

11 *Official Opinions of the Compliance Board 3 (2017)*

- ◆ 1(A)(2) “PUBLIC BODY”: WITHIN THE DEFINITION, ARTS COUNCIL
CREATED BY CITY, STRUCTURED AS NON-PROFIT
CORPORATION

*Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at http://www.marylandattorneygeneral.gov/OpenGov%20Documents/Openmeetings/OMCB_Topical_Index.pdf

February 1, 2017

Re: Baltimore Office of Promotions and the Arts, Inc.
Jeremy Rountree, *Complainant*

Complainant Jeremy Rountree asserts that Baltimore Office of Promotions and the Arts, Inc., (“BOPA”), a Maryland non-profit corporation that conducts various cultural activities for the City of Baltimore, is a “public body” under the Open Meetings Act and therefore subject to the Act. He alleges that BOPA has violated the Act by “never holding public meetings,” “never providing advance notice of meetings,” “never providing advance notice of the agenda,” “never providing past minutes online,” and “refusing, as custodian of PAC [the Baltimore City Public Art Commission] documents, to post the PAC’s minute meetings [sic] online despite doing so until sometime in 2014.”

BOPA, by its attorney, responds that it is not a “public body” subject to the Act and therefore did not violate the Act. BOPA does not contest the allegation that its board of directors meets without complying with the Act.

The submissions show that the city initially formed BOPA in 2002 as the successor to a mayoral committee and a city office and made it a division of the Baltimore Development Corporation (“BDC”), a city instrumentality. In 2004, the city restructured BOPA as a nonprofit corporation but kept it under BDC’s control, where BOPA remains. There are twists and turns in this story—for example, BDC did not view itself as a city instrumentality in 2004, but the Court of Appeals later held that it was—and we do not have records of the actions that BDC’s board likely took to retain control over BOPA. Even so, the information that we have establishes that BOPA meets the definition of a “public body,” that it is subject to the Act, and that it has violated the Act in most of the ways alleged by Complainant.

Background

The Act’s definition of “public body” focuses on how, and by what officer or entity, the entity in question was created. *See* § 3-101(h) (defining “public body”).¹ The courts have also considered whether, as a practical matter, the entity is governmentally controlled and functions as a government instrumentality. *See* Open Meetings Act Manual (2016), Ch. 1, Part A (explaining the scope of the term.) We have derived relevant facts on these issues from the parties’ submissions and the websites of BOPA and the City of Baltimore (“City”). For purposes of our inquiry, the history begins in 2002.

On June 17, 2002, the Baltimore City Council adopted a resolution for purposes that included “designating the Baltimore Office of Promotion & The Arts as the Arts Council for Baltimore City” and “authorizing that Office to be the official recipient of grants from the Maryland State Arts Council and of other arts-related funding.” Resolution 02-30. The recitals in the resolution yield the following information:

The Mayor’s Advisory Committee on Art and Culture (“MACAC”) has recently been merged with the Baltimore Office of Promotion to create a new entity known as the Baltimore Office of Promotion & The Arts.

MACAC was previously the designated Arts Council for Baltimore City and official recipient of funds from the Maryland State Arts Council and other arts-related funding sources.

The Baltimore Office of Promotion & The Arts is now performing the arts-related operations, management, and oversight functions previously performed by MACAC.

The Mayor and City Council of Baltimore recognizes and supports the importance of the arts for the creative life of the City and for its economic and social development, and supports the continuation of this important work.

Id.

The resolution then provides that “the Baltimore Office of Promotion & The Arts is designated the official Arts Council for Baltimore City” and “is authorized to receive (i) all grants and other funds from the Maryland State

¹ Statutory references are to the General Provisions Article of the Maryland Annotated Code (2014, with 2016 supp.).

Arts Council,” and (ii) any grants . . . and other funds from any other source for arts-related purposes.” *Id.*

Consequently, as described in a later agreement between the City and BOPA, MACAC was “dissolved as an office of City government” on July 1, 2002 and its “responsibilities and program budget [were] officially transferred to BOPA.” The same agreement describes BOPA at that point as “a constituent, but separately managed division of the City of Baltimore Development Corporation.” At the time, BDC was (and it still is) structured as a nonprofit corporation governed by a board of directors. We do not know whether BOPA had its own board in 2002.

In May 2004, a chief solicitor in the city’s Law Department filed articles of incorporation for a nonstock corporation named “Baltimore Office of Promotion & The Arts, Inc.” We have no information on who authorized the chief city solicitor to incorporate BOPA or why the city chose to restructure BOPA as a corporation.

BOPA’s articles of incorporation require it to be “operated exclusively as a nonstock charitable organization.” Its corporate purposes include providing services “[t]o the extent contracted with by the Mayor and City Council of Baltimore (the “City”) or City of Baltimore Development Corporation (“BDC”).” Those services, listed in fourteen categories, include “carry[ing] on the functions previously conducted by the Baltimore Office of Promotion & the Arts, heretofore a constituent office of division [sic] of BDC” and “provid[ing] assistance to BDC and the City as requested in furtherance of their respective purposes and endeavors.” Other corporate purposes include “improv[ing] the human capital development of City residents,” soliciting funds for the corporation’s own endeavors, assisting other charitable organizations in promoting the listed objectives “as may be helpful to the purposes and aims of the City, BDC, and the Corporation,” and “exercis[ing] [powers] necessary or desirable for the accomplishment of any of the said purposes.”

The articles of incorporation further identify BDC as the sole member of the corporation, provide that BDC would elect the directors, require that a majority of the directors be BDC directors or employees, provide that only BDC could amend the articles, adopt and amend bylaws, or approve BOPA’s dissolution, and list a BDC employee as its resident agent. The articles of incorporation name five initial directors. We do not know who appointed the initial directors, and we do not have minutes or other documents that would reflect BDC’s election of subsequent directors.

BOPA adopted bylaws in June 2004. They provided that BDC had the power to appoint directors and could remove a director, with or without

cause. We assume that the BDC board approved the bylaws; again, we do not have BDC's minutes.

Meanwhile, BDC, whose board was appointed by the mayor, had apparently been operating on the assumption that its own status as a nonprofit corporation meant that it was not subject to the Act. That assumption was challenged in November 2004, when BDC denied a developer's request to attend one of its meetings, and the developer sued it. *See City of Baltimore Development Corporation v. Carmel Realty, Inc.*, 395 Md. 299, 313-14 (2006). The Court of Appeals issued its opinion in 2006. Rejecting BDC's argument that it was not a "public body" under the Act, the Court held that BDC "is, in essence, a public body for purposes of the Open Meetings Act." *Id.* at 307. More specifically, the Court found that BDC was a "public body" under what is now § 3-101(h)(2)(i), which includes in the definition of the term an entity whose members were appointed by the chief executive authority of a local subdivision. *Id.* at 326. Further, however, the Court extensively reviewed BDC's functions, found that none were solely private, and stated: "An entity that possesses as many public traits as does the BDC is a public body for purposes of the Open Meetings Act." *Id.* at 329-31. Thus, whether as a division of BDC or as a corporation whose sole member is BDC, BOPA has always been controlled by a city instrumentality.

As noted, there are gaps in the history we have. However, we do have some indicia of how BOPA functions now. BOPA's website states: "The Baltimore Office of Promotion & The Arts (BOPA) is a 501 (c) 3 non-profit organization which serves as Baltimore City's official arts council, events agency and film office." Indeed, the "government" tab on the city's website leads to a list that includes BOPA, and the "mayor" tab has a "Cabinet" subheading ("View the leadership of the City of Baltimore") for a list of "Agency Leaders" that includes BOPA's executive director among city officials such as the directors of the departments of Public Works and Recreation and Parks.

Also informative is a report that the city's inspector general issued in 2016 on the maintenance of art placed in the public schools. The report described BOPA this way:

The Baltimore Office of Promotion and the Arts (BOPA), a non-profit and cabinet level organization, is the official Baltimore City Arts Council. The organization administers grants available to artists and art organizations in Baltimore, administers the City's Public Art Program, including staffing and managing the Public Art Commission, and operates two individual artist studio/exhibition spaces. BOPA also produces events and arts programs on behalf of the city, including

major events such as the New Year's Eve and July 4th celebrations at the Inner Harbor, Artscape which is America's largest free arts festival, the Baltimore Book Festival, Baltimore Farmers' Market and Bazaar, School 33 Art Center's Open Studio Tour and the Dr. Martin Luther King Jr. Parade.

Review of the Preservation, Protection, and Maintenance of Public Art at the Baltimore City Public Schools (March 4, 2016).

The report further explains BOPA's role in the work of the Public Art Commission ("PAC"). PAC, a city commission created by ordinance, administers the city's "1-Percent-for-Public-Art Program," which provides for the city's purchase of public art. According to the report, "[t]he 2012 City of Baltimore Public Art Guidelines state that BOPA enforces the 1-Percent-for-Public-Art Ordinance." *Id.* As described by the inspector general, the guidelines state that "the City, PAC, BOPA, and [another agency] shall reasonably assure that the artwork is properly maintained and protected" and that "periodic required maintenance" will be performed "by the City and/or BOPA." *Id.*

Discussion

A. Whether BOPA is a "public body" under the Act

The only question before us is whether BOPA is subject to the Act. To answer that question, we look to two sources of law. *See* 10 *OMCB Opinions* 117 (2016) (explaining the approach to determining whether the Act applies to a particular entity). First, we look to the Act's definition of the term "public body," because the Act expressly applies to an entity that is a "public body." §§ 3-301 (requiring public bodies to "meet in open session"); 3-101(h) (defining "public body"). Second, we look to the reported opinions of Maryland's appellate courts, because the courts have deemed a nominally-private entity to be a "public body" when the governance and functions of the entity, viewed as a whole, are such that the entity is truly governmental in nature. *See* 7 *OMCB Opinions* 195, 199-201 (2011) (applying the principles set forth in *Carmel Realty*, 395 Md. 299, 326 (2006)), *Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125 (1999), and 9 *OMCB Opinions* 246, 253 (2015) (same).

1. The Act's express definition of "public body"

The Act defines "public body" in several ways. All require that the entity have multiple members; all focus on the method by which the entity was created. *See* § 3-101(h) (referring generally to "members," excluding "any

single member entity,” and specifying the methods by which a public body is created); *see also* Open Meetings Act Manual (2016), Ch. 1, § A (explaining the definition). BOPA is a multimember body; its articles of incorporation show that it is governed by a board of directors. *See, e.g., Carmel Realty*, 395 Md. 324 (finding that BDC was a multimember entity because it was run by a board). The question becomes whether BOPA was created by any of the methods specified in § 3-101(h). Only the first two methods, the “created by law” and “executive appointment” methods, are potentially relevant to the facts available to us.

Under the first method, an entity meets the statutory definition of “public body” if it was created by a State or local law, an executive order, or a rule, resolution, or bylaw. § 3-101(h)(1)(ii). Some public bodies are directly established by a provision of law; the Board of Public Works, for example, is directly created by the Maryland Constitution. *See 6 OMCB Opinions* 69, 72 (2009); *see also* Open Meetings Act Manual, Ch. 1, Part A (explaining § 3-101(h)(1)(ii)); *10 OMCB Opinions* 117 (same). Others are established by a law that does not itself create the entity but instead authorizes the creation of an entity for a particular public purpose. In *Avara v. The Baltimore News American*, 292 Md. 543 (1982), for example, the Court of Appeals addressed the status of a joint conference committee that came into being under the rules of each house of the General Assembly. *Id.* at 546. The rules, as described by the Court, “authorize[d] the appointment of conference committees where the two Houses ‘are unable to concur on the final form of a Bill.’” *Id.* The State argued that the particular committee was not a “public body” because it was not directly created by the rules. Rejecting that argument, the Court stated that “Conference Committees are established and exist only in pursuance of House and Senate Rules and in the sense contemplated by [the definition] are plainly the creation of a rule.” *Id.* at 550. To conclude otherwise, the Court stated, “would be to ascribe an intention to the legislature to exclude from the Act’s coverage all those entities which, though lawfully transacting public business and exercising legislative or advisory functions, were nevertheless merely authorized but not required to exist.” *Id.* at 550-51. The Court further stated that such a result “would seriously undercut the Act’s effectiveness and would be wholly at odds with the broad public policy underlying its passage.” *Id.* at 551.

Accordingly, we have found a committee to be a “public body” when a law, regulation, or bylaw has required the creation of such a committee to perform certain tasks. *See 5 OMCB Opinions* 189 (2007) (panel “established in accordance with a statute that required the Critical Area Commission to appoint a panel of 5 of its members to conduct a public hearing on a proposal to amend a local critical area program”); *7 OMCB Opinions* 21, 27 (2010) (boundary study committee appointed by an assistant superintendent in accordance with Board of Education policy requiring the appointment of such committees to advise on school districting); *7 OMCB Opinions* 176, 184

(2011) (committee mandated by parent body’s resolution to perform certain functions).

More recently, we found that a city council created a “public body” when it adopted an economic development plan that called for the creation of a private non-profit entity to implement the City’s economic development strategy set forth there and to replace a city department. 10 *OMCB Opinions* 117 (2016). Applying *Avara*, 292 Md. at 550, we found that the entity “was created ‘in pursuance’ of the Council’s action and [was] ‘plainly the creation’ of that action.” *Id.* at 123. Further, we stated, “[t]he fact that the City structured [the entity] to be somewhat autonomous is not relevant to the application of § 3-101(h); otherwise, government entities could easily avoid the Act by restructuring their agencies as private corporations.” *Id.*

Finally, we have advised that a committee or group that did not start out as a public body will become one later if it is changed in such a way as to meet the definition. 10 *OMCB Opinions* 12 (2016). There, a committee of State employees, not originally a public body, became a public body when the parent agency’s governing board adopted a resolution that defined the committee’s membership and delegated certain functions to it. *Id.* at 15. In sum, the fact that a body was not originally constituted with all of the elements of a “public body” is not necessarily dispositive.

In this case, it is difficult to pinpoint the moment of BOPA’s creation as a board-run entity required by resolution to perform city functions. Certainly, the 2002 resolution ratified the creation of BOPA for a particular public purpose. If BOPA then had a multimember board—as might be inferred from the fact that the mayor’s advisory group, MACAC, “merged” with a city office—BOPA became a public body at that point. However, we do not know whether BOPA had a board in 2002. In any event, it appears that the 2004 incorporation of BOPA, with a board, but still under BDC’s control, did not alter the role that the city council had assigned to it by a resolution that is still in effect. We find that BOPA was a public body in 2004, if not before.

Moreover, BOPA’s articles of incorporation raise the distinct possibility that BDC’s board adopted resolutions both to change BOPA from a BDC division to a corporation of which BDC would be the sole member and to approve the articles of incorporation. We do not have any information on whether the chief city solicitor filed the articles of incorporation pursuant to a BDC resolution.

We also are not ruling out the possibility that BOPA additionally qualifies as a public body under the “executive appointment” part of the definition. Under that method, an entity is a “public body” when it has been appointed by a local government’s chief executive authority, or someone

subject to the policy direction of the chief executive authority, and includes at least two members who are not employed by the local government. See § 3-101(h)(i). While BDC's president appears on the city's website as a member of the mayor's cabinet, and thus would appear to be subject to the mayor's policy direction, the submissions do not provide us with information on the extent to which the BDC board itself is subject to the mayor's policy direction.

2. The courts' application of the Act to privately-incorporated entities

To provide guidance, we address BOPA's argument that it would not be deemed a public body under the courts' approach. The courts have deemed a nominally-private entity to be a "public body" when the governance and functions of the entity, viewed as a whole, are such that the entity is essentially governmental in nature. See 7 *OMCB Opinions* 195 (2011) (explaining the courts' approach); see also 9 *OMCB Opinions* 246, 253 (2015) (same). Thus, in *Andy's Ice Cream*, the Court of Special Appeals held that the Salisbury Zoo Commission, incorporated by the city attorney as a private non-profit entity, was a "public body" because "[i]ts very purpose and the degree of control that the Mayor and City Council have over [it] indicate that [it] was organized and has functioned as an extension and sub-agency of the City government." *Id.*, 125 Md. App. at 157. In *Carmel Realty Assocs*, for example, the Court of Appeals concluded that the mayor's appointment and removal powers over that nominally-private development corporation made it "in essence, a public body." 395 Md. at 326.

By contrast, we concluded that the Act did not apply to the Baltimore Area Convention and Visitors Association ("BACVA"), because it had been founded by private business interests and, "though . . . a close ally of the City and . . . strongly influenced by the City," was not a "City instrumentality." 3 *OMCB Opinions* 284, 292 (2003). And, in 9 *OMCB Opinions* 246, we concluded that the Garrett County Development Corporation, though once a "public body" under the Act, was no longer a public body under the courts' approach because the county had entirely relinquished control over its governance. Still, that case was close; we expressed our discomfort with the delegation of public functions to an entity not required to comply with the Act's open-meeting mandate, and we made clear that our conclusion was based only on the limited information available to us. *Id.* at 253.

Here, BOPA is "in essence, a public body." See *Carmel Realty*, 395 Md. at 326. Baltimore City has not relinquished ultimate control over the corporate entity, and so BOPA is not analogous to the Garrett County Development Corporation. We find BOPA to be analogous instead to the nominally-private entity at issue in *Andy's Ice Cream*. Both "function[] as an extension and sub-agency of the City government" and were created, by the respective city, for that purpose. *Id.*, 125 Md. App. at 157.

B. Whether BOPA violated the Act

BOPA has not disputed Complainant’s allegations that its meetings have not met the Act’s requirements. The allegation that BOPA does not give advance notice of its meetings states a violation of § 3-302, and the allegation that BOPA does not meet publicly states a violation of § 3-301. We find that BOPA has violated those sections with regard to every meeting at which it has performed a function subject to the Act. For example, a meeting at which BOPA discusses entering into a contract would be subject to the Act. *See* Open Meetings Act Manual, Chapter 1, Part C (discussing the quasi-legislative function).

The allegations that BOPA has “never provid[ed] advance notice of the agenda,” and has “never provid[ed] past meeting minutes online,” by themselves, do not state violations of the Act. Before October 1, 2016, the Act did not require public bodies either to provide agendas or to post minutes online. Even now, the Act merely requires public bodies to “make available” their agendas, § 3-302.1, and to post their minutes online “[t]o the extent practicable.” § 3-306(e)(2). We do not know whether, if asked, BOPA would have made its agendas available and whether BOPA has adopted minutes since October 1, 2016. We note that BOPA has its own website and that it is probably “practicable” for BOPA to post its minutes there. The allegation that BOPA refuses to post PAC’s minutes online also does not state a violation of the Act; the Act does not obligate a public body to post another public body’s minutes. In that regard, we note that PAC was not constituted as a BOPA committee.

Conclusion

We conclude that The Baltimore Office of Promotion and the Arts, Inc. falls within the statutory definition of a “public body” for purposes of the Open Meetings Act and has violated the Act by failing to comply with its provisions. We refer this entity to the Open Meetings Act Manual for information on the Act’s training provision and other requirements.

As required by § 3-211, BOPA must announce these findings at its next meeting and submit to us a signed copy of this opinion.

Open Meetings Compliance Board

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