

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

DRAFT MEETING MINUTES – June 2, 2022

The District of Columbia Board of Ethics and Government Accountability held a meeting on June 2, 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, Darren Sobin 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 called to order at 12:01 p.m.

II. Ascertainment of Quorum

A quorum was established with all Members present.

III. Adoption of the Agenda/Approval of Minutes

The Board voted unanimously to adopt the agenda.

The Board approved the minutes for the May 5, 2022 meeting unanimously subject to the Chair’s amendment noting that Board Member Felice Smith joined the May 5, 2022 meeting after the OOG presentation.

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. 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 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 May 20, 2022, I issued advisory opinion #OOG-2022-002_AO, which found that the District of Columbia Department of Transportation (“DDOT”) violated D.C. FOIA’s allowable cost provisions by improperly charging document review fees. The requests at issue were submitted for the Dupont East Civic Action Association (“DECAA”), a non-profit, and non-commercial requester. Under

D.C. FOIA, DECAA falls within the category of requesters for which an agency may not charge document review fees. Therefore, DDOT may only assess DECAA reasonable standard charges for document search and duplication. A copy of the advisory opinion is in the Dropbox for your review.

2. Legal Advice

On May 9, 2022, I issued a memorandum in response to a public body's request to review its proposed bylaws for OMA compliance. The proposed bylaws would establish a quorum of the committee of the public body as "a majority of its current membership" and empower the committee to act on behalf of the whole public body. My findings were: (1) that the proposed bylaws would permit a committee of the public body to act as a specialized quorum of the whole body, in a way that satisfies the OMA; and (2) the committee's gatherings would be meetings subject to the OMA because a quorum of a committee established by the proposed bylaws would gather to consider, conduct, or advise on public business. I also suggested, that since all appointed members of the public body would not participate in these decisions, in the interest of transparency, to edit their draft bylaws to expressly state that the committee meetings are subject to the OMA.

3. 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 (5) requests for OMA advice;
OOG responded to seven (7) requests for FOIA advice; and
OOG responded to twenty-two (22) requests for technical assistance with open-dc.gov.

B. Training/ Outreach

1. Meetings to discuss FOIA Issues

On May 6, 2022, Chief Counsel Barton and Attorney DeBerry met with the DC Sentencing Commission regarding FOIA issues. On May 10, 2022, Chief Counsel Barton and I met with the Office of Unified Communications regarding FOIA issues. In both instances, OOG met with several agency staff members and provided advice on the proper use of FOIA exemptions and also gave guidance on how to respond to specific FOIA requests.

2. FOIA 101 Training

On May 12, 2022, Attorney DeBerry facilitated FOIA training for members of the Open Government Advisory Group and employees from the Executive Office of the Mayor. I, along with Chief Counsel Barton, attended the training. The training was well-received.

3. OMA Compliance Checklist

On May 12, 2022, I provided to the public body administrative points of contact the OOG's OMA Compliance Checklist. The checklist is a user-friendly guide to assist public bodies in conducting meetings in compliance with the OMA. I recommended that administrative points of contact use this checklist as a guide for preparing and conducting meetings. The checklist may also be disseminated to new public body members while they await OMA training by the OOG.

A copy of the compliance checklist is in the Dropbox for your review.

4. Meeting with Open Government Coalition

On May 13, 2022, I met with Tom Susman, President of the Open Government Coalition. He provided me with an update of the organization's priorities. We also discussed the recent text messaging FOIA Advisory Opinion issued by OOG and the possibility of convening an Open Government Reform Task Force.

C. Litigation and Legislative Update

1. Litigation

a. Phillips Lawsuit alleging FOIA watchlist (Case No. 1:22- cv-00277-[JEB])

Criminal-defense lawyer Amy Phillips alleged in a federal civil action against the District that the Metropolitan Police Department ("MPD") maintains a "watchlist" targeting certain D.C. FOIA requesters. She brought the matter under Section 1983 for violation of her civil rights. An update of the case follows.

On May 2, 2022, the United States District Court for the District of Columbia issued a memorandum opinion that denied the District's motion to dismiss. The Court held: (1) Phillips has standing based not upon hypothetical future injury but on her actual pending D.C. FOIA requests (the court took judicial notice of Phillips's pending requests); (2) the First Amendment (as Phillips cited), not just the Fifth Amendment (as the District urged), provides appropriate framework for analyzing the sort of challenge [Phillips] brings in this case; (3) Phillips adequately pleads a constitutional injury in that, "Phillips's argument is that the District has denied her something to which she is statutorily entitled because of her perceived viewpoint, which the District has gleaned from her social-media postings and attendance at certain MPD hearings, as well as the content of her FOIA requests"; (4) Plaintiffs do not need to extrapolate from concrete enforcement actions to determine whether the government has a content-discriminatory policy; and (5) former Chief of Police Peter Newsham was "a final policymaker for the District, and his actions can, therefore, be attributed to it." (Mem. op. at 5-19.)

The court further ordered that the District file its answer no later than May

16, 2022; the District timely complied. In its answer, the District denies, or pleads insufficient information to admit or deny, all of the material allegations in controversy; and asserts affirmative defenses. The initial scheduling conference is set for June 17, 2022, at 3 pm.

Copies of the court's opinion and order and the District's answer are in the Dropbox for your review.

OOG's staff will continue to monitor litigation activity of all cases reported to the Board.

2. Legislation

a. Retention Requirement for Electronic Records (D.C. Act 24-395)

The Fidelity in Access to Government Communications Clarification Temporary Amendment Act of 2022, which amends the District's record management law to clarify "that communications created or received electronically in the course of official business are subject to existing record retention obligations" is currently undergoing congressional review. It is projected to become law on July 20, 2022. The companion emergency measure, D.C. Act 24-355 expires June 26, 2022.

b. Board of Ethics and Government Accountability Delinquent Debt Recovery Amendment of 2022 (Bill 21-0706)

We were informed by Chairperson Nadeau's staff that the Committee on Human Services is looking at dates to markup Bill 24-0706. We will be advised if the markup will be scheduled before the summer recess.

c. Other Legislation

A committee of the National Uniform Law Commission is drafting a Public Meetings During Emergencies Act. The committee will present the measure to the whole Commission on July 10, 2022, at 8:00 am. Attorney Weil will observe the meeting.

OOG staff will continue to monitor legislative activity.

D. Administrative Matters

1. Paralegal Specialist Position

We are currently interviewing candidates to fill this position and hope to extend an offer of employment to the most qualified candidate next week.

2. BEGA Website Redesign Meeting

On May 19, 2022, BEGA met with representatives from the Office of the Chief

Technology Officer about redesigning bega.dc.gov. Present at the meeting were Director Cooks, General Counsel Raj, IT Specialist Bridges, and Administrative Officer Dow, and me (Director Allen). We discussed mapping the current website and conducting a usability survey. We aim to make the website more user friendly and eventually will add components from open-dc.gov to the website to make more room on that website for the Central Meeting Calendar.

This concludes the Office of Open Government’s June 2, 2022, report.

Board Member Sobin asked Director Allen to provide more information on her meeting with the Open Government Coalition. Director Allen stated that the meeting included a discussion of the Mayor’s response to OOG’s text messaging advisory opinion. The Mayor’s office has advised Director Allen that they are looking into how to implement the recommendations and OOG will continue to monitor compliance with FOIA. The Open Government Coalition is also looking to propose legislation to establish an Open Government Reform Task Force. OOG will continue to work with the Open Government Coalition on this issue.

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.

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| OPEN INVESTIGATIONS BY STATUS | |
|--------------------------------------|----|
| Open | 51 |
| Open - Negotiations | 0 |
| Open - Show Cause Hearing | 0 |
| Grand Total | 51 |

| OPEN "UNDOCKETED MATTERS" | |
|----------------------------------|---|
| Grand Total | 6 |

| 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 | 6 |
| Stayed - US District Court Case | 0 |
| Grand Total | 42 |

| REGULATORY MATTERS BY STATUS | |
|-------------------------------------|----|
| Closed - Pending Collection | 26 |
| Open | 6 |
| Grand Total | 32 |

| | Current | Last month | April |
|--------------------------|----------------|-------------------|--------------|
| Investigations Currently | 51 | 49 | 57 |
| Investigations Stayed | 15 | 17 | 17 |

The number of open preliminary and formal investigations includes 11 new matters opened since the Board last met. The investigative team resolved 9 investigations since the Board last met.

OGE published the Quarterly Complaint Report for Fiscal Year 2022 quarter two, ending March 31, 2022. It was posted to bega.dc.gov last week. A copy was placed on the drop box for your review.

B. Trainings/Outreach

1. Professional Development Trainings Attended by staff

Supervisory Attorney Stewart-Mitchell and I attended Compliance Week from May 16-18th at the JW Marriott in DC. The conference included session topics such as: The Current State of Compliance and What's in Store for the Future; Introducing Interactivity and Behavioral Science to Your Ethics and Compliance Program; and the Evolution of the Compliance Officer.

On May 20th, I completed the D.C. Bar's John Payton Leadership Academy of 2022. The program, which began in January, focused on strength-based leadership methods, goal attainment, coaching for success, and developing teams, etc. I found the program to be wonderful opportunity to build my leadership skills while also identifying my personal strengths, weaknesses, and goals.

General Counsel Raj attended 3 trainings this month: Mindset Shift for Managers; Crisis Management, Tough Judgment Calls, and Legal Ethics; and Ethical Implications of Social Media Use for Lawyers 2022. Auditor Tujuba completed the following trainings: Embracing Change at Work; Expert Insights on Adapting to Change; Aligning Goals and Priorities to Manage Time; and Synchronize Goals

to Optimize Your Team.

2. Conducted by staff

Since the last Board meeting, OGE attorneys conducted one ethics training, which was the monthly ethics training. Last week on Monday, May 23rd, we hosted our monthly Ethics Counselor virtual brown bag session. Attorney Advisor Echols led a discussion on nepotism. The next brown bag discussion is scheduled for June 27 will center around post employment.

During the month of May, 888 employees completed our online ethics training via PeopleSoft. Since the April 25th launch of the Learning Management System, 306 employees have registered for the system.

3. Outreach

Director Allen, IT Specialist Kevon Bridges, Senior Attorney Tran and I met with the Office of the Chief Technology Officer's ("OCTO") website development staff to discuss a "refresh" of the BEGA website. The website refresh will improve organization, searchability, and user friendliness, as well as the overall appearance of the website. We continue a series of meeting over the next nine weeks to complete the project.

C. Advisory Opinions/Advice

1. Informal Advice

OGE's legal staff provided advice for approximately 33 ethics inquires, which is 10 less than the 43 reported at the May meeting. This number does not include responses we have provided to questions regarding the Lobbyist and FDS e-filing systems. OGE is currently drafting an Advisory Opinion which focuses on the fundraising prohibition of the Local Hatch Act.

D. Legislation Updates

1. Pro Bono Legal Representation Expansion Amendment Act of 2021

On May 3, 2022, the Pro Bono Legal Representation Expansion Amendment Act of 2021, Bill 24-0298 received its first vote from the Council. The Bill may be presented at the June legislative meeting for a second vote before presentation to the Mayor.

2. Delinquent Debt Recovery Amendment Act of 2012

On April 6, 2022, Director Allen and I testified in support of Bill 24-706, The Board of Ethics and Government Accountability Delinquent Debt Recovery Amendment Act of 2022, which amends the Delinquent Debt Recovery Act of 2012. The amendment will allow BEGA, at its discretion, to transfer and refer

delinquent debts associated with settlements and judgements for ethics violations and OMA violations to the CCU for collection, and the funds collected on BEGA's behalf will be deposited into the Ethics Fund instead of the General Fund. The Delinquent Debt Recovery Act was excluded from the Budget Support Act. Legislative Counsel to Councilmember Brienne Nadeau is working to set a date for mark-up, which may occur before the summer recess. Once the bill goes through mark up, it will need to go through the normal process of having two readings.

3. Comprehensive Code of Conduct

As defined in the Ethics Act, the Code of Conduct consists of seven different statutes and regulations with varying applicability. The Comprehensive Code of Conduct ("CCC") is legislation that consolidates the District's ethics laws in one place and standardizes the ethical practices between the legislative and executive branches. OGE's legal team has begun reviewing and updating the CCC with the goal of submitting an updated version of the legislation to the Council. The ultimate goal is to have the CCC introduced before the Council in the Fall of this year.

E. OGE Administrative Matters

1. OGE Staffing

I am pleased to announce that we have identified a candidate to fill BEGA's new Human Resources Specialist vacancy. We are actively working to fill other vacancies. The Chief of Staff position was posted before the April Board meeting and closed on Tuesday. We will begin reviewing resumes to choose interview candidates.

F. Financial Disclosure Statement (FDS)

The 2022 FDS Filing Season is now closed. A total of 3850 Employees were noticed in April. 3151 Filers (82%) filed their statements using the e-filing system by the May 16th deadline. An additional 219 (6%) filed after the deadline and 480 (12%) have either sought extensions or have yet to file.

In April, Abstract Evolutions completed the Phase III upgrades and they were deployed on April 28. From this date, filers have been e-signing their Financial Disclosures and perhaps most importantly, ANCs have received the certifications to complete. Additionally, the staff is able to upload users and has done so regularly throughout the filing term. Finally, staff can run reports based on the filers' answers to identify the disclosures requiring additional review.

Ongoing Activities of the FDS team include preparing DC Register reports, preparing for enforcement activities, and collecting Financial Disclosure Review Reports from the agencies. Finally, the FDS SOP was finalized and approved by the Director.

G. Lobbying Registration and Reporting (LRR)

Lobbyists' first quarter 2022 activity reports were due on April 18, 2022. The LRR team drafted fine letters to those entities who have not filed their Activity Reports or their 2022 Renewal Registrations. Also, Auditor Tujuba completed the Lobbyist Activity report audit for CY2022 first quarter.

Thank you. This concludes the Office of Government Ethics' June 2, 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 12:56 p.m.

The Board approved the negotiated disposition in **22-0044-F In Re S. Diallo**.

IX. Adjournment

The Board will meet next on July 14, 2022 at 12:00 p.m.