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Boyd MD 20841

May 19, 2014

Open Meetings Compliance Board
c/o Attorney General's Office
200 St. Paul Place
Baltimore MD 21202
OpenGov@oag.state.md.us

Dear Open Meetings Compliance Board,

The purpose of this letter is to file a complaint about the Chevy Chase Town Council for violating SG §10-502.5(i)(3) of the Open Meetings Act and for possibly violating SG §10-508(a) and (b) of the Open Meetings Act.

VIOLATION OF SG §10-502.5(i)(3)

On March 20, 2014, the Open Meetings Compliance Board issued an opinion that found that the Chevy Chase Town Council had violated the SG §10-508(d) requirements for closing a meeting and the SG §10-509(c)(2) requirements for minutes for a closed session.

SG §10-502.5(i)(3) says that if the Open Meetings Compliance Board determines that a violation of the Open Meetings Act has occurred, then at the next open meeting of the public body after the Board has issued its opinion, a member of the public body shall announce the violation and orally summarize the opinion.

According to the website of the town of Chevy Chase (<http://www.townofchevychase.org/agendacenter>), the Chevy Chase Town Council's next open meeting after the Compliance Board issued its opinion on March 20 was on April 9. (See the screenshot of the Chevy Chase Town Council's 2014 meetings, captured on 5/18/2014, attached.)

The Chevy Chase Town Council did not comply with SG §10-502.5(i)(3) in its meeting on April 9. The minutes of the meeting also do not show compliance (see the minutes of the April 9 meeting of the Chevy Chase Town Council, downloaded on 5/18/2014, attached).

POSSIBLE VIOLATION OF SG §10-508(a) AND SG §10-508(b)

Background

In December 2013, the Town of Chevy Chase signed a monthly agreement with the firm Buchanan Ingersoll & Rooney (BIR) for lobbying related to the Purple Line, as reported in the *Washington Post* on January 23, 2014 (see http://www.washingtonpost.com/local/trafficandcommuting/purple-line-advocates-question-town-of-chevy-chase-hiring-congressmans-brother/2014/01/23/f83d29ce-8382-11e3-9dd4-e7278db80d86_story.html).

On February 20, 2014, the Chevy Chase Town Council approved a contract with Buchanan Ingersoll & Rooney and two subcontractors (Chambers Conlon & Hartwell, and Alexander & Cleaver) for lobbying related to the Purple Line, as reported in the blog *Bethesda Now* on February 20, 2014 (see <http://www.bethesdanow.com/2014/02/20/town-of-chevy-chase-will-pay-d-c-firm-to-help-fight-purple-line/>), and in the *Washington Post* on February 21, 2014 (see http://www.washingtonpost.com/local/trafficandcommuting/town-of-chevy-chase-hires-law-firm-to-fight-purple-line/2014/02/21/3c87b492-9a98-11e3-80ac-63a8ba7f7942_story.html).

On April 23, 2014, Town of Chevy Chase resident Jacob Bardin wrote a message on a listserve for Town of Chevy Chase residents (townneighbors@yahoogroups.com, see also <http://www.townofchevychase.org/309/Town-Neighbors-Listserv>) questioning this contract:

For those who may be curious about what benefit the Town is getting from our contract with Buchanan Ingersoll and Rooney to lobby against the Purpleline the answer appears to be "not much".

Here are the facts (Town residents can request an copy of the BIR agreement from the Town office)

1. To date the Town has spent approximately \$130,000 (\$20K a month in December and January, \$29K/month starting in February) with BIR for "Government Services" and will continue to spend \$29,000/month for the next year (approx \$400,000 total)
2. While the Town agreement with BIR specifies very clearly what/when we must pay BIR it says nothing about what objectives we are hoping to achieve or how BIR might actually assist us to achieve those objectives.
3. No written status reports are being provided to the Town by BIR.
4. Since we are paying for "government services" it appears that any "legal services" would require additional funds.
5. The contract was awarded without reviewing any competitive bids from other firms.

I do not have any experience with "government services" (lobbying) however in 25 years of professional life I have never seen a contract like this that does not specify what the buyer is getting in return for their money. In addition in my experience if you can not articulate your objectives and strategy in writing you are probably not going to accomplish much.

Regardless of one's position on the Purpleline this does not appear to be a good use of Town resource.

Town of Chevy Chase mayor (and councilmember) Pat Burda responded on the listserve on April 24 as follows:

I would like to clarify some of the inaccuracies from below and as stated in some recent campaign literature. 1) The Town council interviewed two firms prior to hiring BIR for the initial two months; we interviewed an additional three firms before awarding them the final contract. We did negotiate the final terms of the contract. 2) The contract and reporting requirements are purposely vague because of

the issues we have with our adversaries trying to ascertain our strategies and actions. 3) I am in constant contact with BIR and we have weekly update calls and monthly full council calls to review the work being performed. We do not just write monthly checks without knowing what is being done on our behalf and we can get out of the contract at any time if we feel they are not performing.

Trust me, I and all the council members wish this process could be more open to residents, but then we would just be throwing our money away.

The blog *Bethesda Now* reported parts of this exchange on April 25, 2014 (see <http://www.bethesdanow.com/2014/04/25/purple-line-lobbying-contract-becomes-divisive-in-town-of-chevy-chase/>).

Meeting of the Chevy Chase Town Council on April 9, 2014

The Chevy Chase Town Council held a meeting on April 9, 2014. Item I on the Town Council's agenda for the meeting (see the agenda for the April 9 meeting of the Chevy Chase Town Council, downloaded on 5/18/2014, attached) was an open session

for the purpose of voting to enter a closed session pursuant to the Open Meetings Act, Maryland Code, State Government Article, Section 10-508(a)(7) to consult with counsel to obtain legal advice on matters related to the proposed Purple Line project and on matters related to Maryland Public Information Act requests; pursuant to Section 10-508(a)(8) to consult with staff, consultants, or other individuals about potential litigation related to the proposed Purple Line project; and pursuant to Maryland Code, State Government Article, Section 10-508(a)(1) to discuss a personnel matter.

Item I on the minutes for the April 9 meeting (see the minutes for the April 9 meeting, downloaded on 5/18/2014, attached) is the executive session, as follows:

At 6 p.m., upon the unanimous vote of the Town Council members present, the Council met in open session for the purpose of voting to enter a closed session pursuant to the Open Meetings Act, Maryland Code, State Government Article, Section 10-508(a)(7) to consult with counsel to obtain legal advice on matters related to the proposed Purple Line project and on matters related to Maryland Public Information Act requests; pursuant to Section 10-508(a)(8) to consult with staff, consultants, or other individuals about potential litigation related to the proposed Purple Line project; and pursuant to Maryland Code, State Government Article, Section 10-508(a)(1) to discuss a personnel matter.

The Council approved a two-year contract for the Town Manager by a vote of 4-1, with Councilmember Lang opposed. The Council agreed by consensus to issue a Maryland Public Information Act request to the Maryland Transit Administration.

Present were Patricia Burda, Mayor; Kathy Strom, Vice Mayor; David Lublin, Treasurer; Al Lang, Secretary; John Bickerman, Community Liaison; Todd Hoffman, Town Manager; Ron Bolt, Town Attorney; and (via telephone) Terrence

Heubert of the law firm of Buchanan Ingersoll & Rooney PC; Matt Ginsberg of the law firm of Chambers, Conlon & Hartwell; and Robert Garagiola of the law firm of Alexander & Cleaver.

Mayor Burda's response on April 24 on the listserve of Town of Chevy Chase residents said, "...we have weekly update calls and monthly full council calls to review the work being performed."

I assume that the April "monthly full council call to review the work being performed" by Buchanan Ingersoll & Rooney and its two subcontractors (Chambers Conlon & Hartwell, and Alexander & Cleaver) occurred during the closed session on April 9, because

1. according to the minutes, members of the firms Buchanan Ingersoll & Rooney, Chambers Conlon & Hartwell, and Alexander & Cleaver were present by telephone at the Chevy Chase Town Council's meeting in closed session;
2. according to the agenda and the minutes, one of the purposes of the closed session was "to consult with staff, consultants, or other individuals about potential litigation related to the proposed Purple Line project";
3. the Town of Chevy Chase website (see the screenshot of the Chevy Chase Town Council's 2014 meetings, captured on 5/18/2014, attached) does not show any other public meetings of the Chevy Chase Town Council in April 2014.

SG §10-508(a)(7)

SG §10-508(a)(7) allows a public body to meet in closed session to consult with counsel to obtain legal advice. According to the minutes for the April 9 Chevy Chase Town Council meeting, Ron Bolt, the attorney for the Town of Chevy Chase, was present during the closed session. If the Chevy Chase Town Council consulted with Mr. Bolt to obtain legal advice on matters related to the Purple Line, then SG §10-508(a)(7) allowed the Chevy Chase Town Council to do this during a closed session.

However, if the Chevy Chase Town Council consulted with members of Buchanan Ingersoll & Rooney and/or its two subcontractors to obtain legal advice on matters related to the Purple Line, and if the Town's contract with Buchanan Ingersoll & Rooney does not establish an attorney-client relationship between Buchanan Ingersoll & Rooney (and/or its two subcontractors) and the Town of Chevy Chase, then SG §10-508(a)(7) would not allow the Chevy Chase Town Council to do this during a closed session, because Buchanan Ingersoll & Rooney (and/or its two subcontractors) would not be the Town's counsel. Similarly, if the Town's contract with Buchanan Ingersoll & Rooney is for the provision of non-legal services only, then SG §10-508(a)(7) would not allow the Chevy Chase Town Council to consult with members of Buchanan Ingersoll & Rooney and/or its two subcontractors to obtain legal advice during a closed session, because Buchanan Ingersoll & Rooney (and/or its two subcontractors) would not be providing legal advice to the Chevy Chase Town Council.

Unfortunately, I do not know what is in the Town's February 2014 contract with Buchanan Ingersoll & Rooney, although I have tried to obtain this information through the Maryland Public Information Act. However, the Town's December 2013 agreement with Buchanan Ingersoll & Rooney specified

that BIR's services would "involve solely the provision of non-legal services" and that "the Agreement and the Services do not establish an attorney-client relationship with the Town" (see <http://www.actfortransit.org/archives/press/2014March24NewDocsChevyChaseLobbying.html>).

SG §10-508(a)(8)

SG §10-508(a)(8) allows a public body to meet in closed session to consult with staff, consultants, or other individuals about pending or potential litigation.

If the Chevy Chase Town Council consulted with Buchanan Ingersoll & Rooney and/or its two subcontractors about matters directly related to pending or potential litigation related to the Purple Line, then the closed session on April 9 was in compliance with SG §10-508(a)(8) for this consultation.

However, according to the Open Meetings Act Manual, SG §10-508(a)(8) does not allow a public body to close a portion of the discussion that deals separately with the underlying policy issue. If the Chevy Chase Town Council consulted with Buchanan Ingersoll & Rooney and/or its two subcontractors about an underlying policy issue related to pending or potential litigation related to the Purple Line, then SG §10-508(a)(8) would not allow the Chevy Chase Town Council to do this during a closed session.

SG §10-508(b)

SG §10-508(b) says that a public body that meets in closed session under this section may not discuss or act on any matter not permitted under subsection (a) of SG §10-508.

According to Mayor Burda and other Town of Chevy Chase officials, the February contract with Buchanan Ingersoll & Rooney specifically includes lobbying (as well as other, unspecified services).

In February 2014, her statement in the blog *Bethesda Now* about the purpose of the contract was, "We're still working out strategies. I do know we will be undertaking lobbying. I feel confident we can say that. We want to make sure that the state has followed the process as articulated through the feds so they can cross their t's and dot their i's and make sure they've done the right thing." (see <http://www.bethesdanow.com/2014/02/20/town-of-chevy-chase-will-pay-d-c-firm-to-help-fight-purple-line/>).

Similarly, she talked about lobbying as a purpose of the contract in the *Washington Post* in February 2014 (see http://www.washingtonpost.com/local/trafficandcommuting/town-of-chevy-chase-hires-law-firm-to-fight-purple-line/2014/02/21/3c87b492-9a98-11e3-80ac-63a8ba7f7942_story.html):

"The focus of our conversations will not be to defund the Purple Line," Burda said...Instead, Burda said, the town has asked the firm to lobby state and federal officials about the rail proposal's potential impacts, such as those on nearby homes, the wooded Capital Crescent Trail and the safety of a pedestrian crossing at Lynn Drive. The town also will urge the Maryland Transit Administration to take a more detailed look at a less expensive bus rapid transit option, officials said.

SG §10-508(a) does not provide for closing a meeting to discuss lobbying. Even if the lobbying is done by lawyers, it does not constitute the rendering of legal advice. The Open Meetings Act Manual says, "This exception [SG §10-508(a)(7)] only extends to discussions between a lawyer and public body that actually involve rendering legal advice, not where a lawyer is actually serving in an alternative capacity such as acting as a business agent."

Further, the Open Meetings Act Manual says, "If a meeting is within the scope of the Open Meetings Act, it must be open unless one of the specific reasons for closing it can legitimately be identified. A public body may not avoid an open meeting merely because a topic is controversial or potentially embarrassing."

The Open Meetings Act Manual also says, "When a public body does invoke one of these exceptions, it must limit its discussion to that topic only. If the public body wishes to discuss other matters, it must return to open session, either to discuss the additional matter in public or vote to close the session based on another applicable exception."

If the Chevy Chase Town Council discussed lobbying or any other topic with Buchanan Ingersoll & Rooney and/or its two subcontractors during the closed session on April 9, except as specified in SG §10-508(a), then the Chevy Chase Town Council violated SG §10-508(b) of the Open Meetings Act.

Sincerely,

Miriam Schoenbaum

Attachments:

Screenshot of the Chevy Chase Town Council's 2014 meetings, captured on 5/18/2014
Minutes of the Chevy Chase Town Council meeting on April 9, downloaded on 5/18/2014
Agenda for the Chevy Chase Town Council meeting on April 9, downloaded on 5/18/2014