

MEETING MINUTES

District of Columbia

Board of Ethics and Government Accountability

Monthly Meeting of the Board

November 7, 2013, at 1:00 pm

Hearing Room 540 South

I. Call to Order

The Monthly Meeting of the Board was called to order at 1:01 pm by Chairman Robert Spagnoletti in Hearing Room 540 South at One Judiciary Square, 441 4th Street NW, Washington, DC 20001.

II. Ascertainment of Quorum

Board members Robert Spagnoletti, Deborah Lathen, and Laura Richards were present constituting a quorum. Laura Richards participated via telephone conference, but lost her connection at approximately 1:27 pm. The meeting proceeded without her further participation.

III. Adoption of the Agenda

The Agenda was adopted unanimously.

IV. Acknowledgment of Adoption of the Minutes

The Minutes of the October 3, 2013, and October 17, 2013, Board Meetings were adopted unanimously.

V. Report by the Director of Open Government

a. Critical Infrastructure Amendment Testimony

On October 21, 2013, Director Traci Hughes testified before the Committee on Government Operations in support of a more limited amendment to the Freedom of Information Act (FOIA) to exempt from FOIA critical infrastructure information from companies regulated by the Public Service Commission. Director Hughes acknowledged Chairman Betty Kane of the Public Service Commission for her thoughtful consideration of the Office of

Open Government's (OOG) request to limit the scope of the bill. The amendment was passed by the Council on November 5, 2013.

b. FOIA Tracking System and the Executive Office of the Mayor Open Government and Transparency Initiative

Director Hughes notified the Ethics Board (the Board) that on October 24, 2013, Mayor Vincent Gray announced the implementation of the District's first automated FOIA processing system through FOIA Xpress. This type of system is successfully used by federal agencies and municipalities across the country.

The FOIA processing system is part of the Mayor's Transparency and Open Government Initiative. The Executive is seeking public comment on ways the City can improve transparency and better utilize technology and existing assets to create a more open government. The public comment began on October 25, 2013, and will end November 25, 2013.

Director Hughes informed the Board that she is working with Brian Flowers, General Counsel to the Mayor on the initiative and asked that the Executive Office of the Mayor (EOM) consider forming a task force to include OOG to review comments and establish a sustainable transparency plan. She also advised, that as part of this initiative, EOM has asked each agency to identify an open government coordinator to be the liaison to their respective agency.

The Board commended Director Hughes for her persistence and swiftness in getting the FOIA Xpress system running in such a short period of time.

c. Trainings

On October 28, 2013, Director Hughes conducted the OOG's first citywide training of FOIA Officers. She informed the Board that 46 of 62 Officers and/or staff attended the training. Tina Curtis of the Office of Healthcare, Privacy and Confidentiality presented at the training and spoke about Health Insurance Portability and Accountability Act considerations when responding to FOIA requests; and Brian Flowers who informed FOIA officers and their staff about the Mayor's FOIA appeals process. The second citywide FOIA training session is tentatively expected in July, 2014.

Director Hughes informed the Board that she conducted Open Meetings Act (OMA) trainings for the Board of Barber and Cosmetology and for the Office of Employee Appeals. Also, she and Darrin Sobin, the Director of Government Ethics conducted an Ethics and OMA training with the points of contacts for the Boards and Commissions.

d. Website

Director Hughes informed the Board that BEGA new website is slated to go live December 2013.

e. Advisory Opinion

Director Hughes told the Board that the General Council for the Office of Administrative Hearings (OAH) has requested a formal advisory opinion on the best practice of responding to requests from non-parties. Currently OAH treats all requests from non-parties as FOIA requests, despite the documents being maintained as part of a court record similar to Superior Court, which is public record. The majority of documents filed in OAH proceedings are not filed under seal and is maintained in one file containing judicial notes/recommendations, and confidential information.

Board member Deborah Lathen inquired about the status of enhancements (cameras and microphones) to the Hearing room, and Director Hughes said that she was awaiting an update to hear back from Office of the Chief Technology Officer (OCTO) to see if they received the funding from the Mayor's office.

VI. Report by the Director of Government Ethics

Director Darrin Sobin of the Office of Government Ethics (OGE) introduced its newest Attorney-Advisor, Cristina Patzelt and said that she will be tasked with lobbyist activities and financial disclosures.

a. Update on Status of OGE Operations – Recap of Previous Month's Activities

- Investigations Opened: 5
- Investigations Closed: 7
- Advisory Opinions Issued: 2 (no pending requests)
- Informal Advice Requests: 44 (all addressed)

b. Publication and Reporting Obligations

The OGE is current with all publication and reporting obligations.

c. Trainings

Conducted by Staff

- Office of Employee Appeals (with Director Hughes)
- Council Staff
- Public Charter School Board
- Public Charter School Board Staff
- Councilmember Marion Barry (current on Ethics training)
- DC Bar (Directors Sobin and Hughes)
- Homeland Security and Emergency Management Agency
- New Employee Orientations (three conducted)

d. Advisory Opinions

Director Sobin informed the Board that an Advisory Opinion has been issued to an Advisory Neighborhood Commission (ANC) Commissioner concerning an inquiry about whether or not they could teach at the University of the District of Columbia (UDC). Jack Grimaldi, Senior Attorney-Advisor issued a Formal Opinion affirming that the Commissioner could teach at UDC. OGE has requested that the Opinion be posted unredacted.

The second request for an Advisory Opinion came from five Council members regarding the use of blind trusts. These trusts would be intended to protect the Council from financial conflicts of interest involving property and/or stock that they may own and not be aware of. The Council members asked if this is an effective way of getting around some of the conflict of interests provisions of the Ethics Act. OGE stated that even if blind trusts could be used to satisfy the conflicts of interest provisions of the Ethics Act, there could be no guarantee that the Federal government would recognize them under the Federal conflict of interest law which also applies to District employees. OGE will post the Opinion on the website.

e. Lobbyist Matters

i. Update on Electronic Lobbyist Registrations and Electronic Fee Payments

Ms. Patzelt informed the Board that both the electronic payment gateway and lobbyist registration systems should be finalized soon. OGE revised financial disclosure forms for public officials and ANCs to ensure more ease of use for filers. These forms were also forwarded to the Board of Elections and will be included with information candidates receive when running for office, along with notification that even if they do not win – they are still required to file a financial disclosure statement (FDS).

ii. Filing Issues & Refund Requests

Ms. Patzelt informed the Board that neither Harris Teeter nor the lobbying firm McGuire Woods filed a lobbyist registration form in 2013. Both entities filed Lobbyist Activity Reports for the period of January 1, 2013 - June 30, 2013. Neither report indicated lobbying activity. Harris Teeter's report was filed five days late and they were assessed a \$50 penalty, which was paid. Upon Harris Teeter's discovery that there was no need to register since no lobbying activity was reported, a refund was requested. The Board agreed unanimously to refund the registrant the fee.

Ms. Patzelt also informed the Board that Daniel Flores and his client, Washington Board of Trade requested a penalty waiver. Mr. Flores claims he submitted the Lobbyist Activity Report for the period of January 1, 2013 - June 30, 2013, but did not receive a receipt. Ms. Patzelt said that BEGA did not receive the forms. Letters were sent to Mr. Flores and the Greater Washington Board of Trade informing them of the need to register and file reports and to pay the \$300 civil penalty assessed for failure to timely file reports. The letters were returned to OGE, but Mr. Flores received the letter addressed to the Greater Washington Board of Trade. Ms. Patzelt recommended that the Board deny the waiver and the Board agreed.

f. Budget Matters

Director Sobin informed the Board that BEGA is facing a potential budgetary deficit for FY 2014 and will need to request additional funding from EOM. BEGA has approximately \$70,000 in non-personnel services, but will require supplemental funding of approximately \$80,000 to operate. Chairman Spagnoletti stated that the supplement is necessary because BEGA has to be able to cover the costs to do good business.

Director Hughes informed the Board that OOG posted a job announcement for an IT Specialist, but only received one certified candidate's application – possibly due to the salary range. She plans to discuss the matter with the Office of Finance and Revenue Management.

g. BEGA Legislation

Director Sobin informed the Board that the permanent legislation involving BEGA authority to issue Advisory Opinions *sua sponte*,

negotiated dispositions and alternative dispositions was voted on by the Council Committee unanimously and passed its first reading. The Committee requested to add a provision that provides a 30-day period for public comment on *sua sponte* Advisory Opinions. Director Sobin said that *sua sponte* opinions would be in the vein of Best Practices Opinions and not a set interpretation of laws. The Board then inquired as to whether the Constituent Services Opinion would be considered a Best Practices Opinion and Director Sobin replied that it would fall into that category; the purpose of the Constituent Services Opinion was considered to partly fall under Best Practices. Board member Lathen also asked whether the Constituent Services Opinion is subject to the public comment for a 30-day period and Director Sobin answered affirmatively. He added that Councilmember Cheh's staff and OGE are discussing whether a second charge will be assessed to a person that is aware of the Advisory Opinion, but disagrees with the Opinion, and moves forward to violate ethics laws. Councilmember Cheh wants BEGA to just have to prove that the underlying conduct violated the ethics standards. Director Sobin hopes that the legislation will have its second reading in the next Council session and will become permanent. He added that BEGA may need a Congressional Emergency Bill from the Council to cover the lapse between the temporary legislation and the permanent legislation.

Director Sobin stated the Best Practices legislation is currently with the Committee; it includes required cooperation, penalties for lying to BEGA and a 30-day time period to report to the Board instead of 14-days.

h. Non-Confidential Investigations

Steven Allen – see “Allen Final Decision and Order “

i. Best Practices Report - Discussion of Topics to Include in this Year Report

Director Hughes discussed establishing mediation with FOIA requests complaints prior to reaching EOM. She plans to meet with the Office of the Attorney General (OAG) to discuss the proposal. Chairman Spagnoletti stated that OAG might have the best way to track common complaints pertaining to FOIA requests. Director Hughes said the main problem is possibly timeliness, which may be remedied with the FOIA Xpress system.

Director Hughes stated that she would like to focus on OOG Best Practices regarding open data and working with District agencies to make data available to the public. The data should be structured for the public to use and manipulate, i.e. help solve problems in the city and help create apps to

improve government services. Also, like New York City, which is at the forefront of the data movement, the District should hire a Chief Data Officer to handle open data. Director Hughes also suggests including a citywide transparency policy that would entail up-to-date agency document retention policies.

Director Sobin discussed amending D.C. Official Code § 1-1161.01(6) to refine the definition of “candidate” to include “only successful candidates or only candidates who made the ballot.” OGE has found that the current language presents a challenge because once a candidate loses it becomes difficult to locate them after a year or more. Also, many candidates are unaware of the requirement to file a FDS even if they are unsuccessful. OGE will now include this information with packages distributed by the Office of Campaign Finance (OCF). Director Sobin added that another challenge exists in the statute, which defines a candidate as someone who seeks nomination for office, which commences at the time they receive a nominating petition from OCF – even if they do not obtain any signatures, announce that they are running, or file anything with OCF. As a remedy, Director Sobin proposed that candidates not file if they are not elected. Filing should occur only if they were on the ballot, or filing collected signatures. The Board agreed that one should only be considered a candidate if they submit the forms with signatures to OCF, at which point, they would be required to file a FDS.

Director Sobin then spoke about obtaining authority to impose a fine administratively (up to \$2,000) for unsuccessful non-government candidates for failing to file a FDS instead of pursuing the matter through evidentiary hearings. The Board agreed that the fine should be able to be imposed administratively.

Director Sobin discussed amending D.C. Official Code § 1-1162.30 (Lobbyist Activity Reports) to provide authority to impose an administrative fee for lobbyists who file paper reports rather than file electronically. He stated that OGE administrative staff is overwhelmed with manually entering information into the e-Filing system – information contained in the numerous attachments are sometimes subject to interpretation, which places staff at risk of entering data incorrectly. The fine will hopefully encourage e-filing; thereby, reducing the number of hard copies the Office would have to maintain for a period of at least six years; minimize errors, and reduce the strain on staff. Chairman Spagnoletti expressed concerns that larger firms may rather pay the fine instead of filing electronically while non-profits might feel penalized for following the rules. Director Sobin said the pushback would be too great if OGE enforced electronic filing. The Board suggested that OGE write letters to lobbyists to get feedback on requiring them to pay \$100 for filing hard copies and explaining the benefits of filing electronically.

Chairman Spagnoletti discussed amending D.C. Official Code § 1162.30(c) (Lobbyist Activity Report) to clarify that a registered lobbyist must file an activity report even if he/she does not engage in lobbying activity during the reporting period. The Board agreed on the amendment.

Director Sobin reminded the Board members that they still had to decide whether to recommend that lobbyists be permitted to serve as Board & Commission members.

Director Sobin discussed making ethics training an annual or bi-annual requirement for all District government employees, which could be completed in person or via webinar. He said that mandatory yearly training is a Best Practice and is a requirement for OAG, as well as other jurisdictions, and it was also mandatory in 2012 for all District employees. The Board agreed that mandatory ethics training should be implemented.

Director Sobin proposed amending the Procurement Practices Reform Act of 2010 to require all contracts with the District to contain an acknowledgement clause that would advise vendors that they are subject to BEGA's authority and the Ethics Act. This would be a "consent to jurisdiction" requirement added to all government contracts. The Board agreed, and added that it would give BEGA the power to compel interviews and fine contractors. Chairman Spagnoletti stated that it would raise the question of whether BEGA or the Office of Contracts and Procurement would have the power to debar contractors. Chairman Spagnoletti agreed with the "consent to jurisdiction" requirement for contractors, but not expanding BEGA's sanctioning power.

Director Sobin also discussed requiring FDS filers to file an amended form when an actual conflict of interest arises. The Board agreed on the requirement.

OGE Attorney-Advisor, Yancey Burns spoke about amending the District Official Code § 1-1162.23(a) (Conflicts of Interest) to include non-financial conflicts of interest. The proposed Amended language to D.C. Official Code § 1-1162.23(a) would be: No employee shall use his or her official position or title to personally and/or substantially participate in a manner that the employee knows is likely to have a direct and predictable effect on the employee's **personal** or financial interests or the financial interests of a person closely affiliated with the employee. Mr. Burns informed the Board that the adding the word "personal" to the amendment would help combat this problem. The Board agreed, and added that the wording and definition of "personal" should be better clarified.

The Board then discussed the pros and cons of increasing its members from three to five. They talked about the challenge of only being able to discuss

matters via e-mail and not via telephone due to the Open Meetings Act since they are considered a quorum. The Board also expressed that adding members might shift the flow of communication that has been established over the last year. Director Sobin and Director Hughes also agreed that more members might present more vacancies, which could make it more difficult to have a quorum, and slow down the production of work. The Board agreed to table the issue until it could be discussed further with Board member Richards.

The Board also discussed the benefit of relocating BEGA to the Wilson Building, which may establish more “presence” in the seat of municipal government.

VII. Opportunity for Public Comment

No comment from the public. The Open Meeting ended at 2:45 pm.

VIII. Executive Session (non-public) to Discuss Ongoing, Confidential Preliminary Investigations Pursuant to D.C. Official Code § 2-575(b)(14), 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), and Personnel Matters Pursuant to D.C. Official Code § 2-575(b)(10).

The Executive Session concluded at 4:30 pm.

IX. Resumption of Public Meeting

The Open Meeting resumed at 4:31 pm. No members of the public were present.

X. Adjournment

Having no further business, the Meeting adjourned at 4:31 pm.