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## **Council's questions about BEGA and the OOG answered**

In a letter to D.C. Councilmember Charles Allen, Robert Becker, Coalition government relations chair, answered questions posed Feb. 8 by members of the Council Committee on the Judiciary and Public Safety. I was out of the Washington area Thursday and could not attend the Board of Ethics and Government Accountability (BEGA) performance oversight hearing. I am writing to respond to some of the questions you and other Council members posed about the OOG and its relationship with BEGA.

You asked Fritz Mulhauser what difference it would make to create a new Office of Open Government board to oversee the OOG, as BEGA oversees the Office of Government Ethics (OGE). You also asked about our proposal that appointments to an OOG board should be split between the Council and the Mayor.

### **Why create a separate Office of Open Government board?**

Our rationale for creating a separate board is fairly straightforward and is borne out by BEGA Chair Tameka Collier's testimony. In 2011, when then-Councilmember Muriel Bowser proposed putting the OOG under BEGA, we raised several significant concerns, which the Council heeded in the legislation. The first was that a primary qualification for appointment to BEGA would be the candidate's expertise in government ethics, campaign finance, lobbying and related fields. That is appropriate because BEGA's mandate is government ethics, which is a complex undertaking.

Expertise in government transparency law is not required, and to my knowledge only Laura Richards, among the eight members appointed since BEGA's creation, had any acquaintance with open records and open meetings law. We were concerned that because oversight and enforcement of the Freedom of Information Act (FOIA) and the Open Meetings Act (OMA) are not within the board's primary mandate and BEGA members generally have had no demonstrated interest in government transparency, staff resources would be allocated to ethics investigations first, and to government transparency only when time allowed. Over the past five years, our assessment has proven correct.

An OOG board with a mandate to oversee and enforce FOIA and the OMA would be populated with individuals having government transparency experience. There are numerous experts in the

District, including members of the Coalition board, to choose among. Such a board would be a better advocate for the OOG in the budget process and in guiding legislative and policy decisions than BEGA has been. It could provide better guidance to the staff, and would be better prepared than BEGA to take ownership of OOG rulings and respond to the types of complaints highlighted at the hearing Thursday. As noted in the Coalition's written testimony, BEGA has not advocated for the OOG and has failed to protect the Office's authority against infringement by the Executive Office of the Mayor (EOM) and attacks from other executive branch bodies.

### **Who should appoint OOG board members?**

The Coalition's written testimony suggested that an OOG board might be made up of some individuals appointed by the Mayor and others appointed by the Council. We made that suggestion because BEGA, the OOG and the OGE hold positions in the D.C. government that are different from the positions of other agencies and public bodies. Like the D.C. Auditor and the Inspector General, the OOG and OGE straddle the divide between the executive and legislative branches. Unlike the Auditor and the IG, which are established as part of the D.C. Charter, an appointed board oversees them.

If the Home Rule Act permits, it might be reasonable to conclude that, because the OOG enforces FOIA and to some extent the OMA as they apply to the Council and its staff, as well as the executive, the Council should be able to appoint members to an OOG board. It should not be in the position of merely providing advice and consent to appointments the Mayor makes.

On the other hand, if the Council were to insist on making appointments to the board, would it have to give up its veto of mayoral appointments? I am not convinced either approach is superior. I am merely suggesting that if the former is legally permissible, this is worthy of discussion.

### **The Council intended not to put BEGA in control of the OOG**

In her testimony, Ms. Collier asserted that the relationship between BEGA and the OOG is "untenable" because the board cannot exercise control over OOG investigation and enforcement actions but must respond to complaints like those of the Commission on Selection and Tenure of Administrative Law Judges (COST). She argued that the Council could not have intended to give the OOG operational independence from BEGA. The Coalition's written testimony explains the Council's decision to make the OOG operationally independent, one with which Ms. Collier clearly disagrees.

In a 2011 hearing on the BEGA bill, the Coalition noted that the federal Office of Government Information Services (OGIS) is a subdivision of the National Archives and Records Administration. But the statute establishing OGIS gives it independent responsibility for overseeing federal transparency laws. Committee Report, Bill 19-511 – The Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (B19-511 Report), 205. See *attached* Testimony of Robert S. Becker, November 30, 2011 (November Testimony), 4.

Ms. Collier said the decision not to re-appoint Traci Hughes was driven by BEGA's desire to redefine through the personnel process the OOG director's role. You correctly pointed out that

the problem about which she complained is structural. It cannot be fixed by drafting a new job description for the OOG director position. If that were possible, there would be no reason to replace Ms. Hughes. The board and the director could amend the job description to include reporting and consultation requirements.

What Ms. Collier appears to be proposing is a new job description that requires the OOG director to operate under parameters similar to the statutory restraints on the OGE director's authority. For example, the OGE director must obtain board approval to open or close a formal investigation, and before issuing an advisory opinion or sanction. The OOG's enabling statute does not give the board such authority, and a job description cannot substitute the board's wishes for the Council's intent.

In other words, Ms. Collier's justification for not re-appointing Ms. Hughes represents a futile effort to rewrite the statute without having to convince the Council to change its 2011 decision.

As you heard in the hearing, Ms. Hughes has done an exemplary job, a fact Ms. Collier conceded. She repeatedly evaded requests for explanation of the board's action with vague statements about improving "collaboration" and achieving "efficiencies," and being legally unable to discuss personnel matters.

Because I was deeply involved in negotiations over the FOIA and OMA bills in 2010, and the BEGA bill in 2011 and 2012, I believe I can provide some insights into her "collaboration" and "efficiency" arguments. In discussions about placing the OOG under BEGA, Councilmember Bowser's initial idea was that the OGE and OOG could share staff resources. Lawyers and investigators could be tasked as needed to either ethics complaints or FOIA/OMA matters.

For the reasons outlined above, the Coalition argued that the OOG needed its own staff. B19-511 Report, 76 – 8, 204 – 5; November Testimony, 3 – 4. See *attached* Testimony or Robert S. Becker, October 26, 2011 (October Testimony), 2 – 4. First, consistent with its mandate, BEGA would hire lawyers interested in and experienced with ethics issues, not transparency issues. Second, the ethics case load would always take precedence over the FOIA/OMA case load. BEGA's history since 2013 supports our view. It has asked every year for more lawyers, investigators and auditors to deal with its growing case load, and lent meager support to Ms. Hughes's very modest staffing requests. Third, BEGA is subject to both the FOI Act and the OMA, and it would be a clear conflict of interest for its staff lawyers to adjudicate complaints that the board violated either statute. The legislative history demonstrates that the Council agreed with us then because it removed a provision from the bill that stated, "(1) The powers and duties of the Open Government Office pursuant to section 503 are transferred to the Board of Ethics and Government Accountability." B19-511 Report, 204; November Testimony, 3. We hope you will agree as well. If the Council were to give BEGA operational control over the OOG, oversight and enforcement of the FOI Act and the OMA would suffer significantly.

### **Conciliation is not a tool used to resolve transparency complaints**

Prompted by Ms. Collier's complaints about Ms. Hughes and her decision to amend the OOG's rules, you asked about conciliation in the FOIA/OMA complaint resolution process. As our attached 2011 testimony explains, the fundamental principle underlying both transparency laws is bringing public bodies and agencies into compliance, not on punishing violators. Transparency

laws provide relatively minor sanctions for non-compliance, and impose such sanctions only where a judge determines that a violation was willful or arbitrary and capricious. In other words, the process is remedial, and resorts to sanctions only when all attempts at remediation have failed. B19-511 Report, 77; October Testimony, 3.

As Ms. Hughes explained at the hearing Thursday, when the Office receives a complaint, or when an audit identifies a body's lack of compliance, the OOG offers advice and training. With regard to the Mayor's Advisory Commission on Caribbean Community Affairs, Ms. Hughes also offered use of a BEGA conference room that had equipment to record meetings. The OOG took formal action to compel OMA compliance after months of attempting to convince commissioners to follow the law. The Coalition's written testimony provides more detail.

As that example demonstrates, I do not understand how use of conciliation would change the OOG's process or the ultimate resolution of a OMA complaint or a FOIA appeal. Ms. Collier's lack of understanding on this point supports our contention that BEGA is ill-equipped to assert operational control over the OOG.

### **BEGA's lengthy secret session raises Open Meetings Act questions**


The length of the closed meeting at which BEGA decided not to reappoint Ms. Hughes and Ms. Collier's testimony lead us to believe that her reliance on the OMA's personnel exemption was disingenuous. Ms. Collier is correct that a public body may go into closed session to discuss a personnel matter, and the narrow question of whether to re-appoint Ms. Hughes falls into that category. But there are two caveats: an OMA exemption is discretionary – it does not prohibit disclosure; and the person under discussion can waive the protection the exemption provides. BEGA never determined that Ms. Hughes opposes discussion with the Council of the reasons for its decision.

More importantly, the Coalition understood before the February 1 BEGA meeting that the board probably would not re-appoint Ms. Hughes, and we wrote a detailed letter in an effort to change members' minds. The board met in closed session for an hour, and asked Ms. Hughes to leave the room less than five minutes into the meeting. It is conceivable that our letter prompted some discussion among the three members present, but unlikely that our argument required an hour-long discussion.

Considering Ms. Collier's testimony, it seems logical that BEGA spent a portion of that meeting discussing how it would take greater control over the OOG. That discussion would not be exempt under the OMA, and nothing prevented Ms. Collier from answering Councilmembers' questions. In fact, if the board discussed plans for selecting a new, more compliant OOG director, its failure to return to open session for that discussion probably violated the OMA.

### **Conclusion**

I hope this letter answers some of the questions you and other Council members raised at the hearing. In addition, I hope in light of testimony at the BEGA performance oversight hearing, when the budget cycle concludes, you will schedule a hearing on Councilmember Grosso's omnibus transparency bill. BEGA's decision not to re-appoint Ms. Hughes and Ms. Collier's testimony demonstrate the importance of resolving these issues.

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