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STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE
BOARD

18 Official Opinions of the Compliance Board 1 (2024)

January 10, 2024

Hagerstown City Council

Based on comments by the Hagerstown Mayor at a recent open meeting, the Complainant alleges that the Hagerstown City Council (the “City Council” or “Council”) violated the Open Meetings Act (the “Act”) by meeting earlier in closed session to discuss the process it would use for filling a vacancy on the Council. The Council responds that it did not discuss the process but, rather, “confidential considerations” about appointments that are allowed to take place in closed session. For the reasons below, we find no violation.

Background

On October 10, 2023, a Councilmember resigned, leaving a vacancy on the Council. The City Charter authorizes the Council to “select a qualified person to fill” vacancies, Hagerstown Charter § 506, but does not otherwise dictate a process.

On November 7, 2023, the Council met in closed session. The agenda indicated that the closed session was to discuss, among other things, the Council vacancy and, more specifically, “[t]o discuss the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation or performance evaluation of appointees, employees, or officials over whom it has jurisdiction.”¹

A week after the closed session, the Mayor made the following remarks:

[T]he Council last week decided in a closed session that they were going to— they decided a process and the process was that they were going to appoint, um—and it was a pretty quick discussion and unanimous—uh, to appoint

¹ This quoted language appears nearly verbatim in the Act (specifically, § 3-305(b) of the General Provisions Article of the Maryland Annotated Code), which permits a body to meet in closed session to discuss these matters.

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Peter Perini to the City Council and so on our regular session next Tuesday, Peter Perini will be sworn in and joined directly right after taking his seat.

Discussion

Based largely on the Mayor's remarks, the Complainant alleges that the Council violated the Act by "deliberating, developing, and determining the selection process in closed session."

We conclude that the closed-door discussion did not violate the Act. As we shall explain, a public body is generally entitled to meet in private to discuss making an appointment, for either of two reasons: first, making an appointment is administrative in nature and, thus, generally falls outside the scope of the Act, and second, discussing an appointment falls within one of fifteen specifically enumerated exceptions to the Act's openness requirements.

As to the first point, several of our prior opinions have recognized that making an appointment is an administrative function that is generally not subject to the Act's openness requirements. 7 *OMCB Opinions* 101, 103 (2011) (quoting 3 *OMCB Opinions* 39, 43 (2000)); see also § 3-103(a)(1)(i)² (providing that the Act does not apply to a public body when it is carrying out an administrative function). This is because "a public entity's fulfillment of a statutory duty to appoint a person to a certain position constitutes the administration of an existing law." 7 *OMCB Opinions* at 103 (internal quotation marks omitted; see also § 3-101(b)(1) (defining "administrative function" to mean "the administration of . . . a law").

To be sure, "approving or disapproving an appointment *made by another official*" is a legislative function, 3 *Opinions* 328, 332 (2003) (emphasis added), which generally must take place in an open meeting, see 12 *OMCB Opinions* 69, 72 (2018); see also § 3-101(f) (defining "legislative function" to mean, among other things, "approving or disapproving an appointment"); § 3-103(a)(1) (providing that administrative, judicial, and quasi-judicial functions are not subject to the Act and, thus, implicitly recognizing that other functions, including legislative functions, are). As we explained long ago,

[t]he terms "approving or disapproving" denote a response to someone else's proposal of an appointment. For example, the standard legal dictionary defines "approve" to mean "to confirm, notify, sanction, or consent to some act or thing done by another." Black's Law Dictionary 102 (6th ed. 1990). One of the traditional functions of a legislative body is to confirm or reject

² Statutory references are to the General Provisions Article of the Maryland Annotated Code.

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an appointment made by an executive authority. Presumably, the General Assembly had this function in mind when it included “approving or disapproving an appointment” within the “legislative function.” The phrase “approving or disapproving” can also comfortably encompass a supervisory board’s decision whether to concur with a proposed appointment to be made by a subordinate.

1 *OMCB Opinions* 123, 125 (1995).

When a public body itself makes an appointment, however, it is “not ‘approving’ one.” 1 *OMCB Opinions* at 125. Moreover, if the body is making the appointment pursuant to a legal obligation, the body is “administering a law and so engaged in an “[administrative] function.”³ *Id.*; see also 1 *OMCB Opinions* 252, 253-54 (1997) (concluding that a town council’s discussion of whom to appoint to a Council vacancy was an administrative, not legislative, function); 2 *OMCB Opinions* 45, 47 (1999) (recognizing that “the process by which a public body itself makes an appointment (as distinct from the process of considering the confirmation of an appointment made by someone else) is an [administrative] function not covered by the Act”). Thus, the Act generally does not apply to meetings at which a public body discusses its appointment of a new member to that body. 8 *OMCB Opinions* 84, 84 (2012).

Meeting behind closed doors to discuss an appointment is also generally permissible for another reason: It falls within the personnel matters exception of § 3-305(b)(1), which allows a public body to meet in closed session to discuss, among other things, “the appointment . . . of an . . . official over whom it has jurisdiction.” We have previously recognized that this exception encompasses a town council’s discussion about appointments to fill vacancies on the council. 15 *OMCB Opinions* 46, 50 (2021).

Neither the administrative function nor the personnel matters exception applies, however, if the discussion at issue pertains to the *process* for making an appointment rather than, say, an individual’s suitability for appointment or which of several candidates should be appointed. Thus, while making the actual appointment is administrative, “a public body’s discussion of whether to form outside committees to broaden participation in the appointment process falls more into the realm of forming policy, a quasi-legislative function.” 8 *OMCB Opinions* at 85 n.1. Quasi-legislative functions must be performed in a meeting open to the public, unless an exception applies. See § 3-301 (providing generally that “a public body shall meet in open session” except as otherwise provided in the Act); § 3-305(b) (enumerating fifteen exceptions under which a public body may convene in a closed session). And the personnel matters exception does not apply to a discussion about

³ This quotation used the term “executive function,” but that term has since been replaced, without substantive change, by “administrative function.” See 2006 Md. Laws, ch. 584.

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a “policy concerning the manner in which” appointees are selected. 3 *OMCB Opinions* 67, 69 (2000).

Here, the Council did not expressly cite § 3-305(b)(1) on the public agenda for the closed session but now asserts that this statutory provision authorized the closed-door discussion. Nonetheless, the Complainant asserts that the closed session was improper because, based on the Mayor’s remarks, the Complainant believes that the discussion was about the process for making an appointment to fill the Council vacancy. The Council responds that, notwithstanding the Mayor’s remarks, the Council did not discuss the process for making an appointment but, rather, talked about individual candidates for the vacancy.

Having reviewed the sealed closed-session minutes,⁴ we agree with the Council’s representation of what transpired and find no violation of the Act. We do not see in the minutes evidence of a discussion about the process of making the appointment. Instead, the conversation focused on specific candidates and their strengths and weaknesses. We think such a discussion may be fairly characterized as administrative in nature or, alternatively, within the scope of the personnel matters exception. Either way, the Council was entitled to conduct the conversation in a closed session.⁵

Conclusion

We find no violation of the Act.

Open Meetings Compliance Board
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⁴ Because we are required to maintain the confidentiality of the closed-session minutes, *see* § 3-206(b)(3), we refer to them only in general terms.

⁵ Of course, to lawfully close a meeting under the personnel exception (or any other exception under § 3-305(b)), a public body must, before entering closed session, follow the procedure set forth in § 3-305(d), which requires, among other things, that the presiding officer make a written statement including a citation of the authority for closing the meeting. *See* 3 *OMCB Opinions* 307, 308 (2003) (recognizing that a meeting can “lawfully be closed only if the [public body] [holds] a public vote to do so and if the presiding officer prepare[s] an appropriate written statement of the reason for closing the meeting, the legal authority to do so, and a listing of the topics to be discussed”). The submissions here do not include the written closing statement (if one exists) and, thus, we do not know whether the Council followed the requisite process for closing a meeting under § 3-305(b)(1). However, because we conclude also that the closed session discussion fell within the administrative function exclusion, we need not decide whether the Council failed to follow the proper procedure for closing a meeting under § 3-305(d).