



P.O. Box 73771  
Washington, D.C. 20056  
[www.dco.gc.org](http://www.dco.gc.org)

April 27, 2018

Hon. Karl A. Racine  
Attorney General of the District of Columbia  
441 4<sup>th</sup> St., N.W.  
Washington, DC 20001

Re: Actions by the Board of Ethics and Government Accountability

Dear Attorney General Racine:

On behalf of the D.C. Open Government Coalition, I am writing to request your review of recent actions in the executive branch that are likely to set back progress towards open government in the District. You know the Coalition and its mission, and we have been pleased to work with you from your earliest days in office, most recently resolving press requests for video from MPD body-worn cameras that prosecutors had shown in court. In that spirit, we would like to direct your attention to the following three matters that we find deeply troubling.

First, the Board of Ethics and Government Accountability (BEGA) in a closed session February 1 declined to reappoint the director of the Office of Open Government (OOG) Traci Hughes to a second term. That decision -- which was made, ironically, behind closed doors and with virtually no input from, or explanation to, the public constituents of OOG -- and subsequent BEGA statements and actions in connection with recruiting a new director raise serious questions whether the executive branch correctly interprets the law. That is what we request you review.

BEGA Chair Tameka Collier explained at the agency's Council performance oversight hearing on February 8 that she began last fall to question whether the Board had enough oversight of the OOG. There was no real basis for her concern, as detailed below -- but it has persisted and come to dominate a series of decisions.

For instance, Ms. Collier cited that OOG opinions go out on letterhead showing both the Board and the office, yet she felt she lacked sufficient information to respond when an agency head wrote her with concerns about an OOG opinion. From this thin reed, she concluded the director had failed to "collaborate" with the Board, that a replacement was

needed immediately at the end of her term in April, and that the next director should work under new rules.

Ms. Collier's rationale suggests a fundamental misunderstanding of the law establishing the OOG. To begin with, BEGA need not consider itself responsible for defending OOG decisions to agency heads. There is good reason for that: the OOG is established to do its work independent of BEGA. If the BEGA chair seeks symmetry with the complex rules in law mandating deep Board involvement in the treatment of ethics complaints, that is a mistaken analogy. Instead, the work of OOG, by statute, is entirely independent in every respect, from accepting complaints to researching facts and law, reaching findings and conclusions, issuing opinions, and seeking court orders if needed to gain compliance with the law.

In fact, BEGA has one simple function with respect to OOG: to appoint the director. OOG was established in 2011, but when the mayor did not appoint a director, the Council added this sole responsibility to a pending ethics bill that established BEGA and that took effect in 2012. The details of the office—its tasks and its independence—were in other ways unchanged.

Ms. Collier's concerns last fall and her subsequent actions reflect no grasp of this crucial legislative history, whose key feature is that the Council never intended, and the statutory text does not provide for, any BEGA oversight of the Open Meetings Act, the Freedom of Information Act, or the work of the OOG on those topics.

The attached Coalition statement for the Council oversight hearing record in February gives details of the history just summarized. We are confident the Council intended independence for the OOG, regardless of Ms. Collier's dislike for the arrangement.

Second, we are concerned that the independence of OOG will be further eroded by the job description BEGA has posted for the position of director. That description (see attached text) requires OOG to consult BEGA's senior attorney advisor before issuing opinions or litigating. As already noted, BEGA has no legal jurisdiction over the office and the statutes it is charged with enforcing and overseeing. Thus it should go without saying that, formally or informally, its staff may not control any OOG decision. The duties of a position should reflect the law as it is, not as others may wish it to be; mandatory consultation with staff in an agency that the OOG might even have to investigate (for FOIA or Open Meetings compliance) clearly lacks both legal authority and common sense. Whether intended this way or not, BEGA's description of the job amounts to a neutering of the office.

Third, and finally, the law has a holdover provision, expressly requiring that a director whose term is not renewed stay on until a successor is confirmed. *See* D.C. Code § 2-594(b). The statute thereby provides a sensible continuity. BEGA has instead required the director to leave immediately and make way for an interim appointee for which there is no legal authority.

Accordingly, the Coalition asks you to review what we believe to be the clear misinterpretations of law noted above, in which BEGA has acted repeatedly based on an erroneous view of the respective authority of BEGA and OOG. And we request you to take whatever action is appropriate to ensure D.C. law is followed. As the Court of Appeals has said, "The purported exercise of jurisdiction beyond that conferred upon the agency by the legislature is *ultra vires* and a nullity." *District Intown Prop's., Ltd. v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 680 A.2d 1373, 1379 (D.C. 1996).

The Council may also act to clarify the law. But until then, executive misinterpretation of law is due no deference, and we ask that you, as the top legal authority in D.C. government, review the actions of BEGA and provide corrective guidance. We fear that without that prompt action, a new director will be recruited and new work rules will be put in place – both without any sound legal basis.

We would be happy to meet with you and staff to discuss our concerns further.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a horizontal line extending from the end of the signature.

Thomas M. Susman  
President

Enclosures (Coalition Council statement; OOG director job description)