

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

MINUTES OF MEETING

The District of Columbia Board of Ethics and Government Accountability held a meeting on July 2, 2020 at 10:00 a.m. The meeting was held remotely via WebEx. The Board’s Chairperson Norma Hutcheson participated as well as Board Members Charles Nottingham, Felice Smith, and Melissa Tucker. Board Member Darrin Sobin did not participate in the meeting.

Members of the public were welcome to attend, and a recording of the meeting is available at: <https://www.open-dc.gov/meeting/board-ethics-and-government-accountability-4>
Questions about the meeting may be directed to bega@dc.gov.

I. Call to Order 10:01 am

II. Ascertainment of Quorum

III. Adoption of the Agenda/Approval of Minutes

The Board unanimously approved the agenda and the June 2020 Meeting Minutes.

IV. Report by the Director of Open Government

Good morning Chairperson Hutcheson and Members of the Board. I am Niquelle Allen, the 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

The OOG has not issued any advisory opinions since the Board’s June meeting. OOG continues to provide formal advice regarding the operation of the Open Meetings Act and FOIA during the public health emergency.

1. Formal FOIA Advice:

OOG’s Chief Counsel and FOIA Officer, Johnnie Barton, and OGE’s General Counsel, Rashee Raj, continue to provide BEGA’s pending FOIA requesters with a letter detailing the changes to FOIA requirements and the impact of those changes on FOIA requirements.

2. Informal OMA/FOIA Advice:

Since the last Board meeting, OOG has responded informal requests for advice and assistance on open government matters. The majority of these requests for informal advice have concerned the public health emergency. OOG provided informal assistance with FOIA, OMA, and open-dc.gov, as follows:

- The office responded to 12 requests for FOIA advice;
- The office responded to 12 requests for OMA advice; and
- The office responded to 6 requests for technical assistance with open-dc.gov.

B. Training/ Outreach:

1. Introduction to Section 1983: Defending the Government and its Officers

Training: On June 17, 2020, OOG Attorneys Barton and Deberry attended a course titled, Introduction to Section 1983: Defending the Government and its Officers. The course was presented by Andrew J. Saindon, Senior Assistant Attorney General, Office of the Attorney General for the District of Columbia. The training course was relevant to the mass demonstrations taking place in the District and throughout the US. The discussion focused on the history/intent of the Civil Rights Act and the 14th Amendment. It provided an introduction and hands-on guide to the basic concepts and cases necessary to defend the District of Columbia in Section 1983 cases – violation of constitutional rights. The course covered the scope of the District’s authority and responsibility as a unique, non-State federal enclave.

2. FOIA training: On June 17, 2020, Attorney Barton conducted an in-depth FOIA training for “ABRA” the Alcohol Beverage Regulation Administration.

3. OMA Closed Session training: On July 24, 2020, Attorneys Barton and Deberry remotely attended the Mayor Crash Review Task Force’s meeting at its request to provide counsel and answer questions on the protocol to enter closed sessions.

4. FOIA Training: On June 26, 2020, Attorney Barton, with my assistance, conducted a remote FOIA training for the Public Service Commission and the DC Sentencing Commission. The participants included the agency’s new FOIA officers.

5. COVID Training: On June 29, 2020 all OOG staff completed the mandatory Contact Tracing provided by DCHR via WebEx. The Mayor of the District of Columbia had all District of Columbia employees participate in this training in order to ensure the District has the contact tracing capability as recommended by the CDC.

6. Productivity Training: On July 1, 2020, Attorney’s Barton and Deberry attended the Increase Agency Productivity in the Remote Work Environment Webinar. The Webinar was conducted by the Advanced Technology Academic Research Center (“ATARC”) and organization that provides a collaborative forum for government, academia and industry to resolve emerging technology challenges. The Webinar

discussed the benefits of telework, impacts on morale, the possible impacts on the commercial real estate industry, and the use of platforms such as Zoom.

7. Monitoring Public body meetings: OOG continues to play an important role in ensuring that Boards, Commissions, and other public bodies are able to successfully conduct government business remotely. OOG is currently responsible for remotely overseeing that approximately 292 public bodies comply with the OMA. This figure includes approximately 105 Local School Advisory Teams. OOG continues to ensure the public's right of access to public meetings by monitoring public body compliance with the OMA as amended by the "COVID-19 Response Emergency Amendment Act of 2020." We are monitoring public meeting notices to ensure they provide remote meeting access information for the public to observe these meetings. We are also attending meetings remotely to observe meetings as participants.

8. COVID-19 Weekly Coordination Meetings and Cabinet Meetings: Director Ford and I participated in weekly meetings with Mayor Bowser concerning the District's response to the public health emergency on June 8, 2020, June 19, 2020, and June 22, 2020.

C. Legislation and Litigation Update:

1. Deliberative Process FOIA Exception Case: The U.S. District Court for the District Columbia, in *Center for Investigative Reporting et al v. U.S. Department of Interior* (decided April 7, 2020), examined whether the Department of the Interior ("Department") demonstrated that the disclosure of the withheld information would result in reasonably foreseeable harm to the Department's deliberative processes. The Court concludes that the Department did not. The Court recited a 2016 amendment to FOIA that applies "even if a record would otherwise be exempt." That amendment allows an agency to withhold information under [FOIA] only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law. To satisfy its obligations, the agency must articulate both the nature of the harm and the link between the specified harm and specific information contained in the material withheld. The Court stated that this task "requires more than speculation"— "[t]he question is not whether the purported harms could" occur, but whether "it is reasonably foreseeable" that they will occur. The Court held that the Department had established a reasonably foreseeable link between these harms and the specific information contained in the withheld records.

2. WMATA Public Records Litigation: *Brown v. Wash. Metro. Area Transit Authority* recently reiterated that the public may obtain WMATA's records pursuant to that agency's FOIA equivalent, the Public Access to Records Policy (PARP). Unsuck DC Metro, an organization in DC, recently file suit against WMATA to gain access to its customer satisfaction survey. Unsuck DC Metro sought the record by filing a PARP request to WMATA, which it denied. The US District Court upheld the denial of the PARP request. WMATA asserted that disclosing the survey questions would force it to alter its deliberative process. Also

that the withheld questions shed light on facts that WMATA feels require development to help them reach decisions. *See Unsuck DC Metro v. WMATA, et al.* (decided May 26, 2020).

D. Administrative Matters:

1. Welcome to OOG’s new Attorney-Advisor: On June 8, 2020, Sheree Deberry began work as OOG’s Attorney-Advisor. Attorney DeBerry has 13 years of extensive experience with the Freedom of Information Act (FOIA) and the federal Privacy Act (PA). She has contributed to the development of program-wide standard operating procedures and managed complex FOIA requests. Attorney DeBerry also has litigation experience working with well-respected nonprofits fighting for health and women’s issues. She holds a Bachelor of Arts degree from Marshall University and a Juris Doctorate degree from the District of Columbia School of Law. Attorney DeBerry lives in Ward 5 with her husband and daughter.

2. ReOpen DC: Acting Director Ford and I are working on BEGA’s reopening plan for Phase III. She will discuss in more detail during her report. OOG remains on full telework status during Phase II. The public health emergency remains in effect until July 24, 2020.

3. FY21 Budget: The Committee on the Judiciary and Public Safety granted our budget enhancement request for an OOG Trial Attorney. The District of Columbia Council, Committee of the Whole, will finalize the budget in the near future.

This concludes the Office of Open Government’s July 2, 2020 report.

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

Good morning, Chairperson Hutcheson and Members of the Board. My name is Rochelle Ford and I am the Acting 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 Office of Government Ethics (OGE) Operations: First I will provide a recap of the previous month’s activities. Given the COVID-19 emergency, OGE’s staff has continued to investigate pending matters as is feasible given the stay at home orders. 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	46
Open - Negotiations	0
Open - Show Cause Hearing	4
Grand Total	50

OPEN "UNDOCKETED MATTERS"	
Grand Total	0

PENDING/STAYED INVESTIGATIONS BY STATUS	
Closed - Pending Collection	28
Closed - Pending DC Superior Court Case	1
Stayed - OAG False Claims Act Case	4
Stayed - OIG Investigation	7
Stayed - US District Court Case	0
Grand Total	40

REGULATORY MATTERS BY STATUS	
Closed - Pending Collection	24
Open	3
Grand Total	27

	Current	Last month	May. 2020
Investigations Currently Open:	50	57	50
Investigations Stayed:	13	13	13

B. Trainings/Outreach:

1. Professional Development Trainings Attended by staff:

During the month of June, OGE employees completed the following required trainings from District Government: The Basics of Coronavirus, The Basics of Contact Tracing, Effective Communication (as it relates to Contact Tracing), and Case Monitoring and Resources.

Attorneys Stewart-Mitchell and King attended the webinar "Ethically Speaking: Meeting the Challenges of Professionalism in Remote Proceedings. Attorney Cooks and Investigator Bradley completed the webinar: Cognitive Interview: Getting the Real Story. Auditor Tujuba completed the following trainings: Using Active Listening in Workplace Situations, Polishing Your Feedback Skills, Taking Effective and Professional Notes, and Creating a Project Schedule and Budget.

2. Conducted by staff:

Since the last Board meeting, OGE conducted 2 ethics webinars that were well attended. Monthly Ethics Training on June 17 – attended by 284 employees and a Local Hatch Act Training – attended by 157 employees.

In addition, 139 employees completed the online ethics training.

On June 29, OGE hosted it's second Ethics Counselor Brown Bag Discussion, which was attended by 26 Ethics Counselors. The goal of these regular, virtual meeting is to provide ethics counselors with an opportunity to ask questions and discuss common issues and to receive training and guidance from OGE on how to handle specific issues.

The topic for this month's discussion was "Best Practices for Ethics Counselors." We provided information on how and when to report suspected ethics violations and how and when to seek advice from OGE. OGE staff answered questions and ethics counselors discussed common issues. We very received positive feedback about the session and a request to receive legal training hours for D.C. attorneys.

I also informed ethics counselors that OGE staff would be doing direct outreach to each agency to learn more about any specific issues they may have and if they have supplemental agency recommendations. I also advised them that we would be sending them a questionnaire about their ethics program from OGE following out discussion.

We will continue the discussion on Best Practices for Ethics Counselors at our next virtual ethics forum since we ran out time. Our next session will focus on maintaining ethics records and developing awareness about agency ethics issues.

C. Advisory Opinions/Advice:

Informal Advice: approximately 37 which is 5 less than the 42 reported at the June meeting. This number does not include responses we have provided to questions regarding the Lobbyist and FDS e-filing systems.

OGE did not issue any advisory opinions since the last meeting.

D. Legislative Update

The Office of the Attorney General has been consulting with OGE to determine how to best revise the Ethics Act to allow the OAG to prosecute ethics violations that substantially threaten the public trust as already set forth in the Ethics Act. In the Ethics Act, the Council charged BEGA with identifying what type of conduct would substantially threaten the public. After consulting with our office, the OGE confirmed that BEGA had provided suggestions on how to define conduct that

substantially threatens the public trust in a 2013 Best Practices Report. After consulting with our office, OAG requested that the Council revise the Ethics Act to define conflicts of interest violations as conduct that could substantially threaten the public trust so that the OAG could prosecute violations of the Ethics Act.

OGE fully supported OAG's recommendation to the Committee, but did propose that the Committee revise OAG's proposed revision to the Ethics Act to better allow BEGA to have more flexibility to refer matters to OAG at the preliminary or formal investigation stage of a matter, rather than only after an adversarial hearing. OGE explained that this change was needed to ensure that the OAG could prosecute matters that had not already been formally adjudicated. The Committee staff adopted OGE's suggestion.

I have uploaded OAG's Press Release and the proposed revisions to the Ethics Act to the DropBox.

E. Budget

FY21 Budget: I am pleased to announce that the Committee on the Judiciary and Public Safety granted our budget enhancement request for a full-time attorney for the Office of Government Ethics. The District of Columbia Council, Committee of the Whole, will finalize the budget in the near future.

I have uploaded information regarding OGE's proposed budget enhancements to the DropBox.

F. Administrative Matters

Vacancies:

Both the Director of Government Ethics position and the Board's Senior Attorney Advisor position have not been remain open.

Operating status:

On June 19th, the District entered Phase 2 of Reopening District Government Operations. The District government provided an extensive Return to Work guide for District employees. Per the Return to Work guide, Director Allen and I issued a memo to staff on returning to work that advises them that should an employee need to return to the workplace, they should wear mask in public spaces, practice social distancing, and conduct a health self-assessment before coming into the office. The memo also provided them with agency contacts for COVID-19 related training, supplies, and HR matters.

Under our agencies return to work plan that we provided to the Mayor's office, BEGA employees will continue to telework and provide services remotely during Phase II. However, should employees need to go into office for meetings or interviews, they should confer with their Office Director before coming into the workplace.

The Return to Work Guide and Agency Memorandum have been uploaded to the DropBox.

G. Litigation:

Status of pending cases.

- **Gerren Price –2019 CA 005346.** This matter involves an appeal of a Board decision. The Petitioner’s brief in support of his request to reverse BEGA’s decision was submitted on Tuesday, June 2, 2020 and OAG responded on behalf of BEGA on July 1, 2020. The Petitioner claims that BEGA improperly applied the nepotism statute to his conduct and asks the court to reverse the BEGA’s order and fine, to remove all mention of the matter from the BEGA’s website, and for attorney’s fees in his brief. OAG responded that the D.C. Council clearly designed BEGA to be the expert agency on matters pertaining to government ethics, and as this matter hinges on a question of government ethics, the court should defer to Respondent’s reasonable construction of the regulation.

OAG’s brief has been uploaded to the DropBox.

H. Financial Disclosure and Lobbyist Registration Programs:

Financial Disclosure – In the month of June, 883 filers completed their Public Financial Disclosure Statements. To date 2,424 filers have successfully filed with approximately 1,200 remaining. On June 15, 2020 and June 29, 2020, BEGA sent out filer reminders to those who have not yet submitted their forms. OGE’s Auditor will begin auditing FDS filings in accordance with his audit plan.

Lobbying Registration and Reporting (LRR) System – 2020 Second Quarter Lobbyist Activity Reports are due on July 15, 2020. Lobbyist received notification of the upcoming deadline on July 1, 2020.

E-filing system technical issues: Later today, OGE’s staff plans to meet with OCTO to discuss unresolved technical issues with the both e-filing systems and to discuss a timetable for completing any outstanding deliverables and implementing work completed by our vendor Abstract Evolutions.

Lobbyist Activity fee waiver request

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.”

20-0006-R Squire Sanders – Squire Sanders failed to timely file a 2019 Lobbyist Activity Report and was assessed a \$300 penalty. However, due to LRR system errors, that penalty was then mistakenly not assessed. Once the error was

discovered, Squire Sanders immediately worked to resolve the issue and sought a waiver request for the late filing. Given that the LRR system was erroneously assessing fines to reports that had been timely filed, OGE had to purge out all lobbyist fines during that time period and that led to confusion for the filer and OGE's staff. OGE does not oppose this waiver request.

We ask that the Board approve Squire Sanders request for a fee waiver.

The Board voted unanimously to approve the request for a fee waiver.

Thank you. This concludes the Office of Government Ethics' July 2, 2020 report.

VI. Acknowledge of Public Comment – None received.

VII. Executive Session (non public)

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

VIII. Resumption of Public Meeting

There were no matters reported out from the Executive Session.

IX. Adjournment

The Board will meet again on August 6, 2020.