

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

DRAFT MEETING MINUTES – March 3, 2022

The District of Columbia Board of Ethics and Government Accountability held a meeting on March 3, 2022, 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, and Melissa Tucker. 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.

Members of the public were welcome to attend, and a recording of the meeting will be made available on open-dc.gov and BEGA’s YouTube channel.

I. Call to Order

The meeting was called to order at 12:00 p.m.

II. Ascertainment of Quorum

Chairperson Hutcheson and Board Members Charles Nottingham and Melissa Tucker were present at the start of the meeting. Chairperson Hutcheson noted that Board Member Darrin Sobin was unable to join the meeting. The three Members present constitute a quorum for the meeting.

III. Adoption of the Agenda/Approval of Minutes

The Board Members in attendance voted unanimously to approve the agenda. Chairperson Hutcheson noted that Board Member Felice Smith joined the meeting after the adoption of the agenda. The Board then voted to approve the minutes of the February 3, 2022, meeting.

IV. Report by the Director of Open Government

Good afternoon, Chairperson Hutcheson, and Members of the Board. I am Johnnie Barton, Chief Counsel for the Office of Open Government (“OOG”). I am pleased to present this report on the activities of the 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

1. Advisory Opinions

On February 17, 2022, Director Allen issued Advisory Opinion #OOG-2021-0008-M on whether the functionality of FOIAXpress hinders the submission and processing of D.C. FOIA requests. Director Allen found that it does. She opined that the Office of the Chief Technology Officer (“OCTO”) should adjust the system if the District is going to continue using it to process FOIA requests.

Director Allen recommends that OCTO adjust FOIAXpress to improve its functionality by: (1) Removing the “Request type” drop-down menu so that requesters are not confused by the option of “FOIA-OIG.” (2) Continuing to promote the “Open Data Portal” and consider removing the “Reading Room” feature in its entirety to eliminate redundancy. (3) Removing the “Attach Consent Here” field from the request-submission form. (4) Ensuring that the "Agency Open Government and FOIA Contact Information" site is complete and current, and that OCTO supply a link, via the PAL landing page, which refers requesters to FOIA Officers' contact information. (5) Removing references to 5 U.S.C. § 552 (the federal FOIA statute). The Advisory Opinion is in the Dropbox for your review.

2. Informal OMA/FOIA Advice

Since the last Board meeting, OOG responded informally, via e-mail or telephone, to requests for assistance as follows:

OOG responded to five (7) requests for OMA advice;
OOG responded to six (6) requests for FOIA advice; and
OOG responded to thirty-eight (38) requests for technical assistance with open-dc.gov.

B. Training/ Outreach

1. Office of Attorney General (“OAG”) Training

On February 8, 2022, Director Allen, myself, and Attorney DeBerry, attended the “Basics of Legislative Drafting” training presented by the OAG. The training was an in-depth 2-hour discussion on the District’s legislative process and legislative drafting techniques.

2. District of Columbia Public Charter School Board (“DC PCSB”) OMA Training

On February 11, 2022, Attorney Orji conducted an OMA training for the DC PCSB as a component of the resolution of Complaint #OOG-2021-0001-M. This concluded a two-part training requirement for DC PCSB.

3. DC Bar Legal Writing Webinar

On February 14, 2022, I attended "Writing Well 2022" sponsored by the DC Bar. The webinar provided helpful tips to improve legal writing, including words to use and avoid, improving sentence structure, and making legal writing more persuasive.

4. Advisory Neighborhood Commissioners (“ANCs”) Yearly FOIA Trainings

Pursuant to D.C. Official Code § 1-309.12(d)(6), on February 17, 2022, Director Allen conducted two FOIA Trainings for ANCs via WebEx. The trainings were held at 2:30 pm and 6:30 pm. I also attended.

5. FOIA Webinar

On February 28, 2022, I attended the Cold War Museum's webinar, "The Glomar Explorer in Court: The CIA in a Court Case on Project Azorian." The focus of the webinar was on the history of federal FOIA's Glomar response.

C. Litigation and Legislative Update

1. Litigation

OOG is monitoring FOIA-related cases in D.C. Superior Court and the U.S. Court of Appeals for the D.C. Circuit. The agency is not a party to any 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. Tormell DuBose lawsuit re: Board of Dentistry resumes, experts, complaints, and decisions

On January 20, 2018, Tormell DuBose, D.D.S. sued the District under D.C. FOIA, seeking certain records from the Board of Dentistry and challenging the assessment of fees. The case is pending in the Court of Appeals (Case No. 19-CV-1239).

b. Tax Analysts & Davis FOIA lawsuit re: "other statute" (Exemption (6) applicability to D.C. Official Code § 47-4406, private letter tax rulings

On March 23, 2020, the company Tax Analysts and individual Aaron Davis ("Requesters") sued the District seeking injunctive and declaratory relief and fees and costs (Case No. 2020 CA 001999 B). Requesters had submitted a D.C. FOIA request to the Office of the Chief Financial Officer ("OCFO") for certain private letter rulings ("PLRs") from the Office of Tax and Revenue ("OTR"). OCFO had denied the request based upon Exemption (6) (D.C. Official Code § 2-534(a)(6)) "other-statute" withholding."

The Superior Court granted the District's motion for summary judgment, agreeing that OTR may withhold PLRs based on D.C. FOIA Exemption (6) as applied to D.C. Official Code § 47-4406(a). The court reasoned that "the PLRs are in their entirety an evaluation of the tax consequences of a taxpayer's financial circumstances. Redacting the tax-exempt [*sic*] information...would '[p]roduce an edited document with little informational value,' and therefore it is appropriate to withhold the documents in their entirety."

Requesters have appealed to the D.C. Court of Appeals. (Case No. 21-CV-0031.) The case is fully briefed and set for argument on March 8, 2022.

c. TPM lawsuit re: preliminary budget requests

On July 13, 2020, Terris, Pravlik & Millian, LLP (“TPM”) sued the District under D.C. FOIA, alleging that the District failed to produce and post online various budget-related documents related to the Office of the State Superintendent of Education and District of Columbia Public Schools. (Case No. 2020 CA 003087 B (Super. Ct.)) The case remains pending in the D.C. Court of Appeals (Case No. 21-CV-0543).

The District’s opening brief, filed December 17, 2021, asserts that: (1) the Superior Court effectively “overrides” the deliberative-process privilege by ordering the District to publish the documents under controversy; (2) “DC FOIA should be interpreted in a manner that avoids any constitutional or separation-of-powers question;” and (3) “TPM lacked standing to seek, and the court lacked authority to order, publication of all prospective documents identified in D.C. Official Code § 2-536.”

TPM’s brief filed January 28, 2022, responds: (1) its standing to sue is supported by a correct reading of D.C. FOIA; (2) the District’s reading of the D.C FOIA’s affirmative-disclosure paragraph is incorrect and would nullify it; (3) an “executive-communications privilege” has not been recognized in the District and, even if one existed, it would not apply to the sought documents; and (4) the Superior Court had the power to require the District to post the documents in controversy.

On February 4, 2022, six *amici curiae*, the D.C. Open Government Coalition, the ACLU of DC, the DC Fiscal Policy Institute, Public Citizen, the Reporters Committee for Freedom of the Press, and the Washington, D.C., Chapter of the Society of Professional Journalists, filed a joint brief that supports TPM’s position.

On February 8, 2022, the D.C. Council filed its *amicus* brief, supporting TPM’s position and disagreeing with the Mayor (*i.e.*, procedurally, the District). The District filed its reply brief on February 25, 2022. The briefs are in the Dropbox for your review.

d. Judicial Watch FOIA lawsuits re: autopsy records

On March 19, 2021 (Case No. 2021 CA 000875 B) and May 24, 2021 (Case No. 2021 CA 001710 B), Judicial Watch, Inc., filed complaints in Superior Court seeking specific performance on D.C. FOIA requests from the Office of the Chief Medical Examiner and the Metropolitan Police Department.

As reported to you previously, Judicial Watch seeks certain records relating to the Capitol insurrection. The parties have agreed to a briefing schedule beginning with the District’s motion for summary judgment due on March 4, 2022.

A scheduling conference remains set for July 8, 2022, before Judge McKenna.

e. Washington Post FOIA lawsuit re: requests arising out of Capitol riot

On June 23, 2021, *The Washington Post's* legal entity, WP Company LLC (hereinafter "*Post*"), sued the District in Superior Court for declaratory and injunctive relief under D.C. FOIA. (Case No. 2021 CA 002114 B.)

As reported to you previously, the *Post* seeks certain records relating to the Capitol insurrection. The Superior Court dismissed, in part, the *Post's* Claim 1 (concerning the Mayor's e-mail messages), but the balance of Claim 1 (concerning the Mayor's WhatsApp messages) and the other claims remain contested.

There is a status hearing set for April 8, 2022. Judge Williams has placed the case into a mediation track at the request of the parties.

f. Phillips "Section 1983" lawsuit alleging MPD watchlist

On February 2, 2022, criminal-defense lawyer Amy Phillips sued the District in the United States District Court (Case No. 1:22-cv-00277) under section 1979 of the federal Revised Statutes (commonly called "section 1983"), alleging an MPD "watchlist" targeting certain D.C. FOIA requesters.

The case remains pending in District Court. The District's answer is expected on March 11, 2022.

OOG staff will continue to monitor these cases.

2. Legislation

Fidelity in Access to Government Communications Clarification Emergency Amendment Act of 2022 (Bill 24-0692)

On March 1, 2022, the Council of the District of Columbia enacted the "Fidelity in Access to Government Communications Clarification Emergency Amendment Act of 2022." The emergency measure amends the District's record-retention statute, the Public Records Management Act of 1985 (D.C. Official Code §§ 2-1701(13) and 2-1706(a)(1)), to clarify "that communications created or received electronically in the course of official business are subject to existing record retention obligations." The Emergency Declaration Resolution states that the act covers WhatsApp and similar applications that allow the destruction, deletion or obscuring of communications. Copies of both measures are in the Dropbox for your review.

D. Administrative Matters

1. Paralegal Specialist Position

The Paralegal Specialist position is currently being advertised on dchr.dc.gov and DCHR is accepting applications of qualified candidates on BEGA's behalf. The vacancy closes on April 7, 2022.

2. BEGA Office Reopening:

BEGA's offices reopened to regular operations on Monday, February 28, 2022. BEGA's employees returned to the office at the Barry Building working in the office two days per week and teleworking for three days.

3. Performance Oversight Hearing

Director Allen provided testimony at the February 22, 2022, Performance Oversight Hearing. She touched on the OOG's accomplishments in the enforcement of the OMA and FOIA advice provided in FY21 and FY22. Director Allen also recommended changes to the OMA and FOIA laws. Director Allen is working on the FY23 Budget with Director Cooks and there are no updates on the FY23 budget at this time.

This concludes the Office of Open Government's March 3, 2022, report.

V. Report by the Director of Government Ethics

Good afternoon Chairperson Hutcheson and Members of the Board. I am Ashley Cooks, 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 occur as a result of actions taken by the Board during today's meeting.

OPEN INVESTIGATIONS BY STATUS	
Open	49
Open - Negotiations	1
Open - Show Cause Hearing	0
Grand Total	50

OPEN "UNDOCKETED MATTERS"	
Grand Total	7

PENDING/STAYED INVESTIGATIONS BY STATUS	
Closed - Pending Collection	27
Stayed - Pending DC Superior Court Case	4
Stayed - OAG False Claims Act Case	5
Stayed - OIG Investigation	8
Stayed - US District Court Case	1
Grand Total	45

REGULATORY MATTERS BY STATUS	
Closed - Pending Collection	26
Open	0
Grand Total	26

	Current	Last month	January
Investigations Currently	50	50	53
Investigations Stayed	18	15	14

The number of open preliminary and formal investigations includes 10 new matters opened since the Board last met. The investigative team resolved 10 investigations since the Board last met.

B. Trainings/Outreach

1. Professional Development Trainings Attended by staff

OGE staff took advantage of the following professional development trainings. Senior Attorney Tran, Supervisory Attorney Stewart-Mitchell, and Attorney Advisor Echols completed the Office of the Attorney General’s Basics of Legislative Drafting on February 8, 2022. Program Analyst Stan Kosick took Improving Your Technical Writing Skills on Monday, February 14.

Senior Attorney Tran and I attended the DC Bar National Association of Attorneys General Series – three trainings that included: (1) Election Crimes; (2) Police Corruption; and (3) Bid Rigging and Public Contracts.

Auditor Tujuba completed: (1) Managing Employee Development - about the benefits of developing employees and assessing how their development needs can be addressed through organizational learning. (2) Building a Leadership Development Plan - learning how to assess oneself as a leader, establish a vision for the future, and identify obstacles to that vision. (3) The Art of Staying Focused - strategies for dealing with focus challenges and distractions at work, as well as how to beat fatigue, manage time, and decline work-related requests. And finally, (4) Making the Most of an Organizational Change - introducing the idea of developing a change mindset and details the best practices for building self-motivation and covers the strategies to reshape your career by making use of the opportunities presented by organizational change.

2. Conducted by staff

Since the last Board meeting, OGE attorneys conducted 7 ethics trainings, which included the monthly training. The other trainings included a Monthly Hatch Act training, 3 mandatory Ethics Counselor trainings, Board and Commissions training for the UDC Board of Directors, and a Hatch Act Training for the Office of the Attorney General.

On this past Monday, February 28, we hosted our monthly Ethics Counselor virtual brown bag session. The topic was BEGA Financial Disclosure updates. Supervisory Attorney Stewart-Mitchell provided a thorough walkthrough of the program and introduced Program Specialist Stan Kosick as well as the upcoming new FDS Attorney Millicent Jones.

70 employees completed our online ethics training via PeopleSoft.

3. Learning Management System

OGE obtained an online Learning Management System (LMS) that will assist in its mission to provide ethics training for the District's 34,000 employees and public officials. The LMS will serve as the central location for on-demand ethics trainings and training materials. Employees will have access to trainings that address ethics subjects such as: Becoming an Ethical Leader, Receiving Gifts, Developing an Ethical Culture, Ethical Decision Making, as well as ethics rules such as outside and post employment, conflicts of interest, and nepotism. I am pleased to announce that a group of Ethics Counselors and OGE employees will engage in beta testing of the system. I anticipate that the LMS will be available to District employees by the end of this month.

4. Outreach

After a two-year hiatus, on February 15, OGE published its bi-monthly newsletter, "Ethically Speaking". The newsletter provides guidance to employees and public officials regarding compliance with the ethics rules, offers ideas to build internal thoughts, and gives notification of ethics news, enforcement updates, and upcoming events. The newsletter can be found on the BEGA website. A copy was placed in the drop box for your reading pleasure.

As noted at the last Board meeting, Senior Attorney Tran and I met with the staff of the Campaign Legal Center to obtain recommendations for implementing transparency upgrades to the BEGA website. We plan to meet with BEGA's IT staff and the Office of the Chief Technology Officer to incorporate those recommendations.

C. Advisory Opinions/Advice

1. Informal Advice

OGE’s legal staff provided advice for approximately 29 ethics inquires, which is 4 more than the 25 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 drafted any Advisory Opinions since the last Board meeting.

D. Legislation Updates

On October 27, 2021, the Committee on the Judiciary and Public Safety held a virtual, public hearing on the Pro Bono Legal Representation Expansion Amendment Act of 2021, Bill 24-0298. The Bill is an amendment to Section 223 of the Ethics Act, which will allow employees to provide pro bono legal representation before District courts and federal courts, and District and federal agencies. Since the public hearing, the Committee has amended the bill to include language from the District Personnel Manual, which allows employees to represent another employee in a personnel action and represent a close family member if the employee has not participated in the matter as a part of their official duties. A copy of the draft amendment was placed in the Dropbox for your review.

The Delinquent Debt Recovery Act of 2012 (“Debt Recovery Act”), requires government agencies to forward any uncollected debt that is over 90 days to the Central Collection Unit (“CCU”) and that debts collected by the CCU on behalf of BEGA are to be deposited into the District’s General Fund. OGE has scheduled a meeting with Councilmember Nadeau’s office to discuss amending the Debt Recovery Act to include language that BEGA may, in its discretion, transfer and refer delinquent debts associated with settlements and judgments to the CCU for collection and funds collected shall be deposited into the Ethics Fund. A copy of the draft amendment was placed in the Dropbox for your review.

E. OGE Administrative Matters

1. OGE Staffing

OGE is actively recruiting to fill BEGA’s Human Resources Specialist vacancy. The job announcement is posted on Careers DC and will remain open until the end of this month. We are actively working to fill the other vacancies.

2. Performance Oversight

On February 22, 2022, Chairperson Hutcheson, Director Allen and I testified before the Committee on Human Services in BEGA’s Performance Oversight Hearing. We provided answers to oversight questions regarding the agency’s performance and achievements for fiscal years 2021 and 2022. Copies of the answer submission and testimony were uploaded to the drop box.

F. Financial Disclosure Statement (FDS)

The 2022 FDS Filing Season preparations have begun. OGE has begun to receive filer lists from various agencies. As previously stated, Supervisory Attorney Stewart-Mitchell offered several training sessions for Ethics Counselors and a Brown Bag training specific to Financial Disclosure on Monday, February 28.

The FDS E-file System upgrades are in process. The FDS team has continued to meet its vendor Abstract Evolutions at least once a week. The meetings have been to provide progress updates and clarify OGE processes. We recently met with Abstract Evolutions for a demonstration of the upgrades. This meeting gave OGE staff an opportunity to see the new functionality and offer comments to further fine-tune the improvements. The FDS Team is still working on the Financial Disclosure Standard Operating Procedures Manual.

G. Lobbying Registration and Reporting (LRR)

The 2022 Registrations and 2021 Quarter 4 Activity Reports were due January 18, 2022. In February, OGE received 9 Lobbyist Registration (6 New registrations, 3 Renewals). In addition to the registrations, OGE received 2 Activity Reports for Quarter 4, 2021. The LRR team will be sending enforcement letters regarding the late renewals and activity reports.

F. Formal Investigations

1. **22-0002-F In re Neil Albert** – This matter is a formal investigation, pursuant to D.C. Official Code § 1-1162.12(b) and is based on allegations that the Respondent, former-Chairperson of the DC Housing Authority’s Board of Commissioners, voted to award contracts to Moya Design Partners and failed to disclose a close personal relationship with the owner of Moya Design. OGE is continuing its efforts to investigate this matter by gathering evidence and interviewing witnesses.

Thank you. This concludes the Office of Government Ethics’ March 3, 2022 report.

VI. Public Comment – if received

The Board did not receive any public comments.

VII. Executive Session (nonpublic)

The Board voted unanimously to enter into Executive Session 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

The Board resumed the public meeting at 1:14 p.m.

The Board approved negotiated dispositions in two matters: **#21-0076-P In re J Nelson** and **#22-0002-F In re Neil Albert**.

IX. Adjournment

The Board will meet again on April 7, 2022, at 12:00 p.m.