



JOHN A. OLSZEWSKI, JR.
County Executive

JAMES R. BENJAMIN, JR., *County Attorney*
Office of Law

November 28, 2022

VIA E-MAIL (opengov@oag.state.md.us)

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

Re: Response to Complaint of David A. Plymyer against the Baltimore County Blue Ribbon Commission on Ethics and Accountability

Dear Members of the Open Meetings Compliance Board:

The Baltimore County Blue Ribbon Commission on Ethics and Accountability (“Commission”), by and through undersigned counsel, hereby respectfully submits the foregoing response to the Complaint filed against it by David A. Plymyer of Catonsville, Maryland on October 27, 2022.

Introduction and Pertinent Factual Background

The Commission was created by Baltimore County Executive Order No. 2021-025 signed by Baltimore County Executive John A. Olszewski, Jr. on October 26, 2021.¹ See Executive Order 2021-025, attached hereto as **Exhibit 1**. The Commission was not created via legislation. It is advisory in nature, as its purpose is to perform a review and evaluation of Article 3, Title 14 and Article 7 of the Baltimore County Code and develop recommendations to modernize the Public Ethics and Open Government laws and the Office of the Inspector General in accordance with best practices.

There are currently seven (7) members of the Commission appointed by the County Executive.² Those members are as follows: William E. Johnson, Jr., who serves as the Chair of the Commission; Joanne Antoine; Brigadier General Janeen L. Birkhead; the Honorable Kathleen Cox (Ret.); Thomas X. Glancy, Esquire, Jon Laria, Esquire and Cindy Leppert, Esquire.

Two subcommittees were created by the Commission at the prerogative of the Commission’s Chair to assist the Commission with its ongoing work: the Policy, Process and

¹ A second Executive Order, Baltimore County Executive Order 2022-004, was signed on June 30, 2022 that extended the period of time for the Commission to provide its interim and final reports to the County Executive and the County Council. See Executive Order 2022-004, attached hereto as **Exhibit 2**. Nothing else regarding Executive Order 2021-025 was changed. See *id.*

² Initially, there were initially eight (8) members that comprised the Commission. Unfortunately, one of the members, the Honorable Joseph F. Murphy, Jr., passed away last summer.

Procedure Subcommittee and the Organizational Structure and Accountability Subcommittee. There are three (3) Commission members on the Policy, Process and Procedure Subcommittee,³ and three (3) Commission members on the Organizational Structure and Accountability Subcommittee.⁴ The Commission's subcommittees were not created by Executive Order No. 2021-025. They are more informal in nature.

Part of the Commission's work was to consider the ethical climate in Baltimore County by assessing results of Baltimore County Ethical Climate Survey ("Survey") and providing insight or recommendations based on those results. As part of the Survey, 7,537 County employees were to be surveyed as well as 137 individuals who are members of County Boards and Commissions and who are responsible for filing financial disclosure forms. The Survey was to be conducted July 6-20, 2022 and was to be anonymous.

The Survey was issued to employees and to County board and commission members via e-mail. Respondents to the Survey had the option of providing contact information separately if they were willing to have an invitation extended by the Commission to speak with it about issues related to the ethical climate in the County. Those respondents that provided their contact information were advised that the Commission would be scheduling them to meet with one or both of the subcommittees during some of their meetings. This was done in anticipation of the sheer volume of information expected to be gathered and collected by the two (2) subcommittees for the Commission's review and consideration in formulating recommendations.

Each subcommittee met during the summer and fall collecting and gathering information to assist the Commission in its work. At some of the subcommittee meetings, respondents from the Survey who wished to share pertinent information for the Commission's consideration but remain anonymous as contemplated by the Survey were present and provided the applicable subcommittee with such information. There was no quorum of Commission members present at any of the subcommittee meetings.

Argument

Mr. Plymyer, in his Complaint, alleges that the meat of the Commission's work, *i.e.*, preparing the Commission's recommendations, is being done by the subcommittees. *See* Complaint, pg. 2. Mr. Plymyer asserts that the subcommittees should be deemed public bodies under the Open Meetings Act, and that the Commission is performing its assigned functions through the subcommittees. *See id.*, pg. 3. He is concerned the subcommittees have engaged in evasive tactics as a means to circumvent the requirements of the Open Meetings Act. *See id.* However, Mr. Plymyer is wrong.

³ The members of the Policy Process and Procedure Subcommittee are the Honorable Kathleen Cox, Cindy Leppert, Esquire and Joanne Antoine. Judge Cox chaired this subcommittee.

⁴ The members of the Organizational Structure and Accountability Subcommittee are Brigadier General Janeen L. Birkhead, Thomas X. Glancy, Esquire and Jon Laria, Esquire. Brigadier General Birkhead chaired this subcommittee.

There is no dispute that the Commission is a public body created by Executive Order, a legal instrument. Likewise, there is no dispute that the Commission meets the executive appointment test, as the members of the Commission are appointed by the County Executive and the Commission contains at least two individuals who are not employed by Baltimore County. Thus, the Commission is subject to Open Meetings Act.

As this Board knows, there is a subcommittee exclusion to the Open Meetings Act, § 3-101(h)(3)(ix), which applies only to subcommittees of public bodies that meet the executive appointment test. As such, the question here is whether the subcommittee exception applies, thereby making the subcommittees not subject to the Open Meetings Act.

The subcommittee exception does apply here. Neither the Policy, Process and Procedure Subcommittee nor the Organizational Structure and Accountability Subcommittee would be subject to the Open Meetings Act. This is because these subcommittees would not be considered “a public body.” Indeed, the *A.S. Abell Pub. Co. v. Brd of Regents of Univ. of Md.* case is instructive. In that case, the Court determined that the subcommittees of the task force on academics were created by the chancellor of the university and not by “rule, resolution or bylaw of the board of regents...they were not a ‘public body’ within the meaning of the [O]pen [M]eetings [act]...” *A.S. Abell Pub. Co. v. Brd of Regents of Univ. of Md.*, 68 Md. App. 500, 504-05 (1986).

A subcommittee meeting would be considered a meeting of the parent public body if a quorum of the members of the parent body attends. That has not happened at any of the subcommittees’ meetings, as noted above. Further, this Board has concluded that entities created informally, such as the Commission’s subcommittees, do not meet the test of a public body. *See, e.g., 4 OMCB Opinions* 132, 137 (2005) (“We have long distinguished between entities established by formal action of a public body versus entities established less formally, at the prerogative of a presiding officer or consensus of the body. While the former are subject to the Open Meetings Act, the latter are not.”); *see also 14 OMCB Opinions* 60 (2020).

Mr. Plymyer is correct that courts do construe the Open Meetings Act so as to prohibit evasive devices. Indeed, the Attorney General’s Office, in its Manual, has stated that subcommittees should not be used as a way to perform the parent body’s functions behind closed doors. However, that is *not* happening here. The subcommittees are not conducting the Commission’s own business. Rather, the Commission is utilizing the subcommittees as a means to efficiently collect and gather certain information to assist it – *the Commission* – with its own business (that is, the *Commission’s business*) consistent with its purpose: to perform a review and evaluation of Article 3, Title 14 and Article 7 of the BCC, and provide recommendations for improvement.

In his Complaint, Mr. Plymyer seems to focus heavily on certain statements made by the Chair at the October 20, 2022 meeting. In so doing, he has overlooked – or has chosen to ignore – other statements made by the Chair at the meeting along with statements from other Commission members which demonstrate that the subcommittees are not seeking to conduct functions of the Commission behind closed doors. Consider the following:

- While Chair Johnson did say at about the 1 hour 40 minute mark of the Commission's meeting on October 20, 2022 that the subcommittees' work "is the meat of what we are doing," he noted, importantly, that while the subcommittees would be able to see where there may be overlap as far as the information and data each had collected, the Commission *as a whole* will be able to consider potential recommendations before they are finalized. (emphasis added.)
- Judge Cox, Commission member and Chair of the Policy Process and Procedure Subcommittee, noted shortly after the 1 hour 33 minute mark of the Commission's October 20, 2022 meeting that her subcommittee was "close to the end of its *factfinding portion*" in order "to synthesize information and get to recommendations." (emphasis added.)
- Thomas Glancy, Commission member and member of the Organizational Structure and Accountability Subcommittee, noted shortly after the 1 hour 34 minute mark of the Commission's October 20, 2022 meeting that the Organizational Structure and Accountability Subcommittee was in its "*listening and information gathering phase*" and that the subcommittee "had *not* begun deliberations or formulating recommendations." (emphasis added.)
- Jon Laria, Commission member and member of the Organizational Structure and Accountability Subcommittee, noted shortly after the 1 hour 36 minute mark of the Commission's October 20, 2022 meeting his belief that *all of the Commission* would be reviewing and discussing the subcommittees' work. (emphasis added.)

These statements here demonstrate the work of the subcommittees was an information gathering exercise intended for Commission discussion *as a whole* to facilitate its deliberations as a body to come up with recommendations. Importantly, the Commission is meeting on November 29, 2022 – which is tomorrow – to engage in discussions concerning the fact-finding done by the subcommittees,⁵ and in so doing, will engage as a full body to discuss and develop potential recommendations. See Commission Meeting Agenda, attached hereto as **Exhibit 3**. At the November 29th meeting, the Commission will discuss and begin development of potential recommendations for the following topics for which the subcommittees collected and gathered information:

- Responsibility for investigations and/or audits
- Staffing the OIG
- Independent legal counsel
- Financial independence
- Unrestricted access to materials
- Subpoena waiting period

⁵ Ostensibly, the fact-finding discussion will include discussion of pertinent information that respondents from the Survey, who wanted to share pertinent information for the Commission's consideration but do it anonymously as contemplated by the Survey, provided to the subcommittees for the Commission's review and consideration in formulating its recommendations.

- Draft report notification and response period
- Written policies and procedures
- Communicating about new investigations with County or agency leadership
- Rights of investigation witnesses
- Reimbursement of legal expenses
- Oversight of the OIG
- Creating an advisory board for the OIG
- Ethical climate in Baltimore County overall
- Relationship between OIG and Ethics Commission

See **Exhibit 3**.

In addressing each of these topics, the subcommittees will share information it collected and gathered during their respective meetings for the *overall Commission's review and consideration* for purposes of assisting the Commission in its development of potential recommendations. Importantly, it should be noted that at the November 29, 2022 meeting, which is open to the public, the public will be able to hear the Commission's discussion of the subcommittees' fact-finding.⁶ The public will also have opportunity to provide comment and feedback to the Commission for its review and consideration in discussing and developing potential recommendations. See **Exhibit 3**.

Conclusion

The Commission did not seek to subvert or circumvent the intent and purpose of the Open Meetings Act. In fact, the subcommittees helped to *facilitate* the important work of the Commission. As such, this Board should find that the Commission did not violate, and is not violating, the Open Meetings Act.⁷

Respectfully submitted,



James R. Benjamin, Jr.
County Attorney

⁶ See fn. 5.

⁷ It is important to note that in its procedures, the Board expressly encourages members of the public who have questions about a public body's compliance with the Act to pose their questions first to a member of the public body or its staff or counsel. See Open Meetings Compliance Board Complaint Procedures. It does not appear that Mr. Plymyer sought to reach out to the Commission, the Commission Chair or to the undersigned to share concerns he had in regard to the Commission's compliance with the Open Meetings Act.

Frankly, it seems that Mr. Plymyer's filing of a Complaint may have been premature. In fact, if Mr. Plymyer had done as the Board's procedures encourage before filing his Complaint, perhaps the role of the Commission's subcommittees could have been clarified for him and his concerns may have been alleviated.

Open Meetings Compliance Board
c/o Office of the Attorney General

cc: David A. Plymyer, Esquire (*via e-mail* - dplymyer@gmail.com)
Commission on Ethics and Accountability (*via e-mail* - blueribbonethics@ubalt.edu)



Baltimore County Commission on Ethics and Accountability

Executive Order No. 2021-025

WHEREAS, Baltimore County's mission is to deliver the highest standard of service to residents, businesses, and visitors and to ensure effective, efficient, and ethical stewardship of County resources; and

WHEREAS, public ethics, transparent and open government, and accountability are fundamental to ensuring effective, ethical stewardship of County resources in furtherance of integrity, efficiency and public trust; and

WHEREAS, the comprehensive review, evaluation and modernization of Baltimore County's ethics laws and the laws governing the Office of the Inspector General are necessary to align processes and procedures with national best practices;

NOW, THEREFORE, it is this 26th day of October 2021, by the County Executive of Baltimore County, Maryland, ordered that the Baltimore County Commission on Ethics and Accountability ("Commission") shall be created and charged as follows:

Section I: Goal of the Commission.

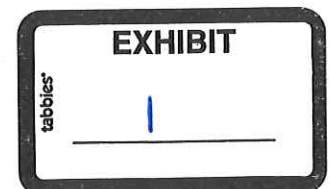
The purpose of the Commission is to perform a comprehensive review and evaluation of Article 3, Title 14 and Article 7 of the County Code. The Commission will develop recommendations to modernize the Public Ethics and Open Government laws and the Office of Inspector General in accordance with best practices for review by the County Executive and the County Council.

Section II: Membership, appointment, terms of office, officers, and compensation of members.

- A. Membership. The Baltimore County Commission on Ethics and Accountability shall consist of up to 11 voting members appointed by the County Executive.
- B. Terms. The term of a member appointed under subsection A of this section expires when the Commission submits its final report. Members of the Commission shall receive no salaries but shall be reimbursed for all expenses necessarily incurred in the performance of their duties in accordance with appropriations approved by the County Council.
- C. Chair. The Chair of the Commission shall be appointed by the County Executive.

Section III: Meetings, quorums.

- A. Meetings. The Commission shall meet at the request of the Chair as frequently as required to perform its duties. Meetings will be conducted virtually as long as necessary due to the ongoing COVID-19 pandemic. In the event that in-person meetings are scheduled, Commission members may attend electronically as needed.
- B. Quorum. A majority of voting members shall constitute a quorum for the transaction of business and an affirmative vote of the majority of those present at any meeting shall be sufficient for any official action.



Section IV. Duties and Responsibilities.

The Commission shall perform the following duties:

- Study Article 3, Title 14 and Article 7 of the Baltimore County Code and formulate recommendations for streamlining and improvement of policies, functions and outcomes in order to align processes and procedures for ethics training and compliance and the Office of the Inspector General with national best practices;
- Propose legislative changes to implement its recommendations, if necessary;
- Review existing State ethics laws to ensure there are no conflicts between State laws and proposed recommendations;
- Issue an interim report to the County Executive and County Council not later than July 1, 2022;
- Issue a final report to the County Executive and County Council no later than November 1, 2022.

Section V. Staff Assistance.

An RFP shall be issued and vendor selected to provide facilitation and technical support for the Commission.

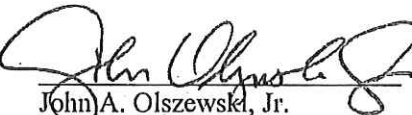
Section VI. Public Input.

The Commission shall create a webpage and publish its criteria and process, and shall provide an e-mail address to receive written comments from members of the public.


This Order shall take effect **IMMEDIATELY** according to its terms and shall continue thereafter until November 1, 2022, unless further extended by the County Executive.

ATTEST:


Secretary to the County Executive


John A. Olszewski, Jr.
County Executive

Reviewed for Form and Legal Sufficiency and Approved for Execution


James R. Benjamin, Jr.
County Attorney



EXECUTIVE ORDER
No. 2022-004

WHEREAS, Baltimore County's mission is to deliver the highest standard of service to residents, businesses, and visitors and to ensure effective, efficient, and ethical stewardship of County resources; and

WHEREAS, public ethics, transparent and open government, and accountability are fundamental to ensuring effective, ethical stewardship of County resources in furtherance of integrity, efficiency and public trust; and

WHEREAS, the comprehensive review, evaluation and modernization of Baltimore County's ethics laws are necessary to develop and adopt creative and innovative practices for ethics and the Office of the Inspector General;

WHEREAS, the Baltimore County Commission on Ethics and Accountability was created on October 26, 2021, by Executive Order No. 2021-025; and

WHEREAS, the Executive Order required the Commission to issue an interim report to the County Executive and the County Council no later than July 1, 2022, and a final report no later than November 1, 2022; and

WHEREAS, the Commission has advised the County Executive that it needs additional time to complete and deliver the interim and final reports.

NOW, THEREFORE, on this 30th day of June, 2022, it is hereby **ORDERED** by the County Executive of Baltimore County that the October 26, 2021 Executive Order No. 2021-025 be and is hereby amended to provide that the Baltimore County Commission on Ethics and Accountability shall:

- Issue an interim report to the County Executive and the County Council no later than **December 16, 2022**; and
- Issue a final report to the County Executive and the County Council no later than **January 16, 2023**.

The other portions of Executive Order No. 2021-025 remain unchanged.



This Order remains effective until rescinded, superseded, amended, or revised by additional orders.

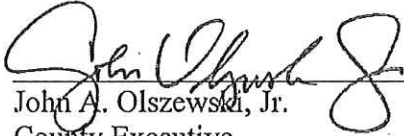
The effect of any statute, rule or regulation of any agency of Baltimore County, Maryland inconsistent with this Order is hereby suspended.

A copy of this Executive Order shall be made available on-line at www.baltimorecountymd.gov for the public.

ATTEST:




Dawn Kile
Executive Secretary



John A. Olszewski, Jr.
County Executive

Reviewed for Form and Legal Sufficiency and approved for Execution.



James R. Benjamin, Jr.
County Attorney



Blue Ribbon Commission on Ethics and Accountability

Tuesday, November 29, 2022 at 5:30-8:30 pm

Meeting will be held via Zoom

Preregistration is required via the link below

https://ubalt.zoom.us/webinar/register/WN_dABmHYzbRNaFx3i72PtEzw

Agenda

- 1) **Welcome**
 - Rev. William Johnson, *Commission Chair*
- 2) **Review of Minutes of the Previous Meeting**
 - Rev. William Johnson, *Commission Chair*
- 3) **Public Comment Period (Register at this link)**
 - Rev. William Johnson, *Commission Chair*
- 4) **Commission Discussion -- Fact-finding and Discussion/Development of Potential Recommendations**
 1. Responsibility for investigations only or investigations and audits
 2. Staffing the OIG
 3. Independent legal counsel
 4. Financial independence
 5. Unrestricted access to materials
 6. Subpoena waiting period
 7. Draft report notification and response period
 8. Written policies and procedures
 9. Communicating about new investigations with County or agency leadership
 10. Rights of investigation witnesses
 11. Reimbursement of legal expenses
 12. Oversight of the OIG
 13. Creating an advisory board for the OIG
 14. Ethical climate in Baltimore County overall
 15. Relationship between OIG and Ethics Commission
 - Rev. William Johnson, *Commission Chair*
- 5) **Other Commission Business**
 - Rev. William Johnson, *Commission Chair*
- 6) **Adjournment**
 - Rev. William Johnson, *Commission Chair*

This Commission is staffed by the Schaefer Center for Public Policy at The University of Baltimore.

The Commission webpage is: BlueRibbonEthics.ubalt.edu
The Commission email address: BlueRibbonEthics@ubalt.edu

