

MARTIN O'MALLEY
Governor

ANTHONY G. BROWN
Lt. Governor



ELIZABETH L. NILSON, ESQUIRE
Chair

COURTNEY J. MCKELDIN

STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

March 20, 2014

The Honorable Patricia A. Burda
The Town of Chevy Chase
4301 Willow Lane
Chevy Chase, Maryland 20815

Re: Open Meetings Act Complaint: Town Council of the Town of Chevy Chase
Ronit Aviva Dancis, Complainant

Dear Mayor Burda:

Enclosed please find the Compliance Board's opinion in this matter.

For an explanation of the procedures that a public body must follow when the Compliance Board has found a violation of the Act, please see http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Violator_Procedures.pdf.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ann MacNeille".

Ann MacNeille
Assistant Attorney General
Counsel, Open Meetings Compliance Board

cc: Ronit Aviva Dancis
Ronald M. Bolt, Esq
Open Meetings Compliance Board

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9 Official Opinions of the Compliance Board 99 (2014)

Re: Town Council of the Town of Chevy Chase
Ronit Aviva Dancis, Complainant

March 20, 2014

Ronit A. Dancis (“Complainant”) alleges that the Town Council of the Town of Chevy Chase violated the Open Meetings Act (the “Act”) by meeting behind closed doors with an attorney whom the Council was considering retaining to advocate the Town’s position on a proposed light-rail project. As we read the complaint, Complainant is specifically concerned by reports in the press that the attorney told the Council that the attorney would not lobby the attorney’s brother, a congressman. Questioning whether the statement should have been made in an open meeting and assuming that it was not, Complainant alleges that the statement was “not legal advice” and that the attorney “waived any privilege that there might be.”

The Council’s response states that the attorney made the statement to the Council on November 26, 2013, when the Council met in closed session with one of its attorneys and the town manager to interview two law firms that were competing with each other to provide legal services regarding the light-rail project. During the meeting, the response states, the competing firms presented their proposals, and potential litigation was discussed.

The Council has provided us with its minutes of the closed session, which we keep confidential under State Government Article (“SG”) § 10-502.5(c), and its written notice of the date, time, and place of the meeting. The notice bears the heading “Executive Session” and states that the Council “will meet in closed session pursuant to [SG §] 10-508(a)(8) to discuss with staff and consultants about legal and government relations issues regarding the proposed Purple Line project.” The notice also stated that the meeting would be closed “pursuant to [SG §] 10-508(a)(14) to discuss a matter directly related to the contents of multiple, competing proposals for services because public discussion or disclosure would adversely affect the ability of the public body to participate in the competitive proposal process.” The closed-session minutes bear out the statements in the notice and in the Council’s response.

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The Act imposes two broad sets of conditions on a public body that wishes to meet behind closed doors under the authority granted by SG § 10-508.¹ First, the public body must disclose, both before and after the closed session and in the ways set forth by the Act, information about the decision to close the session and the events of the session. Second, the topics to be discussed must fall within one or more of the 14 topics for which § 10-508(a) grants an exception to the Act's openness mandate. We conclude that the Council did not meet the first set of conditions and violated the Act in that regard. As to the second set of conditions, we find that the topics that the Council discussed fell within the exceptions that the Council cited, and we therefore find that the Council did not violate the Act by claiming those two exceptions.

We begin with the set of conditions that relate to a public body's disclosures about its decision to hold a closed meeting and the events of the meeting. We incorporate here, and refer the Council to, our recent summary of the Act's requirements for closing a meeting under SG § 10-508, *see* 8 *OMCB Opinions* 182, 183-84 (2013) (providing "the rules applicable to closed sessions"),² and to our explanation of how to apply the Act's public notice requirements when a public body expects to hold such a closed session. *See* 8 *OMCB Opinions* 150, 155-58 (2013) (suggesting wording for such notices).³ The first rule we stated in 8 *OMCB Opinions* 182 was that the public body's notice of a closed session must invite the public to an open meeting right before the anticipated closed session. That rule follows from several disclosure requirements: before a public body may meet in closed session, its members must decide to do so during an open session, by a recorded vote, and on the basis of a written statement that discloses the applicable statutory exception, the topics to be discussed, and the public body's reasons for discussing those topics behind closed doors. *See* SG § 10-508(d); *see also* 8 *OMCB Opinions* at 183 and 8 *OMCB Opinions* 156-57.⁴ Additionally, after the closed meeting, the public body must disclose, in the minutes of its next open meeting, information about the events, attendees, and purpose, among other things, of the closed meeting. *See* SG § 10-509(c) (2); *see also* 8 *OMCB Opinions* at 184.

Here, the Council gave notice only of a closed meeting, did not hold an open meeting before the closed session, did not vote publicly on a motion to hold the closed session, and did not make the required disclosures on a written statement. The Council thereby violated the SG § 10-508(d) requirements for closing a meeting. As to the post-meeting disclosures required by SG § 10-509(c)(2), it appears that the Council adopted the minutes of the closed session during

¹ The § 10-508 requirements do not apply when a public body is performing a judicial, quasi-judicial, or administrative function. SG § 10-503. The Council properly has not claimed that it was performing any of these functions at the November 26 meeting.

² Available at <http://www.oag.state.md.us/Opinions/Open2012/8omcb182.pdf>.

³ Available at <http://www.oag.state.md.us/Opinions/Open2012/8omcb150.pdf>.

⁴ For a sample form of a written statement for closing a meeting, see <http://www.oag.state.md.us/Opengov/Openmeetings/AppC.pdf>.

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its next open session, but the open session minutes do not contain the required information. We therefore conclude also that the Council violated SG § 10-509(c) (2).

Even so, nothing suggests to us that the Council either kept the fact of the November 26 meeting secret or improperly discussed in that meeting matters that the public was entitled to hear. The “procurement” exception set forth in SG § 10-508(a)(14) indeed applies to a public body’s consideration of competing offerors’ proposals when disclosure of the proposals would work against competition, and the “pending or potential litigation” exception set forth in SG § 10-508(a)(8) indeed applies to a public body’s consultation with staff or others about its legal options in a particular matter. *See, e.g., 9 OMCB Opinions 78, 80 (2013).*⁵ The fact that one of the offerors later disclosed a statement he made during the meeting does not affect the applicability of either exception to this meeting.

In closing, we encourage the Council to follow the disclosure measures that are stated in the Act and explained in the opinions that we have cited above. The Act’s disclosure measures serve partly to enable a public body to assure its constituents that when the public body is meeting behind closed doors, it is doing so legally and for a reason. The Council’s use of them for the November 26 meeting might have avoided this complaint, and its neglect of them violated the Act.

Open Meetings Compliance Board

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin

⁵ Available at <http://www.oag.state.md.us/Opinions/Open2013/9omcb78.pdf>.