8 *Official Opinions of the Compliance Board 95* (2012)

♦ Open Session Requirement - *Generally*
- No violation when alleged discussion of policy matters did not occur

♦ Closed Session Procedures - *Written Statement* - *Generally*
- Reason for closing to be specified when not apparent from the topic discussed

♦ Minutes - *Closed Session Statement* - *Generally*
- Disclosure of topics not discussed advisable when meeting was closed in part to discuss them

***Topic headings correspond to those in the Opinions Index (2010 edition) at http://www.oag.state.md.us/opengov/openmeetings/appf.pdf**

July 25, 2012

Re: Maryland State Board of Education (Gary W. Bauer on behalf of Maryland Association of Boards of Education)

We have considered the allegation of Gary W. Bauer, on behalf of the Maryland Association of Boards of Education, ("Complainant"), that the Maryland State Board of Education ("the State Board") violated the Open Meetings Act ("the Act") on February 28, 2012 by discussing certain policy matters in a meeting closed to the public. The State Board denies the allegation and has submitted an affidavit and other documentation on the events of the closed session.

We conclude that the State Board did not violate the Act.

Facts and allegations

The State Board's agenda for its day-long public meeting on February 28, 2012 listed fourteen items. The first eight were scheduled to begin at times ranging between 9:05 a.m. and 11:30 a.m. They were to be followed by an "Adjournment to Executive Session" at 11:50 a.m. and then a return to open session, which was to begin at 2:15 p.m. with the ninth item. The ninth item was listed as an "action item" pertaining to a draft report on processes for student discipline, and 45 minutes were allotted to it.

The meeting itself ran somewhat behind that schedule. At 12:35 p.m., the members voted to adjourn to a closed session. The closing statement [1] signed by the presiding officer cites State Government Article ("SG") §§ 10-503(a)(1)(i) and 10-508(a)(1) and (7) as the statutory bases for the closing. Under SG § 10-503(a)(1)(i), a public body's performance of its "administrative function" is excluded from most provisions of the Act, including the open meeting mandate. Section 10-508 specifies the topics that may be discussed in a closed session. The two exceptions cited by the State Board pertain to employment or other personnel matters affecting a specific individual and to consultation "with counsel to obtain legal advice."

The closing statement listed five categories of topics to be addressed.[2] The first three pertained to appeals, draft orders, and a draft opinion in matters before the State Board. The fourth was the "[receipt of] legal advice on a draft report." The fifth was the "[receipt of] a report on an internal board management/personnel matter." It thus appeared that the State Board was closing its meeting in part to receive legal advice on the

[1] By "closing statement," we mean the written statement that the presiding officer must prepare before the public body adjourns to a closed session. The statement must contain "a written statement of the reason for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed." SG § 10-508(d)(2). The closed-session discussion must then fall within the claimed exception. SG § 10-508(b).

[2] We have stated that the three requirements in SG § 10-508(d)(2) -- statutory citation, topics to be discussed, reason for closing -- have been satisfied when the "reason for closing," although omitted, is implicit in the information conveyed by the entries for "topics discussed." *See* 4 *OMCB Opinions* 188, 196 (2005). Nonetheless, the decision to close a meeting is discretionary, and the mere identification of the topic to be discussed will not always convey why the public body has elected to discuss it behind closed doors. We therefore encourage the use of a form which calls on the presiding officer to enter (and thus consider) the reason for closing as well as the statutory basis and topics to be discussed. Such a form appears in Appendix C to the Attorney General's *Open Meetings Act Manual*, *available at* http://www.oag.state.md.us/Opengov/Openmeetings/AppC.pdf.

draft report that was the subject of the ninth item on the agenda for the open session.

The closed session ended at 2:45 p.m., slightly two hours after State Board's vote on the motion to close. After recessing for 15 minutes, the State Board reconvened in open session, and, according to all accounts, voted to release the draft report without much discussion. The minutes reflect an announcement by the State Board president that the draft report would be released that day for public comment.

The State Board's minutes of the meeting contain a summary of the events of the closed session. The summary states that the session was closed partly under the exception for the receipt of legal advice, as had been foretold by the citation in the closing statement to that exception, and by the fourth topic specified there -- "legal advice on a draft report." The summary describes the State Board's closed-session actions and discussions on the other topics but does not mention a discussion of the draft report.

Complainant infers from the brevity of the State Board's discussion of the draft report in the open session that the State Board had reached its decision on the draft report in the closed session. Complainant states that it has a copy of a preliminary version of the draft report labeled as a confidential draft "For State Board member's Review and Comment." That document, Complainant states, bears "suggested additions and deletions which were debated by the State Board during its Executive Session . . . ." Complainant further alleges that the State Board, after adjourning "[s]hortly before noon" to meet in the closed session, "spent a significant portion of the next three hours discussing and modifying the . . . report out of the public eye." Complainant states that the State Board president "joked that they had gotten their agenda back on schedule by adopting the [draft report] without any public comment, discussion, or debate."

The State Board's counsel states that the members had received a version of the draft report in January 2012 and had debated that draft at its January 24 meeting. The minutes of the January meeting reflect that the State Board president "asked [counsel] to redraft the report with the Board's suggestions so that the report can be released at the Board meeting in February." The State Board president states in his affidavit that the new draft was circulated approximately a week before the February 28 meeting.

He further states that the State Board members did not discuss either the draft report or any school disciplinary policy issues during the closed portion of the February 28 meeting. He states that the members discussed the search for a new superintendent for approximately one hour, spent considerable time deliberating on a complicated disciplinary matter, addressed one other appeal, and approved an opinion and two orders for publication. He explains that the State Board had "reserved time on [the agenda] if it were necessary to receive legal advice on [the draft report]," but that "there were no legal issues to discuss." He states that the State Board was "able to [release the report] without much discussion because it [had] spent over two years discussing school discipline issues in public sessions . . . ."

Discussion and Conclusion

The affidavit of the State Board president, who presided over the closed session, establishes that the State Board did not discuss the draft report or any school discipline policy issues during its closed session. We therefore conclude that the State Board did not violate the Act.

Open Meetings Compliance Board

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