

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



July 27, 2020

Via Electronic Mail

The Honorable Phil Mendelson
Chairman Council of the District of Columbia
1350 Pennsylvania Avenue, NW, Suite 504
Washington, D.C. 20004

The Honorable David Grosso
Chairperson, Committee on Education
Council of the District of Columbia
1350 Pennsylvania Avenue, NW, Suite 504
Washington, D.C. 20004

Re: The School Financial Transparency Amendment Act of 2020

Dear Chairman Mendelson and Councilmember Grosso:

I am writing to comment on the School Financial Transparency Amendment Act of 2020, which is included in the Fiscal Year 2021 Budget Support Act (BSA). I commend the District of Columbia Council for taking this positive step to make the meetings of District of Columbia Public Charter School Boards of Trustees (“Trustees”) subject to the Open Meetings Act (OMA). This action will make their operations more transparent and provide the accountability to the taxpayers that has been absent prior to this change. However, I am concerned that as written, the BSA provision creates a broad exception to the OMA’s open requirement that permits closure of the Trustees’ meetings.

The new exception amends D.C. Official Code § 2-575(b) to add a new proposed subsection (16) and permits a closed meeting for any discussions concerning “school operations,” while requiring open meetings only on the school’s annual budget, school closures, and program expansions. I am concerned that this new, narrow application of the OMA will not make the operations of the Public Charter School Board of Trustees’ more transparent, but will result in the majority of their meetings being held in closed session. The current OMA exceptions provide reasonable options for public bodies to enter into closed session, and in my opinion, the matters provided for in this new proposed subsection (16) are already covered in the OMA. Moreover, if there is a concern that the Trustees will evade the public meeting requirements, the Council should consider addressing that concern by imposing stronger penalties for violating the OMA. I provide suggestions below.

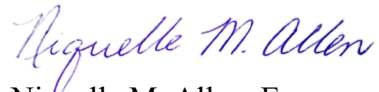
D.C. Official Code § 2-575(b)(11) protects the competitive position of the entity providing information to the government and permits closed sessions to discuss that information. D.C. Official Code § 2-575(b)(11) also provides broad language that permits a public body to meet in closed session to discuss information that would be considered “school operations.” There are numerous District and federal cases that interpret this provision, which mirrors the Freedom of Information Act (FOIA) exemption in D.C. Official Code 2-534(a)(1) regarding trade secrets and financial information received from outside of the government. In fact, the language in this OMA exception was derived from the companion FOIA exemption. The type of information that is covered in the OMA and FOIA exemptions to public disclosure provide guidance for the type of “school operations” that may be justifiably be excluded from the public portion of the Trustees’ meeting. Also, from an enforcement perspective, it is preferable to derive the type of activity and information that is encompassed in “school operations” from existing precedent interpreting the OMA. For example, if a public body is reviewing information regarding property that could be the subject of a future negotiation, the public body may meet in executive session, if making the information public would harm the competitive position of the entity providing the information under Section 2-575(b)(11). This type of discussion regarding “school operations” could be held in a closed portion of a Trustees’ open meeting based on precedent.

Thus, I encourage you to consider revising the language in D.C. Official Code § 2-575(b)(11) to permit the Public Charter School Board of Trustees to utilize this exception. Doing so would provide a clear framework to determine the type public charter school operations that may legally be discussed in a closed meeting. Please consider amending this section to include information provided to the “government and to Public Charter School Boards of Trustees” because Trustees are not classified as government entities. I also recommend deleting the phrase “To discuss information related to the operation of a public charter school; provided that” from the new proposed subsection (16), because those discussions are covered if you include Trustees in Section 2-575(b)(11).

Lastly, based on past discussions regarding justifications for Trustees’ closed meetings, there is a concern that if Trustees are included in Section 2-575(b)(11), they would use the exception to evade public meetings. To alleviate the concern about potential abuses of Section 2-575(b)(11), please consider modifying D.C. Official Code § 2-579(e) to give the courts more authority to impose penalties on public bodies that violate the OMA by raising the maximum civil penalty for violations of the OMA from \$250 per violation to \$1000 per violation. To ensure that penalties are equitably assessed, I also recommend adopting language from Maryland’s Open Meeting statute and adding a new subsection(e)(1), to read: “When determining the amount of a fine under this subsection, the court shall consider the financial resources available to the public body and the ability of the public body to pay the fine.” *See* MD Code, General Provisions Section 3-402(b). Increasing the cap for penalties provides a greater OMA compliance incentive.

Thank you for considering these recommendations and for continuing to ensure that government operations remain open and transparent by making District of Columbia Public Charter School Boards of Trustees subject to the OMA.

Sincerely,



Niquelle M. Allen, Esq.
Director of Open Government
Board of Ethics and Government Accountability

cc:

Councilmember Charles Allen
Councilmember Anita Bonds
Councilmember Mary M. Cheh
Councilmember Vincent C. Gray
Councilmember Kenyan McDuffie
Councilmember Brianne K. Nadeau
Councilmember Booke Pinto
Councilmember Elissa Silverman
Councilmember Brandon T. Todd
Councilmember Robert White, Jr.
Councilmember Trayon White, Sr.