COMPLIANCE BOARD OPINION 93-2

January 7, 1993

Mr. Stewart Dobson
Mr. Sean O'Sullivan

The Open Meetings Compliance Board has considered your complaint dated November 10, 1992 concerning the closing of a portion of a meeting of the Worcester County Commissioners on November 5, 1992. The Compliance Board also considered the more general concern that you expressed about the meeting practices of the Commissioners, one particular example of which concerned an October 27, 1992 meeting between the Commissioners and two members of the General Assembly. The County Commissioners filed a timely response to the complaint by letter of December 7, 1992 from the County Attorney, Edward H. Hammond, Jr., Esquire.

I

November 5 Meeting

Your complaint about the November 5 meeting was as follows:

> Members of the public and the press were asked to leave the meeting room at 11:40 p.m. for a scheduled meeting with members of the Worcester County Board of Education. The commissioners said the public was being asked to leave so that they could discuss personnel matters. The stated purpose of the meeting was supposed to have been discussion of impending state budget cuts in school funding. After the meeting, participants acknowledge that the meeting was about budget cuts. Brief statements were given to the press about the results of the meeting, and County Attorney Ed Hammond maintained that the discussion was an executive matter.

Mr. Hammond asserts that the meeting with the Worcester County Board of Education constituted an "executive function" and therefore was not subject to the Open Meetings Act. Mr. Hammond states "that the purpose of the meeting was to discuss the implementation of the previously (legally) adopted county budget."

With certain exceptions not pertinent here, the Open Meetings Act "does not apply to ... a public body when it is carrying out ... an executive function." §10-503(a)(1)(i) of the State Government Article, Maryland Code. The term "executive function" is defined as follows in §10-502(d)(1):

> "Executive function" means the administration of:
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> (i) a law of the State;
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> (ii) a law of a political subdivision of the State; or
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> (iii) a rule, regulation, or bylaw of a public body.

In the view of the Compliance Board, a discussion between a board of county commissioners and a county board of education over the particulars of how the school board is implementing a previously adopted budget is a discussion of "the administration of ... a law of a political subdivision ...," for a county budget is a "law" for purposes of this definition. Hence, such a discussion is an "executive function" not subject to the Open Meetings Act. By contrast, a discussion relating to "approving, disapproving, or amending a budget" is a "quasi-legislative function" subject to the Act. §10-502(j)(2).

If the discussion at the November 5 session was confined to matters of budget implementation and did not involve any proposal to amend the budget, no violation of the Open Meetings Act occurred.

II

Meeting Practices Generally

Your more general complaint about meeting practices states a concern about "a pattern of avoidance of Open Meeting Laws by the Worcester County Commissioners." Specifically, you describe the following:

> Since July 1, 1992, when the new laws went into effect, the Worcester County Commissioners have continued to hold 30-minute closed sessions before every one of the semi-weekly meetings. The minutes of those meetings do not appear to conform to open meetings requirements. The minutes refer to the commissioners meeting in closed session "to discuss legal and personnel matters."

> On occasion, when directly questioned about the closed session, Commissioners will reveal topics discussed in a closed session, but they are not reflected in public minutes.
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> When executive sessions are called, specific reasons are not cited as a rule. As with the minutes, "legal and personnel matters" are cited as the reason for a closed session, no matter what the topic.
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> As a recent example, at a special session held on October 27, 1992, the public was asked to leave the meeting so the commissioners could meet privately with State Delegate Bennett Bozman and State Sen. J. Lowell Stoltzfus. The reason was given was legal matters, and no account of the meeting or the topics discussed was included with minutes distributed on November 5.

Mr. Hammond confirmed that the Commissioners in fact regularly hold closed sessions scheduled to begin one hour before the open session. "At those [closed] sessions, Commissioners discuss personnel matters and legal matters. That fact is announced and the closed session is placed on the agenda." Matters for which a closed session may be permissibly held under §10-508 of the Act are grouped together for the sake of convenience, to avoid the situation in which the Commissioners periodically open and close the meeting. Mr. Hammond indicates that a vote to hold these closed sessions is taken and properly recorded. He further indicates that "[t]he written statement of the reasons for closing is quite simple, it says `legal and personnel' matters ...."

In the view of the Compliance Board, the Open Meetings Act does not prohibit a public body from grouping matters that can permissibly be discussed in closed session prior to the start of an open session. As Mr. Hammond points out, this kind of grouping may be more convenient for members of the public. The notice of the meeting, however, should make it clear to members of the public that a meeting scheduled to begin at, for example, 9:00 a.m. will commence with a closed session, the open session to commence at 10:00 a.m. *See* §10-506(a) and (b)(3). In addition, a public body must begin its meeting in open session in order to take the vote and issue the written statement that are prerequisites to the conduct of a closed session. *See* §10-508(d).

With respect to the content of the "written statement," the Act requires that it include "the reason for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed." §10-508(d)(2)(ii). In the Compliance Board's view, the practice of the Commissioners of Worcester County in simply reciting "legal and personnel" matters as the "reason" for holding

the closed session is insufficient. While the Act surely does not require that a public body disclose in the written statement sensitive information that the Act permits to be discussed in closed session, the written statement ought to apprise those in attendance of the basis for the invocation of the particular exception that is cited. So, for example, if the Commissioners were planning to gain the legal advice of the County Attorney about a settlement proposal in pending litigation, the written statement should say so, unless the very fact of the offer having been made was sensitive. While the level of detail necessarily will vary from one meeting to the next, the Compliance Board believes that the use of an uninformative boilerplate statement of reasons does not comply with §10-508(d)(2).

On behalf of the Commissioners, Mr. Hammond provided the following detail about the October 27 meeting specifically referred to in the complaint as an example of alleged noncompliance:

> With respect to the meeting of October 27th with Delegate Bozman and Senator Stoltzfus, on October 27th the Commissioners were present at a briefing by the State Highway Administration. These are regularly done and the meeting was open. No minutes were kept because it was a briefing by the State Highway Administration and not technically a meeting of the Commissioners, although admittedly they were all in the same room at the same time. Since Delegate Bozman and Senator Stoltzfus were also at the meeting and since there was an impending meeting of the Legislature, the Commissioners were briefed by Senator Stoltzfus and Delegate Bozman in a closed session on their opinions on the possibility of State Legislation on the deficit. No meeting, however, was convened for the consideration or transaction of public business. The Commissioners were simply briefed and did very little talking. No decisions were made, votes taken or the like .... Some Commissioners made comments about the Legislature, ... but those remarks fell more into the political realm than into the governmental realm.... [I]ndividual opinions of some members ... were expressed with regard to what the Legislature was doing about the deficit. No minutes were kept of the briefing.... In my opinion, that encounter did not constitute a meeting under the definition provided in Section 10-502.

In the view of the Compliance Board, the briefing with the Senator and Delegate was a "meeting" of the Commissioners. The term "meeting" is defined in §10-502(g) as the convening of a quorum of a public body "for the consideration or transaction of public business." Unquestionably the impact of potential State reductions in local

aid is a matter of public business. The Compliance Board is of the opinion that information-gathering at the earliest stages of policy formation is part of the "consideration ... of public business." The questions posed, the answers given, the members' passing comments and observations – all are important parts of the process by which a public body ultimately comes to its decision. As the Attorney General put it, "Even preliminary stages of the decisionmaking process are encompassed by the Act." Office of the Attorney General, Open Meetings Act Manual at 7 (1992).

The determinative issue in this case is whether the briefing on October 27, albeit a "meeting," nevertheless constituted an "executive function" outside the scope of the Act. Worcester County has adopted the code form of home rule, rather than charter home rule with a county executive. Thus, the County Commissioners carry out the executive activities of county government. When they meet in that capacity, the Open Meetings Act generally does not apply. Compliance Board Opinion 92-2, at 2-3 (October 23, 1992); *Open Meetings Act Manual* at 11.

Cuts in State aid to the counties, in the discussion stage on October 27, would surely have a significant effect on the manner in which the Commissioners administer county government. Thus, in the view of the Compliance Board, the public business that the Commissioners considered at the October 27 meeting was an "executive function." Therefore, the Commissioners did not violate the Act by holding the session in private without procedural compliance with the Act.

OPEN MEETINGS COMPLIANCE BOARD

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