

November 22, 2023

Open Meetings Compliance Board
c/o Attorney General's Office
200 St. Paul Place
Baltimore, MD 21202

Dear Open Meetings Compliance Board,

I am writing to you today regarding the City of Hagerstown's City Council (hereafter referred to as the Council) and their potential violation of the Open Meetings Act during the selection of an appointee for a vacant Council seat. Specifically, the Council violated the Open Meetings Act on November 7, 2023 by deliberating, developing, and determining the selection process in closed session. While executing the selection process is excluded from the Open Meetings Act, the deliberating and determining of how that selection process will be carried out is not excluded, and has previously been conducted in open session of the Council.

This complaint is not a dispute of the Council's authority to conduct the selection process in a manner they see fit, and is not a challenge of the process which was used, or the execution thereof. The complaint focuses on the Council's deliberation, development, and determination of the process for the selection which occurred during a closed session, and the lack of public visibility into this deliberation, development, and determination of the process.

Per the Maryland Open Meetings Act:

The "personnel matters" exception: § 3-305(b)(1) has two possible criteria which can be met to exclude a meeting from the Open Meetings Act:

(i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom it has jurisdiction; or

(ii) any other personnel matter that affects one or more specific individuals;

The intention of this criteria is to allow a closed meeting to take place when discussing "individual employees" (per the open meetings act manual). By extension, this same measure would apply to "individual appointees" for a vacant council position. While the subsequent execution of the selection process, as well as discussions of specific candidates for appointment are excluded from the Open Meetings Act, the initial deliberation and determination of the process being used for that selection are not excluded under this provision.

Matters of fact

- On October 10, 2023, Councilmember Bob Bruchey resigned from the Hagerstown City Council, resulting in a vacant council member seat.
- The City of Hagerstown charter does not define a process for replacement of a vacant council member seat. It is left to the discretion of the sitting council to determine the replacement process. Per the charter: "Section 506. Vacancies. In case of a vacancy on the Council or in the office of Mayor for any reason, the Council shall select a qualified person to fill the vacancy for the unexpired term, without regard to political party. The person selected shall meet the qualifications of § 202 for Councilmember or § 302 for Mayor."
 - *This means for each vacancy, the Council must determine the selection process.*
- The Council met in closed session on November 7, 2023. The stated agenda included "To 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), * Board Membership – Code Appeals, Historic District Commission, Board of Zoning Appeals & Ethics Commission, * Council Vacancy"
 - *This is the personnel matters exception, § 3-305(b)(1)*
- The Council met in open work session on November 14, 2023. At the beginning of this meeting, Mayor Martinez announces "the 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 and it was a pretty quick discussion and unanimous to appoint 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 take his seat"
 - *Highlighted text illustrates the Council's confirmation that a process was developed and decided during a closed session, in violation of the Open Meetings Act, when the agenda stated it would be discussion of a matter under the personnel matters exception*
- The Council met in open regular session November 21, 2023. At this meeting, a vote was held and Perini was sworn in. During the public comment section of the meeting, a member of the public expressed their concern regarding the selection process, but these concerns were not able to be expressed in a public meeting until after Mr. Perini had already been appointed, voted on, and sworn in. At the end of the meeting, Councilmember Aleshire explained the Council's reasoning for the process used in appointing Perini, instead of following the traditionally followed appointment process, involving applications and interviews.
 - *The member of the public expressing his concern regarding the selection process further highlights how the lack of transparency surrounding the development of the process prevented the public from understanding how their government was functioning.*
 - *While Councilmember Aleshire's disclosure of the process after-the-fact does provide the public with much needed transparency, it does not resolve the failure to allow public observation of the deliberation and development of the process.*

Historical Context

- Two council vacancies occurred in 2023.
- For the first vacancy of 2023, the deliberation and determination of the selection process was discussed in public work session on February 14, 2023
- Interviews were then held in closed session, and the deliberation process was held in closed session
- Approval vote of the appointee was then held in regular council session
- While the second vacancy in 2023 did not follow the same selection process, the deliberation and determination of the selection process should have been held in open session, while the execution of the process was still acceptable to hold in closed session

Relevant Meeting Recordings

The following YouTube videos contain the start time of relevant public meeting recordings concerning this complaint.

- February 14, 2023 determination of the process for filling the first council vacancy of 2023: <https://www.youtube.com/live/3OKC8KcAE7Y?si=xUJf2xGmUe6l2EJm&t=4016>
- November 14, 2023 work session, announcing that the council decided the process in closed session on November 7, 2023: <https://www.youtube.com/live/1zpooQAbnFA?si=zXfp-o2bX85L4q6k&t=148>
- November 21, 2023 regular session, voting for Perini: https://www.youtube.com/live/nuHhYa_oEZA?si=OrKSbWairwVOgdvP&t=1101
- November 21, 2023 regular session, public comment regarding the selection and appointment process: https://www.youtube.com/live/nuHhYa_oEZA?si=qVs9cLfuAF0iyRJJu&t=1788
- November 21, 2023 regular session, explaining the process used to nominate Perini: https://www.youtube.com/live/nuHhYa_oEZA?si=9FcFrnj0ntwBUREn&t=3295

Relevant OMCB Decisions

- OMCB Volume 4, Decision 163 most directly applies to this incident and highlights the incident as a violation of the Open Meetings Act. In the decision, it is highlighted how the Board of Education of Carroll County violated the Open Meetings Act by developing the procedures for the school board's recommendation to the Governor for an appointee for a board vacancy in a closed meeting. "This was the creation of policy to deal with a new situation." Note that the school board was not discussing candidates during the closed meeting, but merely developing the procedures for selecting a candidate.
 - Much like the Board of Education of Carroll County developed appointment procedures in closed session to appoint an individual to their vacant board seat in violation of the Open Meetings Act, the Hagerstown Council developed procedures in closed session to appoint an individual to their vacant council seat, also in violation of the Open Meetings Act.
- OMCB Volume 4, Decision 182 highlights that the part of the closed meeting in which the council was executing the determined process for filling a board vacancy does not violate the Open Meetings Act. This is further reinforced by OMCB Volume 8, Decision 120, in which it is validated that the interview and discussion of individual candidates does not need to be held in an open meeting.
 - These decisions are being included for context and to clarify that the execution of the procedures to fill the vacant council seat are not subject to the Open Meetings Act. The Hagerstown Council's execution of the procedures in closed session after they were developed is not in question, and a valid exclusion.
- OMCB Volume 15, Decision 85 highlights that when the public was denied access to observe a Board of Education hearing that disclosure after the fact the contents of the meeting "did not absolve the Board of its obligation to allow the public to observe" a public meeting.
 - While Councilmember Aleshire's disclosure of the process after the fact is commendable, it does not absolve the Council of its obligation to observe the deliberation and development of a process used to fill a vacant council seat. Ironically, I was also the submitter of the complaint related to this decision.

To be clear, this complaint is not focused on the execution of the selection process, which has traditionally and should in the future occur in closed session. The focus of this complaint is that the deliberation, development, and determination of the selection process itself was not held in open session, and the public had no knowledge of the selection process even existing until after the Council had selected their appointee for a vote.

Transparency in the processes used by our elected officials is critical to a functioning democracy. I commend the council for their attempts at transparency in the process after-the-fact, especially Councilmember Aleshire's discussion at the November 21, 2023 meeting of why they used this selection process. However, by not allowing the public to observe the deliberation of the development of this process, the Council has denied the public this critical transparency. Additionally, while not specifically required by the open meetings act, the failure of the Council to even inform the public of the process prior to its execution denied the public the ability to provide public comment on this process before its completion, which may have influenced the Council's final determination and votes.

Therefore, I request that the OMCB validate that the Council did indeed violate the Open Meetings Act by not conducting the initial deliberation, development, and determination of the selection process which was to be used to fill the vacant council seat. I am not asking for invalidation of their selection process, the execution of this process, or their appointment of Mr. Perini. I only ask that the OMCB validate this complaint, so that the Council will not conduct similar policy and procedure deliberations behind closed doors in the future.

Thank You,

Kenneth L Buckler
President and Managing Editor
Radio Free Hub City