

MARTIN O'MALLEY
GOVERNOR

ANTHONY G. BROWN
LT. GOVERNOR



ELIZABETH L. NILSON, ESQUIRE
CHAIRPERSON

COURTNEY J. MCKELDIN
JULIO MORALES, ESQUIRE

STATE OF MARYLAND OPEN MEETINGS COMPLIANCE BOARD

October 27, 2009

Kathlyn B. Phillips
Executive Director
Assateague Coastal Trust, Inc.
P.O. Box 731
Berlin, Maryland 21811

Dear Ms. Phillips:

The Open Meetings Compliance Board has considered your complaint alleging that the Board of County Commissioners of Worcester County violated the Open Meetings Act on May 26, 2009, by approving a department consolidation during a closed session. The complaint alleged that the closed session was inappropriate in that it neither qualified as an administrative function outside the scope of the Act nor as a personnel matter for which a meeting subject to the Act may be closed.

For the reasons explained below, we find that the County Commissioners violated the Open Meetings Act in conducting a portion of the closed meeting concerning the departmental consolidation.

I

Complaint and Response

The complaint provided a detailed account of a May 26, 2009, meeting of the Worcester County Commissioners. During a public session, the Commissioners considered the County's fiscal year 2010 budget, including various methods by which the budget could be balanced. One option presented by the County Administrator involved the consolidation

6 Official Opinions of the Compliance Board 180 (2009)

of three departments - Comprehensive Planning, Development Review and Permitting, and Environmental Programs. According to the complaint, the County Administrator said that this option could result in the termination of eleven employees and a savings of \$535,000 for fiscal year 2010. After extensive discussion, the Commissioners agreed on adoption of a balanced budget without the consolidation, layoffs, or furloughs.

Following the budget action, the Commissioners continued discussion on downsizing county government and, at some point, a motion was made and seconded to consolidate the three departments. A question was posed to the County's Human Resources Director asking who would be laid off. One Commissioner asked to adjourn to closed session if specific employees were to be discussed and a vote was taken to adjourn to closed session to discuss "personnel matters." After approximately 15 minutes, the Commissioners returned to the public session. The president reported that personnel matters were discussed. No mention was made of a consolidation or specific layoffs. Motions left pending at the time the meeting was closed were withdrawn and the public session adjourned. The consolidation was then put in effect and employees were notified of their layoffs on May 29. During a regularly scheduled meeting on June 2, the Commissioners, by a 4 to 3 vote, reconfirmed in open session their vote to consolidate the three departments and eliminate certain positions during the closed session on May 26.

The complaint argued that the Commissioners' action on May 26 did not qualify as an administrative function outside the scope of the Open Meetings Act. The complaint alleged that the departmental consolidation following action on the budget and layoffs involved a policy discussion that was subject to the Open Meetings Act rather than an administrative function. Furthermore, the complaint argued that the closed session could not be justified as a "personnel matter" in that it went beyond discussion of identifiable individuals when the commissioners "voted to radically reorganize county government ..." Finally, the complaint argued that the action by the Commissioners at the June 2 meeting did not "cure" the violation of the Act.

The County Commissioners offered a different view. In a timely response on behalf of the County Commissioners, John E. "Sonny" Bloxom, County Attorney, noted that, because the county has adopted code home rule, the County Commissioners are vested with both executive and legislative powers. The response noted that the county powers are derived from Article 25B, §13, Annotated Code of Maryland, which incorporates the powers enumerated in Article 25, §3. "In particular, Article 25 §3(z) provides in part, the power 'To create, change, or abolish offices and departments and to assign additional functions to offices and departments ...'" None of the three departments affected by the consolidation were established by law. Thus, according to the County Commissioners, "no legislative action is required ... to create, change, or abolish these departments." Rather, the County Attorney argued that any change would be pursuant to the County Commissioners' executive power.

Citing §10-503(a),¹ the County Commissioners argued that the closed session involved an administrative function outside the scope of the Act. The County Commissioners were “administering a law of the State, in particular, ... Article 25, §3(z) ... No public policy was involved in the County’s actions ...” The services provided by the County were not changed; rather, following the consolidation, they are handled by a single department.

According to the response, the consolidation plan was developed by the County Administrator and Director of Human Resources and presented to the Commissioners for their consideration. “The consolidation plan and personnel issues are inextricably intertwined.” And because the small size of the departments, the names of those affected would be readily apparent to anyone listening to the discussion. The County argued that discussion necessarily involved the employment status of specific individuals. Under that rationale, even if subject to the Act, the discussion qualified as a personnel matter, justifying closure under §10-508(a). Had the session not been closed, the media and the public would have learned of the specific jobs being eliminated before the affected employees did.

II

Analysis

A. *Administrative Function*

Subject to certain exceptions not applicable here,² if a discussion qualifies as an administrative function, the Open Meetings Act does not apply. §10-503(a)(1)(i). Thus, the initial question is whether the consolidation matter involved an administrative function. We recognize that, under a governmental structure such as in Worcester County in which a public body serves both as a legislative body and administrative head of government, the exact role in which the public body is acting can sometimes seem blurred. However, in applying the Open Meetings Act, we must evaluate a meeting of the public body within the context of the various functions as the Legislature has defined them for purposes of the Act.³

¹Except as otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated code of Maryland.

²Regardless of how a meeting is characterized, the Open Meetings Act applies whenever a public body conducts a meeting to consider the granting of a license or permit or any zoning matter. §10-503(b).

³To be sure, the County Commissioners state that none of the departments involved in the consolidation was established by legislation. However, this argument is inconclusive. A “legislative function” for purposes of the Open Meetings Act is much broader in that it includes not only “the process or act of ... approving, disapproving, enacting, amending, or repealing a law,” but, among other things, any “other measure to set public policy.” §10-502(f)(1).

We have adopted a two-step analysis in evaluating whether a matter qualifies as an “administrative function” as defined by the Act. §10-502(b). We first inquire whether the topic of discussion falls within any of the Act’s alternative defined functions. If so, our analysis ends because, by definition, the topic could not qualify as an administrative function. If the topic does not fall within an alternative function, we consider whether the public body was involved in the “administration of” an existing law, rule, or policy. If not, the topic cannot be considered an administrative function. *See, e.g., 6 OMCB Opinions 23, 25-26 (2008).*

The County Commissioners’ focused on the executive nature of the consolidation and that no county services were changed. The complaint, however, focused on the potential impact of the consolidation on land use decisions and environmental consequences that flow from such decisions, and argued that the decision was a policy matter subject to the Act. We accept as a truism that a consolidation or reorganization of departments at any level of government may well impact the manner that decisions are made and what priorities might be established. But that is not to say that every governmental reorganization necessarily constitutes a measure to set policy under the Act. We recognize the merits to both arguments and note that the question is a close one. However, it is not essential that we resolve it here. Based on the information offered by the Council, we find that the Council’s action failed to qualify as an administrative function under the second prong of the test.⁴

As noted above, to qualify as an “administrative function,” the matter under discussion must involve the administration of an existing law, rule, or policy. As we recognized in the Frostburg opinion, “the second aspect of the analysis requires that we consider whether the discussion concerned the application of a law or policy currently in place or the development of a new policy. Only the former may qualify as an [administrative] function.” *3 OMCB Opinions 227, 229 (2002)*. Here, the only provision identified by the County Commissioners as being “administered” is Article 25, §3(z), Annotated Code of Maryland - - authority “[t]o create, change, or abolish ... departments and to assign additional functions to departments...” As pointed out in the response, this authority extends to a county that has adopted code home rule. Article 25B, §13. However, this statute is a general enabling provision. In acting under this statute, the County Commissioners are not acting in an administrative capacity. *Cf. 3 OMCB Opinions 105, 107 (public body’s actions under Article 25, §3(t) involved a legislative function)*. As we indicated in prior opinions, if every discussion of how to implement a broad enabling statute were deemed an administrative function, the construction would subvert the policies of the

⁴The complaint found support in *3 OMCB Opinions 227 (2002)* in which we evaluated a change in governmental operations in the City of Frostburg whereby municipal department heads would report on a trial basis to the City Administrator rather than to individual Council members. We held that the discussion in that case went beyond the perimeters of an executive function - - now labeled the “administrative function.” We also noted that the charter provision that the City claimed to have been administering was not so specific as to preclude the Council from making policy decisions in its implementation.

Act, since every action of a local government can be traced back to some source of authority. *See, e.g., 3 OMCB Opinions* at 230; *3 OMCB Opinions* 182 (2002); *3 OMCB Opinions* 105 (2001). Absent an existing law or policy that the Commissioners can be said to have been administering, the consolidation action taken by the County Commissioners during the closed meeting on May 26 was not an administrative function under the Act.

B. Personnel Matters

The question remains whether the closed session was properly closed as a personnel matter under §10-508(a)(1). Like all the exceptions under §10-508(a), the personnel exception must be “strictly construed in favor of open meetings.” §10-508(c). Thus, during a meeting closed under §10-508(a)(1), a public body must ensure that its discussion is limited and only address personnel matters concerning identifiable individuals. *3 OMCB Opinions* at 231.

In its response, the County Commissioners point out that the consolidation issue and personnel matters were “inextricably intertwined.” Considering the size of the departments, the individuals associated with specific positions would have been readily apparent. In a recent opinion, we acknowledged similar concerns where the governing body of a municipality considered outsourcing the operation of a municipal golf course and the governing body expressed concern about the manner in which the affected employees would learn of their fate. However, as we explained, “clearly any consideration about discontinuing a particular service or outsourcing responsibility for a service, or any discussion to explore such options, cannot automatically be considered as involving a personnel matter, even though either action would likely impact employees’ jobs.” *6 OMCB Opinions* 104, 108 (2009). Similarly, discussion about consolidating county departments cannot be deemed a personnel matter to the extent discussion extended beyond the impact on individual identifiable employees. In the outsourcing opinion, we acknowledged that public discussions may have made it impossible to notify employees before the matter was made public. However, this was a result of the balancing of interests that is dictated by the Act. *6 OMCB Opinions* at 109.

In response to our request, the County Commissioners provided us with a copy of its minutes for the closed session.⁵ In fact, part of the closed session qualified as a personnel matter in that it concerned the ability of a particular employee to retire. However, other matters were discussed, such as a suggested severance package, when the decision affecting the employees should be implemented, available alternatives such as furloughs, and the merits of reorganization in general. To the extent discussion extended beyond the status of a single identifiable employee, we find that the Commissioners exceeded the permissible bounds of the personnel exception, thus, violating the Act.

⁵Unless the County Commissioners choose to make the minutes of the close meeting public, the Compliance Board is required to maintain the document’s confidentiality. §10-502.5(c)(2)(iii).

Kathlyn B. Phillips
October 27, 2009
Page 6

As the complaint noted, subsequent ratification could not cure the violation of the Open Meetings Act that occurred. 6 *OMCB Opinions* 1, 5 (2008).

III

Conclusion

We find that the County Commissioners violated the Open Meetings Act in that the its discussions during the closed session on May 26, 2009, concerning the departmental consolidation did not qualify as an administrative function outside of the scope of the Act. Nor were the discussions limited to matters within the scope of the personnel matter exception that could justifiably be considered in closed session.

Very truly yours,

OPEN MEETINGS COMPLIANCE BOARD

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

cc: John E. "Sonny" Bloxom, Esquire
The Honorable Louise Gulyas