

***7 Official Opinions of the Compliance Board 49 (2010)***

**Exceptions Permitting Closed Sessions – Personnel –  
Deliberations on agency elimination – Outside exception**

**Exceptions Permitting Closed Sessions – Elimination of  
County Agency – Consultations with legal counsel on  
employment law matters and discussions concerning  
options for specific employees – Session may be closed**

**Closed Session Procedures – Written Statement – Omitting  
topic to be discussed violated Act**

**Open Session Requirements – Practice in Violation – Access  
by invitation only**

October 29, 2010

*Angela Breck*  
*Editor Maryland Independent*

*Pauleen Brewer*  
*George R. “Rusty” Talcott, V*

The Open Meetings Compliance Board has considered your complaints alleging that the Board of County Commissioners of Charles County violated the Open Meetings Act. Ms. Breck focused on two meetings - a closed session conducted May 13, 2010, and a “by invitation” session conducted at the College of Southern Maryland, La Plata Campus, on May 21, 2010. Ms. Brewer and Mr. Talcott’s complaints both focused on the latter meeting. Given the overlap in the complaints we address all three in a single opinion.

For the reasons explained below, we find that the County Commissioners violated the Open Meetings Act on May 13 when they addressed the elimination of a County agency in closed session to the extent that discussions exceeded the provision of legal advice by counsel or consideration of personnel matters pertaining to specific, identifiable employees, matters distinct from the entire class of employees affected by the Commissioners’ action. We also find that the Commissioners failed to properly document the closed session at the time the session was closed. Finally, we find that the exclusion of members of the public on May 21 based on the reservation of seats for those individuals selected by the County violated the Act.

**I****Complaints and Response**

The first aspect of Ms. Breck's complaint focused on a Board of County Commissioners meeting held on May 13, 2010. According to the complaint, the Commissioners held a closed session at 9:00 a.m. "to discuss personnel and legal issues." The Commissioners then convened in a public session to approve the County's Fiscal Year 2011 budget. The Commissioners announced that certain positions would be eliminated. That afternoon, a press release was issued addressing, among other matters, the outsourcing of the County's economic development efforts and a "reduction in force of 8.92 Full-Time Equivalent position" in order to achieve a balanced budget. As described in the complaint, "[w]ith this announcement the [C]ommissioners dismantled the Charles County Economic Development and Tourism Department." Five staff members affiliated with this department lost their jobs. In her newspaper's view, the elimination of the department was a budgetary decision or policy decision rather than a personnel decision. Thus, in the complainant's view, the issue ought to have been discussed in a public session. According to the complaint, the Commissioners never voted during a public session nor did they announce at a public session that a county department would be eliminated.

The second aspect of Ms. Breck's complaint focused on a session held May 21, 2010, "when the Board of Charles County Commissioners hastily put together a meeting of selected local business leaders." According to the complaint, a notice of the meeting appeared on the County's website and the newspaper was alerted about the meeting by telephone. The newspaper quoted the Board President as stating that the Commissioners wanted "to let people know what's going on in economic development." The Board President described the meeting as an "information-type" meeting, but also as an opportunity to listen to the public. All five Commissioners attended the session and advised the audience about the decision to dismantle the department and their strategy on economic development. "[T]hey allowed ... the invited audience to provide input and engage the commissioners in [a] dialogue about the direction of economic development policies and practices. ... This meeting was part of the deliberative process about the future of economic development activities of the county government."

The session was videotaped and the Commissioners announced that it would be aired on the County's cable access channel. Representatives of the media were in attendance. "However, the newspaper's concern is that the meeting was conducted purposefully to limit public participation." The location limited the number of people who could attend and a few members of the public who were not invited were turned away. The newspaper's concern

is that allowing attendance by invitation only, “it suggests a deliberate effort to stifle the dialogue and public participation in the government process.” Because members of the public were denied access, the newspaper expressed concern that the meeting violated the Open Meetings Act.

Ms. Brewer also focused on the May 21 session. She attempted to attend the meeting held at the College of Southern Maryland, but was blocked at the door and was told that the meeting was by invitation only. She was told that unless her name was on the list, she could not attend due to limited seating capacity. She was also told that the meeting would be taped and broadcasted on the local cable channel. The complaint pointed out that the county government building has an auditorium which is used for Commissioner meetings and public hearings. Ms. Brewer estimated the auditorium seats close to 200 people. In the complainant’s view, “this meeting was, intentionally, held at a smaller venue to limit attendance and offer exclusivity of attendees.”

Mr. Talcott focused on the May 21 meeting as well. Mr. Talcott alleged that the session was held without proper advance notice. According to the complaint, this “‘special meeting’ was scheduled to be held the following week at another location.” The only public notice, to the complainant’s knowledge, “was an entity [on a] document management website listing called ‘BoardDocs,’ under the menu heading of ‘Meetings.’” This announcement was added on or after May 19. The complaint further indicated that there was no notice that all or part of the meeting was to be held in closed session. Noting that several people were denied entry, the complaint indicated several excuses were provided, reasons such as insufficient room to accommodate additional people and attendance was by invitation only. The complaint noted that the Commissioners never voted to close the meeting. The complainant indicated that, in an opening statement during the meeting, the Board President explained the reason for the short notice and small room. On May 19, the Commissioners were contacted by the College President who offered to host the meeting. The complainant referred to an e-mail from the College President to the complainant, however, in which the College President suggested his recollection of the conversation with the Board President differed. The College President initiated the call in connection with an Economic Submit and the conversation then drifted to the meeting in question.

Roger Lee Fink, County Attorney for Charles County, submitted a timely response on behalf of the Board of County Commissioners.<sup>1</sup> As to the meeting held May 21, Mr. Fink indicated that he was not involved in the scheduling of

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<sup>1</sup> The Board of County Commissioners were granted a brief extension of time to respond.

this meeting, nor did he attend. Thus, his response was based on discussions with others who were involved, including the five Commissioners. According to the response, after adoption of the budget on May 13, which included the defunding, and thus elimination, of the County's Department of Economic Development and Tourism, the Board President received numerous inquiries from the local business community regarding how the County intended to continue the Department's functions. In order to respond, the Board President decided to schedule a coordinated meeting on May 21. Because the Board President intended the meeting to be a business informational meeting, he contacted the President of the College of Southern Maryland to reserve a meeting room in the College's Center for Business and Industry. Although the Board President anticipated a large room, due to a scheduling conflict, the only room available had a maximum capacity of 40 people. The Board President compiled a list of persons he considered interested parties from the business community, including the Chamber of Commerce and an editor and reporter from the *Maryland Independent*, and instructed the County's event coordinator to contact those on the list. On or about May 20 at approximately 9:00 a.m., the Clerk to the County Commissioners posted a notice of the meeting on the County's website and on a bulletin board outside the Commissioners' office where public notices are routinely posted. The *Maryland Independent* was also notified. And the Commissioners arranged for the session to be videotaped for later broadcast on the County's PEG channel.

According to the response, "[c]learly this meeting was intended to be a public meeting open to the public." At least six individuals whose names were not on the list arrived at the meeting without incident. However, when Ms. Brewer arrived and the room began to reach capacity, she approached the events coordinator and inquired whether she had to be on the list to participate in the meeting. The events coordinator asked the Board President and was instructed that, if her name was not on the list, she could not attend. Neither the two other Commissioners in the room nor the two remaining Commissioners who arrived late were aware this instruction was given. The response acknowledged that "[e]xcluding Ms. Brewer from the meeting was a mistake and it was wrong." In the response, the Commissioners offered their apologies to Ms. Brewer for the inconvenience caused.

As to the May 13 meeting, the Commissioners included a copy of the written statement prepared in closing the meeting, the minutes of the public session that date, and a copy of the sealed closed session minutes.<sup>2</sup> Given the

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<sup>2</sup> The Open Meetings Act requires the Compliance Board to maintain the confidentiality of the latter document unless the public body has chosen to make the document public. §10-502.5(c)(2)(iii).

Compliance Board's opinion addressing an analogous action, 6 *OMCB Opinions* 180 (2009), the Commissioners do not suggest that the session involved an administrative function. Nevertheless, Mr. Fink finds that decision troubling. According to the response, "[n]o subject of discussion and deliberation is more painful and difficult for a chief executive than the reorganization of government to reduce the workforce because of budgetary constraints. The mere hint of such a possibility sends a tremor through the workplace, especially in a small enough organization that the employees likely to be affected can be readily personally identified." In governmental organizations where the chief executive is a single individual, these matters are routinely conducted in private prior to presentation to the legislative body. However, this obviously is not the case where the chief executive is a public body.

While the County Commissioners accept the premise that a discussion concerning elimination of a county department was not an administrative function, they urge that the Compliance Board find that those portions of the May 13 meeting concerning the decisionmaking process about identifiable individuals who would be personally affected by a reduction in force and the advice of counsel on the administrative legal process established to notify those employees in a "responsible, professional and dignified manner" were properly closed. The Commissioners posit that "to publicly notify those employees in an open meeting setting simultaneously broadcast to the public and County employees over the television would have been irresponsible, unprofessional and undignified."

The response also points out an "external structural incongruity between the [Open Meetings] Act and ... the Public Information Act." The Public Information Act recognizes an executive privilege exception to disclosure of a written public record which is pre-decisional and deliberative in nature if the disclosure would be contrary to the public interest. ... There is no parallel exception in the Open Meetings Act. Consequently, the anomaly exists that pre-decisional deliberations expressed in writing ... between officials may ... be withheld ... whereas pre-decisional deliberations expressed orally by [members] of a public body must be conducted in public view."<sup>3</sup>

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<sup>3</sup> Ms. Brewer provided supplemental information taking issue with the Board President's explanation of how the location of the May 21 session was selected and information in the response relating to certain members of the Board's knowledge about her exclusion. We also note that on July 16, 2010, Board President Copper resigned his position on the Board. However, in evaluating a complaint under the Open Meetings Act, our review focuses on the action of the public body as an entity

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**II****May 13, 2010**

Given analogous situations previously addressed by the Compliance Board, the County Commissioners do not argue that their meeting on May 13 involved an administrative function that would fall outside the scope of the Open Meetings Act. *See, e.g., 6 OMCB Opinions* 180 (2009) (Worcester County Commissioners consideration of department consolidation not administrative function). However, the response notes that in those jurisdictions governed by a single executive officer, the type of matter considered by the Commissioners would routinely be held in closed sessions. The simple answer is that an individual chief executive is not a public body. Because Charles County is governed by a public body – the Board of County Commissioners – it is subject to the Open Meetings Act. *Cf. 1 OMCB Opinions* 104, 105 (1994) (While a municipal council is a “public body,” an individual official such as a city administrator is not). The response also points out a perceived inconsistency between the protection of records reflecting pre-decisional deliberative documents under the Public Information Act versus openness requirements under the Open Meetings Act. This argument is more appropriately addressed to the Legislature; by statute, our role is limited to the interpretation of the Open Meetings Act. *See, e.g., 6 OMCB Opinions* 164, 69 (2009).

More significant, the Commissioners ask that we find those portions of the meeting concerning the decision-making process about identifiable individuals who would be affected by the Commissioners’ decision and legal advice concerning the process of notifying employees of the decision to be permissible topics of discussion in a meeting closed under the Act. Clearly, a public body can meet in closed session to hear legal advice from its counsel on any legal question, including laws governing employment matters. §10-508(a)(7). Of course, like every exemption under the Act, this provision must be construed narrowly in favor of open meetings. §10-508(c); *see, e.g., 3 OMCB Opinions* 16, 20-21 (2000). Thus, once legal advice has been given, the public body must return to open session to discuss policy implications of advice received. *Id.* The exception cannot be employed as a pretext to deliberate policy decisions behind closed doors.

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<sup>3</sup> (...continued)

rather than any individual member. Thus, conflicting facts pertaining to any individual member do not alter our analysis.

As to the exception pertaining to personnel matters, §10-508(a)(1), we have repeatedly advised that it extends only to personnel discussions concerning specific identifiable individuals rather than an entire class of employees. *See, e.g., 3 OMCB Opinions* 67, 68 (2000). The County Commissioners acknowledge that we have previously held that deliberations concerning departmental consolidations and similar actions involve policy matters governed by the Act. Although the decisions made almost always impact individual employees, such deliberations do not constitute personnel matters under which the deliberations can be closed under §10-508(a)(1). *See, e.g., 6 OMCB Opinions* 180 (2009) (Worcester County action referenced above); *6 OMCB Opinions* 104 (2009) (exploration of outsourcing municipal service). The fact that a governing body may be forced to publicly reveal that outsourcing is under consideration before the employees learn of the action does not alter the conclusion.

In the County Commissioners' response, we were asked to distinguish the policy decision to outsource the County's economic development efforts from discussions pertaining to individual employees and find that the latter discussions appropriately closed. In prior opinions, we have recognized this distinction. For example, in connection with a municipality's decision to consider outsourcing a particular service, we held that discussions about proposed severance benefits for those individuals affected and the preservation of individual's jobs qualified as personnel matters under the facts presented. *6 OMCB Opinions* at 108. Based on our review of the minutes of the County Commissioners' closed meeting on May 13, 2010, it appears that the County Commissioners received recommendations from their staff. It is not entirely clear whether these recommendations pertained to proposed actions concerning the future employment of specific individuals or were more general, pertaining to the future of a class of individuals based on budgetary actions affecting a class. Thus, we can only offer a qualified response. To the extent the discussions fell within the former description, that portion of the discussions, and only that portion, could properly be considered in a closed session as involving personnel matters.

Although the complaint involving this session focused on the substantive discussions, we would be remiss if we failed to point out a procedural violation in the manner in which the May 13 meeting was closed. In closing a meeting, the Act requires that "the presiding officer shall ... make a written statement of the reason for closing the meeting, including a citation of the authority under [§10-508], and a listing of the topics to be discussed." §10-508(d)(2)(ii).

The written statement prepared in closing the meeting failed to provide any information about the purpose of the session beyond parroting the statutory authority under which the session was reportedly closed. While the form completed by the Board President provided space to record the topics to be

discussed and reason for closing, the Board President left these items blank. We have repeatedly held that failure to provide any level of insight into the purpose of the closed meeting which the public can compare to the cited authority is a violation of the Act. *See, e.g., 6 OMCB Opinions* 77, 82-83 (2009); *5 OMCB Opinions* 160, 163-64 (2007); *4 OMCB Opinions* 142, 145-46 (2005). We find that the written statement prepared May 13 failed to satisfy the Act.

### III

#### May 21 Session

While the May 21 meeting at the College was described as an “informational meeting,” the purpose was not limited to the County Commissioners briefing representatives of the business community on matters on which the Commissioners had already acted. The goal clearly was to also offer an opportunity for the County Commissioners to solicit others’ views as to the County’s future economic development efforts. The response described the May 21 session as a “public meeting”; however, the exclusion of any member of the public based on lack of space due to the manner seating was reserved for those selected by the County was inconsistent with the rights of the public under the Open Meetings Act. The County Commissioners, in effect, admitted to such in their response and apology to Ms. Brewer.

Given the County Commissioners’ acknowledgment, extensive discussion is not necessary. The meeting was not truly an open meeting in that attendance was restricted, but nor was it a “closed” session as contemplated by the Act. We decline to reach the issue whether the County Commissioners violated the Act is selecting a location that could not accommodate the number of people who might be expected to attend. The complainants and County Commissioners explanations appear to differ in this respect and we decline an attempt to resolve the Board’s motive in selecting the meeting location. §10-502.5(f)(2); *3 OMCB Opinions* 136 (2001) (Compliance Board lacks investigatory powers and cannot independently determine facts). However, we find that the notice of the meeting did satisfy minimum requirements of the Act.



**IV****Conclusion**

In summary, we find that the County Commissioners violated the Open Meetings Act on May 13 when they addressed the elimination of a County agency in closed session to the extent that discussions exceeded the provision of legal advice by counsel or personnel matters pertaining to specific, identifiable employees, matters distinct from the entire class of employees affected by the Commissioners' action. We also find that the Commissioners failed to properly document the closed session at the time the session was closed. Finally, we find that the exclusion of members of the public on May 21 based on the reservation of seats for those selected by the County violated the Act.

OPEN MEETINGS COMPLIANCE BOARD

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