

5 Office Opinions of the Compliance Board 60 (2006)

“MEETING” – MEETINGS OF MARC ADVISORY COUNCIL HELD TO GENERALLY INVOLVE THE CONDUCT OF PUBLIC BUSINESS, AND FIRST MEETING HELD NOT BE A SOCIAL OR OTHER OCCASION OUTSIDE THE ACT – EXECUTIVE FUNCTION EXCLUSION – COMMENTS BY ADVISORY COUNCIL MEMBERS ABOUT MARC SERVICE, HELD TO BE OUTSIDE THE EXCLUSION – OPEN SESSION REQUIREMENT – LIMITING TAPE RECORDING OF SESSION, HELD TO BE A VIOLATION

August 14, 2006

Ms. Miriam Schoenbaum

The Open Meetings Compliance Board has considered your complaint that the MARC Riders Advisory Council violated the Open Meetings Act by denying you the opportunity to record its meeting. While the meeting was open to the public, you were told that it was not subject to the Act and, consequently, no attendee could claim an entitlement under the Act to record the proceedings. You dispute this position.

In its response to the complaint, the Advisory Council presented a variety of arguments in support of the view that the Act does not apply to its sessions. This opinion will address each, proceeding from the general to the specific. That is, we shall first consider the Advisory Council’s contention that it did not and never will hold a meeting subject to the Act, because its activities do not involve “the consideration or transaction of public business.” We disagree. Therefore, we next consider the Advisory Council’s alternative argument that, even if it holds meetings that are potentially within the Act’s purview, its activities do not constitute an “advisory function” and instead fall under the “executive function” exclusion from the Act. While we agree with the first proposition, we disagree with the latter. We shall hold that the Act does apply in general to the Advisory Council. With respect to the May 18 meeting in particular, we consider whether what occurred was the kind of social or similar gathering that is not subject to the Act. Because we conclude that the May 18 meeting was mainly subject to the Act, we finally turn to the core of the complaint, the restriction on the use of a tape recorder, and we hold that this restriction was unreasonable and hence a violation of the Act.

I

Complaint and Response

The first session of the MARC Advisory Council was held on May 18, 2006, in a MARC railcar at Union Station in Washington, D.C. According to the complaint, you attended the meeting as a member of the public and set up a small digital recorder, which “operates silently,” on the back of your seat. Within ten minutes of the start of the meeting, the complaint continued, Secretary of Transportation Robert Flanagan, who was conducting the meeting, requested that the session not be recorded.

Included with the complaint was a transcript of the conversation between you and Secretary Flanagan. Apparently, the Secretary had no objections to your taping him or staff members; however, he did object to your taping members of the Advisory Council and others. According to the transcript, the Secretary indicated that “we are asking people to identify themselves [and] there might be some people who would be ... inhibited ... by being taped.” Although the session was open to public observation, Secretary Flanagan advised you that, based on the advice of legal counsel, the Open Meetings Act did not apply. The implication, of course, was that the restriction on taping was within the discretion of the Secretary, unaffected by whatever right to use the recorder might be afforded by the Act.

Citing select pages from the *Open Meetings Act Manual*, published by the Office of the Attorney General, the complaint argued that the Advisory Council is a public body, appointed by the Secretary, to carry out a matter of public concern. Its purpose involves an “advisory function” to which the Act applies, and a quorum of the Council was present during the session. Again citing the *Open Meetings Act Manual*, the complaint claimed that, because the Open Meetings Act applied, a prohibition on recording the session was unreasonable.

Attached to the complaint were: (1) an e-mail communication from the Maryland Transit Administration (“MTA”) to members of the Advisory Council, congratulating them on their appointment and announcing the organizational session; (2) a press release issued by the MTA, dated April 27, 2006, announcing the establishment of the Advisory Council and identifying its goals; (3) the description of the Advisory Council from the electronic version of the *Maryland Manual*,¹ naming the members of the Advisory Council and identifying the appointing authority as the Secretary of Transportation; and (4) the agenda for the Advisory Council’s May 18 session.

¹ <http://www.mdarchives.state.md.us/msa/mdmanual/24dot/html/dot.html>.

In a timely response on behalf of the Advisory Council, Callista Freedman, General Counsel to the MTA, denied that any violation occurred.² The Advisory Council's position is that the Act did not apply. The response described the MARC commuter rail service and the background leading to the appointment of the Advisory Council. During the 2006 session, the Legislature enacted as emergency legislation a moratorium on closing passenger rail stations. Chapter 18, Laws of Maryland 2006, amending Transportation Article ("TR"), § 7-902, Annotated Code of Maryland. The legislation requires that the MTA review specified factors and issue a report to the Governor and the Legislature before closing a station. *Id.*

According to the response, Secretary Flanagan convened the Advisory Council to assist in the administration of the statute. More specifically, the Advisory Council was appointed to "conduct the important task of gathering information about [MARC] service, identify suggestions for improvements about the service and assist the State in complying with the statute." The membership reflects "[a] group of regular riders that represented the use of the service as a whole." However, the Advisory Council "was not vested with the responsibility to conduct the studies, deliberate, make decisions regarding the MARC service or make policy decisions. Once the Council collects the information, suggestions for improvements and complaints, it relays the data to the MTA." Evaluating the data and creating the required reports would be the responsibility of the MTA.

As explained in the response, the May 18 session was an opportunity to introduce members of the Advisory Council, introduce guests in attendance, and brief the Advisory Council on the MARC System and services. Members of the Advisory Council asked questions of the MTA staff about specific events or service procedures. The time and location of future sessions of the Advisory Council were also discussed.³

In the Advisory Council's view, the May 18 session "is best described as an 'other occasion' that is not subject to ... the Act." *See* § 10-503(a)(2).⁴ According to the response, the Advisory Council "did not deliberate during this meeting and create public policy, nor did it consider or transact any public business." In support of its position, the Advisory Council cited *City of New Carrollton v. Rogers*, 287 Md. 56, 72, 410 A.2d 1070 (1980), and 1 *OMCB Opinions* 227, 231-232 (1997).

² The Compliance Board granted the Advisory Council a brief extension of time to submit its response.

³ Among the attachments to the Advisory Council's response was a copy of the minutes from the May 18 session.

⁴ Unless otherwise noted, all statutory references are to the State Government Article, Annotated Code of Maryland.

Addressing application of the Open Meetings Act to the Advisory Council generally, the response explained that “the Council is not set up to ever deliberate, decide, consider or transact any public business.” It argued that the complaint’s focus on body’s title as an “Advisory Council” is misplaced. According to the response, the Advisory Council is simply an “informational forum that provides a conduit between the MTA and the service riders so that the MTA may conduct the studies and create the statutorily required report.” Citing *78 Opinions of the Attorney General 275* (1993) and two prior opinions of the Compliance Board (4 *OMCB Opinions* 163, 165-166 (2005) and 5 *OMCB Opinions* 42, 44 (2006)), the Advisory Council argued that its activities are best described as an executive function, assisting the MTA “in the administration of the statute requiring numerous studies and a final report”; thus, the Open Meetings Act does not apply. § 10-503(a)(1)(i).

Finally, the response noted that, should the Compliance Board determine that the Act applied to the May 18 session, the request to limit recording of the session did not violate the Act. Secretary Flanagan had reasonably determined that recording the session “would chill the participation of Council members in the first meeting and set forth ... a rule that recording be limited to State employees and/or officials.” In fact, a member of the Advisory Committee complained that “use of a recording device made him uncomfortable, inhibited the participation of the lay-persons on the Council, was not aimed at constructively assisting in the information flow and could be used for an improper purpose.” The Advisory Council’s position is that “[t]his rule was reasonable and applied to all those present at the meeting.”

II

Applicability of the Act Generally

A. Does the Advisory Council conduct public business?

The Advisory Council does not dispute that it is a “public body” as defined under the Open Meetings Act.⁵ However, it does argue that its sessions do not constitute “meetings” under the Act because, in its view, the Advisory Council’s sessions do not involve the “consideration or transaction of public business.” § 10-502(g) (definition of “meet”).

⁵ The term “public body” is defined, in part, as “any multimember board, commission, or committee appointed by the Governor ... or *appointed by an official who is subject to the policy direction of the Governor* ..., if the entity includes in its membership at least 2 individuals not employed by the State....” § 10-501(h)(2)(i) (emphasis supplied). Given the Advisory Committee’s makeup and the fact that it was named by the Secretary of Transportation, there is no question that it is a public body.

Although the term “public business” is not defined under the Act, in an earlier opinion we referred to a definition found in a separate statute, defining “public business” as “all matters within the jurisdiction of a public agency which are before an agency for official action or which reasonably, foreseeably may come before that agency in the future.” 2 *OMCB Opinions* 5, 7 (1998), citing Article 24, § 4-202, Annotated Code of Maryland. In the same opinion, we relied on this description by the Court of Appeals: “It is the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business.” *City of New Carrollton v. Rogers*, 287 Md. 56, 72, 410 A.2d 1070 (1980), quoted in 2 *OMCB Opinions* at 7 - 8.

While the Advisory Council lacks final decision-making authority, its purpose is to assist the MTA in evaluating certain key factors relating to MARC service. Given Secretary Flanagan’s statement in the press release that the Advisory Council “will identify improvements that can make the MARC service even more convenient,” it would seem that the Advisory Council will collect and evaluate information and present its findings about matters of unquestioned public concern. Even given the limited role of the Advisory Council as described in the response, one would expect its work to prove important in shaping future decisions concerning MARC service. Hence, in our view, the Advisory Council is involved in the consideration of public business when a quorum of the body meets to carry out its charge.

B. Does the Advisory Council carry out an executive function?

We next turn to the Advisory Council’s argument that it is excluded from the Act because what it does is an “executive function,” to which the Act does not apply. § 10-503(a)(1)(i). The term “executive function” is defined as follows:

- (1) “Executive function” means the administration of:
 - (i) a law of the State;
 - (ii) a law of a political subdivision of the State; or
 - (iii) a rule, regulation, or bylaw of a public body.

- (2) “Executive function” does not include:
 - (i) an advisory function;
 - (ii) a judicial function;
 - (iii) a legislative function;
 - (iv) a quasi-judicial function; or
 - (v) a quasi-legislative function.

§ 10-502(d). Given this definition, we must first consider whether the Advisory Council's work is an advisory function. If it is, we would perforce reject the Advisory Council's position that its activities involve an executive function, because by definition an advisory function cannot be an executive function. § 10-502(d)(2).⁶

How can a public body with the name "Advisory Council" *not* carry out an "advisory function"? The answer is that the Open Meetings Act term is narrower than one might think. An advisory function is defined as follows:

"Advisory function" means the study of a matter of public concern or the making of recommendations on the matter, under a delegation of responsibility by:

- (1) law;
- (2) the Governor;
- (3) the chief executive officer of a political subdivision of the State; or
- (4) formal action by or for a public body that exercises an executive, judicial, legislative, quasi-judicial, or quasi-legislative function.

§ 10-502(b). Because the Advisory Council's authority is not derived from a law or from the Governor, but instead from the Secretary of Transportation, the Advisory Council does not carry out an "advisory function."⁷

Having concluded that the Advisory Council's role involves neither an "advisory function" nor any of the Act's other defined functions, we turn to the

⁶ We discuss only the advisory function because the Advisory Council manifestly does not carry out a judicial, legislative, quasi-judicial, or quasi-legislative function. § 10-502(e), (f), (i) and (j). Although the Advisory Council has an important information-gathering role in a policy-making process, the Council itself is not involved in "approving ... [a] measure to set public policy," a legislative function under the Act. § 10-502(f)(1).

⁷ In an advisory opinion, our role is to interpret as best we can existing law. To do so, however, does not necessarily imply endorsement of the results as a policy matter. In fact, we think that the result here is at odds with common sense. The policy problem is that the definition of "advisory function" is too narrow. In 2004, the Legislature expanded the definition of a "public body" to encompass certain entities appointed by "an official who is subject to the policy direction of the Governor or chief executive authority of [a] political subdivision." § 10-502(h)(2)(i). That is why the Advisory Council is a public body. See note 5 above. Last year, we recommended that the definition of an "advisory function" be expanded in an identical manner. See *Thirteenth Annual Report of the Open Meetings Compliance Board* p. 5 (October 2005). However, the Legislature did not address this matter during the 2006 session.

question whether it involves “the administration of” existing law – the second statutory criterion that must be satisfied if the Advisory Council’s meetings are excused from the Act’s requirements by the executive function exclusion. *See, e.g., 5 OMCB Opinions* 7, 8 (2006). Implicit in this second step are two subsidiary points: there must be an identifiable prior law to be administered, *and* the public body holding the meeting must be vested with legal responsibility for its administration. *4 OMCB Opinions* 163, 165 (2005). If either is not true, the public body is not engaged in the administration of a law, as required by the definition. For example, the cited opinion held that a local school board, in making recommendations to the Governor concerning a board vacancy, was not engaged in an executive function, because statutory responsibility for the appointment was vested solely in the Governor and not the board. Accordingly, the local board could not be said to be “administering” the law.

In this case, the statutory responsibility is vested in the MTA and ultimately the Secretary. While Secretary Flanagan created the Advisory Committee to assist the agency in carrying out its statutory reporting and related duties, legal responsibility for carrying out these duties remains with the agency, not the Advisory Council. Therefore, the Advisory Council is not “administering” the law and so is not carrying out an executive function.

In short, the Advisory Council’s work fits within *none* of the Act’s defined functional areas. What then? We considered this conundrum more than a decade ago and concluded that, under these circumstances, the Act applies. *1 OMCB Opinions* 96, 98 (1994). This is so because the Act commands a public body to meet in open session (and, as a corollary, to adhere to the Act’s other requirements) “[e]xcept as otherwise expressly provided in this subtitle.” § 10-505. In other words, coverage is the default position. Because the Advisory Council’s meetings do not fall within an exclusion from the Act, they are generally covered.

III

Applicability of the Act to the May 18 Meeting

The May 18 session, the Advisory Council’s first, was mainly for the purpose of introductions, briefing members of the Advisory Council on the MARC System, and scheduling subsequent sessions. As the minutes make clear, it also provided an opportunity for members of the Advisory Council to present their personal views regarding the MARC System to fellow members of the Advisory Council.

The Advisory Council argued that the May 18 session was not subject to the Act, in that it is “best described as an ‘other occasion’ that is not subject to ... the

Act.” § 10-503(a)(2).⁸ The Advisory Council relied, in part, on 1 *OMCB Opinions* 227 (1997). In that opinion, we addressed the application of the Act to a closed dinner gathering attended by members of a local library board of trustees, members of an advisory board, and friends of the library. The library board considered it a social affair. The event apparently included a welcoming speech, introduction of board members, a summary of past improvements to the libraries, and an overview presentation about the problems that public libraries would face in the future. The Compliance Board was assured that the gathering did not result in substantive discussions or any focus on the agenda for the local library board. Under the circumstances, we held that this kind of general presentation, a familiar feature of social events held by public and private organizations, did not by itself transform the gathering into a meeting subject to the Act. 1 *OMCB Opinions* at 231-32.

In our view, the Advisory Council session of May 18 differed significantly. To be sure, the start of the session involved introductions that might be characterized as a social occasion. However, the session also included a briefing, the obvious purpose of which was to educate the members of the Advisory Board about the MARC System, so that they could begin to carry out their assigned role in assisting the MTA. Furthermore, the sharing of views among members was clearly germane to the tasks of the Advisory Council and current issues about MARC service.⁹ As the Court of Appeals has made clear, under the Act, the “consideration or transaction of public business” embraces “every step of the process.” *City of New Carrollton v. Rogers*, 287 Md. 56, 72, 410 A.2d 1070 (1980); 4 *OMCB Opinions* 122, 124 (2005). See also 2 *OMCB Opinions* 5, 8 (1998) (where public body has opportunity to explore issues as a group and exchange comments and reactions, the body is considering public business). We hold that the May 18 session was subject to the Act.¹⁰

⁸ This language is part of an exclusion for “a chance encounter, social gathering, or other occasion that is not intended to circumvent [the Act].”

⁹ For example, according to the minutes, one member spoke of the need for “uniform standards” on the three MARC lines, and another recommended “that MARC conductors should have greater authority to control passengers on the trains and to remove riders from the trains for disruptive behavior.”

¹⁰ The Advisory Council also cited *City of New Carrollton v. Rogers* and *Ajamian v. Montgomery County*, 99 Md. App. 665, 639 A.2d 157 (1994), *cert. denied*, 334 Md. 631, 640 A.2d 1132 (1994) as part of its argument that the Act did not apply. However, these cases presented significantly different facts. *New Carrollton* dealt with a meeting that was held to allow the members of a city council to share information with residents of a community proposed for annexation; it was not a meeting convened for the public body to obtain information relevant to its decision about the proposed annexation or to exchange views among the members. See 5 *OMCB Opinions* 55, 57 (2006). *Ajamian* involved a meeting of a nongovernmental entity in which a majority of a public body was in

IV

Taping the Meeting

We turn at last to the heart of the controversy: the complainant's foiled attempt to record the May 18 session. The Act provides:

A public body shall adopt and enforce reasonable rules regarding ... the videotaping, televising, photographing, broadcasting, or recording of its meetings.

§ 10-507(b). As we have previously advised, "Although this language stops short of a mandate that [taping] be allowed, nevertheless it reflects an assumption that no public body would seek to ban these activities at an open meeting. ... The Compliance Board believes that any attempt by a public body to prohibit [taping] at an open meeting would be unlawful." 1 *OMCB Opinions* 137, 139-40 (1995) (footnote omitted).

Thus, the question is what restrictions short of a prohibition are "reasonable." We opined that a rule restricting the taping of a public meeting is "'reasonable' only if it satisfies two criteria: "(i) that the rule is needed to protect the legitimate rights of others at the meeting and (ii) that the rule does so by means that are consistent with the goals of the Act." 1 *OMCB Opinions* at 140. By way of example, we suggested that a restriction on a person moving around to film a meeting would be justified in that the movement may well distract others in attendance. *Id.* However, we concluded that a bar on recording people in attendance in a nondisruptive manner was not reasonable. *Id.* In fact, we specifically rejected the claim that barring recording is justified because some people do not wish to have their presence recorded during the course of a public meeting. This, we wrote, "does not reflect a realistic or well-grounded claim of privacy." *Id.*

If, as we concluded, the members of *the audience* at an open meeting have no legitimate claim to be free from having their image recorded, how can members of *the public body* legitimately expect their words to be exempt from recording? Members of the Advisory Council agreed to participate knowing that they would be heard by anyone wishing to attend. Anyone is free to take notes, including verbatim accounts. The members have no realistic or well-grounded claim to be free from having their words recorded. We find that the restriction on recording members of the Advisory Council at the May 18 session was unreasonable.

attendance but did not engage in any activity as a convened body.

V

Conclusion

The Advisory Council is a public body whose meetings are subject to the Open Meetings Act. At its open meetings, a restriction that disallows recording the comments of Advisory Council members is unreasonable and so contrary to the Act. The imposition of such a restriction at the May 18 meeting violated the Act.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.
Courtney J. McKeldin
Tyler G. Webb