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STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

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August 17, 2021

Dorchester County Council

The Complainant alleges that the Dorchester County Council (“Council”) made “improper use of closed sessions in [its] public meetings” from October 2020 through March 2021, when the Council was meeting by conference call because of the COVID-19 pandemic. As we explain more fully below, we conclude that the Council violated several of the closed-session provisions of the Open Meetings Act (“Act”).¹

Discussion

The Council asserts that the Complainant “does not actually allege that the Council violated” the Act but instead offers only “implied allegations” in the form of a list of “specific provisions . . . of concern.” We agree that the complaint could have been more precise in its allegations, but we find that, by referencing a general time period (October 2020 through March 2021) and citing specific provisions of the Act, it sufficiently alleges violations with respect to agendas, the procedure for closing a meeting, the proper scope of discussions in closed sessions, and compliance training for members of public bodies. See 6 *OMCB Opinions* 74, 75-76 (2009) (finding that a complaint provided the public body adequate information to respond even though it failed to identify a specific date on which the meeting had occurred). We address each of these allegations in turn. To the extent that the Complainant’s failure to identify specific dates has a bearing on our ability to determine whether a particular violation occurred, we will address the lack of specificity as it pertains to that particular allegation.

1. Agendas

The Complainant’s first area of concern is the Act’s agenda requirements. More specifically, the Complainant suggests that the Council violated the Act by not “announc[ing]” in each agenda “the purpose and the applicable . . . exception for any closed session,” and not “announc[ing]” each agenda “reasonably in advance of the meeting so the public ha[d] an opportunity to comment.”²

As to whether the agenda should have included the purpose for any closed sessions, § 3-302.1 requires only that an agenda “indicat[e] whether the public body expects to close any portion of the meeting.” § 3-302.1(a)(1)(ii). Beyond that, “[a] public body is not required to make

¹ Unless otherwise noted, statutory references are to the General Provisions Article of the Maryland Annotated Code.

² To be clear, “the Act entitles the public to *observe* the conduct of public business, see §§ 3-102, 3-303, but it does not regulate presiding officers’ decisions as to whether members of the public may *speak* during a meeting.” 9 *OMCB Opinions* 232, 233 (2015) (emphasis added).

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available any information in the agenda regarding the subject matter of the portion of the meeting that is closed.” § 3-302.1(c). We thus find no violation of this provision based on the submissions, which include twelve meeting agendas from the relevant time period, each indicating that a closed session would occur.

As to the timing of agendas, the Act requires a public body to “make available to the public an agenda” at some point “before meeting in open session.” § 3-302.1(a)(1). Exactly when depends on the circumstances. “If an agenda has been determined at the time the public body gives notice of the meeting,” then “the public body shall make available the agenda at the same time the public body gives notice of the meeting.” § 3-302.1(a)(2). “If an agenda has not been determined at the time the public body gives notice of the meeting, the public body shall make available the agenda as soon as practicable after the agenda has been determined but no later than 24 hours before the meeting.” § 3-302.1(a)(3). Because the Complainant does not provide any specifics about when the Council posted agendas during the relevant period, we have no basis to find a violation of these provisions.

2. *Contents of closing statements*

Without specifying the date of any alleged infraction, the Complainant suggests that the Council violated the Act by not “disclos[ing] the specific topic to be discussed” in closed session, “the statutory exception relied upon for closing the meeting, and the reason for closing the meeting.”

Before a public body meets in closed session, the presiding officer must “make a written statement” that discloses three items of information: “the reason for closing the meeting,” a citation to the authority allowing the body to close the meeting to the public, and “a listing of the topics to be discussed.” § 3-305(d)(2). As we have previously explained, “each of the three items in the written statement serves a distinct purpose and must be included.” 10 *OMCB Opinions* 46, 49 (2016) (citing 9 *OMCB Opinions* 15, 22-24 (2013)). “[T]he written statement of the topics to be discussed and reasons for closing allows the members to cast an informed vote on whether the claimed reason is sufficient to depart from the Act’s norm of openness—that is whether it ‘really is necessary’ to exclude the public.” 9 *OMCB Opinions* 46, 49 (2013) (quoting 4 *OMCB Opinions* 46, 48 (2004)). “A properly drafted statement also enables members of the public to understand why they are being excluded and, later, to ascertain from the summary of the closed session whether the members adhered to the topics they identified.” 9 *OMCB Opinions* at 49. Thus, “[s]omeone reading the written statement ought to have the answer to two questions: what are the [members of the public body] planning to talk about (‘topics to be discussed’), and why should this topic be discussed in closed session (‘the reason for closing the meeting’).” 4 *OMCB Opinions* at 49.

Here, the Council consistently failed to answer the second question. In each of the twelve closing statements that the Council provided to us, the Council listed the applicable statutory citations and the topics to be discussed in closed session. But the Council never specified the reasons for excluding the public from these discussions. For example, the Council on several occasions cited the statutory exception permitting public bodies to close meetings to “consult with counsel to obtain legal advice.” § 3-305(b)(7). The Council also provided brief descriptions of the

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topics of discussion, such as “Legal Advice-Airport Terminal Office Space Lease,” “Housing of Detainees Proposal-U.S. Immigration and Customs Enforcement,” and “Legal Discussion-Dorchester Renewable Energy, LLC-Gas Collection-Beulah Landfill.” Not once, however, did the Council explain why these topics required secrecy. As we have previously recognized,

a public body might decide to receive legal advice from its lawyer in a closed session because the public body does not want to waive the attorney-client privilege as to a particular matter, or because public disclosure would adversely affect the public body’s position in litigation, or even because the public body wants the lawyer’s advice on whether a matter should or must be kept confidential. If so, the public body should disclose those reasons; it is not necessarily a foregone conclusion that a public body’s attorney should only address the members’ questions in a closed session.

10 *OMCB Opinions* 4, 6 (2016). Thus, “the public body must explain why secrecy is appropriate under the particular circumstances at hand.” 15 *OMCB Opinions* 5, 8 (2021).

To be sure, “a reason for secrecy” may occasionally be “obvious from the topic that a public body has specified.” 10 *OMCB Opinions* 46, 50 (2016). But even when the need for secrecy “may be apparent upon reflection,” there “is no excuse for omitting it . . . from the written statement.” 4 *OMCB Opinions* 46, 49 (2004). “[T]he topic to be discussed and the reason for closing the session are separate items that should be addressed separately.” 10 *OMCB Opinions* 128, 132 (2016) (citing 8 *OMCB Opinions* 99, 100 (2012)). *Accord* 9 *OMCB Opinions* 110, 117 (2014) (finding a violation when the public body “adequately disclosed the topics it expected to discuss but did not state its reasons for excluding the public from its discussion of the . . . disclosed topics”). Accordingly, we find that the Council’s failure to articulate its reasons for closing sessions was a violation of § 3-305(d)(2).

We find also that the Council on more than one occasion failed to adequately articulate the topic of discussion in a closed session. “[T]here is no hard and fast rule for how much information is required in every circumstance,” 7 *OMCB Opinions* 216, 224 (2011), and “a public body is not obliged to reveal in the statement information that is protected by the applicable exception,” 4 *OMCB Opinions* 46, 48 (2004). But there must be “some account beyond uninformative boilerplate,” *id.*, and we have thus “advised public bodies to disclose as much information as they can without compromising the confidentiality of matters discussed within the claimed exception,” 15 *OMCB Opinions* 37, 39 (2021) (internal quotation marks omitted). We find that, on at least a few occasions, the Council failed to satisfy this standard. For example, in the closing statement for the March 16, 2021, meeting, the Council listed as one topic “Discussion-Personnel Requests.” We find that this lacks sufficient detail. As we have said:

At a minimum, a closing statement claiming the personnel matters exception should provide enough information to inform the public that the discussion does indeed fall within the exception. The topic to be discussed or reason for closing should thus show that the discussion will involve the personal attributes or performance of specific individuals and will not instead involve broader policy, which would be implicated when anyone in the position would be affected by the action being considered and which would therefore not fall within the exception.

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7 *OMCB Opinions* 225, 228 (2011) (citing 3 *OMCB Opinions* 335, 337 (2003)). “We recognize that the information a public body can disclose without compromising the confidentiality of the discussion will vary with the circumstances.” 15 *OMCB Opinions* 37, 39 (2021). But neither the public nor the Council can know whether it is really necessary to exclude the public when a closing statement uses such broad topic descriptions as “Discussion-Finance” and “County Manager Discussion.” We thus conclude that the Council violated § 3-305(d)(2) by failing, in at least some closing statements, to provide sufficiently detailed descriptions of the topics to be discussed.

To avoid similar violations in the future, the Council may wish to redesign its form closing statement³ or adopt the model closing statement available on the Attorney General’s website.⁴ We encourage public bodies to use a form “which calls on the presiding officer to enter (and thus consider) the reason for closing as well as the statutory basis and topics to be discussed.” 8 *OMCB Opinions* 95, 96 n.2 (2012).

3. *Timing of closing statements*

The Complainant next suggests that one or more of the Council’s closing statements were untimely under the Act, which requires the presiding officer to make the closing statement “[b]efore [the] public body meets in closed session.” § 3-305(d)(2). The Complainant provides no further details of any alleged violation of this timing requirement, and the Council represents that it completed the closing statements before meeting in closed sessions. Thus, we find no violation of the timing requirement in § 3-305(d)(2).

4. *Making closing statements available to the public and permitting the public to object to closure*

The Complainant also implies that the Council violated the Act by not “present[ing] to the public, either orally or in writing,” “the required closing statements.” The Complainant asserts that “[t]he statement to close any meeting . . . must be presented” and “[a] written copy of the closing statement must be available to the public” before the start of the closed session. The Complainant further asserts that “[t]here must be an opportunity for a public objection to the closed meeting,” and “[i]f there is an objection, the County must send a copy of the closing statement to” this board.

“Although the Act does not expressly address public access to closing statements during the meeting,” it does entitle the public to object, § 3-305(d)(3), “and so we have long advised that the closing statement ‘must be available at the time that the public body actually decides to go into closed session.’” 12 *OMCB Opinions* 80, 80 n.1 (2018) (quoting 4 *OMCB Opinions* 46, 48 (2004)). This requires not that the public body read the closing statement aloud, or “affirmatively display the written closing statement”—just that the written statement “be available immediately to a member of the public who *requests* it.” 15 *OMCB Opinions* 37, 41 (2021) (emphasis added)

³ The Council appears to be using an outdated form anyway, as it lists only fourteen exceptions allowing for the closure of a meeting. In 2018, the General Assembly added a fifteenth exception. See § 3-305(b); 2018 Md. Laws, ch. 304.

⁴ The model closing statement, which provides separate spaces for disclosing the topics of discussion and the reasons for closure, is available at <https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx> (last visited July 21, 2021).

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(quoting 9 *OMCB Opinions* 29, 33 (2013)). Accord 5 *OMCB Opinions* 165, 169 (2007) (noting that a closing statement “must be available on request”).⁵

With respect to public objections to the closing of a session, “the Act does not prescribe any particular means by which objections must be received.” 14 *OMCB Opinions* 92, 97 (2020). The Act simply provides that, “[i]f a person objects to the closing of a session, the public body shall send a copy of the written statement to [this] Board.” § 3-305(d)(3).

We must, then, apply those general rules to the allegations here. The Council asserts that, before closing each session during the relevant period, the Council convened in the open, made a closing statement, and voted for closure. Had any member of the public asked to inspect a closing statement, the Council represents to us that it could have promptly emailed the statement. The Council also notes that members of the public had the ability to unmute themselves to ask to inspect a closing statement or to object to a closed session. But no one ever made such a request or objection, and the Complainant does not allege otherwise. Thus, we find no violation of the Act’s requirements regarding the public’s access to closing statements or the right to object to closed sessions. See 15 *OMCB Opinions* 37, 42 (2021) (finding no violation when the complainant “ha[d] not alleged that he or any member of the public objected (or attempted to object) to a closed session, and the submissions indicate[d] that the written closing statements were available upon request at the time of the closed sessions”).

5. *Conducting and recording the vote to close a meeting*

The Complainant next suggests that the Council at some point violated the Act’s requirement that the presiding officer “entertain a motion to close the meeting and then conduct a recorded vote for which *each member’s* vote is specified.”

Before a public body meets in closed session, the presiding officer “shall . . . conduct a recorded vote on the closing of the session.” § 3-305(d)(2)(i). “Implicit in this requirement is that there be a motion to close made by a member of the public body.” 3 *OMCB Opinions* 209, 209 (2002). “The recording of the vote is to ensure that the officials who choose to close a meeting are accountable for that decision.” 7 *OMCB Opinions* 112, 114 (2011) (citing 3 *OMCB Opinions* 4, 6 (2000)).

The Council has provided minutes for twelve meetings from October 2020 through March 2021, each indicating that the Council convened an open session by conference call and later “motioned to adjourn into Closed Session.” The closing statements for each meeting specify which member moved to close the session and who seconded the motion. But, in several instances, the vote tallies in the closing statements do not match those in the minutes. For example, the minutes of the October 6, 2020, meeting indicate that all five council members were present and that the “present Council Members” voted “in favor of the Closed Session.” The closing statement, by contrast, records the votes of only three members. Similarly, the October 20, 2020, minutes

⁵ That said, when, as here, a public body meets virtually, we have recommended that “the presiding officer read the closing statement aloud so as to enable the public to object to closure by notifying staff, possibly via the chat function of an online meeting platform.” 15 *OMCB Opinions* 5, 8 (2021) (citing 14 *OMCB* 92, 97 (2020)).

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indicate that four council members were present and voted in favor of closing the meeting, but the closing statement records the votes of only three members.

We cannot know, in these instances of conflicting documentation, which are the accurate accounts of what transpired. But the existence of such conflicts between the closing statements and minutes means that the Council violated the Act, either because the presiding officer did not accurately record the votes of all members before the Council entered closed sessions, as required by § 3-305(d)(2)(i), or because the Council's minutes did not accurately record the vote, as required by § 3-306(c)(2)(ii). Thus, we caution the Council to more carefully record members' votes to close sessions and to ensure that both closing statements and minutes accurately reflect those votes.

6. *Confining closed session discussions to the topics and scope of the exceptions set forth in closing statements*

The Complainant suggests that, on at least one occasion, Council members may have violated the Act by not “confin[ing] their discussion to the topics and scope disclosed on the closing statement.” The Complainant “notes that without specifically limiting the discussion in advance, the Council could conduct secret deliberations in violation of the [Act].” But the Complainant offers no more details of any alleged violation except to assert that “comments made during the open portion of the March 16 meeting suggested that the close[d] [session] discussion may have extended beyond statutory limitations.” We thus focus our attention on the March 16 meeting.

As we have previously observed, “[w]e cannot firmly conclude whether a closed meeting violated the Act or not unless we know what was said during the meeting. Yet, our knowledge of what happened is dependent on the public body's after-the-fact, summary account.” 4 *OMCB Opinions* 99, 107 (2004). Two different forms of documentation are relevant to the complaint here: the closed-session summary that appears in the public minutes,⁶ and the confidential closed-session minutes.⁷ As we have explained:

The two forms of documentation serve different purposes and in most cases are not interchangeable. A closed-session summary is designed to be public, and it therefore contains only the information about a closed session that the public body deems non-confidential. It serves as the public's way of determining whether the topics that the public body actually discussed matched the topics that the public body said that it would discuss in closed session. From the summary, the public should also be able to broadly ascertain whether the actual discussion fell within the exceptions that the public body claimed as a basis for excluding the public. By contrast, true minutes of a closed session are by design confidential—under the Act,

⁶ Section 3-306(c)(2) provides: “If a public body meets in closed session, the minutes for its next open session shall include: (i) a statement of the time, place, and purpose of the closed session; (ii) a record of the vote of each member as to closing the session; (iii) a citation of the authority under § 3-305 of this subtitle for closing the session; and (iv) a listing of the topics of discussion, persons present, and each action taken during the session.”

⁷ A public body must prepare minutes of its meetings, and minutes of a closed session generally “shall be sealed and may not be open to public inspection.” § 3-306(b) & (c)(3)(ii).

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they are “sealed” and available to us only on the condition that we keep them confidential—and ideally reflect the topics discussed in some detail. Sealed minutes serve not just as a means by which the public body may keep a confidential record of the session, but also, and, more importantly here, as the primary means by which we can determine the legality of a closed meeting.

9 *OMCB Opinions* 127, 131 (2014).

Here, the closed-session summary for the March 16 meeting offers few details about what the Council actually discussed. For example, the summary indicates that the Council discussed, among other things, “two matters relating to personnel,” and “[r]eceived legal advice” about “a lease” and “a legal matter relating to [a] grant.” Although these vague descriptions appear to track those in the closing statements, the lack of detail in both the closed-session summaries and closing statements make it difficult to determine “whether the topics that the [Council] actually discussed matched the topics that the [Council] said that it would discuss in closed session.” 9 *OMCB Opinions* 127, 131 (2014) (explaining the purpose of closed-session summaries).

Thus, while we lack sufficient information to determine whether the Council discussed topics other than those disclosed in the closing statement, we find that the Council violated the related requirement in § 3-306(c)(2) by failing to provide a sufficiently detailed closed-session summary. As with closing statements, there is no “hard and fast rule for how much information is required,” 7 *OMCB Opinions* 216, 224 (2011), but there must be “some account beyond uninformative boilerplate,” 4 *OMCB Opinions* 46, 48 (2004). Here, the reference to “two matters relating to personnel” essentially restates the exception that was relied upon to close the meeting, so much so that it is difficult even to determine whether those two matters were the same personnel matters disclosed in the closing statement. In the future, we encourage the Council to use the template closed-session summary available on the Attorney General’s website, which provides a place to record at least a general topic description.⁸

We also find that the Council violated the Act in one instance by discussing topics beyond the scope of an exception to the openness requirement. When a public body holds a meeting subject to the Act, the meeting must be open to the public unless the topic of discussion falls within one of fifteen exceptions. *See* §§ 3-301, 3-305. One of the exceptions that the Council invoked for the March 16 meeting was the personnel matters exception, which allows a public body to close a meeting to the public to discuss:

- (i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom it has jurisdiction; or
- (ii) any other personnel matter that affects one or more specific individuals[.]

§ 3-305(b)(1). “The exception does not extend to discussions about broadly applicable personnel policies.” 12 *OMCB Opinions* 69, 71 (2018). Thus, we have cautioned that, when a public body invokes this exception, it “must ensure that its discussion is limited and only address personnel

⁸ The template is available at <https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx> (last visited August 2, 2021).

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matters concerning identifiable individuals.” 6 *OMCB Opinions* 180, 184 (2009). *Accord* 11 *OMCB Opinions* 38, 39 (2017) (noting that the exception does not apply “where anyone in the position would be affected by the action being considered”) (quoting 3 *OMCB Opinions* 335, 337 (2003)).

The Council provided us with a portion of its March 16 closed-session minutes,⁹ from which it appears that at least one topic of discussion properly fell within the scope of the personnel matters exception: the hiring of specific individuals to fill certain vacancies. At least one other topic of discussion, however, appears to have strayed beyond the bounds of the personnel matters exception. The minutes indicate that the Council agreed to a policy for soliciting input from employees of a particular department. But, as noted above, the exception does not encompass “discussions about broadly applicable personnel policies.” 12 *OMCB Opinions* 69, 71 (2018). We thus find that the Council violated the openness requirement of § 3-301 by discussing a topic beyond the personnel matters exception of § 3-305(b)(1).

7. Compliance training

Finally, the Complainant lists among its many concerns the Council’s compliance with § 3-213(d), which provides that “[a] public body may not meet in a closed session unless the public body has designated at least one member of the public body to receive training on the requirements of the open meetings law.” § 3-213(d)(2). According to the Council, Councilman George L. Pfeffer, Jr., is trained in the Act’s requirements and took part in each of the closed sessions between October 2020 and March 2021. Thus, we find no violation of this provision.

Conclusion

We conclude that the Council violated § 3-305(d)(2) by not articulating in its closing statements the reasons for closing its meetings and by failing, on more than one occasion, to provide sufficient detail about the topics to be discussed. We also conclude that the Council violated the Act with respect to recording members’ votes to close meetings to the public, either because the presiding officer did not accurately record the votes of all members before the Council entered closed sessions, as required by § 3-305(d)(2)(i), or because the Council’s minutes did not accurately record the vote, as required by § 3-306(c)(2)(ii). Finally, we conclude that the Council violated § 3-306(c)(2) by failing to provide a sufficiently detailed closed-session summary, and violated the openness requirement of § 3-301 by discussing a topic beyond the scope of the personnel matters exception in § 3-305(b)(1). We cannot, as the Complainant asks, “monitor [the Council’s] actions to ensure their compliance.” *See, e.g.*, 1 *OMCB Opinions* 113, 116 n.4 (1995) (noting that this Board “has no enforcement authority” and issues opinions that are “advisory only”). We do, however, note that this opinion is subject to the acknowledgment requirement set forth in § 3-211.

Open Meetings Compliance Board

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⁹ Section 3-206(b)(3) requires us to maintain the confidentiality of those minutes, so we will refer to them only in general terms.