

Bainbridge Island Ethics Board

Ethics Complaint 2011-01

Determination

October 17, 2011

On September 9, 2011, Kim Hendrickson, who has served as Secretary/Chief Examiner of the Bainbridge Island Civil Service Commission (CSC), submitted an Ethics Complaint (Complaint) alleging that the CSC Commissioners met with Bainbridge city officials in violation of the Open Public Meetings Act (OPMA, RCW 42.30) and the Code of Ethics of the Bainbridge Island Ethics Program. More specifically, the Complaint alleges that the three CSC Commissioners met privately with the City Attorney on May 26, 2011, and the City Manager on May 31, 2011, to discuss reorganizing the position of Secretary/Chief Examiner. The Complaint was directed at two Commissioners, David Hand and George McKinney, but not at Commissioner Robert Fernandez, who has resigned from the CSC, or the city officials who attended the meetings.

The City Clerk transmitted the Complaint to the Ethics Board for review pursuant to section III.D of the Ethics Program. The Ethics Board reviewed the Complaint at its meeting on September 19, 2011, and issued a Preliminary Determination stating:

[T]he Ethics Board finds that the factual allegations in the Complaint are credible and the alleged private meetings between the CSC and city officials appear to have violated the transparency requirement of the Code of Ethics. Accordingly, the Ethics Board has made a Preliminary Determination that the facts stated in the complaint, if true, could potentially constitute a violation of the Code of Ethics such that further proceedings are warranted.

The respondent Commissioners were afforded an opportunity to respond to the Preliminary Determination, and Commissioner Hand filed a Response (October 17, 2011) with the concurrence of Commissioner McKinney. The Response provides a brief background and description of the Commissioners' two meetings with city officials and subsequent regular meetings of the CSC. Further, the Response argues that the two meetings with city officials did not violate the OPMA, citing the City Attorney's Memorandum on this subject (discussed below). The Response concludes that:

[I]n hindsight I can now see that it would have been better practice, in the interest of transparency, if we had given public notice of the special meetings.

The City Attorney and City Manager also responded to allegations that their meetings with the CSC Commissioners violated the OPMA, in a Memorandum from the City Attorney to the City Council (September 29, 2011) and a Frequently Asked Questions (FAQ) post on the City's website (original undated; updated October 11, 2011). The City Attorney argues in his Memorandum that the OPMA did not require notice of the CSC Commissioners' meetings with the City Manager and himself because the Commissioners' presence at the meetings waived their right to notice and there was no request by the media to be notified of all special meetings. The City Attorney concludes that:

Although one may argue, as a matter of policy, that more or better notice ought to have been given for the meetings in question, based on the alleged and known facts, it appears that these gatherings of the members of the Civil Service Commission did not violate requirements of the Open Public Meetings Act.

The FAQ on the City's website concurs with the City Attorney's conclusion that the OPMA was not violated and states further that:

Regardless, a better practice for purposes of public transparency would have been for the Commission to publicly notice these meetings and discuss public matters or adjourn to Executive Session to discuss legal or personnel matters.

In response to the city officials' Memorandum and FAQ, the Complainant submitted additional materials to the Ethics Board. In an email (October 6, 2011), Complainant calls attention to a statement by the Municipal Research and Services Center that although the OPMA does not require direct notice of special meetings to the public and there may no media request for such notice,

This does not mean . . . that the governing body need not notify the public in some way about an upcoming meeting. . . . [C]ounties and special districts should have procedures for notifying the public of their meetings. (Report No. 60, footnote 42)

Complainant also attached a Witness Statement of Paula Fernandez, former Secretary/Chief Examiner of the CSC, that after the CSC Commissioners conducted a private discussion in violation of OPMA in 2004, she was informed that two newspapers requested that they be informed of CSC meetings.

In another email submission (October 7, 2011), Complainant transmitted an email (October 7, 2011) from the Open Government Ombudsman in the Office of the Attorney General of Washington stating:

[A] waiver of notice should never be construed to provide a hyper-technical interpretation in favor of compliance where the context of the facts suggest a secret meeting. Otherwise the spirit of the [OPMA] would be irreparably damaged and agencies could perpetually meet in secret by merely consenting to waive the notice requirements for a special meeting.

The purpose of the OPMA is to allow the public to view the decision making process at all stages. The OPMA contains a "mandate for liberal interpretation of the act contained in RCW 42.30.910." Where there is a dispute as to whether a special meeting properly provided notice, all the facts must be considered in favor of a liberal construction of the OPMA....

I suggest that the Civil Service Commissioners re-do the three meetings that you reference, and any actions taken therein, in an open public meeting. (citations omitted)

In addition to these materials, Complainant submitted to the City Council a Petition to Remove Commissioners (September 12, 2011), alleging violations of the OPMA and other acts of malfeasance in office and dereliction of duty by the two Commissioners who are the subjects of her Complaint. The Petition is pending before the City Council, which may refer the matter to a Hearing Examiner. The Ethics Board takes no position on the resolution of the Petition.

Discussion

The ethical requirements of the Code of Ethics are independent of the legal rules under the OPMA. A violation of the OPMA likely violates the Code of Ethics, but compliance with the OPMA does not establish compliance with the Code of Ethics. The ethical requirement of transparency in the conduct of public meetings demands more than the bare satisfaction of the legal rules. Thus, the legal status of the meetings between the CSC Commissioners and city officials, whose occurrence is not disputed, does not determine their ethical status. The ethical goal of transparency is a higher standard concerned with maintaining public confidence in official decision-making by exposing the process of decision-making to the public eye. The OPMA shares that goal but does not exhaust it. The ethical goal requires compliance with the spirit as well as the letter of the law.

The arguments of the Respondents, the City Attorney, and the City Manager that the two meetings in question met the legal notice requirements for special meetings under the OPMA are beside the point. No member or representative of the public was able to observe the Commissioners' actions at the meetings and consider whether the Commissioners were attempting to promote efficiency, shield themselves from criticism, or accomplish some other goal. The Ethics Board takes no position on this issue but notes that it was hidden from public consideration by the lack of access to the meetings. The requirement of transparency was frustrated.

The Respondents' Response acknowledges that public notice of their special meetings "would have been better practice, in the interest of transparency." This acknowledgement is useful but would be more forceful if the same Commissioners had not previously violated the OPMA.

The City Attorney and the City Manager acknowledge there is a difference between legal and ethical standards. The City Attorney recognizes an argument "that more or better notice ought to have been given for the meetings in question," but he regards this position as "a matter of policy." Similarly, the FAQ states that public notice of the meetings would have been "a better practice."

The Ombudsman's view casts doubt that the CSC meetings even complied with the OPMA, and he suggests remedial action - a public re-do of those meetings. This remedy is beyond the authority of the Ethics Board to recommend but might be considered by the City Council.

Conclusion

The relevant facts are not in substantial dispute. Based on the submissions of the Complainant and Respondents, and the public statements of the city officials involved in this matter, the Ethics Board has determined that the conduct of two CSC meetings with no public notice was a material violation of the transparency requirement under section II.I of the Code of Ethics. Transparency is not merely a better practice or matter of policy, but is mandated by the Code of Ethics.

This determination shall be forwarded to the City Council for its review.

Approved at the Ethics Board meeting on October 17, 2011, by Members Willerford, Buckles, Piraino and Yesley. Board Member Killian recused himself.

A handwritten signature in black ink, appearing to read 'Dennis', is written above a solid horizontal line.

Dennis Willerford, Chair