

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

DRAFT MEETING MINUTES – June 8, 2023

The District of Columbia Board of Ethics and Government Accountability held a meeting on June 8, 2023, at 12:00 p.m. The meeting was held remotely via WebEx. Board Members Charles Nottingham, Felice Smith, Darrin Sobin and Melissa Tucker participated in the meeting. Board Chairperson Norma Hutcheson did not attend the meeting. 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 pm.

II. Ascertainment of Quorum

A quorum was established with Board Members Charles Nottingham, Felice Smith, Darrin Sobin and Melissa Tucker present.

III. Adoption of the Agenda/Approval of Minutes

The Board members unanimously to adopt the agenda and approve the minutes of the May 4, 2023 meeting.

IV. Report by the Director of Open Government

Good afternoon, Presiding Member Smith, 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, OOG has continued to fulfill its mission of ensuring that all persons receive full and complete information regarding the affairs of the District of Columbia government and the actions of those who represent them.

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

1. Advisory Opinions and Formal Legal Advice

a. OMA Formal Legal Advice on Secret Ballot Voting

On May 31, 2023, OOG provided formal written legal advice in response to a public body’s request for advice on whether under the OMA they could elect its officers by secret ballot. The OMA expressly states that secretive ballot

voting cannot occur during electronic meetings. Pursuant to D.C. Official Code § 2-577(3) all votes must be taken by roll call when the meeting is electronic (remote) or a hybrid meeting. Moreover, voting via secret ballot is contrary to the OMA’s “Public policy” (D.C. Official Code § 2-572), which entitles the public “to full and complete information regarding the affairs of government and the actions of those who represent them.” This includes the right to observe a public non-secretive vote electing members of a public body. OOG advised that a secretive ballot vote is tantamount to a closed session for which there is no exemption under D.C. Official Code § 2-575(b)(1)-(16)(A). There is no provision under the OMA authorizing the closure of a meeting to conduct elections via secret ballot voting. Also, in a similar context, the Office of the Attorney General (“OAG”) has opined that the election of Advisory Neighborhood Commission’s officers by secret ballot is unlawful. OAG’s opinion is instructive authority regarding the question.

b. OMA Formal Legal Advice on Public Charter School Board Meeting Recording

On May 18, 2023, OOG responded to an inquiry asking whether the Open Meetings Act (“OMA”) requires meetings of public charter school boards of trustees, to be recorded by electronic means. Because they are public bodies per D.C. Official Code § 2-574(3), the OMA requires that “[a]ll meetings of public bodies, whether open or closed, shall be recorded by electronic means, and the recording shall be preserved for a minimum of 5 years; provided, that if a recording is not feasible, detailed minutes of the meeting shall be taken and preserved for a minimum of 5 years.” (D.C. Official Code § 2-578(a)-(b)). The response further cited my guidance to the D.C. Public Charter School Board on August 30, 2021, on the “Retention of a Public Body’s Meeting Records and the Public Inspection of Meeting Records under the OMA.” To comply with the OMA the trustees of public charter school boards must either post a meeting recording to their website or provide the recording to the public upon request. Unlike other public bodies that must post meeting minutes within three business days of a meeting, under D.C. Official Code § 2-578(b)(1), a board of trustees of a public charter school has 30 days to post detailed meeting minutes.

2. Informal OMA/FOIA Advice

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

OOG responded to 7 requests for OMA advice.

OOG responded to 8 requests for FOIA advice; and

OOG responded to 6 requests for technical assistance with open-dc.gov.

B. Remote Meeting Monitoring

OOG attorneys attend remote public meetings to ensure compliance with the OMA and to inspect public body websites and OOG’s Central Meeting Calendar for public

meeting notices and records. We provide legal advice on OMA compliance and take corrective action if necessary.

During May 2023, OOG's legal staff attended 29 remote public body meetings. As a result of the monitoring, eleven instances of written corrective measures were taken. The public bodies failed to do the following: (1) post meeting agendas; (2) provide access to meetings; (3) provide meeting links on agendas; (4) cite the OMA regulatory statement; (5) conduct roll call votes prior to going into a closed session; and (6) provide dial-in numbers for virtual meetings.

C. Training/Outreach

1. World Press Freedom Day

On May 3, 2023, Paralegal Brown attended World Press Freedom Day. The celebration, hosted by the Washington Post, highlighted the work and experiences of journalists around the world.

2. Office of Human Rights Training Series

On May 10 – 12, 2023, I attended a manager's mandatory training series offered by the Office of Human Rights. Each course covered 4 hours of material. On May 10, 2023, I completed Workplace Discrimination Training. On May 11, 2023, I completed Understanding ADA and DCFMLA Training. On May 12, 2023, I completed EEO Counseling Best Practices Training.

3. National Institute for Trial Advocacy ("NITA")

On May 16, 2023, the OOG staff attended "Opening Statements: Let Me Tell You the Real Story" hosted by NITA. The training provided best practices on organizing and presenting opening statements. The training focused on developing a deeper understanding of the first substantial opportunity to tell the story of a case, what is the truth that will be told during trial, and how to present the facts you're confident will be established.

4. Council on Government Ethics Laws ("COGEL")

On May 18, 2023, Attorney Scerbo and Paralegal Brown attended a FOIA Roundtable hosted by COGEL. The discussion provided the latest updates on artificial intelligence and its impact on open government.

5. DC Open Government Coalition ("DC OGC") – Digging Into DC

On May 24, 2022, Attorney Weil represented the OOG during the "Digging Into DC" event hosted by the DC OGC. The event was held at the Martin Luther King, Jr. Memorial Library, and is the first of a series of community conversations. The OOG's attorneys have been invited to attend and present during the informational series. I, along with Attorney DeBerry, Attorney Scerbo, and Paralegal Brown attended the event.

D. Litigation and Legislative Update

1. Litigation

- a. *Phillips vs. the District of Columbia re: alleged Metropolitan Police Department (“MPD”) watchlist* (Case No. 1:22-cv-00277-JEB (D.D.C.))

As I have reported, Amy Phillips alleged in a federal “section 1983” action that the MPD maintains a “watchlist” targeting certain D.C. FOIA requesters.

Now, this case has taken on a local (D.C. FOIA) element because, on May 17, 2023, Ms. Phillips moved to amend her complaint to add a (supplemental jurisdiction/“state”) claim under D.C. FOIA. The original complaint alleged U.S. Constitutional violations only.

The plaintiff’s motion to amend and her proposed complaint (redlined version) are in Dropbox.

- b. *Washington Post vs. District of Columbia lawsuit re: records arising out of Capitol insurrection* (Case No. 2021 CA 002114 B (Super. Ct.)).

As I have reported, *The Washington Post’s* legal entity (WP Company LLC), sought certain records relating to the Capitol insurrection, including the Mayor’s WhatsApp messages. *The Post* “argue[d] that the Mayor’s own search of the phone was insufficient as employees within the Mayor’s Office should have conducted the search and the only affidavit certifying that the search was conducted does not come from the Mayor herself.

Judge Scott disagreed with *The Post* and granted summary judgment to the District, finding “that, in relation to the sufficiency of the search at issue, ‘the search is quite frankly adequate when reviewing the entire record.’” (Order at 11.)

The *Order* is in Dropbox.

- c. *Fraternal Order of Police v. District of Columbia* (Case No. 2021 CA 003695 B (Super. Ct.)).

I have previously reported on this case, which was noteworthy because the dispute involved the rarely litigated D.C. FOIA provision whereby “a public body shall not be required to expend more than 8 hours of personnel time to reprogram or reformat records,” D.C. Official Code § 2-532(f)(1).

On March 17, 2023, the parties reached a settlement and filed their stipulation of dismissal, which is in Dropbox.

- d. *WP Company LLC v. DHS (Bill of Fees and Costs)* (Case No. 1:20-cv-1487 (D.D.C.)).

On February 6, 2023, the United States District Court for the District of Columbia awarded *The Washington Post's* legal entity \$55,741.55 in court costs and attorneys' fees (though this is only 60% of the amount that *The Post* had demanded) against the Departments of State and Homeland Security.

The Post alleged that those agencies had wrongly denied 34 FOIA record requests, submitted between 2018 and 2020, concerning official expenditures on housing and travel for the Secret Service's presidential detail. The agencies argued that delays were justifiable, caused by the COVID-19 pandemic. But, the District Court, applying *Judicial Watch, Inc. v. Department of Commerce*, 470 F.3d 363, 369 (D.C. Cir. 2006), concluded that its four-factor rubric warranted granting fees and costs to *The Post*:

"(1) the public benefit derived from the [disclosure of the records]; (2) the commercial benefit to the [requester]; (3) . . . the plaintiff's interest in the records; and (4) the reasonableness of the agencies' withholding."

Judge McFadden's opinion is in Dropbox.

2. Legislation/Administrative Policymaking

- a. *Fidelity in Access to Government Communications Clarification Emergency/Temporary Amendment Acts of 2023* (D.C. Acts 25-56, 25-91).

These measures became effective without the Mayor's signature, extending the corresponding laws from the last Council Period that clarify that the District's record-retention law covers electronic communications. The emergency measure expires on June 22, 2023. The companion temporary measure is under Congressional review and June 13, 2023, is the projected law date.

Both bills are in Dropbox for your review.

- b. *U.S. Dept. of Homeland Security Issues Body-Worn Camera Policy*

On May 22, 2023, United States Homeland Security Secretary Mayorkas issued a department-wide policy on body-worn cameras. The memorandum is in Dropbox.

- c. *Model Public-Health Emergency Authority Act*

On June 1, 2023, Attorney Weil observed the informational meeting organized by the Uniform Law Commission's drafting committee for the Model Public-Health Emergency Authority Act. The current draft is in Dropbox. (An earlier draft of this model act contained a reference deferring to the states' open-records exemptions.)

This proposed model act is expected to be called up for final reading on Saturday, July 22, 2023. Attorney Weil has observed the drafting process since last year and plans to watch the final floor debate and roll call of the states and territories.

d. FOIA Rules for Office of the Attorney General (“OAG”)

Effective June 2, Attorney General Schwalb promulgated rules governing D.C. FOIA requests to OAG. These new rules (Chapter 13 of Title 1, DCMR) are substantially similar to the Mayor’s rules governing subordinate agencies (Chapter 4 of Title 1, DCMR). The principal differences are:

- (1) A modernized fee schedule for search-and-review, including a more detailed breakdown by the pay grade(s) of the employee(s) involved, 1 DCMR § 1308.1;
- (2) A requirement that all requests be submitted through e-mail, postal mail, or the online Public Access Link (the FOIAXpress portal), 1 DCMR § 1302.1 to .3;
- (3) In the event of a vacancy in the Freedom of Information Officer position, the designation of the Chief Deputy Attorney General as the receiving agent for D.C. FOIA requests, 1 DCMR §§ 1302.1, .2, 1308.8; and
- (4) A slight change to the standard for withholding under an applicable exemption: while the Mayor’s rules require a “need in the public interest to” *exercise* an exemption, 1 DCMR § 406.1(b), the Attorney General’s rules require a “public interest” in order to *disclose in spite of* an exemption, 1 DCMR § 1300.3.

Like the Mayor’s rules, the Attorney General’s rules encourage employees to provide records informally and without insisting on any particular format for a D.C. FOIA request, “in the regular performance of their duties.” 1 DCMR §§ 400.3, .4, 1300.2, .3.

The Notice of Final Rulemaking is in Dropbox

OOG continues to monitor all relevant legislation and the status of court cases previously reported to the Board.

D. Administrative Matters

1. New Employee – IT Specialist, Kevin Brown

It is my pleasure to introduce our new IT Specialist, Kevin Brown. Mr. Brown joined our staff on Monday, and we are pleased that he has joined us. He has experience working in both the private sector and the government and is proud graduate of Bowie State University.

2. BEGA 1030 15th Street, NW Relocation

The weekly meetings continued this month regarding BEGA's relocation to its new office. I, along with Director Cooks and Chief of Staff Mitchell, and met weekly with the Department of General Services' project managers and construction team to discuss the progress of the agency's relocation to its new facility at 1030 15th Street, NW. During the May monthly meetings, we discussed the A/V needs of the new location and we also discussed our needs for data and telephones at the new facility. Construction is actively underway and several of the meetings have been moved on site. Our new IT Specialist joined us for our meeting on Tuesday.

3. Website Redesign Launch

As previously reported, BEGA has redesigned its website, bega.dc.gov. The website launched in May and Director Cooks will share the details in her report. We are very pleased with the result.

This concludes the Office of Open Government's June 8, 2023, report. I am happy to answer any questions the Board may have at this time.

V. Report by the Director of Government Ethics

Good afternoon, Presiding Member Smith, 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 because of actions taken by the Board during today's meeting.

OPEN INVESTIGATIONS BY STATUS	
Open	45
Open - Negotiations	2
Open - Show Cause Hearing	0
Grand Total	47

OPEN "UNDOCKETED MATTERS"	
Grand Total	3

PENDING/STAYED INVESTIGATIONS BY STATUS	
Closed - Pending Collection	31
Stayed - Pending DC Superior Court Case	3
Stayed - OAG False Claims Act Case	1
Stayed - OIG Investigation	4

Stayed - US District Court Case	0
Grand Total	39

REGULATORY MATTERS BY STATUS	
Closed - Pending Collection	26
Open	5
Grand Total	31

	Current	Last month	February
Investigations Open	47	52	53
Investigations Stayed	8	10	10

The number of open preliminary and formal investigations includes 12 new matters. The investigative team has resolved 18 investigations since the Board last met. This total does not reflect the number of complaints that were dismissed for a lack of jurisdiction. The Quarterly Complaint Report for FY2023 Q2 was completed and posted to the BEGA website this week. A copy is included in the DropBox for your review.

B. Trainings/Outreach

1. Professional Development Trainings Attended by staff

During the month of May, OGE attorneys and Senior Board Attorney Lynn Tran took the DC Office of Attorney General's legal ethics course called “Springtime Ethics Hour.”

Senior Board Attorney Tran also took the following trainings: Ethics for Government Lawyers 2023, Advanced Topics in Ethics and Compliance 2023: “State and Local Government Contracts”, and Discrimination, Harassment and Retaliation in 2023.

General Counsel Raj attended a 3-day training given by the DC Office on Human Rights on Discrimination in the Workplace, Understanding ADA & DCFMLA, and EEO Counseling Best Practices. She also attended an online Lexis Nexis webinar titled “See How AI is Transforming Legal Work.”

Investigator Ralph Bradley took a DCHR in-person training course titled Innovative Thinking. Attorney Advisor Fran Vann and I completed Tips, Shortcuts, and What's New in Microsoft Teams.

Attorney Advisor Maurice Echols, Investigator Bradley, Program Coordinator Stan Kosick, and I attended an online Skill Path course titled “Train the Trainer: How to Create and Facilitate Employee Training.”

2. Conducted by staff

Since the May Board meeting, OGE conducted 2 training courses: the May Monthly Ethics Training (227 attendees) and the May Brown Bag session (17 attendees).

Last Monday, Senior Board Attorney Tran presented the May Ethics Counselor Brown Bag Session unveiling BEGA's new website and features. A copy of the presentation was placed in the drop box for your review.

During the month of May, 396 employees completed our online ethics training via PeopleSoft. Since the launch of the Learning Management System in April 2022, 5,871 employees have registered within the system, which is an increase of 746 employees since the last board meeting. The top four courses are: BGA 923 Board of Ethics and Government Accountability Ethics Training (332 completions); BGA 909 Conflicts of Interest (205 completions); BGA 925 Financial Interest and Disclosure (198 completions); and BGA 920 Advisory Neighborhood Commissioner Ethics Training (134 completions). We continue to meet with our LRN program manager to discuss ways to optimize the system and increase employee registration.

3. Outreach

The new BEGA website became active on Monday, May 22nd! The website team, which consists of myself, Director Allen, Chief of Staff Mitchell, and Senior Attorney Tran, reviewed and approved final changes. The new website better reflects the agency's mission and is designed in a manner to make information easily accessible. The website now contains a bold menu in the center of the page which directs users to the subject area they desire. Each individual webpage contains images and icons which provide enhanced imagery and leads users to the subpages. We've received positive feedback on the design and ease of the site. I want to thank the team for their hard work on this big milestone project and to everyone who offered feedback and support along the way.

4. BEGA Newsletter

On Friday June 16th, OGE will publish volume eight, issue three of its newsletter, "Ethically Speaking." The newsletter will provide reminders of the financial disclosure statement review report deadline; inform readers of the ethical issues within the three branches of the federal government; and notify regarding enforcement actions taken by other state ethics boards. This issue will be available on the BEGA website and via email. A copy will be provided at the next meeting for your reading pleasure.

C. Advisory Opinions/Advice

1. Informal Advice

OGE’s legal staff provided advice for approximately 48 ethics inquiries, which is 18 more than the 30 reported at the last Board meeting. This number does not include responses we have provided to questions regarding the Lobbyist and FDS e-filing systems.

2. Formal Advisory Opinions

OGE’s advisory opinion, “Guidance on the Financial Disclosure Statement Filing Process” has been finalized. The office received one comment which was reviewed and considered before final publication. The opinion addresses the history and purpose of financial disclosure filings, who’s required to file (including the designation process), how to file a financial disclosure statement, and the importance of reviewing financial disclosure statements to determine any apparent or potential conflicts of interest. Given that the 2023 filing season has begun, this opinion answers some frequently asked questions and concerns. A copy was placed in the drop box for your review.

Last month, OGE published advisory opinion, “Guidance on Recusal.” The opinion provides advice on when a recusal is warranted and how employees should properly recuse themselves to avoid violating the ethics rules. The opinion details the definition of a recusal and provides information on when a written statement of recusal is expressly required by the Code of Conduct and when a recusal is necessary to avoid even the appearance of an ethics violation. The opinion also addresses what should be included in a written statement and the process after an employee discloses a conflict. The opinion was published on the BEGA website and submitted to the D.C. Register for a 30-day comment period which expires today, Thursday June 8th. A copy was placed in the drop box for your review. We hope to have the finalized version published by the next Board meeting.

D. Legislation Updates

1. 2022-2023 Budget Oversight

There are no updates regarding the agency’s FY 2024 budget enhancement requests that were submitted to the Council.

E. OGE Administrative Matters

1. OGE Staffing

OGE is now reviewing candidates from vacancy announcements for its Attorney Advisor, Investigator, and Auditor positions. We expect to start interviews for the Auditor and Investigator first and the Attorney Advisor soon after. As mentioned

in the OOG report, IT Specialist Kevin Brown joined BEGA on Monday, June 5th. Congratulations and welcome to BEGA! I'd also like to welcome Hunter Galpin, OGE's Legal Intern. Hunter is a rising 2L at the University of the District of Columbia's David A. Clarke School of Law. Welcome to them both.

2. Office Relocation

Our office relocation is still underway! OGE and OOG continue our weekly meetings with the Department of General Services, and the project management team to discuss the build-out of the space, furniture, and finishes. The proposed move-in date remains July 31, 2023.

F. Financial Disclosure Statement (FDS)

Pursuant to D.C. Official Code §§ 1-1161.24 and 1-1161.25, public officials and certain government employees must file a financial disclosure statement as a means of transparency and to prevent engaging in conduct that violates the financial conflicts of interest statute. BEGA is responsible for ensuring that employees and public officials, who meet the statutory requirements, file their annual financial disclosure statement.

The 2023 Financial Disclosure Statements were due on May 15th. This year, we extended a 30-day grace period to late filers. Any employee or public official who fails to file their statement on or by June 15th, will be penalized with a \$300 fine.

In April, the FDS team sent emails to 4,186 Public Filers and 4,263 Confidential Filers announcing the deadline. The number of timely Public filers is 3,521 (84%) and the number of Confidential filers is 3,005 (70%). To date, 3,900 Public filers and 3,284 Confidential filers have submitted their financial disclosure statements. The list of timely filers and those filers who received an extension request will be sent to the D.C. Register for publication. The list of late filers will be sent after the June 15th filing grace period. The FDS Team continues to remind Ethics Counselor to submit their financial disclosure review reports.

G. Lobbying Registration and Reporting (LRR)

Pursuant to D.C. Official Code § 1-1162.27(a), a person who receives compensation or expends funds in an amount of \$250 or more in any 3-consecutive-calendar-month period for lobbying shall register with the Director of Government Ethics and pay the required registration fee. According to D.C. Official Code § 1-1162.30, each registrant shall file a quarterly report concerning the registrant's lobbying activities during the previous quarter.

This past month, the LRR Team received 11 New Registrations and 12 Termination Reports. Additionally, the LRR Team responded to 5 Support Tickets. The LRR Team has been meeting with OCTO to identify upgrades to the e-filing system. On May 31st, OCTO provided a finalized list of items in preparation for the drafting of the MOU for E-File Upgrades.

Regarding education, Attorney Advisor Echols and Program Coordinator Kosick will attend the COGEL Lobbyist Roundtable on June 15. The LRR Team will provide Lobbyist training on June 28th, notice has been posted on the BEGA website and will be sent to via email lobbying registrants.

F. Formal Investigations

1. 23-0003-F In re Medgar Webster – Pursuant to D.C. Official Code § 1-1162.13(3) this is a formal investigation based on criminal information filed in D.C. Superior Court alleging that the Respondent, former Metropolitan Police Officer, engaged in first degree felony fraud when he engaged in unauthorized employment at Whole Food Market during his tour of duty. Specifically, the allegations state that from January 11, 2021, until April 2, 2022, Respondent simultaneously collected pay for a job at Whole Foods and reported those hours as overtime hours for the city. On May 15th, Respondent pleaded guilty to fraud and his sentencing is scheduled for July 25th. OGE will continue to monitor this matter and update the Board accordingly.

Thank you. This concludes the Office of Government Ethics' June 8, 2023, report.

Board Member Nottingham asked about the investigations and regulatory matters pending collection, inquiring whether the status of these matters was routine or presented some problems with the collection process. Director Cooks advised that most of the investigations pending collection are delinquent and have been reported previously to the Central Collection Unit (CCU), although she noted that some matters are pending payments or were part of a payment plan and not delinquent. For regulatory matters, Director Cooks stated that the pending matters were older matters such as financial disclosure or lobbyist finds that have already been sent to the CCU but are likely to include matters where BEGA does not have current contact information available for respondents. Those matters that have already been referred to the CCU, will be referred again for collection, Board Member Nottingham reiterated the importance of BEGA collecting the fines it is owed.

VI. Public Comment – if received

No public comments were received.

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 1:09 pm.

The Board approved negotiated dispositions in **23-0029-P In re L Samuels** and **23-0046-P In re B Smith**.

The Board opened a formal public investigation in **23-0143-C In re Larry Garrett**.

IX. Adjournment

The Board will next meet on July 13, 2023, at 12:00 p.m.

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