

## **8 Official Opinions of the Compliance Board 99 (2012)**

- ◆ Closed Session Procedures – *Written Statement*
  - ◇ Practices in violation – topic description reiterating statutory authority
- ◆ Minutes – *Closed Session Statement*
  - ◇ Practices in violation – inadequate description
- ◆ Exceptions Permitting Closed Sessions –
  - ◇ *Business Relocation §10-508(a)(4)* discussion of negotiation with business considering location in the county: within exception
- ◆ Compliance Board Authority and Procedures
  - ◇ *Complaint* complaint to be based on good-faith belief of violation, after reasonable inquiry
- ◆ Meeting – *Determined not to be a meeting:*
  - ◇ Lunch during noon recess when no public business was discussed

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

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**July 25, 2012**

### **Board of County Commissioners of Washington County (Craig O'Donnell)**

We have considered the complaint of Craig O'Donnell ("Complainant") that, in early 2011, the Board of County Commissioners of Washington County ("the County Board") violated various requirements of the Open Meetings Act ("the Act") pertaining to closed meetings.

Complainant became aware of an April 27, 2012 article, posted on [www.herald-mail.com](http://www.herald-mail.com), which complained about a closed-session decision by the County Board to pay a \$100,000 incentive for a financial service company to expand into Washington County and the County Board's refusal to disclose the name of the company. The online article said that the closed session meeting was held "last year," and it mentioned a meeting held in March 2011. Complainant then researched, online, the County Board's minutes from early February 2011 through April 2011. Complainant sent to us 8 statements for closing meetings for that period of time, plus minutes dated April 12, 2011, which was apparently the date of

the meeting during which the County Board discussed the incentive in a closed meeting.

Complainant alleges that, for every meeting covered by the closing statements sent to us, the County Board violated the act by: failing to prepare adequate closing statements documenting the reasons for excluding the public from the sessions in question; failing to provide an adequate summary of those sessions in the minutes of its next open session; and discussing in closed session matters that exceeded the scope of the statutory authority, or “exception,” claimed as a basis of the closing. Complainant further alleges that, “given the other facts about the Commissioners’ handling of closed meetings, there is a very good possibility that a quorum regularly discussed public business during the “recess.”

We begin with the allegations that the closing statements and closed-session summaries did not contain the information required by the Act. State Government Article (“SG”) § 10-508 (d)(2)(ii) requires the presiding officer to complete a written statement before the public body meets in closed session, to cite the statutory authority for closing the meeting, and to specify the topics to be discussed and the reasons for closing the meeting. *See, e.g., 7 OMCB Opinions 225, 227-29 (2011)*, available at <http://www.oag.state.md.us/Opinions/Open2010/7omcb225.pdf> explaining the procedures required of a public body wishing to close a meeting to perform a function covered by the Act). A public body’s repetition of the statutory language, or “boilerplate,” supplies the “statutory authority,” but not the required information on the topics to be discussed and the reason for excluding the public from the discussion. *See, e.g., 5 OMCB Opinions 160, 163-64 (2003)*.

The early 2011 closing statements provided to us do not comply with the Act; they recite the words of the applicable statute under the heading for the “Statutory Authority to Close Session” and simply repeat that language, without further information, under a heading for “Reasons for Closing/Topics to be Discussed.” The Board’s closing statement for its June 5, 2012 specifies the topic to be discussed and thus comes much closer to satisfying the Act. We encourage the Board to separately address on its closing statements, for each exception it cites, the topic to be discussed and the reason it has exercised its discretion to exclude the public.<sup>1</sup>

Closed-session summaries also must do more than recite the words in the Act. *See* SG § 10-509(c)(2) (requiring the public body to specify the topics discussed and actions taken in the closed session in the minutes of its

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<sup>1</sup> The closing statement form posted on the Attorney General’s website has been revised slightly to draw presiding officers’ attention to the fact that the “topic to be discussed” and “reason for closing” are separate requirements. *See* <http://www.oag.state.md.us/Opengov/Openmeetings/AppC.pdf>.

next open session). It appears that the County Board is now complying with this requirement.

We turn next to the allegation that the County Board discussed in closed session matters not included in the exceptions it claimed. Specifically, complainant asserts that the exception for the discussion of “a matter that concerns the proposal for a business . . . to locate, expand, or remain in the State,” *see* SG § 10-508(a)(4), did not permit the County Board to decide on an incentive to be offered to a business which the County Board had hoped would relocate to the County. The description of the closed-session discussion in the sealed minutes of that session bears out the County Board’s statement that the discussion centered on a “negotiating strategy to attract a prospective business to the County, including the offer of a conditional economic development incentive . . . .” We set forth the parameters of the “business relocation exception” in 7 *OMCB Opinions* 148, 159-65 (2011), and this discussion fell within them. With respect to administrative matters discussed in a meeting closed also under one of the statutory exceptions in SG § 10-508, we direct the County Board to the disclosure requirement in SG 10-503(c).

Lastly, we decline to address Complainant’s speculative allegation that the County Board probably discussed public business during the lunch recess disclosed in its minutes. We have instructed that “[t]he right to file a complaint should be exercised . . . only in the good-faith belief that the Act was indeed violated, based on a reasonable inquiry into the available facts.” 3 *OMCB Opinions* 143, 144 (2001). Indeed, we do not construe the Act to require us to address complaints that mention no indicia of the alleged violation – indicia such as errors in documents required to be kept under the Act, comments or actions by members of the public body or staff evidencing improper conduct, or an apparently rubber-stamped decision suggesting an improper closed meeting, to name a few. Here, Complainant’s allegation is based only on Complainant’s mere surmise, from the minutes posted on-line, that if the County Board did not draft closing statements properly, “there is a good possibility that they discussed public business during the ‘recess.’” As the Complainant states, there is no evidence that a quorum of the County Board even gathered during the recess.<sup>2</sup>

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<sup>2</sup> The Act only applies when a public body “meets” – that is, when a quorum of the public body’s members have convened to discuss public business. See SG §§ 10-502 (g), 10-503(a)(2). Over the years, we have concluded that as long as the members of a public body do not discuss business, they may, without violating the Act and among other things: have coffee together (7 *OMCB Opinions* 269 (2011)); eat breakfast (3 *OMCB Opinions* 257 (2003)); eat dinner (5 *OMCB Opinions* 93 (2007)); gather informally during a break (1 *OMCB Opinions* 92 (1994)); and hold social retreats (6 *OMCB Opinions* 63 (2008)). The County Board denies that the Commissioners discussed public business during the lunch break, and we have no reason to conclude otherwise. As explained in our

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In conclusion, the 2011 closing statements and minutes presented to us did not disclose the information required by the Act, but the County Board has since acted to correct the deficiencies. We commend it for that constructive response to the complaint. The County Board's closed-session discussion about incentives for the location of a particular business in the County did not exceed the scope of the exception it claimed for that discussion, and, as long as the Commissioners do not discuss public business, they do not violate the Act by eating lunch together during a recess.

*Open Meetings Compliance Board*

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2011 opinion, available at <http://www.oag.state.md.us/Opinions/Open2010/7omcb269.pdf>, a social gathering may become a "meeting" subject to the Act if the conversation turns to agenda items or planning. Nothing before us suggests that the Commissioners discussed such topics – or even whether a quorum was present in any one place. The Act did not apply to the recess, and the Commissioners were not required to disclose their activities in the minutes of the meeting.