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## **BEGA urged to reappoint Hughes as OOG director**

January 28, 2018

Ms. Tameka Collier  
Chair  
Board of Ethics and Government Accountability  
441 Fourth Street, N.W.  
Suite 830 South  
Washington, D.C. 20001

Dear Ms. Collier:

We understand that at its next meeting the Board will consider whether to reappoint Traci Hughes as director of the Office of Open Government (OOG). The D.C. Open Government Coalition (DCOGC) believes that since 2013, the OOG under her direction has made significant progress toward improving D.C. government transparency, despite statutory and bureaucratic impediments. Therefore, we urge the Board to reappoint her.

The Board's membership has changed completely since its creation in 2013 and selection of Ms. Hughes as the OOG's first director. Therefore, we believe a brief history of the OOG and the decision to incorporate it into BEGA might assist you and your colleagues to fulfill the Board's statutory duties regarding the OOG's future leadership.

### **The legislative history of OOG independence**

In 2010, Councilmember Mary Cheh, then chair of the Government Operations Committee, proposed a bill to improve the D.C. Freedom of Information Act and to create the OOG as an independent agency charged with overseeing government transparency and enforcing the D.C. Freedom of Information Act (FOIA). The intent of this legislation was to shift from the Office of Attorney General responsibility for training and advising agency personnel about compliance, and to shift from the Executive Office of the Mayor (EOM) responsibility for adjudicating FOIA appeals.

[1]

To protect the Office's decision-making from political influence, its director would be appointed by the Mayor to a five-year term, and the director could be removed only for cause.

That year, then-Councilmember Muriel Bowser, who was not a Government Operations Committee member, introduced a bill to rewrite the District's antiquated Open Meetings Act (OMA). Her bill created a process for appealing violations of the new law and allowed aggrieved individuals to sue public bodies to enforce the law. But, as committee chair, Councilmember Cheh insisted on an amendment that eliminated the private right of action. Her expectation was that the OOG, rather than D.C. residents, would enforce the new law.

Both bills were scheduled for floor votes in December 2010, but Councilmember Cheh withdrew her bill at the last minute. Because the Cheh bill would have established the OOG, the Open Meetings Act reported out of committee did not include an enforcement mechanism. To rectify that deficiency, at the last minute Councilmember Cheh incorporated a modified version of the OOG provisions into the OMA. The bill gave the OOG specific authority to oversee and enforce the OMA and general authority to oversee FOIA.[2] The bill the Council enacted included sufficient funds to run the OOG through fiscal year 2011.

When Mayor Vincent Gray took office in January 2011, everyone expected that he would appoint a director for the OOG. But by late 2011 he had not made the appointment.

By that time, then-Councilmember Bowser was chair of the Government Operations Committee, and she took on the task of drafting legislation to address ethical lapses by members of the Council and other governmental bodies and to create BEGA. Recognizing that government transparency is an essential tool to combat corruption, she proposed taking authority to appoint the OOG director away from the Mayor and giving it to BEGA. BEGA also would assume administrative supervision over the OOG.

At the time, the DCOGC had two major objections to her proposal: that the OOG needed to be an independent body that could act as an honest broker between agencies and requesters; and that the main focus of BEGA properly would be government ethics, not transparency, and thus in the annual budget process the ethics office would get its resources at the OOG's expense.

To address our concerns, the committee report on Bill 19-511 stated the following:

#### Open Government Office

Established in late 2010 by the Open Meetings Amendment Act of 2010, the Open Government Office was charged with administering and enforcing the District's new and enhanced open meetings and FOIA laws....

The Committee believes that the functioning of this office is critical to maintaining the public['s] trust[] in its government, and thus is appropriate for inclusion within the new Board of Ethics. As such, the bill would provide for the Board of Ethics to appoint a Director. The remainder of the Open Meetings Act would not be altered: simply put, the OGO would be stood up within the new Board and the OGO's duties, employees, assets and any unspent funds would be transferred to the new Board.

Committee Report, Bill 19-511, the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, *filed* December 5, 2011, 31. In the Section-By-Section Analysis, the report said “[t]he Open Meetings Amendment Act of 2010 is amended by establishing the Open Government Office as an independent agency within the Board of Ethics and Government Accountability; the Director of the OGO shall be appointed by the Board.” *Id.* at 41.

The Council clearly gave BEGA administrative control over the OOG, *but did not alter the operational independence entrusted to the Office’s director under the Open Meetings Amendment Act of 2010*. It is equally clear that the Council intended the Office of Government Ethics, its director, and staff to operate as an arm of BEGA and to obtain Board approval before initiating investigations and enforcement actions.

According to the report, the legislation created a very different relationship between the Board and the Office of Government Ethics.

*Sec. 107* The Board shall employ and fix the compensation for a Director and such staff, as the Board deems necessary.... The Board shall employ employees to serve under the Director, who once appointed cannot be reassigned without the consent of the Director.... The Board may appoint General Counsel to serve at the pleasure of the Board.... The General Counsel shall perform such duties as may be delegated by rule, or by order of the Board....

...

*Sec. 116.* ... If Director has reason to believe that a violation may have occurred constituting an apparent violation of the Code of Conduct, he or she shall present evidence of the violation to the Board. Upon presentation of evidence the Board may authorize a formal investigation and the issuance of subpoenas if it finds reason to believe a violation has occurred....

*Id.* at 33 – 34.

### **The marriage of BEGA and the OOG in practice**

In April 2013 BEGA appointed Ms. Hughes to be the OOG’s director. Since then many of the concerns we voiced in 2011 about placing the OOG within BEGA have proven prophetic. Yet, under Ms. Hughes’s leadership the OOG has overcome significant hurdles as it has worked to implement and enforce D.C. transparency laws.

For example, about two years ago the Mayor appointed an open government director in the EOM. The job description for the position was remarkably similar to the job description of the OOG director. The stated purpose was to provide advice and training to agency personnel regarding FOIA compliance. But the net effect appeared to challenge the OOG’s authority with regard to Executive Branch transparency.

If the Mayor had appointed an EOM ethics director to whom Executive Branch employees were to turn for advice, instead of the Office of Ethics, it is likely that BEGA would have asserted its prerogative. But BEGA did not question the Mayor’s intrusion or support the OOG as the primary authority on government transparency.

BEGA similarly undermined the OOG and its director by failing to assume full control over the Office's staff. We learned last year that, although the Committee Report said "the OGO's duties, employees, assets and any unspent funds would be transferred to the new Board," BEGA never secured transfer from the EOM of supervisory authority over Ms. Hughes. That oversight created a significant conflict of interest because, despite the Council's intent to insulate the OOG from politics, the EOM remained in a position to evaluate Ms. Hughes's performance. Although the statute prevented Ms. Hughes's direct superiors in the EOM from firing her, it gave them power to deny her advancement in the form of merit increases in compensation. As a result, Darrin Sobin, as Office of Ethics director, received raises over the past five years, but Ms. Hughes did not. According to the FY 2018 budget, her annual salary is now about \$10,000 less than his.

As originally envisioned by the Council, the OOG was to be staffed by a director and two staff attorneys. But for at least 2½ years of her tenure Ms. Hughes was the Office's sole professional employee. Although in every budget cycle since its creation BEGA has asked for more money to fund its own operations, it has not questioned cuts the Mayor proposed in the OOG's budget. Furthermore, because the Board reprogrammed OOG funds to cover shortfalls on the Ethics side, the OOG did not get an additional lawyer until 2016.

Last spring, to protect the OOG's independence and ability to obtain needed resources, Ms. Hughes took the initiative to propose creation of a separate transparency board to oversee the OOG just as BEGA oversees the Ethics Office. The DCOGC would strongly support inclusion of such a board in Councilmember Grosso's pending legislation to strengthen the OOG, FOIA, and the OMA. With regard to the fiscal 2018 budget, we believed the Council would be more receptive to establishing a separate OOG line-item that would allow the Office to advocate independently from BEGA for resources, rather than creating a new board.[3]

Recently, we are hearing that the EOM has expressed displeasure with Ms. Hughes over the OOG's decision to initiate litigation to compel the Mayor's Advisory Commission on Caribbean Community Affairs to comply with OMA. As you know, the Superior Court upheld the OOG's challenge and held that the Caribbean Commission repeatedly violated the statute. We are confident that BEGA would not stand idly by if its well-founded decision to investigate and litigate an ethics violation were to prompt similar complaints.

According to the OOG's motion for summary judgment in *Office of Open Government v. Yates*, 2016 CA 7337B, Ms. Hughes provided training regarding OMA compliance in mid-2015 to the commissioners. To help commissioners comply with the statutory requirement to publish recordings or meeting minutes within three days after meeting, she offered use of a BEGA conference room with recording equipment. In 2016, the Caribbean Commission held seven meetings between January and August. It did not publish notices or agendas before six of the meetings and did not publish recordings or minutes after five meetings. Despite written OOG warnings on July 7, August 5, and August 29, 2016 about the violations, commissioners did not publish notices or an agenda before its July 12 meeting or a recording or minutes after the meeting, and did not publish a recording or minutes after its August 23 meeting. After repeated attempts to bring the Caribbean Commission into compliance with FOIA and OMA, the OOG exercised its oversight function rooted in the statute and sued on October 5, 2016 to enforce its orders.

As you consider criticism of the OOG's decision to take legal action against the Caribbean Commission, you should keep in mind a fundamental difference between FOIA and the OMA: Under the former, any individual denied access to government records may file suit in the Superior Court to challenge the denial. Under the latter, the OOG is the only entity with enforcement authority to sue when a public body refuses — after repeated warnings — to comply with the law. If the OOG fails to act under such circumstances, the OMA's guarantee of transparency would be meaningless and the OOG would be shirking its legal responsibility.

### **The OOG's future**

We believe the OOG has made great strides under Ms. Hughes's leadership, particularly since 2016 when she was able to hire a staff attorney to assist her. Her success was evident at the BEGA budget oversight hearing last April, where nearly every public witness recounted positive interactions with the OOG. The Council's subsequent decision to create an OOG line-item in the budget is an encouraging sign that the Committee with oversight authority supports Ms. Hughes's efforts.

Ethics violations thrive in secrecy, and transparency is essential to combat government corruption. We believe it is time for BEGA to recognize that supporting and promoting the work of the OOG is essential to the Board's mission. To that end, the Board needs to respect the Council's decision to make the OOG operationally independent and to insulate the Office and its director from politics. In short, the Board needs to become a better steward of government transparency, and reappointing Ms. Hughes would be a major step in that direction.

While our assessment above has been critical of BEGA in its relationship to the OOG, we do not overlook the important and successful efforts of BEGA in its government ethics enforcement work. We also recognize that many of the problems cited occurred before appointment of current Board members. We would welcome an opportunity to meet with the Board to discuss the OOG's future.

Yours truly  
Cori Zarek  
President

[1] “This office ... would provide advice, training, dispute resolution, and professional expertise to the District’s administration of FOIA.” Committee Report, Bill 18-777, the “Open Government Act of 2010”, *filed* December 2, 2010, 4.

[T]he Office would be responsible for monitoring the District’s compliance with the Freedom of Information Act and the Open Meetings law, assisting the public and “promot[ing] the effective use” of the laws, and to serve as a non-exclusive alternative to litigation for requesters and public bodies. Specifically, the Office would be charged with ... provid[ing] training to the public and to District employees....

... The statute also clarifies that the Office would have the ability to seek declaratory and injunctive relief....

...

... [O]ne of the central insights of the legislation is that an Open Government Office can be a valuable resource for rank-and-file employees who are confronted with FOIA requests to meet these demands. Having an honest broker to offer advisory opinions, provide informal dispute resolution, and, where necessary, set down orders, can be liberating to both agencies and requesters.

*Id.* at 6 – 7.

[2] It did not shift authority to resolve FOI Act administrative appeals from the Executive Office of the Mayor (EOM) to the OOG.

[3] Bill 22-244, Fiscal Year 2018 Budget Support Act of 2017, 74 – 75, included the Office of Open Government Budget Authority Amendment Act of 2017.

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