

July 31, 2015

VIA ELECTRONIC MAIL AND TELECOPY

Mayor Bruce Morrison
Members of the Pocomoke
City Council
Town of Pocomoke City
101 Clarke Avenue/P.O. Box 29
Pocomoke City, Maryland 21851

Dear Mayor Morrison and Members of the City Council:

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MARYLAND

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GENERAL COUNSEL

I write on behalf of the American Civil Liberties Union of Maryland, reporter Stephen Janis, and The Real News Network, a Baltimore-based non-profit news organization, concerning the Town of Pocomoke City's unlawful actions in excluding the media from its July 13, 2015 Town Council meeting. A similar letter of complaint is being submitted as a formal complaint to the to Maryland's Open Meetings Compliance Board.

The facts, as we understand them, are these:

On or about June 29, 2015, the Pocomoke City Mayor and Council voted to fire the Town's first African American Police Chief, Kelvin Sewell.¹ No explanation was given for the Town's action, and many in the community – both black and white – were upset. Concerns were raised that the Chief's termination might relate 1) to complaints of race discrimination that had been made to the Equal Employment Opportunity Commission by Sewell and two other African American Pocomoke police officers, and/or 2) to Sewell's reporting to the U.S. Department of Justice of irregularities in the Town's use of federal grant funding. Rallying in support of Chief Sewell, community members organized a protest movement, began circulating petitions, contacted the media, and came to City Hall by the hundreds for the July 13 Council meeting to demand answers from City officials. Numerous representatives of print and broadcast media from across the state also turned out to attend and report upon the Town Council meeting. Among the reporters present were Stephen Janis² and Taya Graham of The Real News Network.

¹The sole dissenter to Chief Sewell's termination was Councilwoman Diane Downing, currently the only African American member of the Council, who has been outspoken about saying she believes the action was unjustified. See, e.g., Deneen L. Brown, "Justice Department scrutinizes firing of black police chief in Pocomoke City, Md." *Washington Post*, July 25, 2015.

² Mr. Janis is acquainted with Kelvin Sewell because, as you may be aware, the two co-authored a book, "Why Do We Kill? The Pathology of Murder in Baltimore," when Mr. Sewell was a Baltimore homicide detective.

Given the number of people present for the meeting and the relatively small space available at Pocomoke's Town Hall, many of those who arrived later were not able to fit into the Council Chambers. The Real News team arrived early, however, and so should have been allowed to enter the Chambers and report upon the proceedings directly. However, Janis and Graham, along with numerous other representatives of the media were approached by police, and told that no media were allowed into the meeting, on directions of Mayor Morrison. Members of the press who were already in the room were directed to leave, and those seeking entrance were barred, even as members of the public were entering. Furthermore, police told Mr. Janis, broadcast journalists were not permitted to make audio or visual recordings even outside the Council chambers.

Exclusion of the Press from the June 13 Council Meeting was Unlawful

Meetings of a municipal government's legislative body are required to be open to the public under the Maryland Open Meetings Act (OPA), with limited exceptions, inapplicable here. See §§ 3-101 to 3-501, Gen. Prov. Art., Md. Ann. Code (Oct. 2014). The Pocomoke City Council is undeniably a public body under the OPA, and the Act defines "open session" to mean open to all, meaning both the public and the press. Not only is this true under the Open Meetings Act, it is true under the U.S. Constitution: The First Amendment guarantees that the press and the public enjoy equal access to government information and proceedings, including Town Council meetings, making it unconstitutional for the government to bar reporters from meetings open to the public at large. See, e.g., *WJW-TV, Inc. v. City of Cleveland*, 686 F.Supp. 177 (N.D. Ohio 1988) (City Council violated First Amendment by excluding media from city council meeting), *vacated as moot on appeal*, 878 F.2d 906 (6th Cir. 1989); *Westinghouse Broadcasting Co., Inc. v. Dukakis*, 409 F.Supp. 895 (D. Mass. 1976) (Boston City Council exclusion from meetings of radio and television stations being operated by management during labor dispute violated the First Amendment).³

Surely, Pocomoke City officials must understand this.

³In considering a slightly different issue, where distinctions have been made among different media outlets, several courts have likewise determined that discriminatory access to public forums or to public information is generally violative of the First Amendment. See, e.g., *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir.1986) (district court could not grant one media entity access to discovery materials while excluding another); *American Broadcasting Companies v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir.1977) (ABC could not be excluded from post-election activities at campaign headquarters where other members of the press were granted access); *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C.Cir.1977) (where White House press facilities had been made publicly available as a source of information for reporters, the White House could not exclude a reporter arbitrarily or for less than compelling reasons); *United Teachers of Dade v. Stierheim*, 213 F.Supp.2d 1368, 1373-74 (S.D.Fl.2002) (teachers' union and editor of union newspaper could not be excluded from the press room reserved for members of the "general-circulation" media and relegated to a "separate but equal" media room); *Westinghouse Broadcasting Co., Inc. v. Dukakis*, 409 F.Supp. 895, 896 (D.Mass.1976) (public officials may not selectively exclude one news organization from public meetings and press conferences absent a compelling government interest); *Borreca v. Fasi*, 369 F.Supp. 906, 909-10 (D.Haw.1974) (enjoining mayor from excluding a certain reporter from general news conferences).

In explaining the need for the Open Meetings Act, the General Assembly stated, in the express language of the statute:

The ability of the public, its representatives, *and the media* to attend, report on, and broadcast meetings of public bodies and to witness the phases of the deliberation, policy formation, and decision making of public bodies ensures the accountability of government to the citizens of the State.

§3-102(b)1) (emphasis added). If it was not clear enough from the language of the statute that Pocomoke City must legally open its Council meetings to the public and media alike, that rule was underscored in a decision issued by the Open Meetings Compliance Board (OMCB) more than 15 years ago. That case involved a challenge by the Maryland *Gazette* to an order of the Maryland Citizens Advisory Committee for Corrections Institutions restricting access to its meetings to members of the community surrounding a prison where two inmates had escaped, to the exclusion of the press. Comp. Bd. Op. No. 99-11 (Aug. 12, 1999), attached hereto. There, corrections officials reasoned at the time they closed their meeting that due to the “highly charged atmosphere” in the community following the escapes, closing the meeting to the media would help to ensure that both people in the community and corrections officials could “speak freely.” Upon consideration later, however, they recognized that “members of the press should have been admitted” to the meeting and apologized for the violation.

In considering the *Gazette*’s complaint, the OMCB noted that the language of the Act explicitly states that public meetings are to be open both to the public and the media, presupposing that “reporters, like other members of the public, are free to attend open meetings” in furtherance of First Amendment mandates. The Board explained:

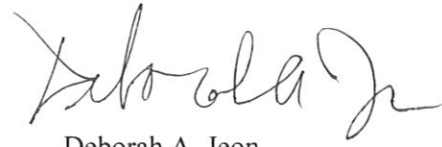
This assumption reflects our country’s longstanding recognition that the press plays a vital role in ensuring public awareness of government activities. The First Amendment itself is proof that “the Constitution specifically selected the press . . . to play an important role in the discussion of government affairs.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Indeed, the public usually learns about the operations of government not through firsthand observation, but rather “chiefly through the print and electronic media.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980). Reporters have been identified by the Supreme Court as “surrogates for the public” and characterized as “playing a unique role as a check on government abuse.” *Id.* at 573; *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

Op. 99-11, at 2.

The same principles control here. Pocomoke City officials violated both the First Amendment and the Maryland Open Meetings Act in barring reporters from the July 13 meeting of the Mayor and City Council. We ask for your assurance that this will not happen again. We understand that the next meeting of the Mayor and Council is scheduled for Monday, August 3. Again, protesters, supporters of Chief Sewell and representatives of the media are likely to attend this meeting, and we expect that, this time, access will be open to all.

Please let us know if you have any questions about this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah A. Jeon". The signature is fluid and cursive, with a large initial "D" and a stylized "J" at the end.

Deborah A. Jeon
Legal Director

Cc: William Hudson, Esq.

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

COMPLIANCE BOARD OPINION NO. 99-11

August 12, 1999

Mr. Bob Mosier
Maryland Gazette

The Open Meetings Compliance Board has considered your complaint dated June 9, 1999, in which you alleged that, at a meeting held on June 3, 1999, the Citizens Advisory Committee for Corrections Institutions violated the Open Meetings Act by excluding a reporter from your newspaper. For the reasons stated below, the Compliance Board finds that the Act was violated.

I

Complaint and Response

Your complaint stated that the Citizens Advisory Committee for Corrections Institutions advertised the June 3 meeting throughout the Jessup community and encouraged residents to come and share their opinions on the recent escape of two prisoners from a correctional facility in Jessup. When Brian Boyer, a reporter from the *Gazette*, arrived, he was informed by a correctional officer that the meeting was open only to members of the community. The Commissioner of Corrections, Dr. William Sondervan, had ordered the meeting closed to the press.

In the Committee's response, President Melanie Gutjahr acknowledged that the meeting was closed to the press, pursuant to Commissioner Sondervan's decision. Ms. Gutjahr commented that she "respectfully disagreed" with the Commissioner's decision to bar the press from the meeting.

Commissioner Sondervan also responded to the complaint, to explain the basis for his decision. Noting the "highly charged atmosphere" following the escape, Commissioner Sondervan stated that he "knew the tensions at the meeting would run high, and felt it extremely important that the members of the community be able to freely express their concerns regarding the escape. Similarly, I felt it important that Division [of Correction] officials be able to speak candidly about the escape and the corrective measures the Division

was implementing to improve security at [the Jessup facility]. In his view, “the presence of the media at the meeting would have tended to frustrate these goals.” He now recognized, however, that members of the press should have been admitted to the June 3 meeting, apologized for the error, and noted that the press did attend the Committee’s next meeting.

II

Analysis

The Citizens Advisory Committee for Corrections Institutions is a public body subject to the Open Meetings Act. The core provision of the Act is that, with exceptions not pertinent here, “a public body shall meet in open session.” §10-505 of the State Government Article. “Whenever a public body meets in open session, the general public is entitled to attend.” §10-507(a). An open session is one in which “citizens [are] allowed to observe the performance of public officials and the deliberations and decisions that the making of public policy involves.” §10-501(a)(2).

Notably, in its statement of legislative policy, the General Assembly found that “[t]he ability of the public, its representatives, and *the media* to attend, report on, and broadcast meetings of public bodies ... ensures accountability of government to the citizens.” §10-501(b)(1) (emphasis added). Thus, the Act presupposes that reporters, like other members of the public, are free to attend open meetings.

This assumption reflects our country’s longstanding recognition that the press plays a vital role in ensuring public awareness of government activities. The First Amendment itself is proof that “the Constitution specifically selected the press ... to play an important role in the discussion of government affairs”. *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Indeed, the public usually learns about the operations of its government not through firsthand observation but rather “chiefly through the print and electronic media.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980). Reporters have been identified by the Supreme Court as “surrogates for the public” and characterized as “play[ing] a unique role as a check on government abuse” *Richmond Newspapers*, 448 U.S. at 573; *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

Discussing the right of the press to attend open court proceedings, the North Dakota Supreme Court observed that “[t]he right of access accorded the public must also be accorded to the media because the media not only constitute a part of the general public but also operate as agents or surrogates for the general public in gathering and disseminating

information.” *KFGO Radio, Inc. v. Rothe*, 298 N.W. 2d 505, 511 (N.D. 1980), *modified on other grounds* 338 N.W.2d 72 (1983). Likewise, the United States Supreme Court, discussing the observation of trials by the public and the media, noted that “[t]he media representatives enjoy the same right of access as the public” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 573. *See also Hearst Corp. v. State*, 60 Md. App. 651, 658, 484 A.2d 292 (1984) (discussing the right of the public and press to attend trials and inspect court records).

When the Maryland Open Meetings Act requires a meeting to be open, it must be open to all. The Act does not contain an intermediate category of “partially open” meetings, to which some members of the public are admitted and others excluded. *See Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821, 823 (Fla. 1985).¹ “The requirement that meetings be open to the public encompasses all the public” Ann Taylor Schwing, *Open Meeting Laws* 227 (1994). Accordingly, a public body may not bar reporters from an open meeting.

III

Conclusion

In the opinion of the Compliance Board, the exclusion of the press from the Committee’s June 3 open meeting violated the Open Meetings Act, as Commissioner Sondervan himself soon recognized.² Perhaps it would have been true, as Commissioner Sondervan feared, that the presence of reporters would have made the discussion less candid. But if so, that is the price of greater government accountability.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim
Courtney McKeldin
Tyler G. Webb

¹ If a meeting is properly closed, a public body may admit selected staff members or others whose presence will contribute to the decision making process. *See Compliance Board Opinion No. 92-1* (October 15, 1992), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 1.

² The Compliance Board is gratified that Commissioner Sondervan acted promptly to ensure press access to the Committee’s next meeting.