

DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

MINUTES OF MEETING
May 9, 2019

The District of Columbia Board of Ethics and Government Accountability held a meeting on May 9, 2019, at 12:00 p.m., in Room 540 South of the One Judiciary Square Building, 441 4th Street, N.W., Washington, D.C. The Board's Chairperson Norma Hutcheson was present as well as Board Members Darrin Sobin, Charles Nottingham, and Melissa Tucker. Senior Attorney Advisor, Rochelle Ford, was also present.

Members of the public are welcome to attend. Questions about the meeting may be directed to bega@dc.gov.

AGENDA

I. Call to Order

Chairperson Hutcheson called the meeting to order at 12:00 p.m.

II. Ascertainment of Quorum

Chairperson Hutcheson established that a quorum was present.

III. Adoption of the Agenda/Approval of Minutes

The Board voted unanimously to adopt the agenda. The Board approved the April 4, 2019 meeting minutes.

IV. Report by the Director of Open Government

Good afternoon Chairperson Hutcheson and Members of the Board. I am Johnnie Barton, Attorney-Advisor for the Office of Open Government (OOG). I am pleased to present this report on the activities of the OOG on behalf of the Director of Open Government. 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:

- a. On April 11, 2019, in response to Open Meetings Act Complaint #OOG-2019-0001-M the OOG issued a resolution of complaint finding that the Government in Sunshine Act, rather than the Open

Meetings Act governs meetings of the Department of Veterans Affairs Central Internal Review Board, a federal body.

- b. DC Public Charter Schools (#0004_11.15.18_FOIA AO). On May 1, 2019, the OOG issued in response to a request, a FOIA advisory opinion finding that FOIA is inapplicable to Public Charter Schools and that FOIA's legislative history makes clear that Public Charter Schools are not private contractors that perform a public function, therefore their records are not accessible pursuant to D.C. Official Code § 2-532(a-3).

2. Informal OMA/FOIA Advice:

Since the April Board meeting, the OOG has provided responses to requests for informal FOIA and OMA advice. The OOG has also responded to requests for technical advice concerning using the OOG's website for OMA compliance. The OOG provided 9 FOIA and 5 OMA substantive responses to requests for informal advice. The OOG also provided 5 responses to OMA requests for technical assistance.

B. OMA/FOIA Audits:

The OOG is continuing its comprehensive FOIA/OMA audit FOIA/OMA which it anticipates completing on or before August 1, 2019, and will report the results prior to September 30, 2019.

C. Training/ Outreach:

1. The Director of Open Government facilitated an online training session on April 9, 2019 entitled, "Social Media and FOIA in 2019." ArchiveSocial hosted the online course, which included 75 participants from all over the country. The participants were government attorneys and public information officials.
2. On April 25, 2019, The OOG conducted an Open Meetings Act training for the Advisory Committee on Street Harassment.
3. On May 8, 2019, the OOG along with the OGE facilitated a joint Open Meetings Act and Ethics training for the Health Benefits Exchange Authority.

D. Legislative Update:

1. Rulemaking:

The Office of Open Government has submitted for publication in the DC Register proposed regulations to implement the recent changes in the law and which makes clarifying amendments to the OOG's regulations at 3

DCMR § 104000. The proposed regulations were published in the April 12, 2019 edition of the DC Register. To date, the OOG has not received any comments from the public on the proposed regulations.

2. Proposed FOIA Amendments

The Council a FOIA subtitle for possible inclusion in the FY 2020 Budget Support Act of 2019. The amendments: (1) clarify that FOIA requests pertains only to information regarding the affairs of government and the official acts of public officials and employees; (2) clarify that electronic records and information on personal devices are subject to FOIA request; and (3) clarify that FOIA requests must reasonably describe the type of public records requested.

E. Staffing:

1. Summer Intern

The OOG will have a summer intern joining us on May 28, 2019. The internship will last for 10 weeks and is through the University of the District of Columbia David A. Clarke School of Law. We look forward to introducing the Intern to the Board at next month's meeting.

2. IT Specialist

There is a delay in the start date of the new IT Specialist. As was stated during April's Board Meeting, the OOG still plans to have the selectee start by the end of May.

F. Litigation:

The Court denied Claudia Barber's petition for review of the COST order, concluding that the COST order is "final and not reviewable in this or any other court."

The ruling found that there was clear legislative intent to preclude judicial review and to leave decisions to remove ALJs entirely to COST's discretion. The Order also states that since ALJs are accepted service employees, they have no right to appeal a termination. Among other findings, the Court also cited the "de facto officer doctrine" – that, "the acts of public officials acting under color of title are presumed to be valid, even though it is later discovered that the legality of that person's appointment or election to office is deficient." This point is important in that it severely weakens, and in fact, dismisses any previous intimations and published opinions that the COST's actions were somehow tainted or invalid because of a promulgated legal fallacy sometimes referred to as an "improperly constituted Commission" – referring to the alleged expired terms of some of the COST members in recent years.

Finally, although the ruling mainly rests on jurisdictional grounds, the Court also addressed the merits of Ms. Barber’s case and rejected her arguments that her constitutional rights were violated or that the OAH Code of Ethics allowed her to run in a party primary.

This concludes the OOG Director’s report for May 9, 2019.

V. Report by the Director of Government Ethics

- A. Update on Status of Office of Government Ethics (OGE) Operations: Recap of previous month’s activities (statistics). 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	16
Open - Show Cause Hearing	3
Open - Negotiations	4
Grand Total	23

PENDING/STAYED INVESTIGATIONS BY STATUS	
Closed - Pending Collection	13
Closed Pending Appeal to DC Court of Appeals	1
Closed - Pending External Action	3
Stayed - Pending DC Superior Court Case	1
Stayed - OAG False Claims Act Case	2
Stayed - OIG Investigation	7
Stayed - US District Court Case	5
Grand Total	32

REGULATORY MATTERS BY STATUS	
Closed - Pending Collection	24
Open - Appeal to Director	2
Open - Board Appeal	9
Grand Total	35

	Current	Last month	March 2019
Investigations Currently Open:	23	24	31
Investigations Stayed (Inactive):	15	15	10

B. Publication and Reporting Obligations:

We are working on the next Quarterly Complaint Report (QCR) for the second quarter of FY19 and will publish it to our website later this month. We have also assembled our Q1 and Q2 performance and workload measurements and entered them into Quickbase.

C. Trainings/Outreach:

1. Professional Development Trainings Attended by staff:

Investigator Corrales attended two training webinars: Social Media Basics webinar (NW3C); Tackling Telephone Interviews (Wicklander-Zulawski & Associates). Investigator Bradley, Attorney Cooks and Attorney Stewart-Mitchell attended a two-day program on Casting the Digital Footprint conducted by the National Criminal Justice Training Center which provided information on how to strengthen investigations through the acquisition of personal, public and open source data. Lastly, Senior Attorney Rochelle Ford attended a Lunch and Learn on “Tips on How to Make Your Ethics Program More Effective” sponsored by the Government Interagency Ethics Council on April 25.

2. Conducted by staff:

Since the date of the last meeting, we conducted or participated in 13 trainings, 5 more than the 8 we conducted last month. The 13 trainings consisted of two monthly ethics trainings, 5 ethics trainings conducted off-site at the Office of the Inspector General, the Department of Housing and Community Development, the Mayor’s Office of Legal Counsel, the Department of Energy and the Environment, and the Office of Unified Communications; two Board & Commission trainings conducted at the Comprehensive Homicide Elimination Strategy Task Force and HBX; one Donations Management Training for the Correctional Informational Council, two new employee orientations, one training webinar on the new Lobbyist e-filing system, and one live, in-person training program on the new Lobbyist system.

I’m also pleased to announce that our Ethics Training video is now linked to PeopleSoft, allowing District employees to access the training by logging into PeopleSoft and clicking on Course Number 003W - Ethics for DC Employees-Online. Best of all, the training will be captured on the employee’s training transcript, which we can verify. I’d like to publicly commend Attorney Cooks, our Training Coordinator, for all the hard work she invested in bringing this initiative to fruition, as it dramatically expands our training capacity.

D. Advisory Opinions/Advice:

Informal Advice: approximately 55, which is 2 more than the 53 reported at the last meeting. This number does not include responses we have provided to questions regarding the Lobbyist and FDS e-filing systems. Attorney Stewart-Mitchell alone has responded to approximately 350 inquiries regarding FDS issues.

Formal Advice requests: We have no pending formal advice requests.

E. Ethics Legislation/Comprehensive Code of Conduct:

Chairman Allen has introduced this year's version of the CCC for the Council's consideration, and CM Brianne Nadeau introduced another bill on March 19, 2019 entitled the "Ethics Reform Amendment Act of 2019." As I mentioned during last month's meeting, one provision from CM Nadeau's proposed bill that is particularly encouraging from OGE's standpoint is language that would authorize us to obtain search warrants for electronic evidence as referenced in our 2018 Best Practices Report. We look forward to working with Chairman Allen, CM Nadeau, and their respective staffs to advance these legislative efforts in furtherance of our agency's mission.

F. Rulemaking:

Notice of our proposed Rulemaking was published in the DC Register on April 26, 2019. It contained a number of conforming and technical changes to our rules, including the change from a 3 to 5 member board and the accompanying quorum change. It is focused on the criteria the Board considers when it has before it waiver requests, whether for e-filing, or FDS or lobbyist fines. It also includes criteria for employee designation appeals. It is contemplated that when the final rule is published, it will contain our entire body of rules, so they are more readily accessible to the public. Another thing to keep in mind is that the agency has the discretion to finalize all or only parts of the rule, depending on the comments it receives as well as its further consideration of the rules. Barring any unforeseen developments, we plan to ask the Board to formally approve the Rulemaking during its next monthly meeting in June, when more than 30 days will have elapsed since its publication in the DC Register.

G. Budget:

Our FY20 budget hearing took place on April 10, and we received updated proposed budget figures from the Committee on the Judiciary & Public Safety on May 1 reflecting a total FY20 budget of \$2,778,108. This represents a net increase of \$327,750 (or 13.34%) over the \$2,450,358 we were allocated for FY19. The Committee has recommended that three more of our FY20 Budget Enhancement requests be granted: Creating an additional Attorney Advisor FTE in the Office of Open Government with recurring local funds (\$98,000); Augmenting OGE's non-personal services budget with \$29,200 in recurrent local funds to cover our annual CMTS case management software licensing fees; and

one-time local funding in the amount of \$33,000, which was described by the committee as covering software licensing fees, but I believe that was a cut-and-paste error as that figure corresponds exactly with an Enhancement Request we submitted to cover the costs of staffing changes and within-grade pay increases enacted in FY18 as part of our strategic restructuring effort.

While we are excited that the Mayor's Office and the Committee appear willing to fund 5 of the 8 Budget Enhancement requests we submitted for FY20, we were disappointed to learn that funding could not be secured for our #1 Budget Enhancement Request, an allocation to cover the rent for new office space that is adequate for our needs. While we will continue to advocate for that funding in FY21 and beyond, we are now shifting our focus to use our existing space as effectively as possible in the interim.

Our FY19 budget currently looks to be in good shape. With less than 5 months remaining in the fiscal year, our local funds currently have an available balance of 49% of our appropriation while our O-Type funds currently have an available balance of 64% of our appropriation. Our staff members are actively enrolling in training programs they believe are well-suited for their individual needs and career goals, and I am working with DGS, OCP and the Office of the Secretary on several projects to take advantage of our available funding between now and September 30.

H. Staffing:

We selected a candidate for our vacant Auditor position last week, and DCHR is currently processing that selection. DCHR has also approved a Position Description for a new Program Specialist position to help manage our Lobbyist and FDS programs, which is the role Caleb Smith is currently filling through a temporary staffing agency. DCHR is expected to post that position competitively by the end of this week for three weeks.

Through OCTO's Pipeline process, we eventually identified three candidates for temporary Tech Support Specialists to help handle customer service requests related to our Lobbyist and FDS e-filing systems. Unfortunately, two of those candidates backed out at the last moment after receiving permanent job offers, but we were fortunate that Joseph Thomas stayed the course and joined us back in April.

Lastly, Counsel Ford and I have collaborated to update and revise the Position Description for our General Counsel position, which has been vacant since Brian Flowers' resignation became effective on April 12.

I. Litigation:

Status of pending cases.

- Gerren Price – (CA No. 16-AA-1230), This case was submitted on October 24, 2018, and we are awaiting the Court’s decision.
- Blaine vs. BEGA, OEA Matter No. J-0030-19. This is an employment matter involving a separated employee. We have submitted our draft response to OAG, which was filed on our behalf on April 12 deadline.

J. Lobbyist/Financial Disclosure Matters:

I am happy to report that the April quarterly activity report filing period for lobbyists has continued to be much smoother than the last one in January, and that this year’s FDS filing season has been far less problematic than last year’s season.

The number of Support Tickets we have received from lobbyists requesting help with the e-filing system has dramatically dropped when compared to the volume of help requests we received back in January. Thus, I am cautiously optimistic that the publication of the new Instructions guide coupled with the numerous training programs we conducted may have helped us to turn the corner and move beyond the new system’s rocky rollout in January.

We kicked off FDS season by sending out the Public Financial Disclosure Statement Filer Designation Email Notice on April 12th. We followed up on the email notices with paper notices on May 1, 2019 that were prepared by a mail merge service this year, which allowed our staff to focus more on customer service and their other core responsibilities. This year there are approximately 3,600 designated filers and so far about 1,826 designated filers have filed the form via our e-filing system. We currently have about 655 support tickets requesting assistance that have been submitted and 466 of those have been resolved. Those remaining outstanding support tickets mostly relate to technical issues with logging into the system.

We still have approximately 200 PFDS non-filers from last season. We are continuing to formulate a strategy for conducting enforcement and will bring that strategy back for discussion with the Board in the coming months.

K. Lobbyist Filing Waiver Requests:

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.”

1. 19-0019-R. Alliance for Construction Excellence (ACE). ACE requests a waiver of late filing penalty incurred due to confusion and technical issues related to the new e-filing system. Registrant filed a Support Ticket in January, but the issues were not resolved until April 23, 2019. We do not oppose this request.

The Board unanimously approved this request.

2. 19-0014-R. Sibley Memorial Hospital. Sibley Memorial Hospital filed a waiver request related to a \$300 late fee imposed for not filing its 2019 Registration Report before January 15, 2019. Mona Imran from Sibley indicated the oversight arose due to confusion with the new e-filing system. We do not oppose this request.

The Board unanimously approved this request.

3. 19-0017-R. Holland and Knight. The firm requests waiver of late fees imposed for 2019 Registration Reports and Activity Reports due to difficulties navigating the new e-filing system. OGE does not oppose this request, as long as the firm pays a \$300 civil penalty previously imposed against it in Case No. 15-0022-R within 30 days for which we have no record of ever receiving payment.

The Board tabled this request to allow the staff to further investigate whether a payment has been made for a previous penalty.

4. 19-0020-R. Compass Government Relations Partners, LLC. This Lobbying firm requests waiver of a \$300 late fee assessed against it due to delays in submitting a 2018 Registration Report on behalf of its Client, American Wind Energy Association (AWEA). The firm is inexperienced and filed a 2018 Registration Report for itself in the old e-filing system on November 14, 2018 and paid the requisite \$250 registration fee at that time. However, the firm did not realize that it also needed to file a 2018 Registration Report for its Client, AWEA, and to pay a second registration fee at that time. Additionally, because the firm mistakenly believed it was required to file a second 2018 Registration Report for itself in the new e-filing system in order to file its January 2019 Activity Report, the firm did so on January 14, 2019 and paid a second \$250 registration fee. The firm did not file a 2018 Registration Report in the new e-filing system on behalf of its Client, AWEA until May 1, 2019, when it was assessed a \$300 late filing penalty. Finally, the firm indicated it has not conducted any lobbying services in the District during Calendar Year 2019 and has filed Termination Reports on behalf of itself and its Client, AWEA. The firm also indicated that if it does begin performing lobbying services on behalf of AWEA or any other clients in the District later in the year, it will promptly re-register and file all required activity reports. We do not oppose this request

The Board unanimously denied this request.

L. Non-Confidential Investigations:

1. 18-0006-P, *In re*: Jack Evans – This formal investigation into allegations that Councilmember Evans violated the Council Code of Conduct is currently stayed.

VI. Opportunity for Public Comment

Michael Sindram provided public comment via telephone. Mr. Sindram inquired into how long the investigation with respect to Councilmember Evans will remain stayed and provided related commentary. OGE's Director stated that the investigation remains stayed in light of law enforcement investigations. Mr. Sindram also sought clarification regarding the OOG's resolution of complaint #OOG-2019-0001-M. Attorney Barton explained that because the Department of Veterans Affairs Central Internal Review Board is a federal body, it was not subject to the OMA, but rather the Government in Sunshine Act. Lastly, Mr. Sindram inquired generally about misuse of government email and FOIA requests. Attorney Barton offered to follow up directly with Mr. Sindram to better understand and respond to the question.

VII. Executive Session (non public)

The Board voted unanimously to deliberate in Executive Session at 10:59 a.m. (non-public) to discuss ongoing, confidential investigations pursuant to D.C. Official Code § 2-575(b), 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 approved the following negotiated dispositions:

1. 19-0001-P, In re: Brandon Todd
2. 18-0003-P, In re: Michael Smith and Soncyree Lee

IX. Adjournment

BEGA's next meeting is June 6, 2019 at 10:00 a.m.