

## 11 *Official Opinions of the Compliance Board 65 (2017)*

- ◆ **1(C)(3) Administrative Function Exclusion—Outside the Exclusion—Step in Process of Adopting or Amending a Contract**
- ◆ **1(J) Quasi-Legislative Function—Presentation That was a Step in the Process of Adopting or Amending a Contract**

\*Topic numbers and headings correspond to those in the *Opinions Index (2016 edition)* posted on the Open Meetings webpage at [www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx](http://www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx)

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November 1, 2017

Re: Council of the Town of Rock Hall

The complaint alleges that the Council of the Town of Rock Hall violated the Open Meetings Act by considering and approving a legal services contract in a “process other than [in a] public [meeting].” The town entered into a written engagement with the town attorney on February 22, 2017. The Council ratified the engagement on August 10, 2017.

The complaint alleges that the Council discussed and approved the legal services contract in a closed meeting on February 9, 2017 and that the Council had not disclosed either the topic or the action. Responding for the Council, the town attorney dismisses the allegations as “speculative.” He states that “no such meeting occurred,” and he describes as “baseless” the allegation that the Council “secretly discussed and approved a legal services contract on February 9.” Then, in a subsequent submission, the town attorney states that, in any event, this Board already addressed the February 9 closed session in 11 *OMCB Opinions* 38 (2017). There, the town attorney asserts, we found that the Council was performing an administrative function when the Council received an “overview” of the town attorney’s new law firm in the February 9 closed session. Therefore, the town attorney argues, this Board has already found that the discussion was not subject to the Act.

We issue this opinion to remove any misunderstanding about the scope of the administrative function exclusion and the content of our earlier opinion, as well as to address the complainant’s understandable inferences about what occurred in the February 9 closed session.

We addressed the February 9 closed session last June. *Id.* We found that the Council had violated the Act by discussing topics that it had not mentioned in its disclosures about

the session. *Id.* at 42. To comply with § 3-206(b)(3),<sup>1</sup> we did not disclose the contents of the closed-session audiotape that the Council had provided to us. Therefore, we did not disclose the multiple topics that the Council had touched on that day in its free-ranging discussion behind closed doors. The Council itself has since disclosed some information about its discussion about one topic, the town attorney’s new law firm, both by discussing the closed session in an open session on August 10, 2017 and by amending its minutes to reflect the topic. Those disclosures enable us to explain our earlier opinion in more detail.

During the August 10 meeting, the Council publicly discussed a topic that it described in its written minutes as the “Town Attorney’s contract and the process of hiring them.” The video recording of that open meeting shows that the Council and the town manager discussed the facts that the town manager had signed an “engagement letter” with a law firm to act as town attorney and that the position had not been filled through a competitive process. The town manager stated that he had not signed the letter on his own accord. He stated that the Council had already agreed to retain the services of the incumbent town attorney’s new law firm. When asked whether there had been a vote, the town manager said he did not know whether it was a “vote or consensus vote,” but that “we sat right here” when the town attorney discussed “what was going to happen and told us what was going to happen.” After some discussion about whether the Council had authorized the engagement letter in advance, the Council voted to ratify it. Then, in September, the council amended the minutes of its February 9 meeting to disclose that, during the February 9 closed session, the Town Attorney had given “a brief overview of his new law firm . . . which started on February 6th.” The amended minutes do not disclose that the Council took action on anything pertaining to the town attorney.

In 11 *OMCB Opinions* 38, we found that the Council violated the Act regarding its February 9 closed-session discussion of a personnel policy matter that did not fall within any exception to the Act. *Id.* at 42. We referred to the fact that the Council had discussed “some topics” that it had not disclosed and stated that one of them “might have been properly discussed in closed session as an administrative matter.” *Id.* We did not find that the Council’s receipt of an overview of the town attorney’s new law firm—a topic that the Council had not disclosed on its written closing statement and had not disclosed in its subsequent minutes—was administrative in nature. The topic that might have been administrative, and that we still may not disclose, arose near the end of the session.

In any event, the administrative function exclusion would not have applied if the Council’s receipt of an overview of the town attorney’s new law firm was a step in the process of adopting or amending a contract. Instead, such a discussion would have fallen within the Act’s definition of a quasi-legislative function: “the process or act of . . . approving, disapproving, or amending a contract.” § 3-101(j). We do not know what role

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<sup>1</sup> References are to the General Provisions Article of the Maryland Annotated Code (2014, with 2016 supp.).

the town attorney's overview played in the "act" of approving the contract. However, that does not matter; his presentation was at least part of the "process" of approving the contract. *See 9 OMCB Opinions 57 (2013)* (explaining to this Council that the Act's prohibition on the secret conduct of public business extends to every step of the decision-making process, not just the final action.).

Finally, we do not put this complaint into the category of those we have declined to address as merely speculative. The August 10 meeting provided the complainant with a reasonable factual basis for his inference that the Council had "discussed and approved" the contract during its closed session on February 9. Unquestionably, the topic was discussed in that meeting. That is all that matters for purposes of the Act.

In conclusion, we have issued this opinion to direct the Council's attention to the limits of the "administrative function" exclusion, and, with the benefit of information made public since our last opinion, to give our advice in more detail.

Open Meetings Compliance Board

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