

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY  
OFFICE OF OPEN GOVERNMENT



January 26, 2018

**VIA ELECTRONIC MAIL**

Mr. Fritz

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**VIA ELECTRONIC MAIL**

Ms. LaRuby May

Chair, Not-For-Profit Hospital

Board of Directors

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**RE: #OOG-0014\_12.14.17-AO\_UMC Board**

Dear Ms. May:

The Director of the Office of Open Government (OOG), pursuant to authority set forth in section 503(a)(2) of the District of Columbia Administrative Procedure Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-593(a)(2)) and 3 DCMR § 10400, has investigated an Open Meetings Act (OMA) (D.C. Official Code § 2-571 *et seq.*) complaint alleging that on December 13, 2017, the Board of Directors (Board) for the Not-For-Profit Hospital Corporation (a.k.a. United Medical Center) (UMC) entered into an improper closed/executive session to vote on a resolution to close the facility's obstetrics unit (OB Unit) in violation of the OMA.

To fully investigate the merits of the complaint, the OOG undertook a review of the Board's January 16, 2018, response to the complaint,<sup>1</sup> the UMC's website, the District of Columbia Register (D.C. Register) and the central meeting calendar that is maintained by the OOG for any published documents relevant to this matter. The OOG also reviewed the open and closed session meeting recording, the Board's By-laws<sup>2</sup> and the online Board Book for the December 13, 2017 meeting.<sup>3</sup>

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<sup>1</sup> On January 17, 2018, Board counsel, Mr. Emil Hirsch, sent by electronic mail a letter dated January 16, 2018, to OOG Director Hughes, responding to the complaint.

<sup>2</sup> The OOG's finds the Board's By-laws mirror the OMA list of reasons for entering closed/executive sessions.

<sup>3</sup> The UMC archives its board meeting materials on its website. The Board Book for the December 13, 2017, meeting was found here: <http://united-medicalcenter.com/media-center-2/board-meetings/item/528-general-board-meeting-december-13-2017.html>. (Last accessed on 1.25.18).

This advisory opinion resolves the issue of whether (1) the OMA permits a public body to enter into a closed/executive session to deliberate or vote on a resolution; and (2) whether these actions must be undertaken in connection with a permissible exception for entering into a closed/executive session under the OMA.

For the reasons which follow, the OOG opines that the OMA permits a public body to enter into a closed/executive session to deliberate and vote on a resolution, but the deliberations and vote must be in connection with one of the permissible exceptions for entering a closed/executive session.

### **Background**

Pursuant to the notice to the public on the Hospital's website,<sup>4</sup> the Board held a meeting on December 13, 2017. December 7, 2017, appears to be the date the notice was published on the UMC website. The notice contains the date, time, location, draft meeting agenda and notice of intent to close. The notice of intent to close reads as follows:

“The NFPHC Board hereby gives notice that it may close the meeting and move to executive session to discuss collective bargaining agreements, personnel, and discipline matters. D.C. Official Code §§ 2-575(b)(2)(4A)(5),(9)(10),(11),(14).”

On its face, the meeting notice appears to comply with the law. However, an analysis of the notice of intent, along with the meeting records, reveals OMA violations.

On December 18, 2017, the OOG electronically transmitted to the Board the Notification of Complaint with a request that the Board provide to the OOG by January 9, 2018, the following:

(1) audio recordings for both the open and closed sessions of the December 13, 2017, meeting; (2) the final agenda for the meeting; (3) all meeting minutes; and (4) all meeting-related materials, other than the Board Book found on the UMC website. However, due to an administrative oversight, the complaints did not attach to the OOG's email. On January 4, 2016, the OOG sent a second electronic communication to the Board attaching a copy of the initiating complaint, and extended the Board's response due date to January 16, 2018.

On January 16, 2018, the OOG received, through the Board's attorney, the Board's response to the complaint. The response, however, did not include the records requested by the OOG on December 18, 2017. In relevant part, the Board's response to the complaint states:

“UMC asserts that no substantive violation of the Open Meetings Act (“Act”), D.C. Code § 2-571, *et seq.*, has taken place in connection with its Board of Directors meeting held on December 13, 2017 (“Board Meeting”) because (i) nowhere does the Act prohibit the taking of any final official action, including voting on a Board resolution, at a closed meeting of the Board, and (ii) at least three statutory exemptions set forth in Section 2-575(b) {sic} of the Act were properly relied upon to close a portion of the Board meeting. Finally, at most, the Complaint raises a potential technical or procedural defect which can be and will be remedied at the Board's

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<sup>4</sup> That website is found at <http://www.united-medicalcenter.com/media-center-2/board-meetings/item/528-general-board-meeting-december-13-2017.html>

January 26, 2018 meeting by taking a roll call vote to ratify the closing of a portion of the December 13 Board Meeting.

To the extent you need additional information including documents in order to enable you to evaluate the defenses UMC contained in this letter please let me know at your earliest convenience.”

In response, that same day OOG Director Hughes sent an electronic communication to the Board’s legal counsel asking that the Board supply by the close of business on January 17, 2018, the records that were requested on the December 18, 2017. However, no records were received by the OOG as requested on that date. Instead, counsel to the Board, requested, pursuant to 3 DCMR § 10405.3, a five-day extension to supply the outstanding records. That extension was granted by OOG Director Hughes on January 17, 2018, with the requirement that the records be supplied to OOG no later than close of business on January 22, 2018. The outstanding records were timely delivered to the OOG on January 22, 2018.

Upon review, the OOG finds the Board violated the OMA by: (1) failing to properly provide notice to the public of the intent to close a portion of December 13, 2017 meeting; (2) conducting an improper closed/executive session; and (3) failing to the adhere to the requirements and protocol for entering into a closed/executive session.

## **Discussion**

### **THE BOARD IS A PUBLIC BODY SUBJECT TO THE OMA.**

The purpose of the OMA is to provide the public with full and complete information regarding the affairs of government and any official action taken by government officials. (D.C. Official Code § 2-572). The OMA is to be construed broadly to maximize public access to meetings and exceptions are to be construed narrowly to permit closure of meetings only as authorized by the Act (D.C. Official Code § 2-573). For these reasons, a public body must strictly adhere to the OMA’s “Notice of meetings” provisions and its “Open meeting” provisions. This includes: (1) providing to the public advance notice of meetings to reflect the date, time, location, planned agenda, and statement of intent to close the meeting or portion of the meeting, including the statutory citation for closure and description of the matters to be discussed (D.C. Official Code § 2-576; and (2) adhering to the requirements and statutory scheme for entering closed/executive sessions (D.C. Official Code § 2-575).

The Not-For-Profit Hospital Corporation was established pursuant to section 5113(a) of Not-for-Profit Hospital Corporation Establishment Amendment Act of 2011, effective September 14, 2011 (D.C. Law 19-0021; D.C. Official Code § 44–951.02(a)).<sup>5</sup> Per this statute, the Hospital is an “instrumentality of the District government with a separate legal existence within the District government.” D.C. Official Code § 44–951.02(b) lists as the primary purpose of the Hospital to:

- (1) Receive the land, improvements on the land, equipment, and other assets of the United Medical Center;
- (2) Operate and take all actions to ensure the continued operation of the hospital; and

<sup>5</sup> Appears as Title IV, Subtitle L of the Fiscal Year 2012 Budget Support Act of 2011.

(3) Sell or otherwise transfer all or part of the hospital and site, if a qualified buyer is identified.

Pursuant to D.C. Official Code § 44–951.04, a 14-member Board governs the Hospital. Eleven of the Board’s fourteen members are voting members. The presence of five voting members constitutes a quorum of the Board. A majority vote of the members present for a quorum is necessary for the Board to take official action. The Board must meet no fewer than monthly, at least ten months each year. The enabling legislation also provides that Board meetings shall comply with the requirements for open meetings pursuant to § 1-207.42.<sup>6</sup> D.C. Official Code § 1-207.42 is known as the “Sunshine Act.” However, as explained below this does not mean that the OMA is inapplicable to the Board as they are two District laws<sup>7</sup> that regulate the same subject area, i.e., open meetings of public bodies in the District of Columbia.

When two statutes simultaneously relate to the same subject area, judicial rules of statutory construction provide that the two statutes should be construed together. Furthermore, with regards to the applicability of these laws to Board, the OMA and the Sunshine Act must be considered in tandem.<sup>8</sup>

It is also abundantly clear from its legislative history that the OMA was meant to augment and not to supplant or repeal the Sunshine Act:

In order to accomplish the twin aims of providing greater transparency into public officials’ decision making and preserving high quality deliberation, the *Committee recommends augmenting the District’s open meeting law* to define public notice requirements and establish a right to observe; to create limited exceptions to the opening meetings; to maintain minimum requirements for invoking the exceptions and for record keeping; and to create provisions for enforcement. Report on the Committee on Government Operations and the Environment on Bill 18-716, the Open Meetings Act of 2010, at p.4 (Council of the District of Columbia December 2, 2010)(hereinafter OMA Comm. Rpt.) (Emphasis added).

Even more compelling is the statutory language in D.C. Official Code § 2-579(a)(2) which makes clear that the OMA is meant to augment the Sunshine Act<sup>9</sup> and in no way curtail the latter provision. D.C. Official Code § 2-579(a)(2) in relevant part reads:

(a) The Open Government Office may bring a lawsuit in the Superior Court of the District of Columbia for injunctive or declaratory relief for any violation of this subchapter before or after the meeting in question takes place; provided, that the Council shall adopt its own rules for enforcement related to Council meetings. Nothing in this subchapter shall:  
(2) **Restrict the private right of action citizens have under § 1-207.42.** (Emphasis added).

<sup>6</sup> D.C. Official Code § 44–951.05.

<sup>7</sup> Both laws have similar names. Section 742 of the Home Rule Act is entitled “Open Meetings.” D.C. Law 18-350 (D.C. Official Code § 2-571- 580), is entitled the “Open Meetings Amendment Act of 2010.”

<sup>8</sup> See *George v. Dade*, 769 A.2d 760, 764 (2001), which held, “[W]here two or more statutes relate to the same subject area, we construe them together.” See also *United States Parole Commission v. Noble*, 993 A.2d 1084, 1087, where the court states: “The correct rule of interpretation is, that if diverse statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari material* are to be taken together, as if they were one law.”

<sup>9</sup> The enabling legislation of the following District public bodies states that the entities are subject to the Sunshine Act: The Interagency Council on Homelessness; the Citizen Review Panel; the Sustainable Energy Utility Advisory Board; and the Water and Sewer Authority Board of Directors. The establishment of these entities was prior to enactment of the OMA.

Based on the OMA’s legislative history, the express language of D.C. Official Code § 2-579(a)(2) and the canons of statutory interpretation and case law, it is clear that in enacting the OMA, the Council did not intend to repeal the Sunshine Act and that the OMA and Sunshine Act must be read together. It is indisputable that the Board is a public body created by the Council at a time when the Sunshine Act was the District’s only open meetings law until the OMA became law on March 31, 2011. The OMA’s legislative history plainly states:

In defining the terms public body and meeting the committee print clearly identifies what is covered under the District’s open meetings law. Public body would include any council, board or commission of the District government established pursuant to statute, regulation or order...”  
OMA Comm. Rpt., at p.4.

**A PUBLIC BODY MUST STRICTLY ADHERE TO THE OMA’S NOTICE REQUIREMENTS TO LAWFULLY ENTER INTO A CLOSED/EXECUTIVE SESSION.**

The Board is a statutory creation which considers, conducts and advises on public business and is therefore, a public body subject to the OMA,<sup>10</sup> and must therefore abide by all of the law’s notice requirements. The OMA contains public notice provisions to which a public body must strictly adhere “before meeting in an open or closed session.”<sup>11</sup> The OMA’s “Notice of meetings” section which contains these provisions are in D.C. Code § 2-576. D.C. Official Code § 2-576 requires advance notice to the public as follows: (1) publication of a public body’s annual calendar of its meetings in the D.C. Register; (2) notice of the meeting must be as early as possible, but not less than 48 hours or 2 business days, whichever is greater, before the meeting; (3) notice must be provided by posting in the office of the public body or a location accessible to the public; and on the website of the public body or the District government; (4) and when timely practicable, notice is to be published in the D.C. Register.<sup>12</sup> D.C. Official Code § 2-576(5) requires notice to contain specific content indicating the time, date, location and planned agenda, including the proper citation to the OMA granting certain topics to be discussed in closed/executive session. In relevant part, D.C. Official Code § 2-576(5) reads:

If the meeting or any portion of the meeting is to be closed, the notice shall include, if feasible, a statement of intent to close the meeting or any portion of the meeting, including citations to the reason for the closure under section § 2-575(b)<sup>13</sup>, and a description of the matters to be discussed.

The Board’s notice of intent to close and its January 16, 2018, response to the complaint lists multiple reasons for closure, many of which the December 13, 2017 meeting notice does not reflect, and others that are not applicable to the discussions that took place during the closed/executive portion of the December meeting.

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<sup>10</sup> In fact, the Board sought on September 13, 2016, the advice and input of OOG Director Hughes regarding whether the Board’s bylaws were in compliance with the requirements of the OMA. (*See*, 9.13.16 email from Ms. Freeman, Board Corporate Secretary to OOG Director Hughes asking for the OOG’s review: “At the request of the Board of Directors, please review the attached Bylaws to ensure compliance of ethical and legal standards.” On 9.28.16 Director Hughes replied, attaching the bylaws with suggested edits, with document entitled, UMC Board Bylaws revised 12-1014 (OOG SUGGESTED EDITS).pdf.

<sup>11</sup>Lead-in language, D.C. Code § 2-576.

<sup>12</sup> The OOG notes that the Board’s December 13, 2017, notice of meeting does not appear in the D.C. Register until December 15, 2017.

<sup>13</sup> Section 405(b) of the OMA is D.C. Official Code § 2-575(b).

The Board's draft agenda<sup>14</sup> lists the following three areas of discussion for entering closure during the December 13, 2017, meeting: collective bargaining agreements; personnel; and discipline matters. However, that same notice of intent to close provides citations to D.C. Official Code § 2-575(b) for the following seven reasons for entering into closure:<sup>15</sup>

- (2) To discuss, establish, or instruct the public body's staff or negotiating agents concerning the position to be taken in negotiating the price and other material terms of a contract, including an employment contract, if an open meeting would adversely affect the bargaining position or negotiating strategy of the public body;
- (4)(A) To consult with an attorney to obtain legal advice and to preserve the attorney-client privilege between an attorney and a public body, or to approve settlement agreements; provided, that, upon request, the public body may decide to waive the privilege.
- (5) Planning, discussing, or conducting specific collective bargaining negotiations;
- (9) To discuss disciplinary matters;
- (10) To discuss the appointment, employment, assignment, promotion, performance evaluation, compensation, discipline, demotion, removal, or resignation of government appointees, employees, or officials;
- (11) To discuss trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained;
- (14) To plan, discuss, or hear reports concerning ongoing or planned investigations of alleged criminal or civil misconduct or violations of law or regulations, if disclosure to the public would harm the investigation.<sup>16</sup>

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<sup>14</sup> Absent any statutory right for the public to comment on agenda items, the OOG's consistent interpretation of D.C. Official Code § 2-576 is that this provision authorizes a public body to revise a draft meeting agenda for adoption as the final meeting agenda provided that: (1) at the start of the meeting a roll call vote is taken by members of the public body; and (2) the vote to amend the agenda is unanimous. As an agenda must be in draft form when published, and can only be adopted upon the establishment of a quorum of a public body, all amendments must necessarily be made and approved by roll call vote when the body convenes to consider, conduct, or advise on public business. (See generally, D.C. Official Code § 2-574(1)). The OOG's interpretation is inapplicable where the public body's enabling legislation authorizes revision of the agenda with less than a unanimous vote.

<sup>15</sup> The OOG notes that notice of intent to close in many of the Board's draft meeting agendas contains the identical citations and references including: January 26, 2018; November 16, 2017; October 25, 2017; September 29, 2017; June 28, 2017; and February 22, 2017.

<sup>16</sup> Although not listed or cited in the notice of intent to close, the Board's response to the complaint, provides D.C. Official Code § 2-575(b)(8) as an additional justification for entering closure. D.C. Official Code § 2-575(b)(8) reads:

- (8) To discuss and take action regarding specific methods and procedures to protect the public from existing or potential terrorist activity or substantial dangers to public health and safety, and to receive briefings by staff members, legal counsel, law enforcement officials, or emergency service officials concerning these methods and procedures; provided, that disclosure would endanger the public and a record of the closed session is made public if and when the public would not be endangered by that disclosure;

The Board's reliance on D.C. Official Code § 2-575(b)(8) to meet in closure on December 13, 2017, is in error for two reasons. First, the application of this provision is to terrorist activities or substantial dangers to public health and safety which the OOG opines to include both natural and man-made disasters. Second, the Board's reliance on this provision requires public disclosure of the record of the closed session when there is no longer a danger to the public. If this provision is applicable, which the OOG opines it is not, the Board must now disclose publically, with regards to the OB Unit t, what took place in closure, since the OB Unit's 's permanent closure renders it no longer "a substantial danger to the public health or safety."

D.C. Official Code § 2-575(b)(1-14) lists exceptions which authorize a public body to meet in closure. This list of exceptions for meeting in an open session is exclusive. Therefore, when a public body deliberates or votes in a closed/executive session, the actions undertaken must fall squarely within the exceptions under the OMA.

Two provisions of the OMA make clear that this was the intent of the legislature. These provisions are the OMA “Rules of construction” (D.C. Official Code § 2-573) and a provision in “Open meeting” statute at D.C. Official Code § 2-575(d). D.C. Official Code § 2-573 provides:

This title **shall be construed broadly to maximize public access to meetings**. Exceptions shall be construed narrowly and **shall permit closure of meetings only as authorized by this Act**.<sup>17</sup> (Emphasis added.)

Additionally, D.C. Official Code § 2-575(d) reads:

A public body that meets in closed session shall not discuss or consider matters other than those matters listed under section (b) of this section.<sup>18</sup>

The legislative history of the OMA clarifies that the list for entering a closed/executive session in D.C. Official Code § 2-575(b)(1-14) is exclusive, and states:

“. . . to create limited exceptions to the open meetings rule; to mandate minimum requirements for invoking the exceptions.” (OMA Comm. Rpt. at 4).

Since it is well established, and undisputed,<sup>19</sup> that D.C. Official Code § 2-575(b)(1-14) contains the exclusive list of exceptions for conducting a meeting or portion of a meeting in closed session, the OOG must determine whether the activities of deliberating on and a voting to close the OB Unit t is within the list of exceptions. As discussed below, the OOG opines that the Board’s actions were improper because there was no allowable reason to discuss and take formal action under D.C. Official Code § 2-575(b)(1-14).

### **THE BOARD IMPROPERLY ENTERED INTO CLOSED/EXECUTIVE SESSION TO DELIBERATE AND VOTE TO CLOSE THE HOSPITAL OB UNIT.**

What’s past is prologue in the instant matter. The OOG is compelled to remind the Board of a somewhat analogous circumstance pertaining to the closure of another health facility. In 2016, the Council of the District of Columbia, which is also subject to the OMA, had before it the closure of D.C. General Hospital as a homeless shelter due to, among other things, unsafe and unsanitary living conditions. The Council undertook its review/deliberations and voting in complete transparency. It held a public hearing, engaged in public discussion, and took two public votes to approve the hospital closure. On the basis of the information available to the OOG, the OOG is hard-pressed to find any pertinent factors which distinguish, under the OMA, these two

<sup>17</sup> This reference is to Title IV of the District of Columbia Administrative Procedure Act, which is the OMA.

<sup>18</sup> Subsection (b) of this subsection is D.C. Official Code § 2-575(b).

<sup>19</sup> The Board, through legal counsel, expresses its agreement with the OOG’s interpretation of the provision. In its January 16, 2018, response to the complaint the Board’s counsel writes: “[T]he Act expressly permits closing of a meeting as well as closing of a portion of a meeting. See {sic} D.C. Official Code § 2-275(b). Such closing is permitted only for reasons enumerated at subsections (1)-(14).”

matters and any lawful justification the Board may rely upon to enter into a closed/executive session to accomplish the closure of the Hospital OB Unit.

The issue in the present case is not whether a public body may deliberate or vote in closed/ executive session, but whether the OMA permits a public body to deliberate or vote in closure on matters that do not fall within the exclusive list of exceptions. This is not a novel issue for the OOG's consideration. The OOG has previously opined on the issue of what appropriately triggers a public body to lawfully enter a closed/executive session in advisory opinion #OMA OOG-00011\_10.31.17\_AO issued to the Sustained Energy Utility Advisory Board (SEUAB).<sup>20</sup> The SEUAB had sought to enter into a closed/executive session to discuss, draft and edit a contract performance report, in part to avoid scrutiny by the public and the media while doing so,<sup>21</sup> and to ensure frank and candid discussion among the Board members. The OOG's findings in that advisory opinion are, *inter alia*, that the public body must undertake those activities in conjunction with one of the enumerated exceptions for entering a closed/executive session.

Further, a public body may discuss, and if necessary, vote on a matter in a closed/executive session. However, the discussion and vote must be on one of the matters contained in D.C. Official Code § 2-575(b)(1-14). Otherwise, the OMA directs that deliberations and voting must take place in a public meeting.

The legislative history of the OMA also makes clear that absent a public body lawfully meeting in a closed/executive session for one of the exclusive reasons listed under D.C. Official Code § 2-575(b), the intent and purpose of the OMA is to provide and protect the public's right to observe a public body's deliberations and any votes taken thereto.

In order to accomplish the twin aims of providing greater transparency into public officials decision making and preserving high-quality deliberation the Committee recommends augmenting the District's open meetings law to define public notice requirements and establish a right to observe . . . ." (OMA Comm. Rpt. at 4)

Open meeting requirements provide the public with access to observe government decision making so the public is aware not only of the outcome of government decisions, *but also the process by which those decisions are made*. These requirements are a benefit to both the process and outcome of government decision making. The Committee believes that Bill 18-716 offers a significant step in improving the openness and transparency of District government decision-making. (OMA Comm. Rpt. at 6).

The right of the public to observe a public body conducting official business is absolute -- absent the narrowly defined topic areas that may be discussed in closed/executive session. After a review of the audio portion of the closed/executive meeting the OOG fails to identify any discussions that took place regarding closure of the OB Unit that were confidential, or rose to the level of exclusion from an open session pursuant to D.C. Official

<sup>20</sup> You may find this advisory opinion at [https://www.open-dc.gov/sites/default/files/SEU2%20Final%20OMA%20OOG-00011\\_10.31.17\\_AO.pdf](https://www.open-dc.gov/sites/default/files/SEU2%20Final%20OMA%20OOG-00011_10.31.17_AO.pdf).

<sup>21</sup> See *Bogulski v. Erie County Medical Center*, 97/95 Sup. Ct. Erie County, January 13, 1998, at page 3, which states: "[H]owever, in the future, the Board and any subcommittee must comply with the Open Meeting Law. This means that the use of an Executive Session is only for a specified exception, not for what is politically inconvenient to discuss in public." *Chanos v. Nevada Tax Commission*, 181 P.3d 675, 677, where the court ruling was that the Tax Commission violated the opening meeting law to the extent that it received non-confidential evidence, deliberated, and voted on the taxpayer's tax appeal in closed sessions.



Code § 2- 575(b)(1-14).<sup>22</sup> Therefore, the OOG finds the Board in violation of D.C. Official Code § 2-575(d) for improperly meeting in a closed/executive session.

### **THE BOARD DID NOT ADHERE TO THE PROTOCOL FOR ENTERING A CLOSED/EXECUTIVE SESSION.**

D.C. Official Code § 2- 575(c), contains the statutory protocol that a public body must strictly adhere to prior to meeting in a closed/executive session. D.C. Official Code § 2- 575(c) states:

- (1) Before a meeting or portion of a meeting may be closed, the public body shall meet in public session at which a majority of members of the public body present vote in favor of closure.
- (2) The presiding officer shall make a statement providing the reason for the closure, including citations from subsection (b) of this section, and the subjects to be discussed. A copy of the roll call vote and statement shall be provided in writing and made available to the public.

The Board's failure to strictly adhere to the provisions of D.C. Official Code § 2- 575(c) is evident from a review of the audio recordings of the meeting. To transition from the open session to the closed/executive session, the Board's chair states in relevant part:

“I'm going to entertain a motion to go into closed session. Is there a motion? Is there a second? It's open for discussion, any discussion? Hearing no discussion all in favor signify by saying aye, all opposed say nay. We are now going into closed session, thank you.”

D.C. Official Code § 2- 575(c)(1) requires a majority of the members of the public body present to vote in favor of closure. The vote to enter closed/executive session was unanimous, therefore the Board did comply with D.C. Official Code § 2- 575(c)(1). However, the Board is in violation of this provision for the following two reasons to which the OOG cannot turn a blind eye: (1) the presiding officer's failure to state the reason or reasons for the closure, including reciting the applicable provisions of D.C. Official Code § 2-575(b), which is a requirement of D.C. Official Code § 2- 575(c)(2); and (2) the Board's failure, upon resuming the open session, to state on the record the official action that was taken while in closed/executive session.

The inconsistencies and errors found in the draft agenda, and the language concerning notice of intent to close, highlights the importance of the presiding officer to: (1) state on the public record the Board's reasons for closure; (2) state on the public record the proper corresponding citations for closure; and (3) to then conduct a roll call vote. Notwithstanding the fact that the official action to close the OB Unit was undertaken during an improper closure, the OMA requires official actions of this type to be placed on the record before the public when resuming the public session. The Board's failure to strictly adhere to all aspects of the protocol for entering a closed/ executive session constitute violations of the D.C. Official Code § 2-575(c).

### **RECOMMENDATIONS**

Therefore, to remedy the volatile actions of the Board improperly deliberating and conducting a final vote regarding the closure of the OB Unit in closed/executive session, the OOG directs the Board to publish the audio recording of the discussion and roll call vote on the UMC website under the December 13, 2017 Board meeting materials. Also, to the extent the Board reviewed data that is already publicly accessible, that

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<sup>22</sup> The OOG did find that the Board discussion of contract matters appropriate for discussion in the closed/executive session. While the notice of intent lists the citation for contract negotiation/discussion as D.C. Official Code § 2-575(b)(2) it fails to expressly state this as a reason for entering closure.

information should also be posted with the December 13, 2017 meeting materials. This action should suffice in allowing the public to hear the discussions leading to the closure of the OB Unit and complete the public record regarding any materials the Board reviewed to aid its final action. The OMA does not recognize any subsequent votes to ratify votes taken during an unlawful action of entering into improper closure. The OOG is happy to work with the Board and its counsel to properly publish the audio file and any related records.

Finally, to ensure that all future Board meetings comply with the OMA, the OOG recommends the following: (1) ensure that Board 's public meetings notices meet the D.C. Register deadline to ensure timely notice to the public; (2) ensure that the notice of intent to close in the draft agenda accurately reflects the reasons for entering into closed/executive session, and corresponds to the appropriate citations to D.C. Official Code § 2-575(b)(1-14); (3) consult with the OOG if uncertainty arises as to whether the Board may properly enter into closed/executive session; and (4) strictly adhere to the OMA protocol for entering closed/executive sessions (D.C. Official Code § 2-575(c), (many public bodies prepare a script to read for such purposes). The Board is requesting training on the OMA by the OOG, therefore, it is unnecessary to include this requirement as a binding recommendation.

### **CONCLUSION**

Before meeting in an open or closed session, all public bodies must follow the OMA requirement that the public receive advance and accurate notice of the meeting as specified (D.C. Official Code § 2-576). To lawfully enter a close/executive session requires a public body to strictly adhere to the protocol for entering into closure. (D.C. Official Code § 2-575(c)). The OOG expressly reserves the right to re-visit this matter concerning the timeliness of the Board providing records of its meetings to the public.

Sincerely,



TRACI L. HUGHES, ESQ.

Director, Office of Open Government

Board of Ethics and Government Accountability

cc: Emil Hirsh, Esq.  
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