

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

MINUTES OF MEETING

September 5, 2019

The District of Columbia Board of Ethics and Government Accountability held a meeting on September 5, 2019 at 10:00 a.m., in Room 540 South of the One Judiciary Square Building, 441 4th Street, N.W., Washington, D.C. The Board's Chairperson Norma Hutcheson was present as well as Board Members Darrin Sobin, Charles Nottingham, Felice Smith, and Melissa Tucker. Senior Attorney Advisor Rochelle Ford was also present.

Members of the public are welcome to attend. Questions about the meeting may be directed to bega@dc.gov.

AGENDA

I. Call to Order

Chairperson Hutcheson called the meeting to order at 10:06 a.m.

II. Ascertainment of Quorum

Chairperson Hutcheson established that a quorum was present.

III. Adoption of the Agenda/Approval of Minutes

The Board voted unanimously to adopt the agenda.

The Board voted unanimously to approve the August 8, 2019 meeting minutes.

IV. Report by the Director of Open Government

Good afternoon Chairperson Hutcheson and Members of the Board. I am Niquelle Allen, Director of the Office of Open Government (the "OOG"). I am pleased to present this report on the activities of the 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 Opinions:

On August 29, 2019, I issued Advisory Opinion #OOG-2019-004-M, regarding the Maury Elementary School Local School Advisory Team's compliance with the OMA. I found that the public body was in violation of the OMA's "Recording of meetings" provisions for: (1) failing to make "a copy of the full record publicly available no later than 7 business days after the meeting;" and, (2) failing to record the meeting by electronic means. The Maury LSAT was also found in violation of the District's Freedom of Information Act for failing to make publically available the detailed minutes of its April 23, 2019, meeting as required by D.C. Official Code § 2- 536(a)(7).

2. Informal OMA/FOIA Advice:

Since the last Board meeting, the OOG has provided responses to requests for informal FOIA and OMA advice. The OOG has also responded to requests for technical advice concerning the use of the OOG's website for OMA compliance. The OOG provided responses to 6 requests for informal advice regarding FOIA. The OOG also provided responses to 4 requests for informal OMA advice. The OOG also provided 53 responses to OMA requests for technical assistance.

B. OMA/FOIA Audits:

The OOG completed the comprehensive FOIA/OMA audit. The report audit will be completed and released to the public on or before September 30, 2019.

C. Training/ Outreach:

1. On August 15, 2019, OOG provided training for additional members of the Alcohol Beverage Regulation Administration (ABRA). The ABRA training was in two parts. OOG Attorney Barton conducted the OMA training and the OOG's Computer System Analyst, Tiffany Montgomery, provided training on using the Central Meeting Calendar.
2. The OOG will provide three training courses during the Ethics Day 2019 event. The courses include:

Course 1 (1.5 hours): Parliamentary Procedure Basics and Open Meetings Act Refresher: Parliamentary Procedure is a process to make discussion among large numbers of people efficient. Learn the basics of how to efficiently run meetings from a Professional Registered Parliamentarian. A brief refresher course on the District of Columbia Open Meetings Act and Open Meetings Regulations will also be provided.

Course 2 (1 hour): FOIAXpress Training: This course is facilitated by the Office of the Chief Technology Officer and designed for public and

government FOIAXpress users. It includes numerous tips and techniques that will enhance the user's experience with the tool.

Course 3 (1 hour): FOIA Forum: Hear from a panel of District of Columbia FOIA experts about the state of D.C. FOIA. The discussion will include presentations from FOIA experts from the Office of the Attorney General, Executive Office of the Mayor, and the Office of Open Government. (*panelists not yet confirmed*).

D. Legislative Update:

Joint Public Hearing re Public Charter Schools:

The Committee of the Whole & the Committee on Education will hold a Public Hearing on B23-0199, the “Public School Transparency Amendment Act of 2019” on October 2, 2019. The bill has implications regarding FOIA and the OMA. I plan to testify at this hearing. From the bill notice: “As introduced the bill requires greater transparency in charter school administration regarding contracts greater than \$25,000. It requires specific information in charter school annual reports. Among other things, it requires that the Public Charter School Board deliver a report to the Council describing the number and cost of requests for information made pursuant to the Freedom of Information Act. The Office of Open Government must provide training regarding obligations of employees of public charter schools and members of the Board of Trustees.”

E. Litigation:

Federal FOIA appeal concerning an electronic reading room:

Animal Legal Def. Fund v. United States Dep’t of Agric., 2019 U.S. App. LEXIS 26224, ___ F.3d. ___, 2019 WL 4062524.

On August 29, 2019, the Ninth Circuit reversed the dismissal of a lawsuit challenging the removal of animal welfare compliance data from a U.S. Department of Agriculture website. Federal FOIA’s reading room provision requires agencies make certain records available on government websites, including agency policies, interpretations of law and frequently requested documents, pursuant to Federal FOIA amendments passed by Congress in 1996 and 2016. In finding that plaintiffs can sue to make government agencies post certain public records online, the Ninth Circuit split with the D.C. Circuit, which held in the 2017 ruling *Citizens for Responsibility & Ethics in Washington v. DOJ*, that courts can only compel the government to disclose records to a requester, not the public at large.

F. Board Hearing Room Upgrade:

1. The OOG is working with OCTO to schedule the installation of new Cisco equipment. The MOU has been signed and we are awaiting approval of the funding transaction from the Office of the Chief Financial Officer.

2. As part of the office expansion and reconfiguration that Director Wolfingbarger will discuss in his report, I am pleased to report that this suite will also be expanded to include new workspaces for employees. As the OOG seeks to add full time employees, this reconfiguration is necessary to accommodate growth.

This concludes the Office of Open Government’s September 5, 2019 report. Thank you.

V. Report by the Director of Government Ethics

- A. Update on Status of Office of Government Ethics (OGE) Operations: Recap of previous month’s activities (statistics). These reported statistics do not reflect status changes that we anticipate will occur as a result of actions taken by the Board during today’s meeting.

OPEN INVESTIGATIONS BY STATUS	
Open	24
Open – Negotiations	2
Open - Board NOV Hearing	1
Grand Total	27

PENDING/STAYED INVESTIGATIONS BY STATUS	
Closed - Pending Collection	14
Closed Pending Appeal to DC Court of Appeals	1
Closed - Pending External Action	2
Stayed - Pending DC Superior Court Case	1
Stayed - OAG False Claims Act Case	2
Stayed - OIG Investigation	8
Stayed - US District Court Case	4
Grand Total	32

REGULATORY MATTERS BY STATUS	
Closed - Pending Collection	23
Open	1
Open - Board Appeal	1
Grand Total	25

	Current	Last month	July 2019
Investigations Currently Open:	27	21	21
Investigations Stayed:	15	14	15

B. Publication and Reporting Obligations:

The Quarterly Complaint Report (QCR) for the third quarter of FY19 has been completed and published to our website.

C. Trainings/Outreach:

1. Professional Development Trainings Attended by staff:

On August 15, Attorney Cooks attended the Financial Investigations Triage course conducted by the National White Collar Crimes Center (NW3C). The course provided an overview of the actions that investigators can take at the outset of a financial crime investigation. On August 13, Program Support Assistant Dow completed an online webinar on The Essentials of Front Desk Safety & Security offered by Skillpath, and he also completed DCHR's all-day training program on Quality Customer Care on August 29. Lastly, I have continued my leadership development efforts with the Center for Creative Leadership, including executive coaching calls with the trainer I partnered with at the CCL training program last year.

2. Conducted by staff:

Since the date of the last meeting, we conducted 5 trainings, 3 more than the 2 we conducted last month. The 5 trainings included two new employee orientations, 1 monthly ethics training, and 2 ethics trainings for the Office of Risk Management. In addition, 205 employees took the online ethics training through PeopleSoft during the month of August.

3. Ethics Day 2019:

Ethics Day is scheduled for October 3, 2019 from 11:30 am to 5:00 pm immediately following the Board Meeting. A copy of the course schedule was added to the Dropbox for your review.

D. Advisory Opinions/Advice:

Informal Advice: approximately 47, which is 6 more than the 41 reported at the last meeting. This number does not include responses we have provided to questions regarding the Lobbyist and FDS e-filing systems.

Formal Advice requests: OGE issued one advisory opinion in response to a request from a former District employee on a post-employment question. The opinion provides guidance on whether an employee who was detailed to an agency several weeks before their departure from District government is banned from contacting that agency under the one-year cooling-off prohibition of the post-employment restrictions. We concluded that the employee had two former

agencies for the purposes of the cooling-off period, and that the employee is prohibited from appearing before both of them.

E. Ethics Legislation/Comprehensive Code of Conduct:

Chairman Allen has introduced this year's version of the CCC for the Council's consideration, and CM Brianne Nadeau introduced another bill on March 19, 2019 entitled the "Ethics Reform Amendment Act of 2019." We met with Michelle Loggins from CM Nadeau's staff on Monday August 13 to discuss the ERAA, and we have had productive discussions with Chairman Allen's staff to discuss how BEGA can help move the CCC forward this year. I have also requested a meeting with Chairman Mendelson to discuss both bills, and we will keep the Board informed as developments occur.

F. Rulemaking:

During its June meeting, the Board formally approved the proposed Rulemaking that was published in the DC Register on April 26, 2019, and the Final Rulemaking was published in the DC Register on August 16, 2019.

G. Budget:

Our FY19 budget currently looks to be in good shape. With less than 1 month remaining in the fiscal year, we currently have an available balance of 16% of our total appropriation. Our staff members are actively enrolling in training programs they believe are well-suited for their individual needs and career goals, and we are working to take advantage of our available funding between now and September 30. The three largest projects involve renovating the Bullpen and soundproofing some of our space on the 8th floor; acquiring a new vehicle; and using the services of a private IT vendor to analyze and improve the architecture of our new FDS and LRR e-filing systems as well as develop and implement needed enhancements for those systems.

H. Staffing:

We have selected a candidate for our new Program Specialist position that will help manage our Lobbyist and FDS programs closed, and it is anticipated that person will join us on September 30.

The updated Position Description for our General Counsel position was posted on July 16 and we received over 260 applications for the position. Senior Attorney Advisor Ford and I have put together a list of screening questions we will pose to a group of candidates we have deemed to be highly qualified for the position with an eye toward identifying the top 3-5 candidates for the Board to interview.

Lastly, I am working to schedule a retreat involving the Board, OGE and OOG toward the end of October to give us time to fill the GC position so that person can participate in it. We will keep the Board posted on possible dates for the

retreat once we firm up our plans a little further, but please let us know if there are any specific dates in October where your schedule would not permit you to attend.

I. Litigation:

Status of pending cases.

- **Gerren Price – CA No. 16-AA-1230 and 2019 CA 005346 P(MPA).** On July 25, 2019, the DC Court of Appeals issued its opinion, ruling that the Ethics Act implicitly amended a provision of the DC Administrative Procedures Act (APA) that requires contested cases be appealed in the D.C. Court of Appeals. The Court agreed with OAG’s argument that BEGA’s final decisions should be reviewed in D.C. Superior Court – as required by the Ethics Act – rather than in the Court of Appeals, as Price argued was required under the APA. Thus, Mr. Price filed his appeal in the wrong court and the Court of Appeals granted him 20 days from the issuance of the opinion to petition for review of BEGA’s decision in Superior Court. Mr. Price’s appeal was required to be filed by August 13, 2019, but the Superior Court’s online docket search indicates he did not file it until August 15, 2019. To the best of my knowledge, we have not yet been served with a copy of Mr. Price’s appeal, but we will turn it over to the OAG upon receipt for further action.
- **A. Blaine vs. BEGA, OEA Matter No. J-0030-19.** This is an employment matter involving a separated employee. We are still waiting for a decision from the Administrative Judge on our motion to dismiss.

J. Lobbyist/Financial Disclosure Matters:

This year there are approximately 3,815 designated filers and so far about 3,305 designated filers have filed the form via our e-filing system, which constitutes an 86.63% compliance rate.

We still have approximately 18 PFDS non-filers from last year, along with approximately 524 current non-filers from this year. 109 of this year’s non-filers were ANC Commissioners in 2018 – some of whom were re-elected and are still serving in that capacity in 2019. Another 65 non-filers are newly-elected ANC Commissioners who were required to file because they were candidates for election in 2018, while another 55 are DCPS employees. The ANC Commissioners – both returning and newly-elected – constitute roughly 1/3 of all non-filers and combined with DCPS employees constitute 43.7% of all non-filers.

We have formulated a strategy for 2018 and 2019 FDS enforcement, and we are continuing to work with OCTO to cross-reference the emails of all OGE staff who worked on FDS matters the past two years with our non-filer lists so that we will not send fine notifications to anyone who reached out to us for help with technical problems related to the new e-filing system. Tiffany Montgomery is assisting us

with this project. After completing that phase, we will continue working to help those who experienced technical problems to access the system and submit their FDS statements, while planning to send fine notifications to the remaining non-filers from both 2018 and 2019.

K. Lobbyist Filing Waiver Requests:

Pursuant to D.C. Official Code § 1-1162.32(c), the Ethics Board may waive the penalty imposed for untimely filing of a Lobbyist Activity Report for “good cause shown.”

1. 19-0017-R. Holland and Knight. The firm requests waiver of late fees imposed for 2019 Registration Reports and Activity Reports due to difficulties navigating the new e-filing system. OGE did not oppose this request, as long as the firm paid a \$300 civil penalty previously imposed against it in Case No. 15-0022-R for which we have no record of ever receiving payment. The Board previously tabled this request to allow the staff to further investigate whether a payment has been made for a previous penalty. We received a check for \$300 on 8/8/2019, so the fine imposed against Holland & Knight in Case No. 15-0022-R has been paid in full and that case has been closed. We are now asking you to approve this request.

The Board voted unanimously to approve this fee waiver request.

L. Non-Confidential Investigations:

1. 18-0006-P, *In re*: Jack Evans – This formal investigation involves allegations that Councilmember Evans violated the Council Code of Conduct. We are working with our partner agencies to ensure that any investigative actions we undertake will not interfere with the related law enforcement investigation.

Board Member Melissa Tucker did not participate in the discussion on *In re*: Jack Evans because she is recused from this matter.

2. 19-0003-F, *In re*: Kenneth Crosswhite. This is a formal investigation based on allegations that former-Deputy Chief Kenneth Crosswhite violated the District’s nepotism rule by entering and approving overtime for his son. This matter was scheduled for a hearing on September 10th; however, the parties have agreed to a negotiated disposition, which will include a \$3,000.00 fine.
3. 19-0008-F, *In re*: Dr. Marla Wyche-Hall. Respondent’s bank responded to our subpoena with extensive bank records (some in hard copy, some in digital form) and we have completed our review of those documents.

VI. Opportunity for Public Comment

There were no public comments.

VII. Executive Session (nonpublic)

The Board voted unanimously to deliberate in Executive Session (non-public) to discuss ongoing, confidential investigations pursuant to D.C. Official Code § 2-575(b), 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

IX. Adjournment

BEGA's next meeting is October 3, 2019 at 10:00 a.m.