

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

**DRAFT MEETING MINUTES – MARCH 4, 2021**

The District of Columbia Board of Ethics and Government Accountability held a meeting on March 4, 2021 at 12:00 p.m. The meeting was held remotely via WebEx. The Board’s Chairperson Norma Hutcheson participated as well as Board Members Charles Nottingham, Felice Smith, Melissa Tucker, and Darrin Sobin. These draft minutes must be approved by the Board. Full meeting minutes will be posted after the next Board meeting. Questions about the meeting may be directed to [bega@dc.gov](mailto:bega@dc.gov).

Members of the public were welcome to attend, and a recording of the meeting is available at: <https://www.youtube.com/watch?v=PqPQgRzF0FE>

**I. Call to Order**

**II. Ascertainment of Quorum**

Quorum established.

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

Board Members unanimously approved the Agenda and February 4, 2021 minutes.

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

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

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

OOG has not issued any advisory opinions since the Board’s last meeting. OOG continues to provide formal and informal advice regarding the operation of the Open Meetings Act and FOIA during the public health emergency in writing via e-mail and orally.

1. Formal FOIA Advice: OOG’s legal staff and OGE’s General Counsel, Rashee Raj, continue to provide BEGA’s pending FOIA requesters with a letter detailing the COVID-19 related changes to FOIA requirements and the impact of those changes on FOIA requirements. Currently, all FOIA requests received by BEGA’s FOIA Officer, Sheree DeBerry, on or after January 16, 2021, will be processed under the normal FOIA rules. However, if the request requires BEGA to search for records located in

BEGA's physical office, BEGA's response to the FOIA request will not be due until 45 days after the public health emergency has concluded.

2. Informal OMA/FOIA Advice: OOG continues to experience a high volume of requests for advice and assistance on open government matters. This is due to the pandemic and the January 6, 2021 Insurrection at the U.S. Capitol.

- The Office responded to 36 requests for OMA advice;
- The Office responded to 30 requests for FOIA advice; and
- The Office responded to 24 requests for technical assistance with open-dc.gov, since the last Board meeting. The IT Specialist has been updating bega.dc.gov and open-dc.gov in consultation with OOG and OGE staff, since the last Board meeting.

B. Training/ Outreach:

1. OMA Guidance on DC Public Charter School Board of Trustees: On February 5, 2021, I and OOG legal staff met virtually with Lathan and Watkins, LLP attorneys. The law firm is counsel to a D.C. Public Charter School Board of Trustees ("Board of Trustees). Specifically, we discussed whether the Board of Trustees may continue the consent vote procedure authorized for non-profits under the District's Corporation Act. In our view, the process is essentially an electronic meeting that the public may not attend. The OOG's position is that these meetings violate the OMA. I have taken the Board of Trustees' position under advisement and the OOG legal staff continues to research the issue. A resolution is forthcoming and may be the subject of a future advisory opinion.

2. Sustained Energy Utility Advisory Board OMA training ("SEUAB"): On February 8, 2021, Attorney Barton conducted an OMA training for the SEUAB. Attorney DeBerry attended the February 8<sup>th</sup> training.

3. Public Charter School Board of Trustees OMA training: On February 10, 2021, Attorney DeBerry presented an OMA training to the Board Liaison for Center City Public Charter School. Chief Counsel Barton attended the training.

4. D.C. Department of Homeland Security ("HSEMA") FOIA training: On February 24, 2021, I conducted a FOIA training for HSEMA's General Counsel, FOIA Officer, executives, and staff. Approximately 40 participants attended. This training was timely. D.C. Act 24-2 was signed by the Mayor on January 15, 2021, which designates HSMEA a law enforcement agency. It also established within HSMEA a fusion center to receive and share sensitive law enforcement data. The Act also designates the fusion center as a law enforcement unit. So, the training emphasized FOIA's law enforcement and privacy exemptions. HSEMA also recently experienced an increase FOIA requests, along with other D.C. law enforcement agencies, as a result of the January 6, 2021 Insurrection and ongoing investigation. D.C. Act 24-2 expires April 14, 2021. The Council passed a temporary version of the Act on March 2, 2021.

5. Office of the Chief Medical Examiner (“OCME”) meeting: On March 1, 2021, I and OOG legal staff met virtually with OCME’s General Counsel to discuss the impact of the District’s transparency laws as OCME contemplates requesting changes to its enabling legislation.

6. Law & Economics Center (“LEC”) webinar: On March 3, 2020, OOG staff attended LEC’s webinar, the “First Amendment, Section 230 and Content Moderation.” LEC is an entity within the George Mason University Antonin Scalia School of Law. Section 230 of the Communications Decency Act provides companies broad protection from suits involving the content third parties post on their platforms. Discussed were content moderation decisions surrounding the COVID-19 pandemic and the removal of former President Trump from Twitter and Facebook.

C. Litigation and Legislative Update:

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

a. TPM Lawsuit update: This is an update on the FOIA case filed against the District of Columbia on July 13, 2020, by Terris, Pravlik & Millian, LLP (“TPM”). The FOIA lawsuit alleges that the District of Columbia government failed to produce and post online various budget-related documents as required by FOIA. The Complaint alleges that the Executive Office of the Mayor failed to produce documents related to the Office of the State Superintendent of Education and District of Columbia Public Schools (Civil Action No. 2020 CA 003087 B). On January 29, 2021, the parties filed supplemental briefings in support of their respective *Motions to Dismiss*. On February 12, 2021, the Court issued an *Order* that denied the District government’s *Motion to Dismiss*. The District’s *Motion to Dismiss* contended: (1) that the documents were deliberative and D.C. FOIA does not make them public information; (2) that TPM served the FOIA request on the wrong agency; (3) that if D.C. FOIA makes the documents public information, it is invalid because it violates the separation of powers in the D.C. government; (4) the documents are protected by the executive privilege; (5) the Court lacks power to compel the District to publish the documents to its website; and (6) TPM lacks standing to request the court to do so. The Court found that the documents were not deliberative because they reflected the policy of the agency rather than the personal opinions of a writer; (2) that TPM reasonably requested documents that do not require a written request, and therefore, satisfied the plausibility requirement of serving its FOIA request on the correct agency; (3) the FOIA request did not implicate the Council or empower the Council to participate in initial executive deliberations, so there was no separation of powers issue [recall that the D.C. Council filed a brief in the proceeding supporting the Plaintiff’s position and rebutting the District Defendant’s separation of powers argument]; (4) the power of the budget is a mixed power between the Mayor and the Council and therefore does not fall within the executive privilege; (5) D.C. FOIA’s statutory history provides for judicial review for failure to publish the documents online; and (6) TPM was harmed and has standing to sue because they are unable to monitor compliance with a past injunction.

On February 26, 2021, the District filed its *Answer*. The District's *Answer* restates as defenses the grounds stated in support of its *Motion to Dismiss*. March 19, 2021 is the Scheduling Conference Hearing. Copies of Court's Order and the District's *Answer* are in your Dropbox. The OOG will continue to monitor this matter.

b. Stop and frisk FOIA lawsuit: On February 16, 2021, the American Civil Liberties Union ("ACLU") filed suit against the District of Columbia (*ACLU of DC v. District of Columbia, No. 2021 CA 000452 B*) seeking records concerning stop and frisks by the Metropolitan Police Department ("MPD"). MPD is required to retain stop and frisk statistics pursuant to the Near Engagement Archives Result Act (D.C. Official Code § 5-113.01(a)(4B)). The *Complaint* seeks declaratory and injunctive relief to compel the District to provide the documents. On March 3, 2021, the District filed *Defendant's Opposition to Plaintiff's Motion for a Preliminary Injunction*. *Inter alia*, the District contends that since MPD has released some of the requested data, through June 2020, the ACLU is unlikely to succeed on the merits and is not irreparably harmed. May 5, 2021, is the Initial Scheduling Conference before the Honorable Judge William Jackson. A copy the *Complaint* is in your Dropbox. The OOG will continue to monitor this matter.

2. Legislation: The D.C. Council acted this week to authorize the extension of the public health emergency. The changes to certain OMA and FOIA laws will remain in effect during the public health emergency.

a. Mayoral Authority to extend the Public Health Emergency: On March 2, 2021, the Council, passed Bill 24-0139, the "Coronavirus Support Emergency Amendment Act of 2021." The measure extends the Mayor's Authority to declare a public health emergency through May 20, 2021. It contains most of the provisions of D.C. Law 23-130, Coronavirus Support Temporary Amendment Act of 2020, which are to expire March 31, 2021. Concerning government transparency, the emergency law maintains the provisions from the Temporary Act that: (1) requires all public body meetings be held remotely; (2) waives the physical posting of public meeting notices; and (3) tolls the timeframes for publishing public meeting records. It does not alter the current requirements to respond to FOIA requests. The measure also extends the time for the Mayor to submit the District's budget to April 22, 2021, in anticipation of receiving federal COVID relief funds. The Council also passed on first reading a corresponding temporary measure (Bill 24-0140, the Coronavirus Support Temporary Amendment Act of 2021).

D. Administrative Matters:

1. Attorney-Advisor and Trial Attorney Vacancies: The OOG Attorney-Advisor position was reposted on Monday, March 1, 2021 and closes on March 31, 2021. The OOG will conduct interviews for the Trial Attorney vacancy beginning on Monday, March 8, 2021.

**This concludes the Office of Open Government's March 4, 2021 report.**

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

Good afternoon Chairperson Hutcheson and Members of the Board. My name is Rochelle Ford, I am 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 will occur as a result of actions taken by the Board during today’s meeting.

<b>OPEN INVESTIGATIONS BY STATUS</b>	
Open	53
Open - Negotiations	0
Open - Show Cause Hearing	0
Grand Total	53

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

<b>PENDING/STAYED INVESTIGATIONS BY STATUS</b>	
Closed - Pending Collection	27
Closed - Pending DC Superior Court Case	0
Stayed - OAG False Claims Act Case	4
Stayed - OIG Investigation	9
Stayed - US District Court Case	0
Grand Total	41

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

	<b>Current</b>	<b>Last month</b>	<b>January</b>
Investigations Currently	53	53	49
Investigations Stayed	12	12	12

The number of open preliminary investigations includes 14 new matters opened since the Board last met. The investigative team resolved 6 preliminary investigations since we the Board last met.

- B. Trainings/Outreach:

1. Professional Development Trainings Attended by staff:

During the month of February, Auditor Tujuba completed the following trainings offered by DCHR:

- Excel Office 365 (Windows) Getting to Know Macros in Excel
- Cultivating Cross-functional Team Collaboration
- Excel Office 365 (Windows) Managing Data
- The Strategy Analysis Knowledge Area

Attorney Cooks completed “Three Strategies for Civil Litigation Success” presented by LexisNexis Legal & Professional. General Counsel Raj completed "Diversity and Inclusion in the Legal Workplace" and "Trauma-Informed Lawyering: Strategies and Best Practices," both from the online Practicing Law Institute.

On March 2, 2021, Director Ford attended a roundtable discussion on Ethics & Compliance in the New Working Environment”

2. Conducted by staff:

Since the last Board meeting, OGE attorneys conducted 8 total ethics trainings to include the Monthly Ethics Training, a DCHR In-School Youth Leadership Seminar, a Donations Management Training with Serve, 4 FDS trainings, and hosting one virtual Ethics Forum we discussed last month “Unlocking the Positive Value of Ethics” by Marcy Maslov, Ethics and Business Consultant. This interactive session provided training to Ethics Counselors and featured hypotheticals and discussion. Ms. Maslov’s presentation was very well received by the ethics counselors in attendance who enjoyed her interactive style.

OGE’s monthly online Ethics Training was attended by 105 employees.

C. Advisory Opinions/Advice:

1. Informal Advice: approximately 50, which is 12 more than the 38 reported at the February meeting. This number does not include responses we have provided to questions regarding the Lobbyist and FDS e-filing systems.

OGE has not issued any advisory opinions since the last meeting. We have drafted an advisory opinion on seeking and negotiating employment and intend to issue it shortly.

D. Legislation Updates:

Oversight: As Director Allen mentioned, last Friday, February 26, 2021 at BEGA’s oversight hearing before the D.C. Council’s Committee on Humans Services. Board Chair Ms. Hutcheson,, Director Allen and I testified before Councilmember Brianne

Nadeau, chair of the Committee, on our agency performance oversight hearing. A link of the recording was sent to all board members and can be provided again if needed. It was a productive and robust conversation. In addition to discussing agency operations over the past year, CM Nadeau directed the agency to revise and update the Comprehensive Code of Conduct. We all look forward to working with her and her office in the future.

Our testimony and agency responses will be added to the BEGA website in an effort to provide more transparency.

**Ethics Reform:** In light of CM Nadeau's request that BEGA update and revise the CCC, OGE's attorney's met with General Counsel of the Campaign Legal Center this morning to discuss potential ethics reform in the District. The CLC is a non-profit entity created in 2002. They advocate for ethics reform at the state and national level, work with ethics commissions, and litigate ethics disputes. They recently have worked with the St. Louis and San Francisco Ethics Commissions on ethics reform.

**[Oversight Questions and this year's responses are uploaded to the DropBox]**

E. OGE Administrative Matters:

OGE is still seeking an Attorney Advisor. We are about to repost the position more broadly.

**Reporting:**

At our oversight hearing, we advised CM Nadeau that although BEGA had not issued a BPR given recent vacancies, that we would like to publish a mid-year report once the Board's Senior Attorney vacancy has been filled.

We also advised CM Nadeau that we intend to provide Quarterly Complaint Reports in a new format. We last published a report for Q1 of FY20, which covers the time period of October 1, 2019 through December 31, 2019. In October of 2019, OGE adopted a new docketing method for incoming complaints. OGE has also been delayed in publishing Quarterly Complaint Reports due to the demands of maintaining remote agency operations during the public health crises, staff vacancies and transitions, and revised case docketing and intake. OGE intends to publish all FY20 and 21 Quarterly Complaint Reports in a revised format including more data regarding the number of investigations initiated from complaints received.

The revised report will break out the number of complaints received each quarter and how they were resolved separately from cases pending at the initiation of the reporting period for clarity. In addition, the report will provide more analysis on the nature of type of complaints that we have received. I anticipate that we should have the reports published by the next Board meeting.

**Website**

The BEGA website improvement working group met last month to identify immediate

website changes that we hope will make the site easier to navigate and allow employees and the public to find information more easily. Our group will continue to work to improve the website with a focus on providing more information to provide more transparency about OGE's practices and policies, adding an Ask the Director Link, providing an index by subject matter for advisory opinions and negotiated dispositions, and uploading more agency information to the site related to our operations.

Our interns who have joined us through DCHR's In-School Youth Leadership program have started assisting the office. They are assisting with the website upgrade by reviewing websites from peer agencies across the nation and assisting with indexing the opinions.

F. Financial Disclosure/Lobbyist Matters:

**Lobbying Registration and Reporting (LRR) System** – OGE received 18 Registrations (New, Renew, Termination) in February 2021. Based upon audits of FY20 filings, OGE has initiated enforcement proceedings against lobbyist who filed late registration or lobbying reports.

**Financial Disclosure** – On Monday, February 8, 2021 the FDS team sent out the FDS Agency Head Memo and officially launched the 2021 Financial Disclosure Season. In the subsequent days, Attorney Stewart-Mitchell conducted four (4) Ethics Counselor trainings. The trainings had a total of 79 participants. The FDS team has been collecting filer lists since it distributed the Agency Head Memo. Once the FDS team receives all the lists they will work with OCTO to ready the e-filing system for this filing season.

The FDS is also working on revising the questions and certifications on the Financial Disclosure Statement with a target date of completion set at April 1st.

Last month, OGE imposed penalties on 181 public and confidential financial disclosure filers last month. OGE will impose penalties on an additional group of filers for failure to file their financial disclosure statements in 2020 after before the end of the quarter.

Lastly, in preparation for 2021 and future filings, OGE has developed a Pilot Program for Confidential Filers. This year, OGE will open the Financial Disclosure e-file system to approximately 200 CFDS filers to test OCTO's sorting code- a code that separates Public from Confidential filers. Program Specialist Kosick has been in contact with different agencies who have expressed interest in participating in the Pilot Program. A successful program would fully automate the Financial Disclosure Filing process and locate the filings in one central clearinghouse location thus making it easier for the filers and OGE enforcement.

**Thank you. This concludes the Office of Government Ethics' March 4, 2021 report.**

**VI. Acknowledge of Public Comment – one received**



Dear BEGA:

I write to inquire as to the status of the quarterly reports by the Director of Government Ethics regarding ethics complaints. My understanding is that there is to be a quarterly report by the Director of Government Ethics regarding ethics complaints that is required to be posted online. D.C. Code § 1-1162.20. However, the last report I can find on the BEGA web site is dated February 25, 2021, which only purports to cover the time period from October 1, 2019 to December 31, 2019. (And, before that, there was a report dated November 20, 2019, which covered the period from July 1, 2019 – September 30, 2019.)

Based upon past inquiries in 2020 and other information that is publicly available, I understand that there has been some staff turnover and apparent changes made to the case management system and reporting system in the early fall of 2020. And undoubtedly the current public health crisis has had some impact on BEGA's operations. But I am not aware of any posted online report on the BEGA web site covering complaints made during the entirety of the year 2020 despite it being March of 2021. And, up until late last month, there was no posted report even covering the last calendar quarter of 2019. If the above is indeed correct, it is concerning to see an agency that is, in part, devoted to the issues of open government seemingly not providing timely reporting concerning ethics complaints.

I will acknowledge that the BEGA web site is somewhat confusing in the manner in which documents are posted, so if more current reports actually have been posted, I would appreciate being directed to the appropriate web address. And I'm likewise happy to be corrected on any of the foregoing if I've made an error.

Regards,

Michael McDuffie

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

**VIII. Resumption of Public Meeting**

No matters to report out.

**IX. Adjournment**

The Board will meet again on April 1, 2021.