Board of Ethics and
Government Accountability

www.BEGA.DC.GOV

2018 Best Practices Report

Tameka M. Collier, Chair
Norma B. Hutcheson, Member
Darrin P. Sobin, Member
Shomari B. Wade, Member

441 4th Street, NW, Suite 830 South, Washington , DC 20001
Phone: 202-481-3411 E-Mail: bega@dc.gov

The District of Columbia Board of Ethics and Government Accountability (BEGA or Board) was established in 2012 pursuant to Section 202(b) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (the "Ethics Act").[1] The Board was established as an independent agency tasked with administering and enforcing the Code of Conduct.[2] The Ethics Act also amended the Open Government Office Act to establish the District of Columbia Open Government Office as an independent office within BEGA with a mission of promoting open governance in the District, primarily through the enforcement of the Open Meetings Act.[3]

The Council of the District of Columbia recently clarified the structure of BEGA through the passage of the BEGA Amendment Act of 2018.[4] The legislation officially established the Office of Government Ethics (OGE) as a separate entity from the Board and renamed the Open Government Office to the Office of Open Government (OOG). The Board is responsible for appointing directors, both of whom report directly to the Board, to execute each office's respective mission. The directors prepare and submit their own budgets with approval by the Board. In sum, the OGE and OOG function as co-equal, independent offices within BEGA.[5]

Now in its sixth year of operation, BEGA has continued to discharge the respective OGE and OOG missions. In 2018, OGE negotiated eight (8) dispositions resolving Code of Conduct violations; administered formal and informal ethics advice to more than 914 District employees and officials; and conducted more than 110 trainings on various ethics topics. Similarly, in FY18 and FY19, to date, the OOG issued eight (8) advisory opinions addressing OMA and Freedom of Information Act issues; resolved sixteen (16) Open Meetings Act complaints; and completed and resolved an Open Meetings Act complaint in D.C. Superior Court. The experience gained from these efforts, coupled with insights gained from attending conferences and staying abreast of industry trends, has prepared BEGA well to meet another of its principal responsibilities -- providing an annual assessment.

---

[1] Effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq*.) (2012 Supp.).

[2] *See* section 202(a)(1) of the Amendments to the Code of Conduct, the Open Meetings Act, and the Freedom of Information Act of 1976, effective March 29, 1971 (D.C. Law l-96; D.C. Official Code § 2-531 et seq.)."

[3] D.C. Official Code § 2-571 *et seq*.

[4] The BEGA Amendment Act of 2018 was passed as a subtitle of The Fiscal Year 2019 Budget Support of 2018 (D.C. Law 22-168; D.C. Act 22-442, effective October 30, 2018). In addition to clarifying BEGA's structure, the subtitle further requires that the Mayor appoint at least one member of the Board with experience in open government and transparency. (D.C. Code § 1–1162.03(g)(2)).

[5] D.C. Official Code §§ 1–1162.05a and 1–1162.05b.

The BEGA Amendment Act of 2018 also modified the nature of the Board's annual assessment to permit the Board to provide more general commentary on best practices to improve the District's public integrity laws.[6] Additionally, BEGA's annual assessment now includes a discussion of open government related issues.[7] Under the new annual reporting requirements, the Board shall provide, by December 31st of each year, a report to the Mayor and Council with recommendations on improving the District's government ethics and open government and transparency laws, including: (l) An assessment of ethical guidelines and requirements for employees and public officials; (2) A review of national and state best practices in open government and transparency; and (3) Amendments to the Code of Conduct, the Open Meetings Act, and the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 et seq.).[8]

In anticipation of this report, the Board directed its staff to review both the OGE's and OOG's activities in carrying out their respective missions; research and assess trends in public integrity laws and enforcement; and to confer with government ethics and open government experts. What follows is the Board's 2018 annual assessment (Best Practices Report) along with its recommendations for actions to be taken by the Council and/or the Mayor to further strengthen the District's public integrity and transparency laws.

I. Assessment of Ethical Guidelines and Requirements for Employees and Public Officials

The OGE is made up of the Director of Government Ethics, and a relatively small staff of attorneys, investigators, one auditor, and administrative support staff. The OGE has authority over the District government's workforce of approximately 34,000 employees, including ethics oversight of the Mayor and the D.C. Council. The primary duties of the OGE are to investigate alleged ethics laws violations by District government employees and public officials, provide informal and binding ethics advice, and conduct mandatory training on the Code of Conduct. The OGE is also responsible for oversight of lobbyist registration and activity, and compliance

[6] Before the passage of the BEGA Amendment Act of 2018, BEGA was required to address seven specific questions in its annual assessment. Those questions were whether the District should: 1) adopt local laws similar in nature to federal ethics laws; 2) adopt post-employment restrictions; 3) adopt ethics laws pertaining to contracting and procurement; 4) adopt nepotism and cronyism prohibitions; 5) criminalize violations of ethics laws; 6) expel a member of the Council for certain violations of the Code of Conduct; and 7) regulate campaign contributions from affiliated or subsidiary corporations. BEGA has addressed these very specific questions in previous Reports which can be found on BEGA's website, https://bega.dc.gov/.

[7] Previously, pursuant to now repealed D.C. Law § 2-593, the Open Government Office was required to separately report annually "on its activities, including recommendations for changes in the law."

[8] *See* section 202(b) of the Ethics Act (D.C. Official Code § 1-1162.02(b)).

with Financial Disclosure Statement filing requirements by high-level employees and elected officials, which are regulatory enforcement duties that constitute a significant portion of its workload.

The Ethics Act was passed to provide the District with a more robust ethics framework in order to effectively promote a culture of high ethical conduct. The Act sought to subject all employees to the code of conduct, require ethics training for District officials and employees, centralized enforcement authority under BEGA, and allows for the imposition of meaningful penalties for misconduct.[9]

The effectiveness of the District's robust ethical framework that was put in place by the Ethics Act has been recently recognized. In October of this year, the Coalition for Integrity, a non-profit organization created to combat corruption and promote integrity, released a ranked index of "States with Anti-Corruption Measures for Public Officials" (S.W.A.M.P.).[10] The S.W.A.M.P. Index analyzed the laws of the 50 States and the District of Columbia based on eight factors including the scope and powers of ethics agencies, and acceptance and disclosure of gifts and contributions by public officials. The Coalition for Integrity describes the Index as an "objective analysis, based on current state laws and regulations governing ethics and transparency in the executive and legislative branches." The District ranked 5th out of 51 jurisdictions based on the strength and effectiveness of its ethics laws and regulations.

While the conclusions reached by the Coalition for Integrity indicate the District's ethics framework is functioning fairly effectively, the OGE still believes that the ethical guidelines and requirements applicable to District employees and public officials continue to suffer from a "lack of uniformity and cohesion," as the Council itself noted almost five years ago.[11] Of particular concern is the uncertainty regarding whether Advisory Neighborhood Commissioners (ANC Commissioners) must comply with the provisions of the District Personnel Manual (DPM) that are incorporated in the District's current Code of Conduct.

The OGE believes that ANC Commissioners are required to comply with Chapter 18 of the DPM, pursuant to D.C. Official Code §1-1161.01 (7)(E) and §1-1162.01a, following the enactment of D.C. Law 20-122, the Universal Code of Conduct and BEGA Amendment Act of

[9] *See generally*, the Report of the Committee on Government Operations on Bill 19-511, the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Act of 2011 (Council of the District of Columbia, December 5, 2011) (Ethics Act Committee Report).

[10] The S.W.A.M.P. Index can be found at https://www.coalitionforintegrity.org/2018/10/03/s-w-a-m-p-index/.

[11] Report of the Committee on Government Operations on Bill 20-412, the Comprehensive Code of Conduct and BEGA Amendment Act of 2014, at 4 (Council of the District of Columbia, March 25, 2014) (BEGA Amendment Act of 2014 Committee Report).

2013, effective July 15, 2014. However, others have argued a contrary interpretation that would exempt ANC Commissioners who are not District government employees from the OGE's enforcement of those DPM provisions.

For example, the OGE received a complaint alleging that an ANC Commissioner had asked his neighbors to complete a ballot and/or poll and return it to him, email him their opinion or "put this poll in the mailbox" at four specific addresses. In so doing, the ANC Commissioner allegedly conspired to violate 18 USC § 1725, which prohibits depositing any mailable matter on which no postage has been paid in any letter box with "intent to avoid payment of lawful postage thereon," and in turn violated DPM §1800.3 (m) ("Employees shall adhere to all federal, state, and local laws and regulations.") However, due to the uncertainty regarding whether an ANC Commissioner not employed by the District was required to comply with this DPM provision aimed at "employees," the OGE declined to pursue that matter.

In another instance, documentary evidence submitted to the OGE indicated that an ANC Commissioner purchased a parcel of real estate at the District's tax sale, in violation of 9 DCMR §340. This conduct also would appear to violate DPM §1800.3 (m), which is incorporated into the Code of Conduct at D.C. Official Code §1-1161.01 (7)(E). However, because that ANC Commissioner was not employed by the District, the OGE likewise declined to open an investigation in that matter.

As discussed at greater length in Section III below, we believe instances like these clearly demonstrate the need for Council to finally enact a Comprehensive Code of Conduct, as we have previously recommended in BEGA's Best Practices Reports.

II. Review of National and State Best Practices in Open Government and Transparency

The OOG's mission is to ensure that District government operations at every level are transparent, open to the public, and promote civic engagement. With a staff of only three, the OOG ensures that more than 2,000 Boards and Commissions members and the Council comply with the Open Meetings Act (OMA), and that District Government Agencies are complying with the Freedom of Information Act (FOIA).

The OOG ensures District-wide compliance with the OMA by providing formal and informal advice to public bodies seeking guidance on compliance with the provisions of the Open Meetings Act and conducting training and outreach on the procedural requirements of the Act. In addition to enforcing the OMA, the OOG also provides advisory guidance on FOIA implementation.

In keeping with the District's explicit policy of encouraging open government and transparency,[12] the OOG is charged with construing the OMA broadly to maximize public access to meetings.[13] The OMA obligates District government entities within the Act's jurisdiction to ensure the rights of citizens to be informed about public business, which is essential in a democracy.[14] If the public is not clearly and properly informed about how public business is conducted, they cannot fully participate in government. Simply put, open government and transparency laws build public confidence and trust in the government, and, thus, they are integral to maintaining an ethical government.

The District's open government and transparency practices focus on ensuring that information, not otherwise subject to valid disclosure restrictions, is made accessible to the public in a timely manner. This basic tenet is the foundation for best practices for open government at the federal level and for those of most states. In light of rapidly changing technology, developing best practices in many jurisdictions have primarily focused on releasing datasets and machine-processable data directly to the public.

Datasets are the collection of underlying information organized or formatted in a specific manner and used by government entities to develop policies, draft reports, and otherwise inform decision making. Providing the public access to datasets or data in its "raw," unstructured form increases transparency and allows for greater utilization and analysis of the information. Other agencies can also utilize datasets to increase efficiency and aid in decision making and policy implementation.

In March of 2018, in accordance with District of Columbia Data Policy,[15] the District released a "near comprehensive list of enterprise datasets within government—all the spreadsheets, records,

---

[12] D.C. Official Code § 2-532 and Code § 2-572.

[13] The legislative intent of the OMA (D.C. Official Code § 2-571 *et seq.),* is to provide the public with full and complete information regarding the affairs of government and any official actions taken by government officials. (D.C. Official Code § 2-572). Therefore, the OMA is to be construed broadly to maximize public access to meetings, and exceptions are to be construed narrowly to permit closure of meetings only as provided in the statute. (D.C. Official Code § 2-573).

[14] The purpose of the OMA is to provide the public with full and complete information regarding the affairs of government and any official actions taken by government officials (D.C. Official Code § 2-572). For that reason, requirements of the OMA include that a public body: (1) maintain detailed records of all public meetings; (2) provide to the public advance notice of meetings to reflect the date, time, location, planned agenda, and statement of intent to close the meeting or portion of the meeting, including the statutory citation for closure and description of the matters to be discussed (D.C. Official Code § 2-576); and (3) strictly adhere to the OMA when conducting a public meeting by electronic means (D.C. Official Code § 2-577(b)).

[15] District of Columbia Data Policy, Mayor's Order 2017-115, dated April 27, 2017, amended June 19, 2018.

and databases that government agencies create and use internally to make decisions."[16] The D.C. Policy Center, a non-partisan think tank focused on District policy, praised the release of enterprise datasets to inform the public and noted that it "is particularly valuable for filing public records requests."[17] "This is the first time an inventory like this has been seen by the public or government; no agency previously had a good sense of the data assets of another. The inventory has the potential to promote greater agency collaboration—or at least data-sharing—and support citywide initiatives."[18]

On the federal level, on December 22, 2018, Congress passed the Open, Public, Electronic, and Necessary Government Data Act, H.R. 4174.[19] The Act represents the most comprehensive federal open data legislation to-date. Among other provisions, the Act requires agencies to ensure that all public "data assets" or datasets are machine-readable to allow data to be "easily processed by a computer without human intervention while ensuring no semantic meaning is lost." The Act also requires, to the extent practicable, agencies to develop and maintain inventories "that account[] for all data assets created by, collected by, under the control or direction of, or maintained by the agency." To the extent not already implemented, the District and states should look to the Act for best practices.

Additionally, the federal government, through the National Archives and Records Administration (NARA), has recommended that federal agencies adopt the "Capstone" approach respecting the retention of emails.[20] The federal government has management requirements for its electronic data, including email.[21] The Capstone approach is based on the concept that key records are created and held by senior officials. Therefore, the email records of those senior officials should be retained indefinitely to satisfy records management requirements. The Capstone approach also ensures email records are part of a record retention schedule; has provisions to prevent unauthorized access, modification, and deletion of permanent records; requires that all records

[16] "D.C. Government just released a list of (nearly) all of its data," Kate Rabinowitz, March 15, 2018. Article can be found at https://www.dcpolicycenter.org/publications/dc-government-enterprise-dataset-inventory-release/.

[17] *Id.*

[18] *Id.*

[19] Passage of the Act was a bi-partisan effort and the President is expected to sign the legislation in the near future.

[20] With the issuance of the Managing Government Records Directive (M-12-18), Goal 1.2, Federal agencies are required to manage both permanent and temporary email records in an accessible electronic format by December 31, 2016. The issuance of NARA Bulletin 2013-2 established "the Capstone Approach" as an alternative means of managing email, while the transmittal of GRS 6.1 provides disposition authority for the approach. Both issuances provide one way in which Federal agencies can meet the requirements of Goal 1.2 of M-12-18.

[21] Federal agencies are required to manage their email records in accordance with the Federal Records Act, 44 U.S.C. Chapter 31, and 36 CFR Chapter XII Sub-chapter B.

are retrievable and usable; requires consideration of whether email records should be associated with related records; and requires the capture and maintenance of metadata.

The Capstone approach has several additional benefits. It calls for increased automation of the email retention process and relies less on individual records retention officials to correctly identify and classify emails as permanent records. The approach also reduces the risk of unauthorized deletion of emails. It also encourages the use of updated and evolving technology to manage the email retention process. The District, in particular, may benefit from exploring the benefits of this approach as it considers the future economy of its current policy of retaining its current catalog of emails indefinitely.

III. Recommendations for Amendments to the District's Ethics and Open Government Laws

The Board is also tasked with recommending amendments to the Code of Conduct, the Open Meetings Act, and the Freedom of Information Act of 1976, effective March 29, 1971 (D.C. Law l-96; D.C. Official Code § 2-531 et seq.) in order to improve the District government's ethics and open government and transparency laws.[22]

Ethics Recommendations

First, in light of a recognized "continued lack of uniformity and cohesion of the District's ethics law" still persists with respect to the District's Code of Conduct,[23] BEGA again urges passage of its proposed Comprehensive Code of Conduct of the District of Columbia (CCC).

On June 12, 2015, BEGA submitted proposed legislation in the form of Bill 21-250, the "Comprehensive Code of Conduct of the District of Columbia Establishment and BEGA Amendment Act of 2015." The draft CCC bill represented a culmination of a year-long effort of BEGA personnel and incorporated feedback from the legislative and legal community.[24] After a hearing, the Committee took no further action, and Bill 21-250 lapsed, without prejudice, at the end of the Council Period 21. On February 28, 2017, BEGA again introduced a substantially similar bill, the "Comprehensive Code of Conduct of the District of Columbia Establishment and BEGA Amendment Act of 2017" (Bill 22-136). Bill 22-136 was also the subject of a public

[22] D.C. Official Code § 1-1162.02(b).

[23] BEGA Amendment Act of 2014 Committee Report, at 4.

[24] The initial draft CCC bill reflected input from dozens of interviews with city officials, two public forums held at the UDC David A. Clarke School of Law, collaboration with ethics specialists in and outside of the District of Columbia, and a general review of national best practices at that time.

hearing on November 2, 2017, however, the Council again took no action on the bill and it has lapsed, without prejudice, again at the conclusion of Council Period 22.

Enacting this important piece of legislation will not only enable BEGA to perform its statutorily mandated functions more effectively; enacting the CCC will also strengthen the District's ethics framework in order to better cultivate a "culture of high ethical standards in District government"[25] and further assure the public's trust in the integrity of District officials and employees. The CCC, in other words, would operate to further the Council's clear and continuing intent "to create an independent and unified ethics scheme" in two significant ways – by consolidating the District's government ethics laws in one place and by standardizing practices across the legislative and executive branches.

As suggested by its title, the CCC would apply to the ethical responsibilities of all employees and public officials serving the District of Columbia, its instrumentalities, subordinate and independent agencies, the Council, boards and commissions, and Advisory Neighborhood Commissions (excluding the judiciary). The current "Code of Conduct" as the term is defined in the Ethics Act remains an amalgam of several statutes with varying applicability to subgroups of individuals.[26] Additionally, the CCC addresses other needed changes to existing laws. These proposed changes fall within several categories: standardizing some legislative and executive practices (e.g. gift giving, widely attended gatherings); refining existing prohibitions (e.g. nepotism, lobbying related activities, post-employment restrictions); and regulating existing practices (e.g. fundraising, outside activities). In effect, the proposed CCC would be positive law, immune from amendment by any Executive Branch agency. These changes are strongly recommended based on BEGA's experience in carrying out its mission, extensive consultation with other agencies and interested parties, and a review of federal and state ethics regulations.

The Board believes that the upcoming legislative session presents an ideal time to enact the CCC. Although the CCC may appear daunting or expansive at first blush, it largely is taken verbatim from existing laws or rules. Overall, it proposes few changes to current law. Consistent with the District's incremental approach to ethics reform, enactment of the CCC

[25] Ethics Act Committee Report, at 11.

[26] Code of Official Conduct of the Council of the District of Columbia; Sections 1801 through 1802 of the Merit Personnel Act [D.C. Official Code §§ 1-618.01 and 1-618.02]; Chapter 7 of Title 2 of the Official Correspondence Regulations [D.C. Official Code § 2-701 et seq.)]; Section 415 of the Procurement Practices Reform Act of 2010 [D.C. Official Code § 2-354.16; Chapter 18 of Title 6B of the District of Columbia Municipal Regulations; Chapter 11B of the Ethics Act [D.C. Official Code § 1-1171.01 et seq.]; Parts C, D, and E of subchapter II, and part F of subchapter III of the Local Hatch Act [D.C. Official Code §§ 1-1163.38 and § 1-1162.21]; and Subchapter XIII of the Donations Act [D.C. Official Code § 1-329.01.

would be the next logical step in the ongoing process of further unifying and strengthening the District's ethics laws.

In its Council Period 22 Activity Report, the Committee on the Judiciary and Public Safety stated its commitment to "prioritize" the passage of the CCC in the upcoming Council Period.[27] BEGA concurs with this priority and appreciates the Council's continued commitment to further strengthening the District's ethics laws.

In addition to enacting a CCC, the OGE is also concerned that it may not possess the full scope of investigative powers needed to fulfill its statutory mandate. For instance, the Supreme Court issued a decision in June 2018 in *Carpenter v. U.S.*, No. 16-402, that curtailed the ability of investigative agencies like the OGE to obtain cellphone location records in the absence of a search warrant issued by a court of competent jurisdiction.

This decision follows a trend in cases involving similar forms of electronic evidence, including *U.S. v. Jones*, 565 U.S. 400 (2012) (GPS tracking information), and is based upon the perception that electronic communications deserve stronger privacy protections than they historically have been accorded. Until relatively recently, investigative agencies like the OGE could use administrative subpoenas pursuant to the Stored Communications Act to obtain the "content" of at least some electronic communications (e.g. email messages opened by the recipient that were stored by a service provider for more than 180 days after their creation). However, administrative subpoenas seeking such electronic records – like the subpoenas the OGE is empowered to issue with the Board's approval – are now being routinely resisted on expansive privacy grounds by third parties who possess those records.

At present, the OGE has limited options to attempt to obtain electronic records such as these. If the District of Columbia Office of the Inspector General (OIG) is also investigating that matter, the OGE can ask the OIG to request a search warrant for those records on its behalf. However, if the OIG has already closed its investigation, it typically declines to seek a search warrant just to benefit the OGE's investigation, which in reality ends the OGE's ability to obtain those records.

BEGA recommends Council consider amending the Ethics Act to close this gap in the OGE's investigative resources. An additional subsection could be added to D.C. Official Code §1-1162.11 explicitly vesting the OGE with the power to request search warrants for electronic evidence with the Board's approval. Or, in the alternative, the Ethics Act could be modified to clarify that the OIG, the Office of the Attorney General (OAG), and/or the Metropolitan Police

[27] Council Period 22 Activity Report for the Committee on the Judiciary and Public Safety, at 22 (Council of the District of Columbia, December 11, 2018).

Department (MPD) are empowered to request search warrants for such electronic evidence on the OGE's behalf even if those agencies are not investigating the matter themselves.

Open Government Recommendations

The District has taken significant steps to make government more transparent and accessible to the public in ways that are in tune with technology and the 24-hours-a-day expectation of access to information. BEGA has two recommendations that would better allow the OOG to carry out its mission with respect to implementing the Open Meetings Act and advising on FOIA implementation.

First, in providing advisory guidance on FOIA implementation, the OOG has repeatedly been faced with questions related to identification requirements needed for first-party FOIA requests. The OOG has concluded that FOIA and implementing regulations, as written, do not support any requirement for a requester to present valid identification to prove his identity to receive a record that is only releasable to the subject of the record. Although the law is silent on the issue, it appears that some District entities are requiring identification to avoid violating privacy laws, and thus, are limiting the public's access to information. As a result, BEGA recommends that FOIA regulations be promulgated to address identification requirements for first-party FOIA requesters that are similar to the requirements for obtaining vital records or similar to the federal privacy law requirements. [28]

Second, BEGA recommends that the District implement the 2018 recommendations of the Chief Data Officer, which called for the adoption of a "reasonable and uniform retention policy for email."[29] The District of Columbia does not have a retention schedule for email; it stores all email for all agencies indefinitely. According to the Chief Data Officer report, "OCTO stores more than 293 terabytes of email and attached documents. The oldest email in OCTO's collection is from 1998." In the context of FOIA, this is problematic because the email search process is cumbersome and results in significant delays in processing FOIA requests. According to the CDO Report, "[w]hen District agencies fail to meet legislated requirements for processing FOIA requests, slow email searches often constitute a large portion of the delay." BEGA recommends that the Mayor adopt a reasonable email retention policy that requires email be stored for a fixed period of time.

In this context, BEGA also recommends that the Mayor convene a task force of experts to create a white paper that justifies, explains, and recommends a comprehensive email retention policy to

[28] *See* the Federal Privacy Act: 5 U.S.C. § 552a.

[29] http://opendata.dc.gov/pages/cdo-annual.

the Mayor. One such white paper is the National Archives and Records Administration's (NARA) "White Paper on the Capstone Approach and Capstone GRS," released in April 2015.[30] Through the white paper, NARA introduced a novel approach to managing email records through the Capstone approach discussed in Section II above. Similarly, open government experts in the District should convene to determine whether NARA's Capstone approach is appropriate for the District of Columbia and make recommendations adopting it or recommending an alternative approach, tailored to the needs of the District.

[30] https://www.archives.gov/files/records-mgmt/email-management/final-capstone-white-paper.pdf.