6 *Official Opinions of the Compliance Board* 121 (2009)

Closed Session Procedures – Written Statement – public access – timing
Closed Session Procedures – Written Statement – required detail
Minutes – Closed Session – document reflects suggestion discussion violates Act

June 25, 2009

Ismael "Vince" Canales, President
Fraternal Order of Police Lodge 89

The Open Meetings Compliance Board has considered your complaint that the County Council of Prince George's County violated the Open Meetings Act by conducting closed meetings in a manner inconsistent with the Act. While the record precludes us from reaching a firm decision as to certain issues raised in the complaint, as to those issues we were able to analyze, we find that no violation of the Act occurred.

I

Complaint & Response

The complaint alleged that the County Council violated the Open Meetings Act on January 13 and February 17, 2009, by failing to create a written statement that described the reasons for closure, as required by the Act. Instead, the Chair of the County Council provided statements merely repeating verbatim the statutory exceptions relied on in closing the session. The complaint also alleged that the County Council violated the Act by failing to submit to the Open Meetings Compliance Board a copy of the written statement used in closing the meeting on February 17 after a citizen objected to the closing, suggesting the closure was "a direct violation of Section 10-508 ..., and that closing the session was an attempt to conceal important public information...."[1] The Chair of the Council then promptly closed the session without further discussion.

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

The complaint also indicated that on February 17, Kerry Watson, 2d Vice President of FOP Lodge 89, approached Council staff and requested a list of the topics to be discussed during the closed session, "due to the ambiguous language written in the agenda." In response, Ralph Grutzmacher, Legislative Officer, indicated and repeated that, "it's in the agenda." The complaint alleged that the Council discussed during closed session on January 13 and February 17, as well as other dates, "information that should be entirely in the public realm." Finally, the complaint included a general allegation that the Council has repeatedly violated the Open Meetings Act, specifically the provisions of §10-508, since January 2008.[2]

In a timely response on behalf of the County Council, Karen T. Zavakos, Legislative Officer, acknowledged that the Open Meetings Act requires that, in closing a meeting under the Act, the presiding officer of a public body must produce a written statement of the reasons for closure, including the statutory authority, and a listing of the topics to be discussed. The response indicates that a statement for the January 13 closed session was "drafted contemporaneously with the closing of the meeting," a copy of which was included with the response. That document indicated, among other information, that the meeting was closed pursuant to §10-508(a)(7) and (8) and, under the caption "topics to be discussed," listed "[p]ending or potential litigation and consult with counsel to obtain legal advice concerning the single sale cigar ban and Reaching Hearts RLUPA case and update by counsel concerning district council zoning litigation matters." The response also included a copy of the agenda, which noted under the caption "Executive Session" for the purpose of "[d]iscussion of pending or potential litigation in accordance with Maryland Annotated Code, State Government, Section 10-508(a)(8)."

As to the closed session on February 17, the response included a copy of the written statement which stated, among other things, that the session was closed pursuant to §10-508(a)(8) and indicated that the topic was to "[h]old briefing on litigation concerning union contracts, zoning cases, and briefing on litigation concerning single cigar ban and litigation update on the Washington Gas Lighting case." The response noted that this statement was drafted "contemporaneously with the closing of the meeting." The agenda for

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[2] The complaint also included allegations concerning the withholding of certain records. The Compliance Board is only authorized to address the application of the Open Meetings Act; the Compliance Board is not authorized to address matters governed by other law. Thus, in submitting the complaint to the County Council for response, we advised that the Council need not address matters unrelated to the Act.

session indicated that the meeting would be closed pursuant to §10-508(a)(7), (8), and (9). The response indicated that the agenda language is intended to satisfy the requirement under §10-506 of notice of a closed session. The Council's position is that the written statements comports with the requirements of the Act. As to the substance of discussion that occurred during the closed session, the response included a copy of the minutes of the closed session.

The response acknowledged that the Council did not submit a copy of the written statement used to close the meeting on February 17, but disputed the complainant's characterization of the public comment as an objection, triggering the obligation to send the written statement to the Compliance Board in accordance with §10-508(d)(3). Enclosed with the response was a DVD of the meeting, reflecting the comments of Daniel Valentine, a reporter with the Gazette Newspaper.

As to Mr. Grutzmacher's alleged comment in response to a request for a list of topics to be discussed in closed session, the response included a statement by Mr. Grutzmacher that "refutes th[e] characterization" suggested in the complaint. In that statement, Mr. Grutzmacher indicated that, at the request of another Council staff member, he approached a group of three individuals (including the complainant) before the start of the meeting and informed the group that the Council was to get briefings about a couple pending cases as indicated in the agenda. When then asked what the Council would discuss, Mr. Grutzmacher indicated he didn't know, but the Council was limited to the topics listed on the agenda. No follow-up question was raised.

Finally, as to the general allegation of violations of the Open Meetings Act since January 2008, the response indicated that the complainant's statements are insufficient for the Council to offer a meaningful response.

III

Analysis

A. Written Statements - Detail

When a public body closes a meeting under the Open Meetings Act, certain procedures must be followed. One requirement is that the presiding officer complete "a written statement of the reason for closing the meeting, including

a citation of the authority under [§10-508], and a listing of the topics to be discussed." §10-508(d)(2)(ii). In terms of the amount of detail required in the statement, we have long advised that a public body may not simply parrot the statutory language. To be sure, a public body is not expected to disclose a level of detail that would undermine the confidentiality that the Open Meetings Act permits. But the description of topics ought to be sufficient to allow the public to assess compliance by comparing the authority cited as justification for closing the meeting and the topic identified for discussion. 4 *OMCB Opinions* 77, 82 (2009). The statements submitted by the County Council for the closed meetings on January 13 and February 17, 2009, clearly satisfied this standard. Both documents provided the purpose of the closed session and applicable statutory authority and provided a description of the topics to be discussed - - allowing the public to understand the connection to the cited exception justifying closure of the meeting to the public.[3]

B. Written Statements - Access

The complainant and the County Council differ as to what transpired in connection with a request for information about what would be discussed during the closed session on February 17. Apparently, this discussion occurred before the start of the meeting. We decline to rule on this issue because the Compliance Board was not established to resolve disputed facts. 6 *OMCB Opinions* 77, 82 (2009). However, some general observations are offered as guidance.

The written statement required to close a meeting is to be available at the time the public body actually decides to go into closed session. 4 *OMCB Opinions* 46, 48 (2004). In other words, the statement is to be completed at the time the public body votes to close the meeting or immediately thereafter; but it must be available before the public body concludes its public session immediately in advance of the closed session. These statements are a matter of public record. §10-508(d)(4). As we previously advised, these statements generally should be available to the public as soon as completed. Anyone in attendance who wants to review it has a right to do so during the public portion of the meeting. A photocopy should be made available at that time if feasible or, if copying facilities are not available at that time, during the next business day at the latest. 5 *OMCB Opinions* 184, 187 (2007). Access to this document

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[3] This is not a case where the information in the agenda was intended to serve as the written statement. *Compare* 4 OMCB 46, 48 (2004). We are told that the briefer description included as part of the agenda was intended to give notice to the public in accordance with §10-506(b)(3) that part of the meeting would be closed.

is necessary to effectuate the right to anyone present to object to the closing of the meeting. *Id*.; §10-508(a)(3).

We understand that the practice of the County Council is to complete this statement contemporaneously with the closing of the meeting. Thus, it appears that this statement is completed by the time the meeting is actually closed. Had the complainant, or anyone else present, requested to review the document once it had been completed and before the session was closed, the public body would have been obligated to comply. Whether the complainant's request, apparently made to staff before the meeting started, and before the written statement existed, might have been fairly construed as a request to review the written statement upon completion, we are unable to say. *See* §10-508(f)(2).[4]

C. Reporting Obligation under §10-508(d)(3)

When an objection is made to the closing of a meeting, a public body is to submit a copy of the written statement prepared under §10-508(d)(2)(ii) to the Compliance Board. §10-508(d)(3). The Council's response indicated that it did not view Mr. Valentine's comments as an objection that would trigger the requirement that a copy of the written statement be submitted. Based on a review of a recording of the public portion of the February 19 meeting, we agree with the Council's assessment. Mr. Valentine noted that the Council had conducted three closed meetings in the last month and reminded the Council that the Act allows a closed session for purposes of discussing litigation, but not legislation. He provided examples of matters that he felt the Act requires be addressed in open session and he noted that the Attorney General has stated that the conduct of public business in open meetings increases the faith of the public in their government. However, Mr. Valentine never actually objected to the Council closing the meeting on February 19.

D. Miscellaneous

The complaint suggested that the Council violated the Act by considering in closed session matters that were "in the public realm." We have reviewed

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[4] In reviewing the record submitted by the County Council, it is obvious that the Chair's statement made in connection with a request for a motion in support of the closure did not include the level of detail disclosed in the written statement as to the topics that would be discussed during the closed session. To be sure, the requirement that a public body must vote to close a meeting implies that there be a motion by a member of the body. 3 *OMCB Opinions* 209 (2002). However, the motion certainly need not include the level of detail that is required to be included in the written statement.

the minutes for the Council's closed session, February 17.[5] Although the minutes do not reflect a lot of detail, the appear to satisfy the requirements of §10-509(c)(1). There is no evidence that the Council considered matters beyond those permissible under the authority relied on in closing the session.

As to the general allegation of repeat violations of the Act since January 2008, the Council indicated that the complainant's statement was insufficient for the council to provide a meaningful response. The Act provides that a complaint include, among other information, the action of the public body, the date of the action, and circumstances of the action that provide the basis for the complaint. While we have occasionally addressed general allegations made as part of a specific complaint, given the limited record available to us, we are unable to address this final issue. *See* §10-502.5(f)(2).

IV

Conclusion

We find that the County Council of Prince George's County did not violate the Open Meetings Act in connection with the written statements produced in closing meetings on January 13 and February 17, 2009. Nor did the Council violate the Act by not submitting to the Compliance Board a copy of its statement relied ion in closing the February 17 meeting. There is no evidence that the Council violated the Act on February 17 by discussing matters during in closed session beyond those permissible under the Act. Given the record before us, we are unable to offer a firm conclusion on other issues raised in the complaint.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin
Julio Morales, Esquire

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[5] The Compliance Board is required to maintain the confidentiality of this document under §10-502.5(c)(2)(iii).