7 *Official Opinions of the Compliance Board* 42 (2010)

Notice Requirements – Method – Oral Announcement of Legislative Committee meetings during final days of session satisfy Act

Notice Requirements – Method – Absent special circumstances, written notice required

Minutes – Failure to prepare and adopt violated Act

October 14, 2010

Tom Marquardt
Editor and Publisher
Capital- Gazette Communications

The Open Meetings Compliance Board has considered your complaint alleging that committees of the General Assembly have failed to comply with the requirements of the Open Meetings Act. Specifically, you alleged that the House Rules and Executive Nominations Committee ("HRC") and Senate Rules Committee ("SRC") have conducted meetings without giving proper notice in accordance with the Act and have failed to keep minutes of meetings as required under the Act. You further alleged that the House and Senate standing committees fail to keep minutes of their meetings as required by the Act.

For the reasons explained below, we find that the HRC and SRC did not violate the notice requirements of the Act for those sessions that were announced in the Committee Meetings and Hearing Schedule. Furthermore, oral notice of a HRC meeting held on the final day of the 2010 session satisfied the Act in that advance written notice prescribing a time that the committee would meet was impractical on the last day of session. However, absent special circumstances that might preclude advance written notice, the HRC and SRC were obligated to give advance written notice of meetings at which the committees considered re-referrals of late filed legislation. Finally, we find that the failure of standing committees to prepare and adopt minutes of their meetings violated the Act.

I

Complaint and Response

The first part of the complaint concerned the practices of the HRC and the SRC. According to the complaint, each committee meets as the need arises and the meetings are announced on the floor of the respective chambers and

occur immediately after the session. This practice, in the view of the complainant, is a violation of §10-506(a),[1] requiring "reasonable advance notice" of a meeting, and §10-506(b), requiring that, whenever reasonable, notice is to be in writing.

The complainant states that his newspaper was told by the communications director in the House Speaker's Office that the HRC "usually just tries to have meetings when all of the committee chairs are around." While the complaint recognizes that this practice may be convenient, it is "not in accordance with the law created by the very body violating it." The complaint further alleged that the committees do not produce minutes of their meeting as required by §10-509(b) and (c)(1), which require that minutes, reflecting each item considered, the action taken on each item, and each recorded vote, be prepared as soon as practicable after a public body meets.

By way of example, the complaint stated that the HRC met on March 1, 2010, to hear House Bill 660 ("State Officials - Limitations of Terms") and perhaps conduct other business.[2] On April 12, the HRC reported on 21 pieces of legislation. However, as far as the complainant knows, no notice of the meetings was given to the public or the media. Based on bill information posted on the General Assembly's website, the complaint indicated that the SRC held hearings on February 25 and March 5, 9, 12, and 18. However, "[b]ecause of the lack of minutes, [the complainant is] unaware how often the [SRC] met during the 2010 session or what it discussed." To the complainant's knowledge, no notice of these meetings was ever posted nor were minutes prepared. According to the complaint, an aide to the Senate President indicated that "[t]here's no technical announcement of the meetings."

The second part of the complaint focused on the standing committees of both the House and Senate. According to the complaint, none of these committees prepare minutes as required by the Act.

Assistant Attorney General Sandra Benson Brantley, Office of Counsel to the General Assembly, submitted a timely response on behalf of the legislative committees that were the subject of the complaint. According to the response, although the HRC and SRC "occasionally consider the substance of bills, ...the principal function of both ... Committee[s] is to consider the acceptance of late filed bills." The response indicated that the HRC held bill hearings only twice

---

[1] Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

[2] Based on attachments to the complaint, the hearing on House Bill 660 occurred on March 8. The March 1 reference appears to have been a typographical error.

during the 2010 Session, on March 1 and 8. The hearing on House Bill 660 occurred March 8. As evidenced by attachments submitted with the response, the HRC gave notice of these meetings in the Committee Meetings and Hearing Schedule published by the Department of Legislative Services.

The response acknowledged that the HRC met on several additional dates "for the limited purpose or re-referring late filed House bills to the appropriate standing committees." "Because these meetings are not bill hearings at which substantive testimony ... is presented, but rather re-referrals of bills after the bill sponsor is given an opportunity to explain why the bill was filed late, notice of these meetings was simply announced from the House floor, typically a day in advance of the meeting, if time permitted." (footnotes omitted).

The voting session held on April 12 – the final day of the legislative session – was announced orally on the House floor, a "standard practice and the only reasonable alternative in the waning hours of the legislative session." The response cited 4 *OMCB Opinions* 147, 152 (2005), for the proposition that, under the circumstances, oral notice satisfies the Act.

The response stated that the SRC did not meet on 4 of the 5 dates identified in the complaint. The Committee did meet on March 9; however, advance notice of this meeting appeared in the Committee Meetings and Hearing Schedule. The response also included a list of the dates on which the SRC met during the session.

As for the allegation that the Legislature's standing committees fail to keep minutes as required by the Open Meetings Act, the response noted that §10-509 makes clear that it does not "require any change in the form or content of the Journal of the Senate of Maryland or Journal of the House of Delegates ..." §10-509(a)(1). The response also argued that, under the Maryland Constitution, "the General Assembly alone is vested with the power to 'determine the rules of its proceedings.'" Md. Const. Art. III, §19. The response referred to the applicable House and Senate rules governing committee procedures, including provisions governing the recording and reporting of votes. The response also noted that traditionally a bill file is maintained on each bill and that the file "contains all the information required to be included in a public body's minutes of meetings." Thus, according to the response, "the bill file serves the functional equivalent of minutes, even if not so labeled." In other words, "[t]he bill file materials, which are publicly available, fulfill the purpose of ... §10-509." The response further discussed the value of the bill file as the official legislative history of legislation.

II

Notice

When a public body conducts a meeting governed by the Open Meetings Act, it must give "reasonable advance notice" of the session. §10-506(a). "Whenever reasonable, ... notice ... shall: (1) be in writing; (2) include the date, time, and place of the session; and (3) if appropriate, include a statement that a part or all of [the] meeting may be conducted in closed session." §10-506(b). The Act prescribes a nonexhaustive list of the methods by which notice may be provided. §10-506(c); *see* 7 *OMCB Opinions* 18, 19 (2010).

Whether advance notice is "reasonable" depends on the facts, namely, the interval of time between when a meeting is scheduled and notice to the public is provided. 6 *OMCB Opinions* 110, 112 (2009). A public body should give notice of a meeting as soon as practicable after it has determined the date, time , and location where the meeting will occur. *Id.*. Timing may also affect the method by which notice is given. For example, when a meeting is scheduled on very short notice, verbal notice to a reporter may well prove sufficient. However, when sufficient time is available, some form of written notice is required.

As noted in the committees' response, we have previously recognized special concerns that arise in the scheduling of committee meetings during the legislative session:

> As anyone who has participated in or observed the legislative process knows, the last few days of the General Assembly's annual session are a period of intense activity that does not follow a preordained schedule. ... [C]ommittees have no control over the timing of voting sessions, because bills requiring a vote arrive on no set timetable, and lulls in floor action, when committee members might briefly absent themselves from the floor, cannot be predicted. In our opinion, under these circumstances oral notice from the committee chairman during a floor session is reasonable. There is no practical alternative.

4 *OMCB Opinions* 147, 152 (2005). Thus, while the HRC or SRC may anticipate the need for a meeting, it is unlikely that the actual time could be announced in sufficient time for publication. Similar scheduling difficulties may sometimes occur at other points during the session such as immediately before "crossover day" when each house pushes to complete its work, moving legislation by the date required to avoid legislation being assigned to the opposite chamber's Rules Committee.

Turning to the specifics of the complaint, it is clear that no violation of the Open Meetings Act's written notice requirements occurred for those meetings

where the HRC or SRC published notice of meetings in the Committee Meetings and Hearing Schedule.[3] Nor would a violation occur with respect to the dates when the SRC did not meet. As to the HRC meeting held April 12, 2010, the final day of the session, we find that the announcement on the floor would appear to satisfy the Act for the reasons stated above.

However, we cannot agree that a floor announcement alone satisfies the Act whenever the rules committees meet for the sole purpose of considering the reassignment of late filed legislation. The notice requirements of the Open Meetings Act apply to any meeting in which a legislative committee deliberates concerning legislation, even if the substantive merits of the legislation are not addressed. *See, e.g.*, *Avara v. Baltimore News Am. Div.*, 292 Md. 543, 552-53 (1982), *quoting City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980). (Open Meetings Act applies "not only to final decisions made by a public body exercising legislative functions ... but as well to all deliberations which precede the actual legislative act or decision ...") After all, the decision of the rules committees at these meetings determines whether proposed legislation is given an opportunity to advance. Members of the public may well be interested in why a legislator felt it was necessary to file particular legislation late or why the committee is willing (or not) to excuse a deadline. In our view, absent special circumstances that would have precluded advance written notice, when the HRC met to consider bill reassignments without providing reasonable advance written notice, it violated the Open Meetings Act.

III

Minutes

The remaining allegation in the complaint is that the House and Senate standing committees, including each chamber's rules committee, have failed to prepare minutes of their meetings.[4] The Open Meetings Act provides that,

---

[3] We note that this document is readily available to the public in that it is routinely posted on the General Assembly's website, http://mlis.state.md.us.

Apparently, notice of the House Rules Committee meeting held on March 8 and the Senate Rules Committee meeting held March 9 appeared in the Committee Meeting and Hearing Schedule dated March 4, 2010. There is no evidence before us when these meetings were actually scheduled. However, the amount of notice does not appear unreasonable during the legislative session.

[4] The complaint names specifically the House Appropriations, Economic Matters, Environmental Matters, Health and Government Operations, Judiciary, Ways and Means, and Rules and Executive Nominations committees and the Senate Budget and Taxation, Education, Health and Environmental Affairs, Finance, Judicial Proceedings, and Rules committees.

"[a]s soon as practicable after a public body meets, it shall have written minutes of its session prepared." §10-509(b). In terms of content, the minutes must, at a minimum, reflect "(i) each item that the public body considered; (ii) the action that the public body took on each item; and (iii) each vote that was recorded." §10-509(a)(2) and (c)(1).[5] To be sure, the requirement for minutes does not envision a transcript, although a transcript would likely satisfy the requirement for minutes. 6 *OMCB Opinions* 164, 168 (2009). However, we have previously advised that the minutes should describe each item considered in sufficient detail to allow a member of the public who reviews the minutes can gain an appreciation of the issue under discussion. *Id*. Furthermore, we have also long held that minutes of a meeting do not satisfy the requirements of the Act until such time as the public body has approved them. *See, e.g.*, 2 *OMCB Opinions* 11, 13 (1998); 3 *OMCB Opinions* 303, 306 (2003); 6 *OMCB Opinions* 47, 51 (2008). With these general principles in mind, we turn to the committees' response to the complaint.

In the response, the committees offered several arguments why the committees' practices are not inconsistent with the Act. While the Act's provisions governing minutes do not require any change in the form or content of the House or Senate journals, §10-509(a)(1), the journals reflect the floor proceedings of each body. Although committee reports are reflected, the journals do not address the actual committee proceedings. Each standing committee is a distinct public body for purposes of the Act. It is true that under Article III, §19 of the Maryland Constitution, each house is vested with the power to "determine the rules of its proceedings" and that both chambers have adopted rules governing committee procedures, including how votes are to be recorded and reported. However, the Open Meetings Act itself was enacted by the General Assembly which did not exclude itself from the Act's scope. *Contrast* federal Government in Sunshine Act, 5 U.S.C. §552(b) (limited to certain executive branch and independent agencies). While the rules governing committee proceedings are in some respects more detailed, nothing in these rules appears to supersede provisions governing minutes under the Open Meetings Act.

While some of the information routinely found in the legislative bill files clearly would duplicate information in written minutes of a meeting, the bill files do not qualify as minutes. To be sure, the files reflect documentary material developed on each bill, including written testimony, amendments

[5] The provisions requiring minutes make no distinction between public and closed sessions. Thus, minutes are required for both. Office of the Maryland Attorney General, *Open Meetings Act Manual* p. 23 (6th ed. 2006). The Act requires further disclosures as part of publicly-available minutes subsequent to a session closed pursuant to the Act or a closed administrative function session during the course of a public meeting governed by the Act. *See* §§10-503(c) and 10-509(c)(2).

considered in the committee, and the committee voting record on a bill. But individual bill files are not necessarily organized according to particular meetings. Nor do they necessarily record all actions taken at a particular meeting. Finally, as explained above, minutes do not qualify as such until they have actually been approved by the membership of a public body – in this case, the individual standing committees of the Legislature. To the extent that a standing committee fails to adopt minutes for each meeting in accordance with §10-509, the committee violates the Act.

In light of the publicly available bill files with detailed information, including any written testimony and actions taken on each bill by the committees, minutes of meetings would not need to be elaborate. We also note that the public currently has access to recordings of Senate bill hearings. It is our understanding that in the House committees, video recordings are now available at least for a limited period. While recordings clearly are not a substitute for written minutes, the availability of the recordings reduces the level of detail that minutes might need to contain in order to reflect a committee's consideration of individual bills. Nevertheless, the public is entitled to review a record of every public meeting governed by the Open Meetings Act, reflecting the minimal information required under §10-509(c)(1) in the form of approved minutes.

IV

Conclusion

We find that the HRC and SRC did not violate the notice requirements of the Open Meetings Act for those sessions that were announced in the Committee Meetings and Hearing Schedule. Furthermore, oral notice of a HRC meeting held the final day of the 2010 session satisfied the Act in that advance written notice prescribing a time that the committee would meet probably was impractical on the last day of session. However, absent special circumstances that might preclude advance written notice, the rules committees were obligated to give advance written notice of earlier meetings at which the committees considered re-referrals of late filed legislation. Finally, we find that the failure of standing committees to prepare and adopt minutes of their meetings violated the Act.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin
Julio Morales, Esquire