



**BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
GOVERNMENT OF THE DISTRICT OF COLUMBIA**



January 5, 2022

VIA ELECTRONIC MAIL

Carson

Washington D.C.

[yahoo.com](#)

RE: Resolution of Complaint Concerning the Historic Preservation Review Board's Compliance with the Open Meetings Act (#OOG-2021-0007-M)

Dear Ms. Carson:

On August 10, 2021, the Office of Open Government (“OOG”) received your complaint (#OOG-2021-0007-M) (“Complaint”). The Complaint alleged that the Historic Preservation Review Board (“HPRB”) violated the Open Meetings Act (“OMA”) “Record of meetings” provision because the HPRB’s “Record of Action” summaries differed from the findings and recommendations in its July 1, 2021, and July 22, 2021, public electronic meeting recordings.

Pursuant to 3 DCMR § 10400 *et seq.*, I reviewed and assessed the Complaint. I also reviewed the following materials to resolve this matter: (1) the HPRB July 1, 2021, and July 22, 2021, public meeting recordings; (2) the HPRB July 1, 2021, and July 22, 2021, “Record of Action” summaries; (3) notes from the OOG’s October 6, 2021, meeting with the HPRB and the D.C. Office of Planning (“OP”) to discuss the Complaint; and (4) the HPRB’s regulations. Upon consideration of the aforementioned materials, I find that the HPRB did not violate the OMA because the Record of Action summaries differ from the published electronic meeting recordings. The inconsistency is permissible since, pursuant to the HPRB’s regulations, the Record of Actions are: (1) summaries prepared at the HPRB’s discretion; (2) are not transcripts or meeting minutes; and (3) are not the official record of the proceedings. Additionally, the Record of Actions is not required under the OMA.

As relief, the Complaint requested, “that the Open Government Office (“OOG”) investigate and issue a formal finding that the July 6 and August 2 HPRB memoranda are null and void and order a stay of the decision until the next HPRB meeting.” Since I find no OMA violation, it is unnecessary to bring an enforcement action in court. Additionally, I am not statutorily authorized to stay a public body’s proceedings or nullify “the HPRB’s Record of Action memoranda.” Therefore, as detailed below, I must dismiss your complaint.

This Advisory Opinion sets forth the rationale for the dismissal of the OMA complaint. My analysis begins with a summary of facts, then a discussion of the OMA’s “Record of meetings” provisions. I conclude with a discussion of my enforcement authority under the OMA.

I. BACKGROUND

A. The Complaint.

On August 10, 2021, you submitted the Complaint via email to the OOG. Your Complaint, in part, stated:

This [complaint] alleges that Historic Preservation Review Board (HPRB) July 6 and August 2 memoranda concerning the 1775 Swann St Project (a proposal for a four-story apartment house abutting a row of two-story houses in the Dupont Circle Historic District; HPRB 21-367;) are null and void because of HPRB failure to comply with the Open Meetings Law. As set forth below, at open public hearings, the HPRB adopted official Resolutions that said one thing on July 1 and July 22 and then wrote something very different in later July 6 and August 2 memoranda. In public on July 1, the HPRB Resolution requested project sponsor consults with the community and ANC, to include “overall massing and height.” The July 6 memorandum, prepared out of public view, purports to be a simple write-up of the public Resolution. In fact, however, it is a completely different decision. It omits any mention of community consults or ANC involvement. In public on July 22, the HPRB cited an alleged ANC letter approving the project sponsor’s response to community concerns as the basis for dismissing continuing objections. Just as in the example above, the August 2 memorandum, prepared out of public view, purports to be a simple write-up of the July 22 public Resolution. In fact, however, it, too, is a completely different decision. It omits any mention of the ANC letter (which turned out not to exist). The District of Columbia Open Meetings Act requires that public bodies take all official actions in public meetings. It prohibits changes in official decisions made behind closed doors and out of public view, such as those found in the July 6 and August 2 HPRB memoranda. These memoranda are therefore null and void. I hereby request that the Open Government Office investigate and issue a formal finding that the July 6 and August 2 HPRB memoranda are null and void. The project sponsor is apparently not to blame here, and the Open Government Office might also advise the HPRB to place the project on its next hearing agenda for {sic} full hearing to lessen delay. It also might also advise the HPRB to say what it means in public from here on out.

You provided a summary of the inconsistencies between the recorded public meetings and their corresponding “memoranda,” which are the Record of Action summaries. You alleged that due to these inconsistencies “the 1775 Swann Street Project did not receive full HPRB approval.” You requested the OOG “advise the HPRB to minimize further delay by placing this matter on its September calendar for {sic} full hearing.” On August 10, 2021, you sent your Complaint to the HPRB. The HPRB did not provide a written response to the Complaint.

B. Summary of the HPRB’s public meetings that gave rise to the Complaint.

HPRB is a nine-member Board staffed by the Historic Preservation Office—a division in the District of Columbia’s Office of Planning (“OP”).¹ During the July 1, 2021, public meeting, the HPRB considered a new build application for 1775 Swann Street N.W. (“Swann Street”). The HPRB took public comment, deliberated, and unanimously voted to support the Swann Street application with additional design comments and feedback. The HPRB strongly encouraged the applicant to continue to work with the local Advisory Neighborhood Commission (ANC) to resolve any design issues from the community. Ultimately, the HPRB approved the design application.² The HPRB required the Swann Street applicant to re-appear on July 22, 2021, per the local ANC’s request.³ Following its July 1, 2021 meeting, the HPRB posted the electronic recording of the meeting and its Record of Action. The July 1, 2021 Swann Street Record of Action reads:

1775 Swann Street NW, HPA 21-367, concept/new construction of three-story plus penthouse residential building. The Board found the concept for new construction to be compatible with the character of the Dupont Circle Historic District, with the conditions that: 1) the wood fence at the entrance should be redesigned (as it appeared more like a rear yard fence than a fence appropriate for a front entrance); 2) the side entrance be made more prominent and visible from the sidewalk, and 3) a greater dimension of brick be provided at the front corner adjacent to the projecting {sic} ba. The Board asked that the project {sic} return for final review as requested by ANC 2B. Vote: 7-0.⁴

On July 22, 2021, the HPRB conducted a public meeting that briefly addressed the Swan Street application.⁵ The HPRB reiterated its July 1, 2021, decision to approve the application and found the new building project compatible with the character of the neighborhood.⁶ The HPRB found the applicant had addressed both the ANC’s and HPRB’s concerns.⁷ The HPRB reiterated its recommendation that the applicant work with the ANC; however, it clarified that this was not a requirement needed for approval but merely a recommendation.⁸ Following the July 22, 2021 meeting, the HPRB posted the Swann Street Record of Action, which reads:

1775 Swann Street NW, HPA 21-367, revised concept/new construction. The Board considered the letters received expressing concerns about the project but reaffirmed that it found the concept compatible at the previous meeting and that its recommendation that the applicants continue working with the community and ANC to be a recommendation, not a requirement.

¹ Historic Preservation Office or HPO means the administrative office that serves as the staff to the Historic Preservation Review Board, State Historic Preservation Officer, and Mayor in performing functions pursuant to this act. *See* D.C. Official Code § 6–1102. [Historic Preservation Office | op \(dc.gov\)](https://www.dcr.gov/hpo)

² An overview of the discussion 1775 Swann Street N.W. is timestamped from 45:24-1:21:09. You may access a copy of the July 1, 2021, electronic recording here: <https://play.champds.com/dc/zoning/event/249/s/2721>

³ An overview of this discussion begins at 1:22:20. You may access a copy of the July 1, 2021, electronic recording here: <https://play.champds.com/dc/zoning/event/249/s/2721>

⁴ You may access the July 1, 2021 “Record of Action” summary here:

https://planning.dc.gov/sites/default/files/dc/sites/op/page_content/attachments/HPRB%20ACTIONS%20June%2024%20and%20July%201%202021.pdf

⁵ You may access the July 22, 2021, public meeting recording here: <https://play.champds.com/dc/zoning/event/255/s/384>

⁶ An overview of the discussion begins at 06:44 here: <https://play.champds.com/dc/zoning/event/255/s/384>

⁷ An overview of the discussion begins at 06:48 here: <https://play.champds.com/dc/zoning/event/255/s/384>

⁸ An overview of the discussion begins at 07:20 here: <https://play.champds.com/dc/zoning/event/255/s/384>

The HPRB maintained its decision, during the July 1, 2021 meeting, to approve the Swan Street Application and advised the applicants to continue to work with the local ANC to address any concerns.

Next, I summarize the OOG's meeting to discuss the Complaint with the HPRB and OP. This meeting occurred as part of the OOG's investigation of the Complaint's allegations.

C. Summary of the OOG's October 6, 2021, Meeting with the HPRB and the OP to discuss the Complaint.

In response to the Complaint, on September 1, 2021, the OOG emailed the OP to schedule a meeting with the OP's General Counsel, David Lieb, and the HPRB Chairperson, Marnique Heath, to discuss the Complaint. On October 6, 2021, OOG's legal staff met with HPRB and OP. During the meeting, OP and HPRB denied the Complaint's allegations. They explained their procedures and what constitutes a "Record of Action." They explained that a Record of Action: (1) is a discretionary written summary of the HPRB's actions taken during public meetings and it is not a part of the full record under its regulations;⁹ (2) is not an official record of HPRB's actions taken during or after a public meeting; (3) is not voted on by the HPRB or adopted as a part of its official record; and (4) is an unofficial summary of HPRB's actions used as reference materials.

The following is a discussion of the OMA's "Record of meeting" requirements as applied to the background facts and allegations contained in the Complaint to provide the rationale for my dismissal of the Complaint.

II. DISCUSSION

A. The Record of Action summary is not detailed meeting minutes, a transcript, or an official record of HPRB proceedings. Under the OMA it is of no consequence that the electronic recordings and Record of Actions differ. The HPRB complied with the OMA by recording and making publicly available electronic recordings of its July 1, 2021, and July 22, 2021, meetings.

The status of the Record of Actions is crucial to the resolution of this matter. Pursuant to HPRB regulations, the Record of Actions: (1) are prepared at the option of HPRB staff; (2) are not transcripts or meeting minutes; (3) are written summaries of the HPRB's actions that may be prepared from meeting minutes and meeting transcripts; and (4) are not a part of the full official HPRB records. Per HPRB regulations, the Record of Actions is of small consequence. The OMA also does not require a Record of Actions or similar records be maintained by a public body.

The OMA requires that a public body take detailed meeting minutes or provide transcripts only when recording the meeting electronically is impracticable.¹⁰ The HPRB complied with this requirement. After conducting its July 1, 2021, and July 22, 2021, meetings, the HPRB posted electronic recordings of both meetings to its website. The July 1, 2021, recording was over seven hours in length. The July 22, 2021 meeting recording was over four hours in length. Both electronic recordings contained timestamps of

⁹ 10A DCMR § 329.2 reads: "[T]he staff may prepare a written summary of the Board's actions from meeting minutes and the transcript. The staff may also send written confirmation of the Board's action on an application."

¹⁰ D.C. Official Code § 2-578(a).

when HPRB discussed the Swan Street application. Consequently, the HPRB did not violate the OMA's "Record of meetings" provisions since it electronically recorded and made publicly available the meetings at issue. Because of its status, per the HPRB regulations, it is also immaterial that the Record of Actions differs from the electronically recorded meetings. Pursuant to the HPRB regulations, "[T]he transcript shall serve as the official record of the Board's decisions at the meeting."¹¹ Under the OMA electronic recording is a component of the full record of a public meeting.¹²

Below, I explain why the HPRB did not violate the OMA's "Record of meetings" requirement by not providing a verbatim written account of statements and official actions taken during the meetings as the Complaint alleged.

B. When a public meeting is recorded electronically, the OMA does not require a public body to make publicly available a verbatim written account of all statements and official actions taken during the public meetings.

The Complaint also alleged that HPRB's July 1, 2021, and July 22, 2021, Record of Actions, which you refer to as "memoranda," failed to provide a verbatim account of the HPRB's actions during its July 2021 meetings in violation of the OMA. As discussed below, this allegation is contrary to the HPRB's regulations and prior OOG interpretations of the OMA.

The HPRB's regulations require that: "[S]ubsequent to each meeting, the Board shall make available for public inspection the minutes and any written transcript that has been made of the proceedings. As discussed above, "[T]he transcript shall serve as the official record of the Board's decisions at the meeting."¹³ Under its regulations, the HPRB is required to make publish minutes and transcripts that are made of the proceedings. This is a requirement under the HPRB's regulations and not the OMA. My investigation of the Complaint revealed that the HPRB did not take meeting minutes or have transcripts prepared of the July 1, 2021, and July 22, 2021, public meetings. Since minutes were not taken and no transcripts were prepared, HPRB did not violate its regulations. Because the HPRB electronically recorded and made the recordings publicly available, it did not violate the OMA.

However, I deem clarification is necessary on this issue since the HPRB's regulations require the HPRB to make meeting minutes and transcripts, if any, publicly available is beyond what the OMA requires. In previous advisory opinions,¹⁴ the OOG has defined "transcript" as a "verbatim account of all statements and official actions taken during a public meeting."¹⁵ Comparatively, "detailed meeting minutes" are not a verbatim account, however, minutes must be "detailed enough to allow the public to gain a complete understanding of the topics discussed and the actions taken by its members."¹⁶ Hence, the OOG has opined that: (1) it is "redundant" for a public body to post a complete transcript of a meeting and detailed meeting minutes;¹⁷ and (2) that a public body "may post one or the other, as long as the minutes or transcript allow the public to gain a complete understanding of the topics discussed and the

¹¹ 10A DCMR § 329.1.

¹² Pursuant to D.C. Official Code 2-578(b) as interpreted by the OOG, the meeting agenda, meeting minutes, transcripts, and electronic recordings constitute the full record.

¹³ 10A DCMR § 329.1.

¹⁴ See OOG's Advisory Opinion "Posting of Meeting Minutes, Transcripts, Electronic Recordings." You may access the opinion here https://www.open-dc.gov/sites/default/files/12.12.13%20OOG%20Opinion_HPTF_Meeting%20Record_Minutes%20Audio%20Video%20Transcripts.pdf

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* ("The posting of a complete transcript and detailed meeting minutes is redundant and is not required.")

actions taken by its members.”¹⁸ Similarly, I opine that posting the electronic meeting recording with a transcript or detailed meeting minutes is not required under the OMA unless the public body is required to do so by its enabling legislation, regulations, Mayor's Order, or by-laws. To comply with its regulations, the HPRB should post meeting minutes and transcripts, if any, along with the electronic meeting recordings required under the OMA.¹⁹ However, posting both is unnecessary for most public bodies since the OMA only requires recording the meeting electronically to comply with the statute. Electronic meeting recordings are sufficient and detailed enough for the public to ascertain what occurred during a public body’s meetings. For these reasons, the HPRB did not violate the OMA by failing to provide a verbatim account of all statements and official actions that were taken during the two meetings.

C. The Director of Open Government does not have statutory authority to nullify and void action taken by a public body or to stay a public body’s decision while investigating an OMA complaint.

The Complaint requested that I render the HPRB’s decision regarding Swan Street “null and void” and order a stay of the decision until the next HPRB meeting.²⁰ The relief you request exceeds the scope of my authority under the OMA. I do not have the legal authority to: (1) stay a public body’s decision when investigating an OMA violation;²¹ or (2) remand an issue that has been voted on and approved by a public body. I am empowered to seek injunctive and declaratory relief when certain OMA violations have occurred.²² However, in this instance, I find no OMA violation, thus no court action is necessary.

This concludes my opinion on this matter. My findings are limited specifically to the facts and circumstances of this Complaint. For the reasons stated herein, and under the OOG’s regulations, this matter is dismissed. Attached is a copy of your Complaint.²³

Sincerely,

Niquelle M. Allen, Esq.
Director of Open Government
Board of Ethics and Government Accountability

¹⁸ *Id.* This is also consistent with the OMA regulations. 3 DCMR 10409.4 states: “[A] Public Body may post transcripts in lieu of posting detailed meeting minutes.

¹⁹ However, many public bodies including the Board of Ethics and Government Accountability, publish both detailed meeting minutes and electronic meeting recordings but are not required to do so by statute, regulation, Mayor’s Order, or bylaws.

²⁰ See Complaint #OOG-2021-0007-M. “The project sponsor is apparently not to blame here, and the Open Government Office might also advise the HPRB to place the project on its next hearing agenda for full hearing so as to lessen delay.”

²¹ See 3 DCMR § 10405

²² See D.C. Official Code § 2-579.

²³ See 3 DCMR § 10403.2.

Enclosure:
Copy of OOG-2021-0007-M

cc: David Lieb, Senior Counsel, D.C. Office of Planning