.

D. Administrative Matters

1. BEGA 1030 15th Street, NW Relocation

On January 6, 2023, January 11, 2023, January 20, 2023, January 25, 2023, and February 1, 2023 I, along with Director Cooks, Chief of Staff Mitchell, and Administrative staff members met with the Department of General Services and the Office of the Chief Technology Officer to discuss the progress of the agency’s relocation to its new facility at 1030 15th Street, NW. We met to plan the deployment of technology infrastructure in the new location and we selected furniture for the location. Due to supply chain issues, the move may be delayed until the very end of FY23.

2. BEGA Website Redevelopment

The BEGA website redevelopment team includes me, Director Cooks, Senior Attorney Tran, Chief of Staff Mitchell, and IT Specialist Bridges. The team has met several times internally to discuss the relaunch of the website. We internally met on January 9, 2023 and January 13, 2023. We met on January 27, 2023 with OCTO to discuss the current development website and project launch date. We hope to have the website ready for relaunch by the spring.

This concludes the Office of Open Government’s February 2, 2023, report. I am happy to answer any questions the Board may have at this time.

Board Member Nottingham asked about the delay in the relocation to the end of FY2023. Director Allen noted difficulty with deploying technology was the basis for the potential delay in moving to the new office location.

V. Report by the Director of Government Ethics

Good afternoon, Chairperson Hutcheson and Members of the Board. I am Ashley Cooks, the 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 occur as a result of actions taken by the Board during today’s meeting.

OPEN INVESTIGATIONS BY STATUS	
Open	54
Open - Negotiations	1
Open - Show Cause Hearing	0
Grand Total	55

OPEN "UNDOCKETED MATTERS"	
Grand Total	0

PENDING/STAYED INVESTIGATIONS BY STATUS	
Closed - Pending Collection	26
Stayed - Pending DC Superior Court Case	3
Stayed - OAG False Claims Act Case	3
Stayed - OIG Investigation	4
Stayed - US District Court Case	0
Grand Total	36

REGULATORY MATTERS BY STATUS	
Closed - Pending Collection	26
Open	5
Grand Total	31

	Current	Last month	December
Investigations Open	55	54	55
Investigations Stayed	10	17	16

The number of open preliminary and formal investigations includes 10 new matters. The investigative team resolved 9 investigations since the Board last met. This total does not reflect the number of complaints that were dismissed for a lack of jurisdiction. The Quarterly Complaint Report for the first quarter of Fiscal Year 2023 was posted last week. A copy was placed in the drop box for your review.

On January 27th, General Counsel Raj and Investigators Cook and Bradley met with staff of the Office of the Inspector General for our quarterly investigations meeting. The teams discussed joint investigations, matters that are stayed pending an OIG investigation, investigations that have been referred between both agencies, and pending investigations. As a result of the meeting, OGE was able to close seven stayed cases. The meeting proved to be productive, and we look forward to our next case meeting on April 14th.

B. Trainings/Outreach

1. Professional Development Trainings Attended by staff

During the month of January, Attorney Advisor Maurice Echols attended the National Black Prosecutors Association Trial Masters Boot Camp – Case Preparation. General Counsel Rashee Raj took on-demand PLI sessions from the following courses: Ethics for Government Lawyers 2023, FinTech 2022, and the Advanced Compliance and Ethics Workshop 2022. Program Specialist Stan Kosick attended the following seminars: “How to Reduce the Risk of Burnout” and “Identifying gaps in your E&C program” by the LRN Team.

The remaining OGE staff members completed the mandatory DC Government Cybersecurity Training course which included sessions: on E-Place Phishing Training; Working Remotely; and Security Awareness Fundamentals.

2. Conducted by staff

Since the January Board meeting, OGE conducted 5 trainings: the January Monthly Ethics Training, a Quarterly Lobbyist Training, a Ruff Fellowship Training for the Office of the Attorney General, and the Quarterly Boards and Commissions Training.

This past Monday, Supervisory Attorney Stewart-Mitchell presented the first Ethics Counselor Brown Bag Session for 2023. The topic was the Latest Advisory Opinions and Dispositions. This was a highly requested topic among Ethics Counselors, and several were in attendance. A copy of the presentation was placed in the drop box for your review.

During January, twenty-three employees completed our online ethics training via PeopleSoft. Since the launch of the Learning Management System in April 2022, 374 employees have registered and completed training modules. In the past month, 9 new users have completed 24 courses with BGA920 “Advisory Neighborhood Commissioners Ethics Training” and BGA 909 “Conflicts of Interest: An Overview” having the most attendees and completions. We continue to meet with our LRN program manager to discuss ways to optimize the system and increase employee registration.

3. Outreach

This past month, I offered a warm ethics welcome to newly elected Council members, Matthew Frumin of Ward 3 and Zachary Parker of Ward 5. I provided both Council members with OGE's Council ethics packet which contains our Letters of Recommendation and Support Advisory Opinion and Quick Guide, Constituent Services Advisory Opinion, Ethics Manual, Local Hatch Act – May or May Not Guide, and BEGA's 2022 Annual Best Practices Report. I assured the Council members of OGE's willingness to assist them with any ethics advice and training matters. Supervisory Attorney Stewart-Mitchell is coordinating a training date for Council member Parker's office.

Lastly, OGE and OOG continue to meet with the Office of the Chief Technology Officer's website development staff to coordinate the BEGA website refresh. The new website is undergoing its final stages of editing.

4. BEGA Newsletter

On December 16th, OGE published volume seven, issue six of its newsletter, "Ethically Speaking." The next issue will be released in February. It will include a "Meet the Team" section for OGE investigators and provide insight into their professional and personal preferences.

C. Advisory Opinions/Advice

1. Informal Advice

OGE's legal staff provided advice for approximately 40 ethics inquiries, which is 15 more than the 25 reported at the last Board meeting. This number does not include responses we have provided to questions regarding the Lobbyist and FDS e-filing systems.

2. Formal Advisory Opinion

After some technical issues with the DC Register, OGE has finalized its Advisory Opinion, Outside Employment and Private Representation. The sua sponte opinion provides guidance on the restrictions surrounding outside employment and private representations. Specifically, this opinion clarifies that employees are prohibited from engaging in outside employment that is incompatible with government service, and that Board or Commission Members are prohibited from representing a third party before their board or commission and employing agency. The final opinion is posted on the website.

D. Legislation Updates

1. 2022-2023 Performance Oversight

BEGA is scheduled to provide testimony and information on the agency's

performance before the Committee on Executive Administration and Labor on March 1, 2023.

E. OGE Administrative Matters

1. OGE Staffing

After reviewing resumes and interviewing candidates, OGE selected Naquita Titus for the Program Support Assistant vacancy. Ms. Titus joins BEGA with the experience of having served as Quality Analyst, Team Lead, and Customer Service Representative for DC Health Link, and most recently as a Test Center Administrator for Prometric. Ms. Titus is a graduate of Anacostia High School and is a student at the University of Maryland. I am pleased to welcome Ms. Titus to the team. OGE also selected a candidate to fill its Attorney Advisor vacancy. That person will start on Monday February 27th. Our HR Specialist is in the process of posting the Supervisory Investigator vacancy. OGE plans to fill its Auditor and Program Coordinator vacancies soon.

2. Office Relocation

Our office relocation is still underway! OGE and OOG continue our weekly meetings with the Department of General Services, and the project management team to discuss the build-out of the space, furniture, and finishes. Davis Construction has been chosen as the firm to complete the build-out. On yesterday we conducted a site walk-through with NTI National Technologies to review our AV equipment within the hearing room. We attended the third furniture design session in which we discussed the office furniture layout and finishes. The proposed move-in date remains July 2023 but is subject to change.

F. Financial Disclosure Statement (FDS)

Financial Disclosure 2023 preparations have begun. The FDS Team reached out to the agencies to confirm contact information for the Agency Ethics Counselor and/or Liaison. Of the 123 agencies that were contacted, 100 have responded informing the team of the primary persons for this FDS season. Attorney Advisor Jones has prepared a survey for feedback from the Ethics Counselors with regards to BEGA offering the e-filing system for Confidential as well as Public Filers. Additionally, Attorney Advisor Jones sent the FDS Agency Head memo to Ethics Counselors and Directors informing them of this year's notice requirements and deadlines.

G. Lobbying Registration and Reporting (LRR)

The lobbying calendar year 2023 Registrations and 2022 Quarter 4 Activity Reports were due Tuesday, January 17, 2023. On December 29, the LRR team sent a reminder notice to 498 Active Lobbyists and their clients reminding them the upcoming deadline. In response, the e-file system received 399 New and Renewal Registrations; 41 Terminations, and 454 Activity Reports. These numbers are down slightly compared to the same period in 2022.

	2022	2023	Difference
New/ Renew	415	399	-3.9%
Terminations	53	41	-23%
Activity Reports	460	454	-1.3%

As mentioned in the training portion, on January 11th, Attorney Advisor Echols and Program Specialist Kosick hosted 40 attendees for the quarterly training session for the lobbying community. Topics included what constitutes lobbying and how to file. Additional training sessions will be offered in March, June, and September prior to the quarterly activity reporting deadlines.

Thank you. This concludes the Office of Government Ethics' February 2, 2023, report.

VI. Public Comment – if received

No public comments.

VII. Executive Session (nonpublic)

The Board voted unanimously to enter into Executive Session to discuss ongoing, confidential investigations pursuant to D.C. Official Code § 2-575(b)(14), to consult with an attorney to obtain legal advice and to preserve the attorney-client privilege between an attorney and a public body pursuant to D.C. Official Code § 2-575(b)(4)(A), to discuss personnel matters including the appointment, employment, assignment, promotion, performance evaluation, compensation, discipline, demotion, removal, or resignation of government appointees, employees, or officials pursuant to D.C. Official Code § 2-575(b)(10), and to deliberate on a decision in which the Ethics Board will exercise quasi-judicial functions pursuant to D.C. Official Code § 2-575(b)(13).

VIII. Resumption of Public Meeting

The Board resumed the public meeting at 12:59 pm. Chairperson Hutcheson noted that Board Member Sobin did not rejoin the meeting after the executive session and that Board Member Smith joined the meeting earlier during the open session.

IX. Adjournment

The Board will next meet on March 2, 2023, at 12:00 p.m.