



September 6, 2017

**VIA ELECTRONIC MAIL**

Mr. Johnnie I. Barton  
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Board of Ethics and Government Accountability  
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**RE: #OMA OOG-0004 7.03.17 AO**

Dear Mr. Barton,

This letter responds to the Office of Open Government's ("OOG") August 9, 2017, advisory opinion's ("Advisory Opinion") conclusions that the DC Public Charter School Board ("DC PCSB") violated the Open Meetings Act ("OMA") and the School Reform Act ("SRA") at its June 19, 2017, Board Meeting by 1) amending its planned agenda through a non-unanimous vote, and 2) using "renew the motion" to add items to the agenda without providing 48 hours' notice. We appreciate you taking the time to discuss the Advisory Opinion, our questions, and our concerns with the opinion on August 17, 2017. As stated during that conversation, DC PCSB respectfully disagrees with aspects of these conclusions.

Please note that this letter is limited to the interpretation of the statutes and does not address the fact-specific findings of the Advisory Opinion with respect to DC PCSB's actions at the June 19 meeting. DC PCSB will comply with the Advisory Opinion's recommendations given its authority on matters of open government. However, we disagree with the two above statutory conclusions and wish to memorialize in writing our concerns, as discussed during our August 17 conversation.

Amending the Draft Agenda

The Advisory Opinion states that "the OOG has consistently interpreted D.C. Official Code § 2-576 to authorize public bodies to revise a draft public meeting agenda for adoption as the final public meeting agenda provided: (1) at the start of a meeting a roll call vote is taken by members of the public body; and (2) the vote to revise the public meeting agenda is unanimous."<sup>1</sup>

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<sup>1</sup> Advisory Opinion at 4.

The Advisory Opinion later refers to these revision procedures as a “protocol the OOG has provided to public bodies.”<sup>2</sup>

As an initial matter, DC PCSB was not aware that the OOG had interpreted this section of the OMA to impose either of these requirements, particularly the requirement of unanimous consent. We had not been provided with notice of any such protocol or received any written guidance from the OOG on this issue prior to the Advisory Opinion. Further, DC PCSB undertook a thorough search, both before the June 19 meeting and after receiving notice of the OOG complaint, of the OMA and its regulations, of DC case law, and of the complaint resolutions and advisory opinions published on the OOG<sup>3</sup> and Board of Ethics and Government Accountability’s<sup>4</sup> websites and was unable to find any mention of this interpretation or any guidance on how to amend a draft agenda prior to its approval at a board meeting. Accordingly, DC PCSB referred to Robert’s Rules of Order in the absence of such guidance. The associated footnote in the Advisory Opinion also cites to no authority, but merely acknowledges that DC PCSB may not have been aware of the OOG’s interpretation.

During our August 17 conversation, DC PCSB inquired about this interpretation and the manner in which the OOG “has provided [this guidance] to public bodies.”<sup>5</sup> We were told that it has been provided to bodies that called the OOG for advice on this specific issue, and that it has been mentioned at some OOG trainings. However, DC PCSB legal staff have diligently attended multiple OMA trainings over the past several years and this interpretation has not been discussed at any of them, nor is it included in the OMA training materials available on the OOG’s website.<sup>6</sup> The OOG’s interpretation has not been reduced to writing in any form that DC PCSB can locate or publicly disseminated in any way to public bodies at large. Accordingly, we object to the OOG holding DC PCSB accountable for compliance with a requirement not present in the plain text of the statute and of which we could not reasonably be expected to be aware.

Secondly, DC PCSB respectfully disagrees with the OOG’s interpretation of § 2-576. While we agree that an agency’s interpretation of its organic statute is owed deference and that the OOG has the statutory authority to interpret the OMA, we do not believe this interpretation of § 2-576 is reasonable on its own, and certainly not when read in conjunction with the SRA, as discussed later. DC PCSB’s own enabling statute, the SRA, does not impose any requirements on Board votes, save that member elections

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<sup>2</sup> *Id.* at 5.

<sup>3</sup> Available at <https://www.open-dc.gov/documents/oma-complaints-resolved>, <https://www.open-dc.gov/documents/advisory-opinions>.

<sup>4</sup> Available at <https://bega.dc.gov/publications?type=1481>.

<sup>5</sup> Advisory Opinion at 5.

<sup>6</sup> Available at <https://www.open-dc.gov/documents/training-materials>.

must be held when requested by majority vote.<sup>7</sup> It is an implicit power of any board, absent any statutory language or regulations to the contrary, to establish rules governing its operations. Accordingly, the Board has established bylaws, adopted and amended through a fully transparent and public process,<sup>8</sup> that govern the Board. These bylaws state that the Board shall vote by a majority of members at any meeting where a quorum is present.<sup>9</sup> The Board's bylaws do not require a unanimous vote for *any* act.

To take this one step further, it would seem plainly unreasonable and beyond the intended scope of the OOG's authority for the OOG to interpret § 2-576 to impose the requirement that *all* board actions must be approved unanimously. Nothing in the OMA either imposes this requirement or suggests that the OOG has the authority to impose such a requirement where none exists in the law or in a public body's own governing documents. There is no logical distinction between a vote to amend a draft agenda and a vote to take action on any other item before the public body.

The rationale stated by the OOG for imposing this unanimous consent requirement is "the balance that must be maintained between a public body conducting its business and the public's right to full and complete information regarding the affairs of government and those who represent them."<sup>10</sup> However, requiring unanimous consent to amend a draft agenda does not serve to maintain this balance. Independent notice requirements with respect to certain matters exist to maintain this balance.<sup>11</sup> To the contrary, imposing the additional requirement of unanimous consent to amend a planned agenda results in stymieing a board's effort to operate effectively by allowing one or two board members disproportionate control over board business while providing little to no additional transparency to the public. This requirement, for example, could give one member the power to prevent the majority of a board from voting to include on the agenda an item most of the board felt required public discussion.

### Using "Renew the Motion" to Add Agenda Items Without Notice

The Advisory Opinion seems to suggest that, because of the SRA mandate that all DC PCSB Board meetings be open to the public and allow for public comment,<sup>12</sup> DC PCSB is subject to heightened requirements of

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<sup>7</sup> D.C. Official Code § 38-1802.14(b)(1).

<sup>8</sup> The bylaws were last revised at the May 16, 2016, Board Meeting, which can be viewed here: <https://livestream.com/accounts/6219837/events/5406963>.

<sup>9</sup> DC PCSB Bylaws, Art. 5.5. ("An act by a majority of Members present at any meeting at which there is a quorum shall be the act of the Board.")

<sup>10</sup> Advisory Opinion at 4.

<sup>11</sup> See, e.g., § 38-1802.03(c) (requiring at least 10 days' notice for a public hearing on a petition to establish a charter school).

<sup>12</sup> § 38-1802.14(b)(3).

transparency and notice beyond those contemplated by the OMA.<sup>13</sup> During our discussion, the OOG stated that, per its interpretation of this SRA mandate, DC PCSB could *never* properly amend its agenda during a public meeting, even through unanimous consent, because of the requirement that each meeting allow for public comment. DC PCSB disagrees with this interpretation of the SRA. Given the deference owed an agency's interpretation of its enabling statute, DC PCSB does not believe that the OMA's interpretation of *DC PCSB's* enabling statute would trump DC PCSB's own reasonable interpretation.<sup>14</sup>

The provision that all DC PCSB Board meetings be open and allow for public comment was added to the SRA by the District of Columbia Public Education Reform Amendment Act of 2007 ("PERAA"), which was passed several years prior to the enactment of the OMA. Among other things, PERAA repealed the District's local charter school law, dissolved the DC Board of Education, and transferred oversight authority over all charter schools authorized by the Board of Education to DC PCSB, making DC PCSB the District's sole charter authorizer. PERAA also established the current State Board of Education.

A review of PERAA's legislative history indicates the goal of the Act was to broadly reform the education system within DC and improve overall accountability and oversight.<sup>15</sup> The changes PERAA made to the SRA in particular brought DC PCSB in line with other educational agencies within the District government, and specifically with the previous Board of Education, from which DC PCSB was assuming substantial authority. The meetings of the previous Board of Education were open to the public. In contrast, at the time PERAA was passed, DC PCSB was not subject to any open meetings requirements, nor was it subject to the District's Freedom of Information Act ("FOIA"). PERAA amended the SRA to include the open meetings and public comment provision and to make DC PCSB subject to DC FOIA. Considered in context, these changes do not suggest that the legislative intent was to make DC PCSB subject to uniquely stringent requirements of openness and transparency. Rather, they indicate an intent to ensure that the public

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<sup>13</sup> See Advisory Opinion at 5 ("Normally, revising a public body's draft meeting agenda for adoption as the final meeting agenda under the protocol the OOG has provided to public bodies would present no affront to the OMA or SRA. However, the DCPCSB's enabling legislation is unique. The statute requires, without limiting language, for all DCPCSB's meetings to be open to the public with a reasonable period for public comment on the agenda items.")

<sup>14</sup> Among certain other powers, the OOG is statutorily authorized to issue advisory opinions to agencies on compliance *with the OMA*. § 2-593(a)(2).

<sup>15</sup> See *generally* B17-0001-Committee Report, *available at* <http://lims.dccouncil.us/Download/18426/B17-0001-CommitteeReport1.pdf>.

continued to have an avenue for discourse on the important issue of education.<sup>16</sup>

It should also be noted that the SRA contains numerous provisions mandating specific notice requirements and timelines for certain actions.<sup>17</sup> Congress would not have enumerated specific items if it intended for *all* actions of the Board to be subject to strict notice requirements. For these reasons, it is DC PCSB's interpretation that, for any item not subject to specific notice requirements under the SRA, the SRA's general mandate of open meetings subjects it to the OMA, and any reasonable interpretation thereof, and no more.<sup>18</sup>

The effect of the OOG's stated interpretations of the OMA and the SRA is to alter the plain meaning of the OMA. By opining that a unanimous vote is required to alter a planned agenda, and also opining that DC PCSB's enabling statute requires notice and allowance for public comment on all items on the agenda, the OOG is effectively changing the OMA's required "*planned* agenda" into a finalized agenda.<sup>19</sup> Essentially, the OOG's August 17 Advisory Opinion reads into the OMA and the SRA a requirement that is, in fact, directly contradictory to the plain text of the OMA. And this troubles DC PCSB. A public body should be able to rely on the plain text of the statute, particularly when the OOG has not disseminated clear guidance on an issue.

### Conclusion

DC PCSB recognizes the need for governmental transparency and values the input of the public it serves. We also greatly respect the role of the OOG in ensuring open government. For the reasons discussed above, however, DC PCSB respectfully disagrees with the OOG's Advisory Opinion on the actions DC PCSB took at its June 19 Board Meeting. As mentioned earlier, DC PCSB will nonetheless comply with the OOG's recommendations stated in the Advisory Opinion.

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<sup>16</sup> Notably, the establishing language for the new State Board of Education, also included in PERAA, contains a similar mandate that the Board conduct monthly meetings "to receive citizen input." § 38-2652(b). This provision was present when PERAA was initially enacted in 2007.

<sup>17</sup> See *supra* n. 11. Note that enrollment ceiling increases and program replications, the issues that were added to the agenda using "renew the motion" at the June 19 meeting, are not specified in the SRA as requiring notice.

<sup>18</sup> DC PCSB also acknowledges that it is subject to the notice requirements of the Advisory Neighborhood Commissions Act, but those notice requirements are distinct from the ones at issue in this discussion.

<sup>19</sup> § 2-576(5) (emphasis added).

If you have any questions or wish to discuss this matter in person, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Nicole L. Streeter". The signature is written in a cursive style with a large initial "N" and a long, sweeping underline.

Nicole L. Streeter  
General Counsel

A handwritten signature in black ink that reads "Darren Woodruff". The signature is written in a cursive style with a large initial "D" and a long, sweeping underline.

Darren Woodruff, PhD  
Board Chair

