6 *Official Opinions of the Attorney General* 69 (2009)

COMPLIANCE BOARD – RESPONSE TO COMPLAINT – COMPLAINT THAT SPECIFIES SUFFICIENT DETAIL SO THAT PUBLIC BODY MAY IDENTIFY MEETING AND ALLEGATIONS SATISFIES ACT

January 12, 2009

Craig O'Donnell

The Open Meetings Compliance Board has considered your complaint alleging that the manner in which the Board of Public Works ("BPW") conducts its "pre-meetings" violates the Open Meetings Act. For the reasons explained below, we are unable to offer a definitive evaluation whether the meetings identified in the complaint were subject to the Act. However, we understand that the BPW has take steps to ensure that future pre-meetings are conducted in accordance with the Act, which is appropriate.

I

Complaint and Response

The complaint focuses on the traditional "pre-meetings" of the Board of Public Works ("BPW").[1] Relying primarily on a story that appeared in *the Baltimore Sun*, the complaint noted that, at some point, the Comptroller stopped attending these sessions "based on his impression that public business was being conducted." *See* Baltimore Sun, Aug. 7, 2008, at 1B. The complaint noted that attendance by two members of the BPW would result in a quorum of the BPW. The complaint emphasized topics identified in the newspaper article discussed during a pre-meeting that would appear subject to the Act, *i.e.*, a State land purchase and the witnesses who had signed up to testify on a controversial contract that was scheduled for a vote. The article indicated those in attendance included the Governor and State Treasurer, as well as the Lieutenant Governor and a half-dozen staff members. The article noted that aides indicated that issues may arise at the last minute that should be brought to the attention of BPW members or that might cause them to withdraw agenda items. The newspaper article also referred to a pre-meeting where an initiative to expand Internet access in rural areas was

[1] Pre-meetings are routinely conducted in advance of regular BPW meetings and typically include staff and State employees whose agencies have business on the BPW's agendas. Sometimes, one or more members of the BPW attend.

considered. The Comptroller's aides indicated that Patrick Mitchell with the Maryland Broadband Cooperative was summoned and asked to discuss pertinent facts. However, Mr. Mitchell was quoted as saying he attended to say hello to the Governor and denied that he was asked any questions. The complaint identified several concerns about the BPW's compliance with the Open Meetings Act during pre-meetings which can be summarized as whether notice is provided in advance of pre-meetings, whether minutes are maintained, and whether the meetings are actually accessible to the public.

In a timely response on behalf of the BPW,[2] Deputy Attorney General John B. Howard, Jr., argued that, "to the extent that the pre-meetings are limited to - as they historically have been - administrative, 'housekeeping' matters and social exchanges among Board members and staff, the pre-meetings are exempt from Open Meetings Act requirements." However, the response noted that all of the members of the BPW have publicly and repeatedly stated that the media, and indeed anyone, is welcome to attend the pre-meetings and that members of the media now regularly attend and report on the pre-meetings.

As to the complaint, the response argued that it failed to state facts that would support a finding of a specific past violation. The response noted that a complaint "shall [...] identify ... the action of the public body, the date of the action, and the circumstances of the action." §10-502.5(b)(2).[3] The response asked that we compare §10-510(c).[4] The response noted inconsistencies in the newspaper account relied on by the complainant and indicated that, "[w]ithout additional or more certain information regarding the date or circumstances of an action in violation of the Act, the [BPW] is unable to respond specifically to the broad charge that its decades-long practice of short pre-meeting discussions violates the Act." Thus, the response requested that the Compliance Board not opine on whether a violation of the Act has occurred or, in the alternative, find that there is an insufficient basis to establish that a violation has occurred.

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[2] Mr. Howard was granted a brief extension of time to submit a response.

[3] All statutory references are to the Open Meetings Act, Title, 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

[4] The subsection provides:

> In an action under this section, it is presumed that the public body did not violate any provision of this subtitle, and the complainant has the burden of proving the violation.

The response also contrasted the BPW's pre-meetings from regular meetings governed by the Act, noting that when Board members and staff review the agenda and deal with "housekeeping" matters, they are engaged in an administrative function, exempt from the Act under §10-503(a). The response indicated that, for many years, the members of the BPW, joined by staff, have gathered informally in an office adjacent to the Governor's reception room, typically for less than 15 minutes, to allow the members, their aides, and staff to interact socially as well as "to go over last-minute 'housekeeping' and administrative matters. Such matters include reviewing the final [m]eeting agenda, the number and order of witnesses, and the anticipated time needed for various agenda items. ... Other ... details relating to the conduct of the meeting are worked out in the pre-meeting." While acknowledging that the consideration of legislative or quasi-legislative matters start with the decision to place a matter on an agenda, the response argued that the mere consideration of the timing and ordering of agenda items is undertaken for administrative purposes.

The response also noted that the inclusion of procurement matters as agenda items are driven by actions of State agencies rather than the BPW and discussions as to timing and order of agency – submitted items are prototypically managerial and administrative in nature. According to the response, the removal of agenda items due to time limitations or some incompleteness in the factual record is purely an administrative decision. In support of its position, the BPW's response cites 1 *OMCB Opinions* 10 (1992) (planning commission's review of applications for completeness, among other actions, found "executive"/administrative in nature) and 6 *OMCB Opinions* 23, 31 (2008) (decision whether to retain lobbyist, when to reschedule meeting found "administrative").

In summary, the response argued that the activities of the BPW during pre-meetings are outside the scope of the Act. "Nonetheless, the [BPW] has directed its staff to put in place all of the procedures of the Open Meetings Act to maximize openness and transparency in the [BPW's] processes and to encourage public confidence in those processes."

II

Analysis

As a preliminary matter, we must address the BPW's suggestion that the complaint failed to state sufficient information required under the Act. We disagree. To be sure, the Open Meetings Act requires that a complaint "identify the public body, specify the action of the public body, the date of the action, and the circumstances of the action." §10-502.5(b)(2). However, the newspaper account referenced in the complaint clearly put the BPW on notice as to the complainant's allegations at least as it related to the two meetings discussed. Furthermore,

provided a complaint includes a specific allegation, it is not unusual for us to consider general allegations concerning compliance with the Open Meetings Act to the extent the record permits. The response seems to suggest that the complainant has failed to meet the burden of proof to support a finding of a violation. But a complainant need not satisfy any particular burden of proof. After all, it normally is the public body, not the complainant, that has the information, including the actual date a specific action might have taken place, that is necessary to allow us to fully evaluate whether or not a violation occurred. 5 *OMCB Opinions* 93 n. 1 (2007). The response asked that we compare the presumption of no violation found in §10-510(c); however, that provision is limited to actions in a circuit court. It has no application to the Compliance Board. 1 *OMCB Opinions* 178, 180-81 (1996). Our inability to address the specific meetings identified in the complaint is not the fault of the complainant, but the failure to address the specific meetings in the response. The lack of specificity in the response is in no way condoned by the Compliance Board. Nevertheless, certain general observations are appropriate.

The Open Meetings Act applies if three things are true: (1) a "public body" is involved; (2) the public body is holding a "meeting"; and (3) the substance of the meeting is subject to the Act. Clearly, the BPW is a "public body" as defined under the Open Meetings Act in that it is established by Article XII, §1 of the Maryland Constitution. §10-502(h)(1)(ii)1. And, when two members of the BPW meet, resulting in a quorum and consider public business that comes before the BPW, whether in a regular meeting or pre-meeting, it is considered a meeting under the Open Meetings Act. §10-502(g).[5] The question remains whether the substance of a pre-meeting is within the scope of the Act.

As the response correctly noted, when the members of the BPW are engaged in an administrative function or simply meet in a social gathering, the Act does not ordinarily apply. §10-503. However, if a topic of discussion constitutes either legislative or quasi-legislative function, by definition, it is subject to the Act and does not qualify as an administrative function. §10-502(b). Furthermore, any discussion concerning the issuance of a license or permit is governed by the Act, notwithstanding Act's scope exclusions. §10-503(b)(1). The response noted that in 1 *OMCB Opinions* 10 (1992), we concluded that a municipal planning commission's pre-meetings held to ensure that certain applications were complete were outside the Act.[6] Similarly, to the extent that pre-meetings involved solely

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[5] Of course, if a pre-meeting is attended by a single member of the BPW or only staff, the Open Meetings Act has no application.

[6] The response also cited 6 *OMCB Opinions* 23 in which we evaluated the hiring of a lobbyist by a local board of education. In that opinion, we were unable to reach any conclusive determination on that issue. However, we also noted in that opinion that the

(continued...)

arranging the submitted agenda items based on the number of witnesses who had signed up to testify in the interest of saving individuals' time, such discussions might qualify as an administrative function, although the response did not identify what law or rule the BPW would be involved in administering. *See* §10-502(b)(1); 6 OMCB Opinions 23, 25-26 (2008) (test for determination of administrative function). On the other hand, if a pre-meeting involved the imparting of information concerning a matter scheduled to come before the BPW, even if unaccompanied by discussion by BPW members present, or involved members soliciting information that might assist in their decision on whether to approve a contract (a quasi-legislative function in the parlance of the Act) or to grant a license, the Open Meetings Act would apply. *See, e.g.*, 1 *OMCB Opinions* 35 (1993). While pre-meetings may consist of matters outside the scope of the Act, we suspect that the opportunity to inquire into proposed agenda items of significant interests and exchanging of substantive information is often the more significant motif why pre-meetings occur. We want to emphasize that when such conversations occur, the Open Meetings Act applies and the Act's procedural requirements must be followed.

III

Conclusion

Given that the response failed to address the specific meetings referenced in the complaint, we are unable to offer a definitive evaluation whether the meetings were subject to the Act. However, given the BPW's decision to ensure that future pre-meetings are conducted in accordance with the Act, an analysis of the BPW's former practice during specific meetings would be an academic exercise.

OPEN MEETINGS COMPLIANCE BOARD

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[6] (...continued)
mere rescheduling of a meeting without discussion of agenda matters qualified as an administrative function.