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STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

11 Official Opinions of the Compliance Board 90 (2017)

Downtown Frederick Hotel Advisory Committee

December 15, 2017

The complaint alleges that the Downtown Frederick Hotel Advisory Committee (“HAC”) has violated the Open Meetings Act by holding meetings without inviting the public to attend, preparing agendas, or adopting minutes. The complainant asserts that HAC performs public functions, acts as a “public body” of the City of Frederick, and is subject to the Act’s requirements for the meetings of “public bodies.” The complaint points to HAC’s role in the City’s procurement of a developer for a hotel to be built with financial assistance from the City, to the mayor’s statements about his appointment of HAC’s chair, and to the fact that HAC’s membership includes some City employees. The complaint directs us to the Request for Proposals (“RFP”) and a memorandum of understanding (“MOU”), between the City and the developer of the hotel project. The City’s governing body adopted the MOU by resolution. Both the RFP and the MOU assign substantive functions to HAC.

The City of Frederick, by its attorney, states that HAC was created by the Frederick County Chamber of Commerce and is a private entity that does not fall within any of the Act’s definitions of a “public body.” In support of that assertion, the City states that the City did not create the group, did not appoint a majority of its members, and lacks the power to dissolve the group or remove members. The City states that, as far as it knows, HAC does not have bylaws. The response does not address the role that the City and developer assigned to HAC in the MOU.

HAC itself did not submit a response, but the City’s response includes a letter in which the Chamber of Commerce president provides her predecessor’s recollections about HAC’s formation and membership. She states that a committee of the Chamber initially formed HAC as an “ad hoc” group and “put together a team that spanned the private and public sectors.” She further states that the members “participate at the invitation” of the group, which also chose the chair.

The Act’s various definitions of a “public body” focus on the method of creation of a multimember group, the status of the person or entity that appoints the members, and, as developed by the courts, the degree to which the group is controlled by, and functions as an arm of, the government. See § 3-101(h)¹ (Act’s definition); *see also* Chapter 1 of the Open Meetings Act

¹ References are to the General Provisions Article of the Maryland Annotated Code (2014, with 2017 supp.).

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Manual (2016, rev. 2017) (explaining the term “public body” for purposes of the scope of the Act). Here, we agree with the City that HAC was not a “public body,” as defined by the Act, when it was initially formed. However, the facts that we have do not yield a clear answer to whether HAC has now become a public body by virtue of the functions that the City assigned to it in the MOU, a document that the Mayor and Board of Aldermen (City Board) adopted by resolution.² Specifically, we are unable to resolve the apparent factual disconnect between the “ad hoc advisory group” described in the City’s submissions—a private, informal and amorphous group changeable and dissolvable by the Chamber at any time, led by a chairman of its own choosing—and the entity, by the same name, that the City itself designated, in a formally-adopted MOU, to perform substantive functions regarding the developer’s performance of the contract, under the leadership of a chair whom the mayor said he had appointed.

Our inability to resolve this matter, however, does not mean that a court could not; as we have pointed out in other matters involving nominally-private groups that seemingly perform governmental functions, factual questions of control and actual functioning can be explored and resolved in court in ways not available through our streamlined complaint procedure. *See, e.g., 7 OMCB Opinions* 195, 202 (2011) (stating the Compliance Board’s inability to resolve the “public body” status of several privately-incorporated entities); *9 OMCB Opinions* 246, 254 (2015) (stating the Compliance Board’s inability to assess the past status of a development corporation).³

When a governmental body decides to delegate functions to a privately-created group, the government should consider whether to require the group to act as a public body, in the sunlight. The government should also make the group’s status clear to the public at the outset. Thus, once again, “[w]e encourage governing bodies, when outsourcing governmental functions to private

² The MOU contains this provision concerning HAC, referred to as the “Committee”:

Committee Review and Recommendation – The Developer shall seek and consider all input from the Committee in the design of the Project to ensure that it is in general accordance with the RFP Response. Developer will hold at least two (2) meetings with the Committee at critical phases of the design of the Project. These meetings are to occur at the schematic design phase and 50% design development. In addition, the Committee shall review the proposed final design and inform the Mayor and Board of Aldermen as to the Project’s general compliance with the RFP Response prior to approval of the Master Joint Development and Funding Agreement.

The MOU does not describe either the membership or the governance of the “Committee.”

The RFP sends mixed messages about whether the City was acting for HAC in issuing the request, or vice versa. The RFP included a cover letter, signed by the mayor and HAC’s chairman, that stated: “The City of Frederick on behalf of the Downtown Frederick Hotel Advisory Committee is pleased to accept proposals for the development of a privately owned and operated full-service hotel” The RFP further stated that “[t]he Downtown Frederick Hotel Advisory Committee is seeking proposals for a full-service hotel.” However, the RFP also provided that “[p]roposals shall be evaluated by the Downtown Frederick Hotel Advisory Committee composed of representatives of the City of Frederick and its partners,” and that HAC would “serve solely as the recommending body to the City.”

³ <http://www.marylandattorneygeneral.gov/Opinions%20OMCB%20Documents/Vol09/9omcb246.pdf>

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entities, to consider whether the delegation of the particular function should include a duty of transparency.” 9 *OMCB Opinions* at 247.

Open Meetings Compliance Board

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