

7 Official Opinions of the Compliance Board 92 (2011)

- **“Meeting”**
 - **Determined to be a meeting – Accidental quorum attending another public body’s meeting on matters before both bodies**
- **Compliance Board Authority**
 - **Process – Opinions – Reconsideration of prior opinion – Standards**
- **Notice**
 - **Timing – Generally**

March 9, 2011

REVISED OPINION

Craig O’Donnell
Kent County News

The Open Meetings Compliance Board has considered the complaint of Mr. Craig O’Donnell (“Complainant”) that the Millington Town Council (“Council”) violated the Open Meetings Act on February 16, 2010 when the Council’s three members attended a closed session of the Kent County Commissioners and then, in Complainant’s words, “proceeded down the street to the office of Mitch Mowell, consultant lawyer, and had a second illegal meeting.” In both instances, Complainant alleges, the Council failed to follow the Act’s procedures for meeting in a closed session. Complainant states that the Commissioners had given public notice that the first meeting would be closed for the discussion of “Potential Litigation/Legal” matters.¹

¹ This opinion replaces the opinion we sent to the parties on March 9, 2011. There, we proceeded solely on the basis of the complaint because we had not received a response from the Council, and we found that the Council had violated the Act by not responding. The Council has since established to our satisfaction that it had in fact sent a timely response. It provided us with that response and requested that we reconsider our opinion. We granted that request. We conclude in this case that the purposes of the Act would not be served by holding the Council accountable for lost mail when it appears that the Council acted diligently. Generally, we do not revise our opinions on the basis of matter that either party, through the exercise of reasonable diligence, could have presented in that party’s complaint or response, *cf.* 3 *OMCB Opinions* 255, 256 (2003); this is not such a case.

With respect to the presence of a quorum of the Council at a closed meeting convened by the Commissioners to discuss potential litigation, the Council responds that the presence of the quorum was unplanned, that the quorum attended solely to listen to the County's presentation of litigation matters, and that the members did not interact on public business. We accept that statement of the events, which bear a close resemblance to those we addressed in 3 *OMCB Opinions* 30 (2000). There, a quorum occurred by accident when one council member "poked her head into the room" where others were listening to a budget presentation. We distinguished between "a presentation having no connection to any particular legislative business, which would not involve the conduct of public business, and a presentation linked in a specific way to a topic before the body, which is the conduct of public business." *Id.* at 34. We found that a briefing about the budget, "even if limited in scope and devoid of discussion" constituted part of the conduct of public business – namely, the process by which the Council considered the budget." We stated, "the conduct of public business 'includes every step of the process.'" *Id.* (citing *City of New Carrollton v. Rogers*, 287 Md. 56, 72, 410 A.2d 1070 (1980)). Finally, we concluded that the facts of "'an accidental quorum' and therefore an unplanned meeting [did] not excuse compliance with the Act." *Id.*

Here, as in 3 *OMCB Opinions* 30, the briefing concerned "a topic before the body." The briefing also was a step in the Council's process of acting on that topic: the Council states that the briefing caused it to convene an emergency meeting with its counsel to act on the information conveyed there. Accordingly, here, too, we conclude that the Council violated the Act. And, as in 3 *OMCB Opinions* 30, we believe that what happened was "a failure of awareness, not a deliberate attempt to cut legal corners." *Id.* at 35.

We fully recognize that the Council's awareness here was made considerably more difficult by the fact that the accidental quorum occurred at another public body's properly-announced and closed meeting.² We again counsel that "members of a public body have a duty to be especially sensitive to Open Meetings Act issues when, as here, a quorum is together, the setting is manifestly not a social one, and the topic bears directly on a pending matter." *Id.*

² The Complainant states that the entities could have publicly discussed the lawsuit in question "without harming either the town or the county." However, a public entity need not find harm before closing a meeting under the pending or potential litigation and legal matters exceptions. *Compare* §10-508(a) (7) and (8) *with* §10-508(a)(10) (conditioning the public security exception on the public entity's determination that an open meeting on the particular issue would pose a risk to the public or public security).

We turn to the Council’s meeting with its attorney. We accept the Council’s description of the event as an “emergency meeting”; we do not “second-guess a public body’s decision to meet on short notice absent evidence suggesting improper motive.” 6 *OMCB Opinions* 1, 7 (2008) (citing 4 *OMCB Opinions* 99, 101 (2004)). The operative word, however, is “notice.” We have acknowledged that the provision of written notice in accordance with §10-506 might not be reasonable for an emergency meeting, 1 *OMCB Opinions* 162,168, n.3 (1996), and we have found that, during the last week of a General Assembly session, there was “no practical alternative” to oral notice of a committee voting session. 4 *OMCB Opinions* 147, 152 (2005); see also 7 *OMCB Opinions* 42, 45 (2010). Here, though, there was no notice at all.³ While we accept the Council’s statement that it was not able to reach the Town Office to have the meeting posted and that it notified the Complainant’s newspaper after the meeting, we are unable to assess whether there was “no practical alternative” to the failure to give notice.

In conclusion, while we find violations of the Act, we find no evidence of nefarious intent by the Council. This matter did not involve a public body’s improper discussion behind closed doors; the Complainant was not entitled to observe these particular meetings. Here, the Act’s procedural safeguards, if followed, might have protected the Council from suspicion where suspicion was not due. We encourage the Council to adhere to them.

OPEN MEETINGS COMPLIANCE BOARD

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³ We shall not resolve the factual dispute as to whether there was a closing statement and a summary of the minutes. 1 *OMCB Opinions* 56, 58 (1994). If those documents exist, Complainant is entitled to inspect them, see §§10-508 and 10-509; if not, the Council violated the Act by failing to create them.