COMPLIANCE BOARD OPINION NO. 97-10

May 27, 1997

Mr. Conrad Potemra

The Open Meetings Compliance Board has considered your complaint dated March 27, 1997, in which you allege that the Commissioners of Poolesville violated the Open Meetings Act in the conduct of their closed session on March 17, 1997. For the reasons stated below, the Compliance Board concludes that the Act allowed the meeting to be closed but cannot state an opinion whether the Commissioners' statement prior to closing the meeting was adequate.

We understand your complaint to make two points: that the Commissioners did not have a legitimate basis for invoking the "litigation" exception, §10-508(a)(8) of the State Government Article, because no litigation against Poolesville is pending; and that, even if the Commissioners could properly have closed the meeting, the description of their basis for doing so was inadequate.[1]

According to the agenda of the March 17, 1997 meeting, the Commissioners planned to adjourn their open meeting into closed session in part "to consult with counsel to obtain legal advice concerning the disposition of property within the town's boundary and possible litigation." The agenda cites §10-508(a)(7) and (8) and the legal basis for the closing.[2] In a timely response on behalf of the Commissioners, Town Attorney Charles S. Rand indicates that the agenda item was intended to serve as the statutorily required statement prior to the closing of the meeting. The agenda statement, Mr. Rand asserts, "contains the reason and authority for closing a meeting as well as the topics to be discussed .... The notice speaks for itself, and it is respectfully suggested that the notice was proper."

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[1] Your complaint stated that you "asked if the possible litigation was about the prior topic of disposition of land. I was told by the Town Attorney that this was another issue. No further information was given by the Town Attorney or any of the Commissioners."

[2] The meeting was also closed on the basis of §10-508(a)(1)(i), which deals with certain personnel matters. This aspect of the closed meeting is not the subject of your complaint.

Your complaint objects that the "litigation" exception should not have been invoked by the Commissioners: "I believe this [exception] is being used as a catch-all for executive sessions to discuss legal ramifications. Unless they can show pending litigation against the Town, this [matter] should be discussed in public." Mr. Rand correctly notes, however, that the exception in §10-508(a)(8) permits a closed session to "consult with staff, consultants, or other individuals about pending *or potential* litigation." (Emphasis added.) We discussed this exception in our immediately prior opinion about Poolesville and will not elaborate here. *See* Compliance Board Opinion No. 97-9, at 4 (May 20, 1997).

Mr. Rand reports that Poolesville "is involved in a situation where it may be sued by a finite member of claimants; however, their Statute of Limitations will expire in September. This was explained by me, and hence [the Commissioners] tabled the matter until October." Under these circumstances, it appears to the Compliance Board that the Commissioners had a reasonable basis for invoking this exception. Therefore, the Compliance Board finds no violation in this regard.

Before a public body may hold a closed session authorized by one of the Act's exceptions, the presiding officer has two obligations: to conduct a recorded vote on the closing of the session; and to "make a written statement of the reason for closing the meeting, including a citation of the authority under this section, and a listing of topics to be discussed." §10-508(d)(2). The Commissioners' statement prior to the closing of the March 17 session includes a citation of the authority to close the meeting and, with regard to the "legal advice" exception, indicates the topic.

The bare reference to "possible litigation," however, would ordinarily be insufficient as a statement of the "topic to be discussed." As we wrote in a prior opinion, "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 of the invocation of the particular exception that is cited.... While the level of detail will necessarily 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 [the Act]." Compliance Board Opinion 93-2, at 4 (January 7, 1993).

Apparently, the concern of the Town Attorney was that *any* elaboration about the topic of the "possible litigation" might alert potential litigants and so expose Poolesville to suits that otherwise will be foreclosed by the running of the statute of limitations. The Compliance Board is not able to substitute its

judgment for that of the Town Attorney as to the possible consequences of saying anything more than the two words "possible litigation."

Therefore, the Compliance Board is unable to offer an opinion about the Commissioners' compliance, in this instance, with §10-508(d)(2). The Board can only observe that, under ordinary circumstances, the bare statement "possible litigation" would be insufficient compliance with the Act's requirement. It may be, however, that special circumstances here justified this minimal disclosure.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.
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