

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

**MINUTES OF MEETING
July 11, 2019**

The District of Columbia Board of Ethics and Government Accountability held a meeting on July 11, 2019 at 12:00 p.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 Charles Nottingham, Darrin Sobin, 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 12:00 p.m.

II. Ascertainment of Quorum

Chairperson Hutcheson established that a quorum was present.

III. Adoption of the Agenda/Approval of Minutes

Chairperson Hutcheson explained that the draft meeting agenda was amended to reflect changes in the Directors’ reports and to provide information about the Open Meetings Act in accordance with new rules. The Board voted unanimously to adopt the amended agenda.

The Board voted unanimously to approve the June 6, 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. I would first like to congratulate and welcome new BEGA Board Member Felice Smith and say that I look forward to working with you and appreciate your service to the community by serving as a member of the Board of Ethics and Government Accountability.

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:

The OOG has not issued any Advisory Opinions since the last Board meeting.

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. These requests were sent to the OOG via telephone or e-mail and the responses were not shared with the public in the form of an Advisory Opinion.

The OOG provided responses to 14 requests for informal advice regarding FOIA. The OOG also provided responses to 13 requests for informal OMA advice. The OOG also provided 28 responses to OMA requests for technical assistance, which included separate instances of targeted support, including the creation of new accounts, setting up passwords, and assistance with the Central Meeting Calendar.

B. OMA/FOIA Audits:

The OOG is continuing its comprehensive FOIA/OMA audit. The audit will be completed on or before August 1, 2019, and will report the results prior to September 30, 2019. Attorney Barton is handling the OMA audit and I am handling the FOIA audit. With respect to FOIA, the OOG's review of independent agencies websites is complete and will forward letters to the independent agencies with website compliance issues on or before Friday, July 12, 2019.

C. Training/ Outreach:

1. The Open Government Director completed the "Maximizing Your Leadership Potential" training course with the Center for Creative Leadership in Greensboro, NC, from June 12-14, 2019. The purpose of the intensive training was to increase your leadership skills by increasing your ability to understand others, motivate others, and meet the needs of diverse teams. I would like to take this opportunity to thank Chairperson Hutcheson, Director Wolfingbarger, and members of the staff for

providing feedback on my performance. I appreciate you taking time out of your busy schedules to help me become a better leader. Director Wolfingbarger recommended the training to me and I found it to be extremely useful in my professional and personal life. On a personal note, my late mother was a retired Center for Creative Leadership Faculty Member and Feedback Coach, so it was especially rewarding to connect with her friends and colleagues.

2. OOG will hold OMA training sessions on Thursday, July 25, 2019, from 10:00am-12:00pm, and on Thursday, August 8, 2019, from 10:00am-12:00pm. These sessions will include instruction regarding the OMA and the new OOG regulations. The target audience for these training sessions is the agency administrative points of contact for Boards and Commissions.
3. The Director of Open Government will be a featured instructor at the American Society of Access Professionals, Inc.'s 12th Annual National Training Conference in Arlington, VA, which is taking place July 22-24, 2019, at the Renaissance Capital View Hotel. I will be a presenter for the course "State and Local Freedom of Information" at 8:00am on Monday, July 22, 2019.
4. The OOG published its Biannual Newsletter on Friday, July 5, 2019. The newsletter discussed the latest issues concerning FOIA and the OMA, details important information concerning transparency, profiles new BEGA members, and spotlights a high-performing public body. The newsletter is available on open-dc.gov, under the "Documents" tab. The document is also provided in the BEGA Dropbox for your review.

D. Legislative Update:

1. OOG's Rulemaking: On June 21, 2019, the OOG sent a memorandum to the Administrative Points of Contact for District of Columbia Boards and Commissions to inform them of the recent changes to OOG's regulations concerning open meetings. The memorandum summarized the rulemaking by noting the significant changes to the existing rules and recommended best practices. The document is in the BEGA Dropbox for your review.
2. Joint Public Hearing re Public Charter Schools: On June 26, 2019, the Committee of the Whole and the Committee on Education held a joint public hearing on Bill 23-239 "the School Based Budgeting and Transparency Amendment Act of 2019." The stated purpose of the bill is to establish an electronic reporting system for all Local Education Agencies and public school budget expenditures to collect comparable data from schools and LEAs. The bill subjects meetings of the Board of

Trustees of Public Charter Schools to the Open Meetings Act. The OOG did not provide public comment on the matter, but did monitor the hearing. The OOG's only concern is that if this bill passes, it will increase OOG's workload and the DC Council should provide BEGA with additional budgetary funds to handle this increase. The bill is in the BEGA Dropbox for your review.

E. Litigation:

On June 24, 2019, *In Food Marketing Institute v. Argus Leader Media*, 588 U.S. ____ (2019), the Supreme Court of the United States (SCOTUS) held that where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" within the meaning of 5 U.S.C. § 552(b)(4), the federal Freedom of Information Act's Exemption 4. The SCOTUS ruled 6-3 to reverse and remand the 8th Circuit's decision in this case, in an opinion by Justice Gorsuch. Justice Breyer filed an opinion concurring in part and dissenting in part, in which Justices Ginsburg and Sotomayor joined. By this decision the SCOTUS overruled the 45-year federal precedent set forth in *National Parks & Conservation Assn. v. Morton*, 498 F. 2d 765, 770 (D.C. Cir 1974), which held that in order to withhold confidential information, the federal government's release of the information must cause "substantial harm to the competitive position of the person from whom the information was obtained."

The case began in 2001 with a FOIA request from The Argus Leader, a South Dakota newspaper, to the Department of Agriculture for records of the food stamp revenue totals from participating grocery stores. The Department of Agriculture administers the supplemental nutrition program and maintains records concerning the dollar amounts paid to retailers participating in the program. The lower court held that these records were not exempt from disclosure because the government could not meet the National Parks standard for Exemption 4.

The Supreme Court's opinion is in the Dropbox for your review.

F. Board Hearing Room Upgrade:

OOG is working with OCTO-DC-Net to purchase the upgraded Cisco equipment for the hearing room. The equipment purchase will be completed this month. We are determining whether to integrate the equipment with the existing A/V equipment or wait until we begin the full upgrade project. The current equipment is operational now, but will not be supported if it breaks.

This concludes the Office of Open Government's July 11, 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	17
Open - Show Cause Hearing	2
Open - Negotiations	1
Open – Board NOV Hearing	1
Grand Total	21

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	6
Stayed - US District Court Case	5
Grand Total	31

REGULATORY MATTERS BY STATUS	
Closed - Pending Collection	23
Open	1
Open - Appeal to Director	1
Open - Board Appeal	1
Grand Total	26

	Current	Last month	May 2019
Investigations Currently Open:	21	21	23
Investigations Stayed:	14	15	15

- B. Publication and Reporting Obligations:

We submitted our FDS filer report to the DC Register as required on June 17, 2019. We are also in the process of completing the Quarterly Complaint Report (QCR) for the third quarter of FY19 and will publish it to our website when it is completed.

- C. Trainings/Outreach:

1. Professional Development Trainings Attended by staff:

Investigator Corrales, Attorney Stewart-Mitchell and Attorney King attended one training webinar on 5 Steps to Create a Culture of Ethics, Compliance and Accountability (I-Sight). Investigator Bradley completed a training webinar on Myth & Realities of Cell Site Coverage Areas" presented by Hawk Analytics on July 27, 2019. The training covered records and best practices for mapping & analyzing cell site location information, in-depth presentation about cell site coverage areas, and records generated from cell site locations. And 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 August.

2. Conducted by staff:

Since the date of the last meeting, we conducted or participated in 10 trainings, 6 more than the 4 we conducted last month. The 10 trainings included 2 monthly ethics trainings, 4 full ethics trainings at the Commission on Arts and Humanities, the Public Service Commission, the Department of For-Hire Vehicles and the Department of Forensic Sciences; three new employee orientations; and an ethics overview conducted by Attorneys Cooks and Stewart-Mitchel for the Academy of Public Administration of Kazakhstan. In addition, 116 employees took the online training between May 1 and June 18 (will update these numbers at the meeting), including our new Auditor, Amanueil Tujuba.

3. Ethics Day 2019:

Last year BEGA held its annual Ethics Day on October 4th, here at One Judiciary Square. Based on the large number of attendees and the positive reviews, the event was a huge success. This year, OGE is proposing that the Board host an Ethics Day similar to last year's event on October 3, 2019. We will begin preparing a draft proposal of courses in preparation for next month's Board meeting, and we welcome any suggestions you may have to offer.

4. Newsletter:

The July edition of Ethically Speaking, the BEGA/OGE Newsletter was published on July 10, 2019. We decided to hold off on asking the Mayor's Office to distribute this month's newsletter to all DC government employees because they are only willing to let us do that one time before requiring employees to "opt in" to receive our newsletters moving forward. Instead, we will take advantage of that opportunity for an upcoming month's newsletter once the agenda for Ethics Day is finalized, so we can spread the word about that event to as broad of an audience as possible.

D. Advisory Opinions/Advice:

Informal Advice: approximately 59, which is 23 less than the 82 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: We issued one “Safe Harbor” letter upon the request of a District employee, which subsequently will be published in the DC register once we learn if the employee wants his name redacted from the letter.

E. Ethics Legislation/Comprehensive Code of Conduct:

Nothing new to report. 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 look forward to working with Chairman Allen, CM Nadeau, and their respective staffs to advance these legislative efforts in furtherance of our agency’s mission.

F. Rulemaking:

During last month’s meeting, the Board formally approved the proposed Rulemaking that was published in the DC Register on April 26, 2019. The Final Rulemaking will be submitted this week for inclusion in the next DC Register in accordance with legal and procedural requirements.

G. Budget:

Our FY19 budget currently looks to be in good shape. With less than 3 months remaining in the fiscal year, our local funds currently have an available balance of 35% of our appropriation while our O-Type funds currently have an available balance of 80% of our appropriation. Our staff members are actively enrolling in training programs they believe are well-suited for their individual needs and career goals, and I am working with DGS, OCP and the Office of the Secretary on several projects to take advantage of our available funding between now and September 30.

Because the Mayor’s Office and the Committee on the Judiciary & Public Safety did not provide funding for our #1 FY20 Budget Enhancement Request – an allocation to cover the rent for new office space that is adequate for our needs – we shifted our focus to use our existing space as effectively as possible in the interim. On June 13, we received a proposed new layout for the Bullpen and information regarding furniture options, but the plan called for 12 employees to be jammed into that space which I thought would be too crowded. On June 25, Ms. Peterson and I had a follow-up meeting to review the proposed layout and we subsequently asked that the layout be modified to allow for 8 work stations rather than 12, and we expect to receive that revised layout any day now. We are also awaiting estimates regarding the anticipated costs to better sound-proof our

existing conference room/interview room on the 8th floor, as well as the two offices that adjoin the space occupied by DSLBD.

Lastly, a contract was awarded on June 21 to a staffing agency called Abstract Evolutions to provide us with an experienced Application Developer to help implement needed enhancements in our FDS and Lobbyist e-filing systems. Sandra and I met with the agency's leadership team on June 27 to discuss our project in greater detail. I had a follow-up phone call with the agency on July 10, at which time they provided me with a PowerPoint to explain their proposed approach to addressing our needs, which I found very helpful and consistent with my experience in the private sector working on software development projects. I have reached out to OCTO to schedule a four-way meeting or conference call next week involving BEGA, OCTO, Abstract Evolutions and DataNet (the vendor of our old e-filing systems) to discuss a number of inter-related issues including A) moving forward to complete the still-unfinished data migration project that was required under our original MOU with OCTO, and B) integrating the team from Abstract Evolutions into the effort to improve the stability and functionality of the new e-filing systems through developing and implementing these needed enhancements.

H. Staffing:

I would like to introduce you to our new Auditor, Amanueil Tujuba, who joined us on June 10. Amanueil has an MBA in professional accounting and is a Certified Public Accountant (CPA) with more than 15 years of experience in public accounting, financial reporting, internal audits, and internal control procedures. He has quickly become a very valuable member of our team, and he has taken the lead on a project to develop more robust and well-designed procedures for our FDS and Lobbying audits.

DCHR's recruitment for our new Program Specialist position that will help manage our Lobbyist and FDS programs closed on Friday July 5. This is the role Caleb Smith most recently filled through a temporary staffing agency. DCHR is currently vetting the 29 applications and we are waiting for them to send us a list of highly qualified candidates from which we will begin scheduling interviews as soon as possible.

Back in April, we secured the services of Joseph Thomas as a temporary Tech Support Specialist to help handle customer service requests related to our Lobbyist and FDS e-filing systems. Joe continued working in that capacity through the month of June to help wrap up outstanding Support Tickets, and he will remain onboard through at least July, to provide assistance during the current quarterly Lobbyist reporting season.

We submitted the updated Position Description for our General Counsel position to DCHR on June 28, making some minor modifications at that agency's request. DCHR has approved the PD, and it should be posted within the next few days and remain open for applications for three weeks.

Lastly, I am working to schedule a retreat involving the Board, OGE and OOG, most likely in late August or September to give us time to fill the GC position so that person can participate in it. I have been planning for a two-day event, where I envision the first day being dedicated to long-term strategic planning – with the Board, both Directors, the GC and the Board’s Senior Attorney collaborating at a high-level during the first half of the day, followed in the afternoon by a series of sessions involving both Directors, the GC, the Board’s Senior Attorney and line staff from both Offices designed to “flesh out” the high-level plans that emerge from the morning sessions. The Board members would not be expected to participate in those afternoon sessions, although you would certainly be welcome to do so if your schedules permitted you to do so. Likewise, the second day is expected to be dedicated to personal assessments and team building exercises involving the leadership and staff from both Offices. I’d greatly appreciate it you could let us know at some point in the next week or so what dates in August and September you could be available to participate in this retreat, and also if you have any suggestions regarding potential locations as I am still exploring available options.

I. Litigation:

Status of pending cases.

- Gerren Price – (CA No. 16-AA-1230). This case was submitted on October 24, 2018, and we are still awaiting the Court’s decision.
- A. Blaine vs. BEGA, OEA Matter No. J-0030-19. This is an employment matter involving a separated employee. We submitted our draft response to OAG, which they filed on our behalf before our April 12 deadline. The Administrative Law Judge issued an Order requiring to the employee to submit a legal brief establishing OEA’s jurisdiction by April 26, 2019. As of May 3, 2019, the employee had not responded, and on May 3 the ALJ issued an Order requiring the employee to submit both her brief and a statement of good cause for failing to file the brief timely by May 16, 2019. The employee submitted a “brief” on May 8, 2019, simply stating, “I’m sorry for submitting my brief late,” and the OAG filed a response on May 21, 2019. We are now waiting for a decision from the Administrative Judge. There has been no update as of this week.
- Larry Hicks – (2017 CA 008091). This was an enforcement (collection) action filed to collect a \$20,000 fine imposed on Mr. Hicks. On May 28th, OAG informed us that Mr. Hicks contacted them and agreed to a payment plan. Under the plan, he should complete payment of his fines by September of 2021. OAG has provided us with a copy of the settlement agreement, but as of July 9, they were still waiting to receive a signed copy from Hicks.

J. Lobbyist/Financial Disclosure Matters:

This year there are approximately 3,815 designated filers and so far about 3,295 designated filers have filed the form via our e-filing system, which constitutes an 86.37% compliance rate.

We still have approximately 200 PFDS non-filers from last year, along with the 534 current non-filers from this year. 112 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 66 non-filers are newly-elected ANC Commissioners who were required to file because they were candidates for election in 2018, while another 57 are DCPS employees. The ANC Commissioners – both returning and newly-elected – constitute exactly 1/3 of all non-filers and combined with DCPS employees constitute 44% of all non-filers.

We have formulated a strategy for 2018 and 2019 FDS enforcement. In addition to reviewing the FDS Support Tickets we received after OCTO created that Admin tool in June 2018, we plan 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.

As you may know, we must file three reports with the DC Register in connection with the FDS program on or before June 15th each year: a list of all public filers, a list of all filers who sought and received an extension and the reason for the extension and a list of those who have not yet filed a report and the reason for the failure to file. We submitted those reports to the DC Register on Monday June 17, 2019 and the reports were published on Friday June 28, 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 does not oppose this request, as long as the firm pays a \$300 civil penalty previously imposed against it in Case No. 15-0022-R within 30 days for which we have no record of ever receiving payment. The Board had tabled this request to allow the staff to further investigate whether a payment has been made for a previous penalty. Holland & Knight responded to our inquiry and indicated they would send us a check for the \$300 penalty previously

imposed in Case No. 15-0022-R. I will follow-up with Tyrell to determine if we have actually received the check.

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.
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. FEMS issued a final agency decision in which it found that Mr. Crosswhite violated the nepotism rule and Mr. Crosswhite has appealed that decision to OEA. The Board approved a Notice of Violation at the last Board meeting and Mr. Crosswhite has filed his answer to the Notice of Violation. We asked that the Board issue a hearing date for this matter. The Board’s Senior Attorney is working with the parties and the Board to schedule a date for the adversarial hearing.
3. 19-0008-F, *In re*: Dr. Marla Wyche-Hall. The Board authorized a formal investigation and the issuance of subpoenas in this matter, and we are waiting to receive responsive documents before deciding upon next steps. My understanding is that we recently just received the documents.

VI. Opportunity for Public Comment

Valerie Jablow provided public comments. Ms. Jablow discussed a complaint (which was dismissed) that she filed in June 2018 against PAVE, in which she alleged that the group engaged in lobbying activity. Last month, she submitted information to OGE’s Director suggesting that PAVE is inherently biased. She further stated that PAVE provides transport and sets up meet and greets for parents. She is asking that BEGA take the new information that she submitted and reopen the investigation. OGE Director Wolfingbarger explained that BEGA staff had investigated the matter fully, that all respondents are inherently self-interested, and that BEGA investigators had spoken to all with relevant information, including individuals who were not affiliated with PAVE.

Michael Sindram also provided public comment via telephone. Mr. Sindram expressed dissatisfaction with the Chair’s advisement about time limits to make comments.

VII. Executive Session (non public)

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

- Board Member Melissa Tucker announced that she is recusing herself from #18-0006-P, *In re Jack Evans* given her prior working relationship and interactions with the Councilmember's counsel.
- The Board unanimously approved negotiated dispositions in the following matters:

- 1.#19-0005-P – S. Mattavous-Frye
- 2.#17-0023-P – A. Priest
- 3.#19-0029-C – C. Cebrynski

IX. Adjournment

BEGA's next meeting is August 8, 2019 at 12:00 p.m.