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April 2, 2018

Ms. Ventris C. Gibson  
Director  
D.C. Department of Human Resources  
One Judiciary Square  
441 Fourth Street, N.W.  
Suite 330 South  
Washington, D.C. 20001

*Re: Director of Open Government, ES-0901-10*

Dear Ms. Gibson:

We note that the Board of Ethics and Government Accountability (BEGA) has begun the search for a successor to Traci Hughes as director of the Office of Open Government (OOG).<sup>1</sup> We are distressed to find that BEGA's posting appears to deviate in significant ways from the statutory conception of OOG as a functionally independent entity.

BEGA Chair Tameka Collier testified in a performance oversight hearing before the D.C. Council's Committee on the Judiciary and Public Safety February 8, 2018, that she intended to assert greater supervision over the next OOG director. That prompted a warning from Councilmember Charles Allen, committee chair, that BEGA should not attempt through the hiring process to alter the statutory relationship between the OOG and BEGA.

BEGA appears to be acting in a manner contrary to statute and in disregard of Councilmember Allen's warning. We ask that you remove this posting from the DCHR website pending a determination about whether it conforms with relevant statutes. Interested candidates should not be invited to apply, and their applications should not be evaluated, until the legality of key sections of the job description (*italicized in the excerpts below*) is reviewed.

According to the posting, the OOG director

Researches best practices among federal, state and local governments designed to promote open government, freedom of information, and public transparency. Makes recommendations to the Ethics Board about which practices should be adopted by the

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<sup>1</sup> The job posting is attached.

District government to promote the mission of the Office of Open Government.

At the request of the Ethics Board *and in consultation with the Ethics Board's Senior Attorney Advisor*, drafts proposed legislation and rules relating to open government and freedom of information. Prepares reports and policy papers.

...

*In consultation with the Ethics Board's Senior Attorney Advisor*, issues advisory opinions to public bodies on compliance with the Open Meetings Act (D.C. Official Code §§ 2-571 through 2-580).

...

*In consultation with the Ethics Board's Senior Attorney Advisor*, provides direction and oversight of other responsibilities of the Office of Open Government, including enforcement actions in Superior Court for declaratory relief from violations of the Open Meetings Act (D.C. Official Code § 2-579).

(Emphases added.). The italicized passages indicate where we believe BEGA, in the 2018 job posting, is effectively changing core agency functions in a manner beyond its authority.

### **The OOG is operationally independent of BEGA**

“The District of Columbia Open Government Office (‘Open Government Office’) is established as an independent office within the Board of Ethics and Government Accountability to promote open governance in the District of Columbia.” D.C. Code § 2-592. Its director is appointed to a five-year term by BEGA, but the director, not BEGA, employs the OOG’s staff. D.C. Code § 2-594(a) and (d). To assist you in understanding the statutory relationship between BEGA and the OOG, I have attached a letter the Open Government Coalition sent the Judiciary Committee to augment the record after the February 8 hearing.

The scope of the OOG’s authority is clear; the enabling statute requires that

- (a) The Open Government Office shall:
  - (1) Report annually, on or before February 1, on its activities, including recommendations for changes in the law;
  - (2) Issue advisory opinions to public bodies on compliance with subchapter IV [Open Meetings] of this chapter;
  - (3) Provide training to public bodies, officials, and employees related to subchapter IV of this chapter; and
  - (4) Issue rules to implement the provisions of this subchapter [Open Government Office] and subchapter IV of this chapter.
- (b) The Open Government Office may bring suit to enforce § 2-579.
- (c) The Open Government Office may issue advisory opinions on implementation of subchapter II [Freedom of Information] of this chapter.

D.C. Code § 2-593. The statute does not require the director to consult with or obtain permission from BEGA or its senior attorney advisor in performing these duties.

The distinct and separate work of BEGA is equally clear. According to D.C. Code § 1-1162.02,

- (a) There is established a District of Columbia Board of Ethics and Government Accountability, whose purpose shall be to:
- (1) Administer and enforce the Code of Conduct;
  - (2) Appoint a Director of the Open Government Office;
  - (3) Appoint a Director of the Ethics Board;
  - (4) Receive, investigate, and adjudicate violations of the Code of Conduct;
  - (5) Conduct mandatory training on the Code of Conduct;
  - (6) Produce ethics training materials, including summary guidelines for all applicable laws and regulations;
  - (7) Produce a plain-language ethics guide;
  - (8) Issue rules and regulations governing the ethical conduct of employees and public officials; and
  - (9) Establish an anonymous and confidential telephone hotline for the purpose of receiving information related to violations of the Code of Conduct or other information with regard to the administration or enforcement of the Code of Conduct.

BEGA's primary purpose is to enforce the Code of Conduct; and it appoints the OOG director. Nothing in either statute subordinates the OOG director to the board or any member of its staff. Furthermore, BEGA has no authority with regard to the Open Meetings Act (OMA), D.C. Code § 2-571, *et seq.*, the Freedom of Information Act (FOIA), D.C. Code § 2-531, *et seq.*, or operations of the Office of Open Government.

### **BEGA's proposed restrictions would prevent the OOG from meeting its statutory obligations**

Based on Ms. Collier's testimony, we are concerned that by using the phrase "in consultation with," BEGA clearly creates the inference that the OOG director must obtain permission from the board or its senior attorney advisor before issuing an advisory opinion, initiating litigation to enforce its orders, promulgating rules and proposing legislation. The board provides no standards circumscribing its exercise of this newly created approval process, or procedures for the OOG director to appeal any disagreement with BEGA's position.

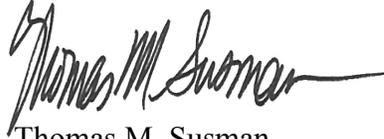
In fact, the OOG statute requires the Office's director to advise the Executive Branch and Council directly on needed legislation and best practices. BEGA has no authority to filter those recommendations or to demand that the OOG obtain permission to engage in legislative or rule-making activities. The board's legislative and rule-making authority are limited to the realm of government ethics. *See, e.g.*, D.C. Code § 1-1162.02(b) and § 1-1162.09.

Similarly, the OOG has an independent duty to issue advisory opinions and determine whether to initiate litigation to enforce its orders. If it were to bow to the board or its senior attorney advisor,

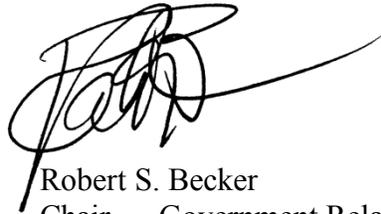
the OOG would forfeit the independence the Council intended for this open government watchdog agency.

We have other concerns about the job description, and would welcome the opportunity to share them with you. If we can provide additional information please let us know.

Yours truly,



Thomas M. Susman  
President



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Chair — Government Relations Committee  
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cc: Chairman Phil Mendelson, Council of the District of Columbia  
Councilmember Charles Allen, Chair, Committee on the Judiciary and Public Safety  
Councilmember Mary M. Cheh  
Councilmember Anita Bonds  
Councilmember Vincent C. Gray  
Councilmember David Grosso

**Job Posting**  
**Director of Open Government**  
**ES-0901-10**

# Director of Open Government

ES-0901-10

## Introduction

The Office of Open Government is an independent office within the [Board of Ethics and Government Accountability](#). The mission of the Office of Open Government is to promote open government operations to provide District citizens with greater information about how government officials make and implement decisions and to encourage public participation in government affairs. The Office of Open Government is responsible for enforcing the Open Meetings Act, monitoring the District's compliance with the Freedom of Information Act, and assisting government agencies in the implementation of open government practices.

Pursuant to the Open Government Office Act and the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, this position is established as the Director of the Office of Open Government (the "Director"). The Director is responsible for managing and overseeing the administration and implementation of the Office of Open Government. The overall goals and objectives of this position are to improve the transparency with which the District government operates in accordance with the Open Government Office Act, the Open Meetings Act, and the Freedom of Information Act.

## Major Duties

Manages the staff of the Office of Open Government and establishes the guidelines and procedures governing the operations of the Office. Makes assignments to staff, and provides direction based on the office mission, goals and priorities identified. Tracks the activities of the Office of Open Government and reports to the Ethics Board on the status of those activities at such times as may be required by the Ethics Board.

Develops high-level objectives, to be reflected in specific performance measures, and creates a strategic plan to achieve those objectives through individual projects. Monitors the strategic plan and reports to the Ethics Board on project status.

Researches best practices among federal, state and local governments designed to promote open government, freedom of information, and public transparency. Makes recommendations to the Ethics Board about which practices should be adopted by the District government to promote the mission of the Office of Open Government.

At the request of the Ethics Board and in consultation with the Ethics Board's Senior Attorney Advisor, drafts proposed legislation and rules relating to open government and freedom of information. Prepares reports and policy papers.

Reports annually, on or before February 1st, on activities of the Office of Open Government, including recommendations for changes in the law (D.C. Official Code § 2-593(a)(1)).

In consultation with the Ethics Board's Senior Attorney Advisor, issues advisory opinions to public bodies on compliance with the Open Meetings Act (D.C. Official Code §§ 2-571 through 2-580).

Trains public bodies, officials, and employees on the Open Government Office Act, the Open Meetings Act, and the Freedom of Information Act.

In consultation with the Ethics Board's Senior Attorney Advisor, provides direction and oversight of other responsibilities of the Office of Open Government, including enforcement actions in Superior Court for declaratory relief from violations of the Open Meetings Act (D.C. Official Code § 2-579).

Serves as key advisor on implementing the principles of open government. Serves as the District's authority on matters relating to the public disclosure of information, and advises on privacy issues related to informed consent, disclosure risk, and data sharing.

Advises on the development and maintenance of privacy policies, procedures, and guidance essential to the effective and efficient implementation of the District's agencies and offices.

Advises internal working groups and committees tasked with making program, policy, or information technology decisions that may have privacy-related implications.

Performs other related duties as assigned.

### **Other Significant Facts**

Possesses professional knowledge of laws governing the Ethics Board and the Office of Open Government, the Open Meetings Act and the Freedom of Information Act. Demonstrates a commitment to open and transparent government.

Demonstrates ability to apply legal standards and investigative information to evaluate potential violations of the Open Meetings Act.

Demonstrates superior planning skills, skill in problem-solving and negotiation strategies, and ability to employ qualitative and/or quantitative methods to assess and improve program effectiveness and complex management processes.

Demonstrates skills and experience in providing leadership in a managerial capacity and in providing leadership in a team-based environment, including the ability to set appropriate work standards and to hold people accountable for their performance.

Possesses superior oral and written communication skills, and has significant experience in public speaking, preparing policy papers, presenting factual findings and preparing and presenting oral and narrative reports.

Possesses ability to exercise tact, discretion and skill in personal interactions with individuals and groups in diverse environments.

Demonstrates ability to make accurate summaries of facts and to prepare reports, opinions and findings.

### **Special Requirement**

**Note:** The incumbent of this position will be subject to enhanced suitability screening pursuant to Chapter 4 of DC Personnel Regulations, **Suitability – Security Sensitive**.

### **Education And Experience**

Candidate must possess at least one (1) year of specialized experience equivalent to the next lower grade level in the District of Columbia government service, or its non-District equivalent obtained from the public or private sector which demonstrates the ability to perform the duties of the position. Specialized experience is experience that has equipped the applicant with the particular knowledge, skills, and abilities to perform successfully the duties of the position, and that is typically in or related to the work of the position. Examples of specialized experience for this position include: managing and overseeing the administration and implementation of the Office of Open Government; improving the transparency with which the District government operates in accordance with the Open Government Office Act, the Open Meetings Act, and the Freedom of Information Act; developing high-level objectives, to be reflected in specific performance measures, and creating a strategic plan to achieve those objectives through individual projects; monitoring the strategic plan, and reports to the Ethics Board on project status; researching best practices among federal, state and local governments designed to promote open government, freedom of information, and public transparency; recommending to the Ethics Board about which practices should be adopted by the District government to promote the mission of the Office of Open Government; and advising on the development and maintenance of privacy policies, procedures, and guidance essential to the effective and efficient implementation of the District's agencies and offices.

**Salary Range for the Position:** ES-10, \$119,406 - \$179,108

Interested individuals should send: 1) a cover letter (which specifically addresses the applicant's relevant experience and interests); 2) a resume by email to [OOD.Recruit@dc.gov](mailto:OOD.Recruit@dc.gov)

**Letter to D.C. Council**  
**Committee on the Judiciary and Public Safety**  
**February 12, 2018**



P.O. Box 73771  
Washington, D.C. 20056  
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February 12, 2018

Hon. Charles Allen  
Chair  
Committee on the Judiciary and Public Safety  
Council of the District of Columbia  
1350 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

*Re: Board of Ethics and Government Accountability  
Performance Oversight Hearing, February 8, 2018*

Dear Councilmember Allen:

I was out of the Washington area Thursday and could not attend the Judiciary Committee Board of Ethics and Government Accountability (BEGA) performance oversight hearing. But I was able to watch it beginning shortly before the end of the last public witness's statement and ending when you shifted focus from the Office of Open Government (OOG) to BEGA operations. I am writing as the D.C. Open Government Coalition's government relations chair 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 of 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.

Yours truly,

Robert S. Becker  
Chair  
Government Relations Committee  
(202) 364-8013  
rbecker@dcapeals.com

cc: Councilmember Mary Cheh  
Councilmember Anita Bonds  
Councilmember Vincent Gray  
Councilmember David Grosso