COMPLIANCE BOARD OPINION NO. 97-5

April 29, 1997

Mr. Dennis W. Evans, et al.

The Open Meetings Compliance Board has considered the complaint dated March 5, 1997, in which you and other citizens of Worcester County alleged violations of the Open Meetings Act in connection with the consideration by the County Commissioners of a proposal to construct a medical facility to house certain federal prisoners in or near Pocomoke City. The Compliance Board finds that the County Commissioners were authorized by the Act to hold meetings on this subject closed to the public but violated the Act by failing to adhere to some of the Act's procedural requirements. The Compliance Board notes, however, that the County Commissioners have adopted new procedures that should lead to compliance with these requirements.

I

Complaint and Response

The complaint points out, based on newspaper accounts and other information, that the Worcester County Commissioners apparently engaged in negotiations with other government officials and private individuals "regarding the possibility of the location of a hospital for federal prisoners in or near Pocomoke City. Such apparent negotiations included a discussion of the expenditure of public funds that involved land acquisition, construction costs, etc." The complaint alleges that the County Commissioners failed to comply with the Open Meetings Act "by properly documenting they were going into closed session and on what date, time, and place as it pertains to this matter. Furthermore, the Commissioners have not provided any written verification of any recorded vote on the closing of the sessions that were conducted; nor any written reason provided for closing the meeting (except for possible vague references found in several minutes regarding legal matters); nor the inclusion of any citation of the authority under the law; nor a listing of the topics to be discussed." The complaint also objects to the omission from minutes of the information required by the Act.

In a timely response on behalf of the County Commissioners, County Attorney Edward H. Hammond, Jr. confirms that the Commissioners have met on several occasions to discuss a proposal by a private corporation that seeks to operate, under contract with the Federal Bureau of Prisons, a geriatric nursing facility for federal prisoners. As Mr. Hammond summarizes the proposal, the company "will locate a secure geriatric nursing home within the County which would employ approximately one thousand people at wage scales significantly in excess of those generally available in Worcester County. In return the County and State would provide certain incentives."

Mr. Hammond contends that the Commissioners were authorized by the Open Meetings Act to conduct meetings about this proposal in closed session. Mr. Hammond acknowledges, however, that the procedures used by the Commissioners to conduct the closed sessions may have been "technically lacking." In particular, "usually the first hour of the meeting is set aside for executive functions and matters which may be considered in closed sessions (which are listed on the agenda — usually personnel matters and legal advice). Individual votes to close these sessions are not held at the time of the meeting."

II

Authority to Close Meeting

Under §10-508(a)(4) of the State Government Article, a public body may hold a closed meeting to "consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State." The Compliance Board finds that the proposal to locate the secure geriatric facility in Worcester County unquestionably falls within the scope of this exception. *See generally* Compliance Board Opinion 93-3 (February 24, 1993). Therefore, the County Commissioners were legally authorized to meet in closed session to discuss the proposal and any item reasonably related to it — for example, the extent to which County funds or other benefits ought to be provided as part of the package to encourage this development.

When a public body closes a meeting under this or any other exception in §10-508, however, it may do so only by following the procedures specified in §10-508(d)(2). Specifically, the presiding officer of the public body must

"conduct a recorded vote on the closing of the session." The presiding officer must also "make 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."

These procedures must be carried out in open session. "Members of a public body are accountable for their decision to hold a closed session, and part of their accountability is to make that decision before the public that is about to be excluded." Compliance Board Opinion No. 96-12, at 3 (November 20, 1996). Moreover, the Act's requirement that a written statement of the reason for closing the meeting be prepared is not satisfied by "uninformative boilerplate." Compliance Board Opinion 93-2, at 4 (January 7, 1993).[1]

In addition, certain information about a meeting closed pursuant to an exception in §10-508 must be provided in the minutes of the public body's next open session. While the minutes of the closed session themselves are confidential, minutes open to the public are to include:

> (i) a statement of the time, place, and purpose of the closed session;
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> (ii) a record of the vote of each member as to closing the session;
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> (iii) a citation of the authority under this subtitle for closing the session; and
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> (iv) a listing of the topics of discussion, persons present, and each action taking during the session.

§10-509(c)(2). Although the level of detail in these minutes need not be so great as to compromise the goals of confidentiality that led to the session being closed in the first place, this disclosure statement should give the public enough information to evidence that the discussion was indeed limited to the

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[1] That opinion noted that the procedures used by the Worcester County Commissioners did not comply with the Act. Because the particular matter complained about fell within the "executive function" exclusion, however, the Act was not violated. Opinion No. 93-2, at 5. *See* note 2 below.

topic that permitted the meeting to be closed. *See* Compliance Board Opinions 95-1 (April 13, 1995), 94-5 (July 29, 1994), and 92-5 (December 22, 1992). Moreover, the discussion actually conducted in the closed session must be limited to the topic that justified the closing of the meeting. *See, e.g.,* Compliance Board Opinion 95-2 (June 20, 1995), 93-11 (November 30, 1993), and 92-1 (October 15, 1992).

The County Commissioners have recognized the problems with their current procedures and have revised them accordingly. The most significant change concerns the manner in which meetings will be closed when the closing is justified by an exception in §10-508.[2] Mr. Hammond indicates that, "for those non-executive matters for which the meeting may be closed, [a]t an open meeting the Commissioners will vote by a recorded vote (giving reasons) with written reference to the Open Meetings Law, and reasons, as to whether or not those matters for which the session may be closed may be heard in closed session.... Appropriate minutes will be kept and extracts publicly available." If these procedures are adhered to, the County Commissioners will be in full compliance with the Act.

OPEN MEETINGS COMPLIANCE BOARD

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[2] With the exception of certain zoning and licensing matters, if the topic of discussion concerns an "executive function," as defined in §10-502(d), the Act does not apply to the discussion. §10-503. Therefore, the County Commissioners need not follow the Act's procedures to close a discussion of an executive function.