Closed Session Procedures – Written Statement – Practices in violation: preparing written statement before or after meeting; topic description reiterating statutory authority; and failure to record vote

Minutes – Practices in violation: inadequate description / violation

Exceptions – Collective Bargaining – Outside Exception – Discussion of whether to recognize a particular union or employee representative

Personnel – Outside exception – Sheriff's appointees to sheriff's advisory committee not invoking discussion of individual county employees

Public Safety – Outside exception – Discussion about Sheriff's advisory committee, not bearing on public safety

March 10, 2011

Complainant:
Kevin Spradlin
The Potomac Highlands Dispatch

Respondent:
Allegany County Commissioners

On behalf of the Potomac Highland Dispatch, Kevin Spradlin filed a complaint suggesting that the initial meeting of the new Board of County Commissioners for Allegany County on December 17, 2010 violated the Open Meetings Act, particularly with respect to closure of the meeting for the purpose of discussing personnel or public safety matters. The County Attorney responded on behalf of the County Commissioners, denying that any violation occurred.

For the reasons set forth below, we find that the Commissioners violated the Open Meetings Act by failing to create a written contemporaneous closing statement that documented their vote to close the meeting and their reasons for closing the meeting. In addition, we find that the public minutes of the closed session inadequately described the topics of discussion. Finally, the Commissioners' discussion with the Sheriff concerning an advisory committee to be appointed by the Sheriff was not an appropriate subject for a closed

meeting under the Act. We are unable to determine whether the meeting was properly closed for the other topics of discussion based on the information provided to us.

I

Background

The three newly elected County Commissioners for Allegany County were sworn into office on December 16, 2010. They immediately issued a notice that they would meet the next morning with the County Administrator, the County Attorney and the newly-elected Sheriff. The notice stated that they would meet in executive session to "discuss matters related to Public Safety/Public Security."

The next day, the Commissioners met as advertised and voted to close their session. The County Attorney has, pursuant to §10-502.5(c), provided us with a copy of the sealed minutes of that closed meeting as well as a public description of the closed session that was apparently made a part of the public minutes of the next meeting of the Commissioners on December 30, 2010,[1] pursuant to §10-509(c)(2). In addition, the County Attorney indicated in his response, the discussion during the closed meeting concerned the Sheriff's creation of a committee to advise him on certain matters, the use of County property by certain federal agencies, and a request by members of the police department for representation by the Maryland Classified Employees Association.

II

Discussion

The complaint suggested that the "series of events" on December 16 and 17 violated the Open Meetings Act, without alleging a particular violation. We discuss the most pertinent requirements of the Act.

Notice

The complaint does not appear to be questioning the reasonableness of the notice of the meeting under the circumstances. Moreover, the notice clearly

[1] This document is entitled "Statement Regarding Executive Session Held on December 17, 2010 at 10 AM." In a supplemental response, the County Attorney confirmed that this document had been created after the closed session.

indicated that a closed session would take place, as the Act recommends. §10-506(b)(3).

Recorded Vote, and Closing Statement

Before a public body closes a meeting, it is to meet in open session, take a recorded vote on the proposal to close the meeting, and make a written statement that describes the reason for closing the meeting, including a citation of legal authority, and a listing of the topics to be discussed. §10-508(d)(2).[2] If a person objects to closure of the meeting, the public body is to send a copy of the written statement to the Compliance Board.

According to the response, the Commissioners first met in open session on December 17 in order to vote on the motion to close the meeting. However, it appears that no written closing statement was created. While a document prepared after the meeting for inclusion in the minutes states that the motion was passed, lists the participants in the meeting, and essentially quotes three statutory exceptions to the open meetings requirement, it does not satisfy the requirements of §10-508(d) for a written statement.

First, the document was not created coincident with the decision to close the session. This is not a technical point, as the propriety of a closed meeting can turn on whether the subsequent discussion deviated from the purposes announced in public for closing the meeting. In this case, the advance notice of the meeting cited one exception for closing the meeting while the statement created for the minutes recites three reasons. A closing statement created after a closed session has happened would create confusion as to the purpose for which the meeting was closed and the actual discussion that took place. As we have said before, after-the-fact justifications are ineffective. *See, e.g.*, 1 *OMCB Opinions* 96, 99 (1994).

Second, it is not clear from the statement created for the minutes precisely how the commissioners voted on the motion to close the session – *i.e.*, whether the vote was unanimous or by a 2-1 margin. This is also not a technical point. The recording of the vote is to ensure that the officials who choose to close a meeting are accountable for that decision. 3 *OMCB Opinions* 4, 6 (2000).

Finally, in describing the reasons for closing the meeting, the statement prepared for the minutes quotes or closely paraphrases three statutory

[2] Many public bodies use a form provided in Appendix C of the Attorney General's Open Meetings Act Manual for this purpose. While it is not necessary to use that particular form, it does cover all of the elements required by the Act.

provisions. This would not be adequate for a closing statement. As we have said previously, a closing statement need not be so detailed as to compromise the confidential purpose for which the meeting is closed, but "saying nothing beyond the statutory language deprives the public of the information to which it is entitled." 5 *OMCB Opinions* 33, 35 (2006).

In any event, the Commissioners violated the Act by failing to create a written closing statement at the time they voted to go into closed session on December 17.[3]

Public Minutes of Closed Session

When a public body closes a meeting, or part of a meeting, it is to include in the public minutes of the next open meeting certain information about the closed session – in particular: a statement of the time, place, and purpose of the closed session; a citation of the legal authority for closing the session; a listing of the topics of discussion, persons present; and a record of any votes taken. §10-509(c)(2). The written statement concerning the closed session included in the public minutes complies with the statutory requirements, except that it fails to describe the topics of discussion other than to quote or paraphrase the language of the cited exceptions. As prior opinions have stated, the description must be more informative than simply parroting the statutory language. 4 *OMCB Opinions* 76, 78 (2004).

Content of Closed Session

The complainant appeared most concerned about whether the subject matter of the meeting was a proper basis for a closed session. The County Attorney provided us with a copy of the sealed minutes of that session, pursuant to §10-502.5(c)(2)(ii), and summarized the discussions during the closed session in his response to the complaint.[4] We note that each of the exceptions for closing a meeting is to be strictly construed in favor of open meetings. §10-508(c).

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[3] We understand that an objection was made by a member of the public to closure of the meeting during the initial open session. If the Commissioners had created the required closing statement, they would have been obligated to send it to the Compliance Board as a result of that objection. §10-508(d)(3).

[4] In justifying the closed sessions, the response relied on exceptions to the open meeting requirement of §10-508. We thus do not consider whether any of the discussions would have fallen under the rubric of "administrative function" and as a result, not been subject to the Act at all, although that possibility seems unlikely.

The response indicates that one portion of the closed session concerned a discussion with the Sheriff of individuals to be appointed by the Sheriff to advise him about certain public safety matters. From our review of the sealed minutes it does not appear that this discussion fell within any of the stated exceptions. It does not fit the personnel action exception in (a)(1), as it was not a discussion about individual employees of the County; rather, it was about possible appointees to an advisory board of the Sheriff. Nor did the discussion directly concern collective bargaining negotiations, the deployment of police staff, or anything related to emergency plans. In our view, the Commissioners violated the Act in closing this portion of the meeting.

Second, the response states that there was a discussion of the use of certain buildings for law enforcement purposes and matters related to federal agencies and states that, under federal law and a written agreement with the federal agencies, "any further disclosure related to that matter would be a violation of National Security." Without citation to federal law or a copy of the agreement, we cannot evaluate this claim. Nor are the sealed minutes enlightening. What we can say is that the exceptions cited in the written statement included in the public minutes do not appear to apply to this discussion. If federal law would bar disclosure of the content of this discussion, the appropriate exception would be §10-508(a)(13), which allows closure of a meeting to "comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter."

Finally, the response states that there was also a discussion of a request by certain members of the police department for representation by the Maryland Classified Employees Association. The closed session minutes are exceedingly cryptic on this issue and we are therefore unable to reach a conclusion as to whether the session was properly closed under this exception. However, it is notable that the exception relates to the conduct of negotiations or discussions related to negotiations – not to discussions as to whether to recognize a particular union or employee representative.

III

Conclusion

In summary, we find that the Commissioners violated the Open Meetings Act by failing to create a written contemporaneous closing statement that documented their vote to close the meeting and their reasons for closing the meeting. In addition, we find that the public minutes of the closed session inadequately described the topics of discussion. Finally, the Commissioners'

discussion with the Sheriff concerning an advisory committee to be appointed by the Sheriff was not an appropriate subject for a closed meeting under the Act. We are unable to determine whether the meeting was properly closed for the other topics of discussion based on the information provided to us.

OPEN MEETINGS COMPLIANCE BOARD

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