

## 14 Official Opinions of the Compliance Board 98 (2020)

- ◆ 1(A)(2) Public Body – Determined to be a public body. Subcommittees created by resolution or formal action that assigned them functions 2(A) Notice-Generally. Failure to provide public notice of meeting. (Violation)
- ◆ 3(A) Access - Generally. Unless an exception applies, a public body shall meet in open session. (Violation)
- ◆ 5(A)(1) Closed Sessions, Generally. Requirement that public bodies that hold closed sessions must first designate a member to take training on the Act's requirements.
- ◆ 7(G)(1) Training Requirement, Generally. The public body must designate a member, as well as a staff member, to take training based on the Act's requirements.
- ◆ Violations: § 3-301

*\* Topic numbers and headings correspond to those in the Opinions Index posted on the Open Meetings webpage at [www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx](http://www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx).*

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**November 2, 2020**

### **Montgomery County Housing Opportunities Commission**

The Montgomery County Housing Opportunities Commission, a public body created by State law, performs numerous functions under the direction of a seven-member board of commissioners.<sup>1</sup> Often, issues that come before the full Commission have been addressed earlier by one of the Commission's committees. The various committees are comprised of three commissioners who, after meeting, convey their recommendations to the full Commission during the Commission's public meetings. The committees themselves do not meet in public. The complainant alleges that three particular committees are subject to the Open Meetings Act and are violating the Act by failing to invite the public to observe their meetings. The Commission, by its attorney, responds that the Act only applies to an entity that falls within the Act's definition of a "public body," that none of the three committees meets that definition, and, therefore, that the Act does not apply to them. The Commission further states that the committees were intended to be informal subcommittees and that it did not intend to "create an infrastructure of committees as public bodies that were required to operate pursuant to the [Act]." The committees have been in existence at least since 1981, and both parties have provided us with extensive documentation of the relevant facts.

The question before us is whether the committees are "public bodies" subject to the Act. If so, they have violated the Act by convening to consider public business without inviting the public to their meetings. If the committees are not subject to the Act, the complaint does not state a

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<sup>1</sup> As described on the Commission's website, those functions are to: "develop housing; provide mortgage financing to developers and first-time homebuyers; manage public housing and other rental units; administer rental subsidy programs, including the Housing Choice Voucher Program; and provide counseling and support services to lower income individuals and families in assisted housing."

violation of it. At issue is the status of the Budget, Finance, and Audit (“BF&A”) Committee, the Development and Finance (“D&F”) Committee, and the Legislative and Regulatory (“L&R”) Committee.

### Applicable law - The Act’s definition of a “public body”

An entity is subject to the Act only if the entity falls within the Act’s definition of a “public body.” See § 3-101(h)(2) (defining “public body”) and §§ 3-301 *et seq.* (detailing the Act’s requirements for “public bod[ies]”)<sup>2</sup> That definition defines a multimember entity as a “public body” if the entity meets any of several tests. Only the first test is relevant here. Under that test, an entity is a public body if it was “created by” certain types of laws and legal instruments, including “a rule, resolution, or bylaw.” See § 3-101(h)(1)(ii). As the Maryland Court of Appeals has construed this provision, an entity can be “created” as a public body either expressly, when a legal instrument expressly brings it into being, or impliedly, when a legal instrument is deemed to have created it by mandating the assignment of a task to it. See *Avara v. Baltimore News Am. Div.*, 292 Md. 543, 546 (1982) (holding that a conference committee of the General Assembly was a public body because the rules of both houses required that bills be referred to such a committee when the two houses’ versions differed); 13 *OMCB Opinions* 21 (2019) (explaining that the complained-of committee would be a “public body” if a resolution had “mandated [its] performance of certain functions”); see also *Open Meetings Act Manual* (“Manual”), Chapter 1, Part A (explaining the “created by law” test). Whether a legal instrument has impliedly constituted a committee as a “public body” is not always clear. However, as we have explained, “the more precisely the provision identifies the function of a committee, the more likely it is that the committee will be deemed a public body.” 13 *OMCB Opinions* 21 (quoting the Manual). Finally, the fact that a committee might have started off as an informally-created group is not dispositive; if it is “then constituted or mandated by one of the listed legal instruments, it becomes a public body,” 10 *OMCB Opinions* 12, 15 (2016), and becomes subject to the Act’s default requirement that public bodies meet in open session. See § 3-301 (requiring public bodies to meet in open session unless the Act expressly provides otherwise).

### Discussion

#### A. *Whether the Budget, Finance, and Audit (“BF&A”) Committee is a “public body”*

The submissions provide the following facts: In 1996, the Commission adopted a resolution that “RESOLVED that a Budget and Finance Committee is hereby created.” In 2002, the Commission adopted a resolution that gave that committee its current name – the Budget, Finance, and Audit Committee. The Commission also adopted various resolutions that spelled out the committee’s functions, most recently in 2019.

In 1998 and 2004, for example, the Commission resolved to adopt “Budget Policy #1,” “Budget Policy #2,” “Budget Policy #3,” and “Budget Policy #4.” Budget Policy #1 provides, in relevant part:

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<sup>2</sup> Statutory references are to the General Provisions Article of the Maryland Annotated Code.

The Budget & Finance Committee . . . will review the recommended budget and make a recommendation to the full Commission for adoption. The Budget & Finance Committee will also review the budgets of the properties including the various development corporations. . . .

The Executive Director will present budget comparison reports on a quarterly basis and for the year-end to the Budget & Finance Committee. . . . The Budget & Finance Committee will review any proposed budget amendments and make a recommendation to the full Commission.

Budget Policy #2 provides, in relevant part:

The Budget & Finance Committee will review the Executive Director's recommended tax credit partnership budgets and make a recommendation to the full Commission for their approval prior to submitting the budgets to the limited partners. . . .

The Budget & Finance Committee will review the audits of the partnerships. During the year, the Budget & Finance Committee will review summary budget comparison information on the partnerships in conjunction with its quarterly review of the HOC owned properties, programs and activities.

Budget Policy #3 provides, in relevant part:

The Budget & Finance Committee of the Housing Opportunities Commission will review the budgets and/or amendments of [certain properties and non-profit] organizations only to the extent that they may require a short or long-term use of agency funds.

Budget Policy # 4 provides, in relevant part:

“All activities in the Operating Reserve will be reported to the Commission quarterly at the Budget, Finance and Audit Committee Meetings.”

The resolutions establish that the Commission took formal actions that variously created the BF&A Committee expressly, acknowledged it as a committee of the Commission itself, detailed the precise advisory functions it is to perform, and delegated to it the receipt of reports on the Commission's behalf. We therefore find that the BF&A Committee was created as a “public body,” both expressly and impliedly. And, although some of the committee's functions may fall within the administrative exclusion and thus beyond the Act's scope, the process of approving a budget does not. *See* §§ 3-103 (generally providing that the Act does not apply to meetings held to perform an administrative function) and 3-101(j) (defining that function as quasi-legislative). Accordingly, we conclude that the BF&A Committee has violated the Act by meeting, apparently for years, without providing to the public the opportunity to observe its conduct of public business. The fact that the Commission may not have intended the committee to be subject to the Act does not change this result.

***B. Whether the Development and Finance (“D&F”) Committee is a “public body”***

The D&F Committee apparently was not expressly created by resolution. According to the response, the Commission referred to it in a resolution for the first time in 2002, when the Commission resolved to appoint certain commissioners to serve on it. Also by resolution, the Commission adopted Policy #5, titled “Budget Approval and Amendment.” As relevant here, the policy provides:

Staff shall produce a balanced development budget for all new construction or substantial renovation projects. . . . The Development & Finance Committee of the Housing Opportunities Commission will review the development budget and make a recommendation to the full Commission for approval. . . .

The Development & Finance Committee will review any proposed changes to the total amount of the development budget and make a recommendation to the full Commission.

These resolutions show that the Commission formally acknowledged the D&F Committee as a committee of the full Commission and then resolved to assign precise functions to it. We conclude that it meets the Act’s definition of a “public body” and that it, too, has been violating the Act.

***C. Whether the Legislative and Regulatory (“L&R”) Committee is a “public body”***

In 1985, the Commission adopted a resolution that a “Legislative” Committee “be and it is hereby established.” In 2002, the Commission adopted a resolution that changed the name of that committee to its current name – the “Legislative and Regulatory Committee.” We find that this committee was expressly created by resolution, is a public body subject to the Act, and, like the other two committees, has been violating § 3-301 by failing to meet in open session.

**Conclusion**

We conclude that the committees in question are subject to the Act and that they violated § 3-301 whenever they met in closed session to perform a function subject to the Act. We thank the complainant and the Commission for their careful research into the relevant history and for their thorough and detailed submissions. As public bodies, the committees must each designate a member for training if the committee wishes to close a meeting under the Act, *see* § 3-213, and they must acknowledge this opinion in accordance with § 3-211. We encourage the Commission to review the status of its other committees.

**Open Meetings Compliance Board**

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