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THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

Complaint to the Open Meetings Compliance Board

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

Courtesy copy to: elections@rockvillemd.gov

Via e-mail: OpenGov@oag.state.md.us

Re: Rockville City Election Day Impropriety

Complainant: Sen. Cheryl C. Kagan

Public Body Involved: City of Rockville Board of Supervisors of Elections

Short Statement:

The City of Rockville's municipal election was held on November 7, 2023. After the polls closed and the paper ballots were canvassed at the Montgomery County Board of Elections ("Montgomery County BOE"), the City of Rockville's Board of Supervisors of Elections ("Rockville BSE") convened an unscheduled and unpublicized meeting at approximately 1:00 am, when issues related to the election were likely discussed. The appointed Chair of the City's BSE unilaterally announced that the meeting would be closed and ejected me as well as an observer for one of the candidates. This was done without following appropriate procedures to close the meeting. I am seeking a written opinion from the Open Meetings Compliance Board that the Rockville BSE violated Maryland's Open Meetings Act.

Facts:

After polls closed at 8pm and through the early morning hours of November 8, 2023, Rockville's paper ballots (for Mayor and Council as well as four ballot measures) were canvassed at the Montgomery County BOE office in Gaithersburg with County staff overseeing the process. In addition to BSE members, this was observed by Theodore Kiviat (theodorekiviat@outlook.com), who was there in his capacity as a certified election watcher for Council candidate (now Councilmember) Adam Van Grack. I joined him near the end of the canvass as an observer.

At roughly 1am, when the canvass had been completed, the MoCo BOE handed a printout with the unofficial election results to the Rockville City Clerk. City staff and members of the Rockville BSE were immediately summoned into a conference room in the basement of the Montgomery County BOE. When Mr. Kiviat and I followed them into the room, we were addressed by Robert Kurnick, Chair of the Rockville BSE, who insisted that we were not entitled to be present and demanded that we leave. After I protested his order, we were again directed to leave the room. City Clerk Taylor-Ferrell kindly held the sheets with the election results against the door for us to photograph before the door was shut behind us. Roughly ten minutes later, the secret meeting adjourned and the unofficial results were publicly announced on social media and on the City of Rockville's website.

For years, I have sponsored and enacted legislation requiring transparency in Maryland government... and particularly in our election process. It was shocking, therefore, to be ousted from a meeting of the Rockville BSE in what I believe to have been a clear violation of Maryland's Open Meetings Act (OMA). Unceremoniously, and without the required vote to close this meeting to the public, Mr. Kiviat and I were ordered to leave the conference room.

Neither I nor the public knows what was discussed in that private BSE meeting, since both Mr. Kiviat and I were excluded. There was no report or minutes from the November 8th meeting that were shared at the BSE's open meeting on November 14, 2023.

Facts Not in Dispute:

- The Rockville BSE is a "public body" covered by the OMA.
- The Rockville BSE had a closed-door meeting in the early hours of November 8, 2023.
- A quorum of the Rockville BSE was present for the November 8, 2023 closed-door meeting.
- Two members of the public were ejected.
- The Rockville BSE did not disclose any exception to the OMA that would have permitted it to exclude members of the public.
- There is no record that the Rockville BSE adopted a written statement closing the meeting or conducted a public vote to close the meeting.
- The open meeting conducted by the Rockville BSE prior to November 8 was held on November 2, 2023. Neither the written agenda nor the recorded proceedings of this meeting indicated that there would be a closed meeting on Election Day.

- Rockville BSE Chair Robert Kurnick personally ejected Mr. Kiviat and me with neither a prior vote nor an explanation as to the need to close the meeting to the public.
- Following Election Day, the Rockville BSE next met on November 14, 2023. At no time did the board discuss the Election Night meeting, nor was it included on the written agenda.

Reference Documents/Video for the Open Meetings Compliance Board:

- November 2, 2023 Rockville BSE Open Meeting: Agenda and Meeting recording <https://www.rockvillemd.gov/AgendaCenter/Search/?term=&CIDs=19,&startDate=&endDate=&dateRange=&dateSelector=>
- November 14, 2023 Rockville BSE Open Meeting: Agenda and Meeting recording <https://www.rockvillemd.gov/AgendaCenter/Search/?term=&CIDs=19,&startDate=&endDate=&dateRange=&dateSelector=>

OMA Sections at Issue: As the Open Meetings Compliance Board is aware, when a public body holds a meeting subject to the OMA, it must be open to the public. There are [15 exceptions](#) that allow a public body to exclude members of the public. See §§ 3-301, 3-305. Assuming for the sake of argument that the Rockville BSE believed that the November 8, 2023 meeting was an exception to the OMA, prior to closing the meeting to the public, it was required to disclose the specific exception that would justify holding a closed session. The Act does not authorize public bodies to close meetings for discussions that fall outside of the exceptions.

As noted in the [Open Meetings Act Manual's October 2023 edition](#):

“It is important to note that no exception authorizes a closed session ***unless the public body has disclosed its reliance on the exception before the closed session.*** See § 3-305(c) (A public body that meets in closed session under this section may not discuss or act on any matter not authorized under subsection (b)); § 3-305 (b) (providing exceptions “[s]ubject to” § 3-305(d)); § 3-305(d) (requiring the adoption of a written statement and motion before the closed session).

...

Put another way, if the public body has not cited the exception before it excludes the public, ***the exception does not apply.***” (emphasis mine)

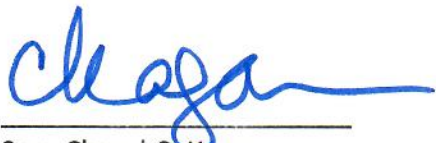
(Source: Open Meetings Act Manual (12th ed., October 2023 at [chapter 4, page 2](#)).

- To properly close the 1:00 am meeting on November 8, 2023, the Rockville BSE should have first met in open session. Then, its Chair, Robert Kurnick, was required to have made “a written statement of the reason for closing the meeting.” § 3-305(d)(2)(ii). In that statement, Mr. Kurnick should have disclosed the “topics to be discussed” and the statutory exception relied upon as authority for conducting the closed the meeting. *Id.*

- Next, the Rockville BSE was required to hold a recorded vote on a motion to close the meeting to the public. § 3-305(d)(2)(i).
- Last, after the November 8, 2023 closed meeting, the Rockville BSE was required to disclose, in the minutes of its next open meeting, what topics were discussed in the closed meeting; who attended the closed meeting; and what actions (if any) it took. See § 3-306(c)(2). Importantly, the OMA's disclosure requirements also apply to meetings closed for the performance of an administrative function (if the Rockville BSE believes that this was the purpose of the closed November 8, 2023 meeting) § 3-104 (Open Meetings Act Manual (12th ed., October 2023 at page 5-2). **This would be an absurd claim, as administrative topics of this variety could not plausibly be the rationale to convene a board at 1am after a long and stressful Election Day.**

Conclusion:

If the Rockville BSE wanted to discuss the many problems with the November 7, 2023 elections, the law required them to do this in public... and **not** behind closed doors. Even if, for the sake of argument, such discussions *could have been* closed to the public, the Rockville BSE did not follow the appropriate procedures before expelling Mr. Kiviat and me. The Compliance Board should conclude that the actions of the Rockville BSE in ejecting the public from its meeting in the wee hours of November 8, 2023-- and holding the meeting in secret-- were a clear violation of the Open Meetings Act.



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