

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

**MINUTES OF MEETING
August 8, 2019**

The District of Columbia Board of Ethics and Government Accountability held a meeting on August 8, 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 Charles Nottingham, Felice Smith, and Melissa Tucker. Board Member Darrin Sobin participated by telephone. Senior Attorney Advisor Rochelle Ford also participated by telephone.

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 voted unanimously to approve the July 11, 2019 meeting minutes.

IV. Report by the Director of Open Government

Good afternoon Chairperson Hutcheson and Members of the Board. I am Niquelle Allen, Director of Open Government (the “OOG”). I am pleased to present this report on the activities of the OOG. I would first like to congratulate and welcome new BEGA Board Member Felice Smith and say that I look forward to working with you and appreciate your service to the community by serving as a member of the Board of Ethics and Government Accountability. I would also like to thank, Anthony Scerbo, OOG’s legal fellow from the David A. Clark School of Law, for his excellent work and contributions to the office this summer.

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 August 5, 2019, in response to Open Meetings Act Complaint #OOG-2019-0002-M, the OOG issued an advisory opinion finding that DCPS Local School Advisory Teams, or LSATs, are public bodies subject to the OMA. Additionally, the LSATs violated the OMA in this matter by failing to provide notice of the LSATs' meetings that were the subject of the Complaint and failing to provide meeting minutes, as required by the OMA.

The directive of a former Superintendent of DCPS created the LSATs. The directive provided that the LSATs are a "group of elected and appointed members that must exist in every DCPS school. The team consists of parents, teachers, non-instructional school staff, a community member, and in some cases students, to advise the principal on matters that promote high expectations and high achievement for all students."

The Advisory Opinion concluded that LSATs are public bodies for the following reasons:

First, based on the plain meaning of the statute. The OMA defines public body to mean any government council, including the Council of the District of Columbia, board, commission, or similar entity, including a board of directors of an instrumentality, a board which supervises or controls an agency, or an advisory body that takes official action by the vote of its members convened for such purpose. LSATs are "an advisory body that takes official action by the vote of its members convened for such purpose" because LSATs advise school principals and, subsequently, DCPS, by considering, debating and recommending on school plans, budgets, and staffing issues.

Second, LSATs advise DCPS principals by authority delegated by the DCPS and that benefit the DCPS. Under the OMA, LSATs qualify as public bodies the that the OMA's legislative history identifies as being "any other entity that is created by and exercises authority delegated by the District of Columbia government."

The Advisory Opinion directs the LSATs to be trained on the OMA by this office and conduct its meetings in compliance with the OMA.

2. Informal OMA/FOIA Advice:

Since the last 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 the use of the OOG's website for OMA compliance. These requests were sent to the OOG via telephone or e-mail and the responses were not shared with the public in the form of an Advisory Opinion.

Since the July Board meeting, the OOG has provided responses to requests in the following manner. The OOG has responded to 80 requests for technical advice. The OOG provided 6 FOIA and 4 OMA substantive responses to requests for informal advice.

B. OMA/FOIA Audits:

The OOG has completed its comprehensive FOIA/OMA audit and is currently reviewing the results and drafting the report. We look forward to presenting the Board with results in September.

C. Training/ Outreach:

1. On July 22, 2019, the Director of Open Government was a presenter at American Society of Access Professionals Annual Training Conference in Arlington, Virginia. The course topic was "State and Local Freedom of Information" and was attended by approximately 150 FOIA Officers and analysts. I discussed how DC laws are similar to and different from federal FOIA, and shared my insights into trends that are emerging in access laws. Specifically, I discussed the District of Columbia's approach to requests for Body Worn Camera footage and the challenges it provides for the District. I also discussed our email retention policy and contrasted it with the federal capstone approach. As you know, DC retains all emails permanently, while the federal government only retains emails of high-level officials indefinitely and all other emails are retained for 7 years. I also attended the training conference along with OOG Attorney Johnnie Barton.
2. On July 25, 2019, OOG Attorney Johnnie Barton conducted an Open Meetings Act training course for the D.C. Board of Library Trustees and the Corrections Information Council. The training course also featured instruction on the new open meetings regulations.
3. July 31, 2019, OOG Attorney Johnnie Barton conducted an Open Meetings Act training course for the Alcohol Beverage Control Board's attorneys. The training course also featured instruction on the new open meetings regulations.

D. Legislative Update:

Note: BEGA is required to provide an annual report that includes a review of national and state best practices in open government and transparency. To that end, OOG briefs the Board on notable federal and state legislation, regulation, and case law. Since the last Board meeting there have been two such developments in the area of open records laws.

Federal Legislation: On July 23, 2019, a bipartisan team of senior U.S. Senators introduced legislation to clarify important sections of the federal Freedom of Information Act and to codify a presumption of disclosure for commercial records. The “Open and Responsive Government Act of 2019” would address limits to FOIA being imposed by regulatory agencies, such as the Environmental Protection Agency (EPA), in addition to those recently created by the Supreme Court’s decision in *Food Marketing Institute v. Argus Leader Media*. As reported last month, that decision allowed for a broad interpretation of confidentiality under the FOIA’s Exemption 4 (trade secrets). The proposed amendments would expand the language of the “trade secrets” exemption to explicitly require a standard of substantial harm for the nondisclosure of commercial information. The bill has been referred to the Judiciary Committee.

E. Litigation:

State Case Law: *L.R. o/b/o J.R. v. Camden City Public School District*, N.J. LEXIS 988, 2019 WL 3210234.

On July 17, 2019, the New Jersey Supreme Court, in a split decision, affirmed that requested student records may not be disclosed under the NJ Open Public Records Act (OPRA), even if personally identifiable information is redacted. Further, disclosure of the records would require a court order if the requestor did not otherwise qualify for access under the New Jersey Pupil Records Act (NJPRRA). The decision clarifies that the NJPRRA provides enhanced protection to student records, above and beyond the protections provided by federal law, and gives guidance to school district records custodians in responding to requests for student records.

In this case, the named plaintiff, a parent, submitted two records requests to the school district that the child attended, asking for the access log of persons permitted to view the child’s records, as well as records, letters and emails from specified sources that contained the child’s name. The parent also filed an OPRA request in another district for the purposes of obtaining comparative information, asking for requests made on other students’ behalf for independent evaluations and responses to such requests. Another plaintiff, the nonprofit Innisfree Foundation, submitted OPRA requests in other districts for special education settlement agreements. Both plaintiffs’ requests were representative of similar requests received by various school districts.

This case considered whether the NJPRA prevented disclosure of the requested government records. In the New Jersey Superior Court, Appellate Division's prior October 2017 decision, that court found that the records requested were student educational records that were covered by FERPA, but, even if a school district redacted personally identifying student information from the records as required by FERPA, the records were still protected from disclosure under the NJPRA. Similarly, the privacy protections provided by the state regulations prevented disclosure of the requested records under OPRA.

The NJ Supreme Court affirmed the decision of the Appellate Division, which found that the plaintiffs may be able to access the requested records if they could establish that they were a bona fide researcher as permitted by the NJPRA, which includes an exception to allow researchers to access otherwise-confidential student records. Alternatively, the plaintiffs could obtain a court order allowing access to protected student records.

F. Board Hearing Room Upgrade:

OOG signed the MOU with the Office of the Chief Technology Officer for the upgraded Cisco equipment for the hearing room. OCTO will install the equipment before the end of the fiscal year. I am working with them to schedule the installation.

This concludes the Office of Open Government's August 8, 2019 report. Thank you.

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 | 17 |
| Open - Show Cause Hearing | 1 |
| Open - Negotiations | 2 |
| Open - Board NOV Hearing | 1 |
| Grand Total | 21 |

| PENDING/STAYED INVESTIGATIONS BY STATUS | |
|--|----|
| Closed - Pending Collection | 14 |
| Closed Pending Appeal to DC Court of Appeals | 1 |
| Closed - Pending External Action | 1 |
| 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 | 31 |

| REGULATORY MATTERS BY STATUS | |
|-------------------------------------|----|
| Closed - Pending Collection | 23 |
| Open | 1 |
| Open - Appeal to Director | 1 |
| Open - Board Appeal | 3 |
| Grand Total | 28 |

| | Current | Last month | June 2019 |
|--------------------------------|---------|------------|-----------|
| Investigations Currently Open: | 21 | 21 | 21 |
| Investigations Stayed: | 15 | 14 | 15 |

B. Publication and Reporting Obligations:

We submitted our FDS filer report to the DC Register as required on June 17, 2019. We are also working on the Quarterly Complaint Report (QCR) for the third quarter of FY19 and will publish it to our website when it is completed.

C. Trainings/Outreach:

1. Professional Development Trainings Attended by staff:

On July 24 and 25, Investigators Bradley, Cook, and Corrales, along with Attorney King attended a two-day training program on Cognitive Interviewing Communication and Influence (NW3C). The program was geared to improve students' ability to interview suspects, witnesses and victims by learning how to observe brain-based deception behavior, and to improve the effectiveness of their own courtroom testimony. On July 16, Senior Attorney Ford attended a webinar through the Society of Corporate Compliance and Ethics (SCCE) on "Compliance Staff Development." Auditor Tujuba completed an online webinar through DCHR on the District's Telecommuting policies and a second course on ethics in connection with his CPA license. On August 6th, Attorney Cooks completed the Thinking on Your Feet, a webinar training that teaches you how to prepare for the unexpected questions and dialog. Attorneys Stewart-Mitchell, King, and Senior Attorney Ford are currently attending the Council of the Inspectors General on Integrity and Efficiency's (CIGIE) Public Corruptions Investigations Training in Pittsburgh, Pennsylvania, which covers the fundamentals, techniques, legal issues, and best practices of working several types of internal and public corruption investigations, via case studies and the discussion of lessons learned. I completed that CIGIE class last Spring, and I can attest that it was fantastic. Lastly, I have continued my leadership development efforts

with the Center for Creative Leadership, including executive coaching calls with the trainer I partnered with at the CCL training program last August, and a brown box lunch with Director Allen on July 18.

Although not a professional development training, several OGE staff members including Senior Attorney Ford, Attorney King, Auditor Tujuba and myself attended a “Roadshow” conducted by the Office of Risk Management (ORM) on July 23 which was very informative. One referral we received from ORM recently resulted in the imposition of a \$4,000 ministerial fine, and the agency’s leadership indicated that more referrals may likely come our way.

2. Conducted by staff:

Since the date of the last meeting, we conducted 2 trainings, 8 less than the 10 we conducted last month. The 2 trainings included two new employee orientations. In addition, 144 employees took the online ethics training through PeopleSoft between June 14 and August 2.

3. Ethics Day 2019:

Ethics Day is scheduled for October 3, 2019 from 12:00 pm to 6:00 pm immediately following the Board Meeting. We are still finalizing the schedule, and we welcome any suggestions you may have to offer.

D. Advisory Opinions/Advice:

Informal Advice: approximately 41, which is 18 less than the 59 reported at the last meeting. This number does not include responses we have provided to questions regarding the Lobbyist and FDS e-filing systems.

Formal Advice requests: A redacted version of the “Safe Harbor” letter we issued last month upon the request of a District employee has been sent to the DC Register for publication. We are also working on a request for a Formal Advice opinion regarding whether the post-employment rules apply to an agency to which an employee was detailed while she was formally employed by a different District agency.

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.” We have a meeting with Michelle Loggins from CM Nadeau’s staff on Monday, August 13, 2019 [sic -- August 12, 2019] to discuss the ERAA, and we have had productive discussions with Chairman Allen’s staff to discuss how BEGA can help move the CCC forward this year. We will keep the Board informed as developments occur.

F. Rulemaking:

During its June meeting, the Board formally approved the proposed Rulemaking that was published in the DC Register on April 26, 2019, and the Final Rulemaking has been submitted for publication in the next DC Register.

G. Budget:

Our FY19 budget currently looks to be in good shape. With less than 2 months remaining in the fiscal year, our local funds currently have an available balance of 25% of our appropriation while our O-Type funds currently have an available balance of 57% 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 we are 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. The three largest projects involve renovating the Bullpen and soundproofing some of our space on the 8th floor; acquiring a new vehicle; and using the services of a private IT vendor to analyze and improve the architecture of our new FDS and LRR e-filing systems as well as develop and implement needed enhancements for those systems.

H. Staffing:

On July 22 and 23, our interview panel met with four candidates that DCHR ranked as “highly qualified” for our new Program Specialist position that will help manage our Lobbyist and FDS programs. This is the role Caleb Smith most recently filled through a temporary staffing agency. The panel unanimously identified one candidate as the most qualified applicant for the position, and Administrative Officer Peterson is currently working to obtain and review that applicant’s references. If the references are positive, we will formally select that candidate and ask DCHR to extend an offer if its background checks return favorable results.

Back in April, we secured the services of Joseph Thomas as a temporary Tech Support Specialist to help handle customer service requests related to our Lobbyist and FDS e-filing systems. Joe continued working in that capacity through the month of July to help wrap up outstanding Support Tickets and provide assistance during the quarterly Lobbyist reporting season. We anticipate that he will remain onboard through at least the middle of October, to provide assistance during the next quarterly Lobbyist reporting season as well.

The updated Position Description for our General Counsel position was posted on July 16 and we will continue to accept applications until Friday, August 16. As of Tuesday August 6, we had received 94 applications for the position. The General Counsel position was advertised broadly, including being posted on Indeed.com and LinkedIn.

Lastly, I am working to schedule a retreat involving the Board, OGE and OOG, in October to give us time to fill the GC position so that person can participate in it. I had originally hoped to schedule that event in September, but I believe the timing of the GC posting coupled with an overseas trip I have scheduled next month makes it more prudent for us to hold off on scheduling the retreat until some point after the conclusion of our Ethics Day event on October 3. As previously described, we're planning for a two-day event, where the first day will be dedicated to long-term strategic planning – with the Board, both Directors, the GC and the Board's Senior Attorney collaborating at a high-level during the first half of the day, followed in the afternoon by a series of sessions involving both Directors, the GC, the Board's Senior Attorney and line staff from both Offices designed to “flesh out” the high-level plans that emerge from the morning sessions. The Board members would not be expected to participate in those afternoon sessions, although you would certainly be welcome to do so if your schedules permitted you to do so. Likewise, the second day is expected to be dedicated to personal assessments and team building exercises involving the leadership and staff from both Offices. We will keep the Board posted on possible dates for the retreat once we firm up our plans a little further.

I. Litigation:

Status of pending cases.

- Gerren Price – (CA No. 16-AA-1230). On July 25, 2019, the DC Court of Appeals issued its opinion, ruling that that the Ethics Act implicitly amended a provision of the DC Administrative Procedures Act (APA) that requires contested cases be appealed in the D.C. Court of Appeals. The Court agreed with OAG's argument that BEGA's final decisions should be reviewed in D.C. Superior Court – as required by the Ethics Act – rather than in the Court of Appeals, as Price argued was required under the APA. The Court ruled that D.C. Code § 1-1162.17 does not violate the Home Rule Act, which prohibits the Council from amending Title 11 of the D.C. Official Code (relating to organization and jurisdiction of the D.C. courts). BEGA argued that the Council's passage of the Ethics Act did not amend Title 11 of the Code, but rather impliedly amended the contested case provisions of the APA with respect to BEGA, which the Council has authority to do. The Court was persuaded by existing case law and the legislative intent and history of the Ethics Act that the Council intended to make contested cases heard by BEGA appealable in the Superior Court rather than the Court of Appeals. Thus, Mr. Price filed his appeal in the wrong court and they granted him 20 days from the issuance of the opinion to petition for review in Superior Court. Mr. Price's appeal must be filed by August 13, 2019.
- A. Blaine vs. BEGA, OEA Matter No. J-0030-19. This is an employment matter involving a separated employee. We are still waiting for a decision from the Administrative Judge on our motion to dismiss.

- Larry Hicks – (2017 CA 008091). This was an enforcement (collection) action filed to collect a \$20,000 fine imposed on Mr. Hicks. We have received a fully executed copy of the settlement agreement between Mr. Hicks and OAG. Per that agreement, Mr. Hicks has agreed to pay monthly installments of \$500 each month between July 2019 and June 2020, followed by monthly installments of \$1,000 each month between July 2020 and June 2021, as well as an additional payment of \$2,000 no later than July 15, 2021. Mr. Hicks signed the agreement on August 3, and the OAG instructed him to tender payment of the July and August installments totaling \$1,000 no later than August 15.

J. Lobbyist/Financial Disclosure Matters:

This year there are approximately 3,815 designated filers and so far about 3,301 designated filers have filed the form via our e-filing system, which constitutes an 86.53% compliance rate.

We still have approximately 18 PFDS non-filers from last year, along with approximately 526 current non-filers from this year. 110 of this year's non-filers were ANC Commissioners in 2018 – some of whom were re-elected and are still serving in that capacity in 2019. Another 65 non-filers are newly-elected ANC Commissioners who were required to file because they were candidates for election in 2018, while another 57 are DCPS employees. The ANC Commissioners – both returning and newly-elected – constitute roughly 1/3 of all non-filers and combined with DCPS employees constitute 44% of all non-filers.

We have formulated a strategy for 2018 and 2019 FDS enforcement, and we are continuing to work with OCTO to cross-reference the emails of all OGE staff who worked on FDS matters the past two years with our non-filer lists so that we will not send fine notifications to anyone who reached out to us for help with technical problems related to the new e-filing system. Tiffany Montgomery is assisting us with this project. After completing that phase, we will continue working to help those who experienced technical problems to access the system and submit their FDS statements, while planning to send fine notifications to the remaining non-filers from both 2018 and 2019.

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. 19-0017-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 had tabled this request to

allow the staff to further investigate whether a payment has been made for a previous penalty. Holland & Knight responded to our inquiry and indicated they would send us a check for the \$300 penalty previously imposed in Case No. 15-0022-R. I will follow-up with Tyrell to determine if we have actually received the check.

2. 19-0025-R. Metropolitan Washington Airports Authority (MWAA). The registrant requests waiver of late fees imposed for 2019 Registration Reports and Activity Reports due to technical problems with the new e-filing system. OGE does not oppose this request.

Board Member Felice Smith recused herself from voting on this matter due to her affiliation with the MWAA. Excluding Ms. Smith, the Board voted unanimously to approve this fee waiver request.

3. 19-0024-R. Physicians Committee for Responsible Medicine. The registrant requests waiver of late fees imposed for its 2019 Registration Report due to technical problems with the new e-filing system. OGE does not oppose this request.

The Board voted unanimously to approve this fee waiver request.

L. Non-Confidential Investigations:

1. 18-0006-P, *In re*: Jack Evans. This formal investigation involves allegations that Councilmember Evans violated the Council Code of Conduct. We are working with our partner agencies to ensure that any investigative actions we undertake will not interfere with the related law enforcement investigation.
2. 19-0003-F, *In re*: Kenneth Crosswhite. This is a formal investigation based on allegations that former-Deputy Chief Kenneth Crosswhite violated the District's nepotism rule by entering and approving overtime for his son. This matter is scheduled for a hearing on September 10, 2019. We ask that the Board approve the Proposed Scheduling Order, which is being submitted by both parties.

The Board unanimously approved the Proposed Scheduling Order in this matter.

3. 19-0008-F, *In re*: Dr. Marla Wyche-Hall. Respondent's bank responded to our subpoena with extensive bank records (some in hard copy, some in digital form) and we are still reviewing those documents.

VI. Opportunity for Public Comment

Michael Sindram provided public comment via telephone. He first asked if BEGA is an independent agency, why hasn't it taken any actions against Councilmember Jack Evans.

Director Wolfingbarger explained that administrative and criminal proceedings can sometimes run parallel, but that administrative proceedings (such as BEGAs) tend to defer criminal investigations. Mr. Sindram then asked why BEGA was involved in student test scores. Director Allen explained that she was just relaying a case of note from another jurisdiction regarding open government. Mr. Sindram also asked what BEGA's authority is over WMATA.

VII. Executive Session (nonpublic)

The Board voted unanimously to deliberate in Executive Session (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 a negotiated disposition in the following matter:

1. 19-0011-P, *In re*: Jack Evans.

IX. Adjournment

BEGA's next meeting is September 5, 2019 at 10:00 a.m.