

Chapter 5: Conditions for Closing a Meeting

Chapter 5: Did the public body take the necessary steps before, during, and after the closed session?

(Index Topic 5)

Chapter summary: As of October 1, 2017, public bodies may not close a session subject to the Act if they have not designated a member to take training on the Act. The Act then imposes five additional conditions on a public body’s exercise of its discretion to close a meeting to discuss one of the topics listed in § 3-305.

Three conditions must be met in open session, after proper notice, *before* the meeting is closed. First, the presiding officer must “make a written statement of the reason for closing the meeting.” § 3-305(d). In that statement, often called a “closing statement,” the presiding officer must also disclose the “topics to be discussed” and the statutory exception relied upon as authority for closing the meeting. Second, the presiding officer must conduct a recorded vote—a vote for which each member’s vote is specified—on a motion to close the meeting to the public. § 3-305(d)(1). Third, as of October 1, 2017, a member designated for training must attend the open meeting at which the public body votes to hold the closed session, or, otherwise, the public body must complete the Compliance Checklist posted on the Attorney General’s website and attach it to the open-session minutes. 2017 Laws of Md. Ch. 525 (adding § 3-213(d)).

The fourth condition must be met *during* the closed session. That condition requires the members of the public body to confine their discussion to the topics and the scope of the exception disclosed on the closing statement. *See* § 3-305 (permitting a closed session “only to” discuss the excepted topics and only in accordance with the pre-conditions set by § 3-305(d)); *see also* Chapter 4, Chapter Summary. In effect, the presiding officer’s closing statement sets the agenda for the closed session, such that, during the closed session, members of the public body may not bring up “new business.” *See, e.g., 9 OMCB Opinions*

46, 50 (2013) (rejecting the public body’s argument that it was not required to specify the topics to be discussed on its closing statement because, at the time of the vote, the members did not yet know what topics might come up in the closed session).

Fifth, *after* the meeting, the public body must disclose, in the minutes of the next open session, information that discloses what was actually discussed, who attended the closed meeting, and what actions the public body took. *See* § 3-306(c)(2). Disclosure requirements also apply to sessions closed for the performance of an administrative function. § 3-104.

To figure out whether a public body complied with the disclosure requirements, a person should inspect the open-session minutes for the session that was closed and for the next open session, as well as the closing statement.

A. Before the closed session: designated member, closing statement and recorded vote

A public body may not meet in a closed session subject to the Act “unless the public body has designated at least one member of the public body to receive training on the requirements [of the Act].” § 3-213(d)(effective October 1, 2017). Moreover, before a public body closes a meeting subject to the Act, it must hold a public meeting, after notice, in order to vote to close the session and to make written disclosures, known as a “closing statement.” § 3-305(d). A designated member must attend that public meeting, or, if a designated member “cannot be present,” the public body must complete the Compliance Checklist posted on the Attorney General’s website and attach it to the open-session minutes. 2017 Laws of Md. Ch. 525, adding § 3-213(d) (effective October 1, 2017).

The closing statement must contain three items of information: the “topics to be discussed” in the closed session, a citation to the exception applicable to each topic, and “the reason for closing the meeting.” § 3-305(d). Once adopted by the members’ recorded vote, the closing statement is the public body’s representation to the public that the closed session will comport with the Act. In fact, members of the public are entitled to a copy of the closing statement when the meeting is closed. *See 7 OMCB Opinions 5, 6* (2010) (“[T]he statement is a matter of public record that must be available at the time a public body concludes its public session immediately before the start of the closed meeting.”). Further, if a member of the public objects to the closing, the public body must send a copy of the closing statement to the Compliance Board. § 3-305(d)(3).

The Compliance Board has explained the purposes to be served by closing statements:

As might be inferred from the fact that the General Assembly assigned to the presiding officer the duty to make the written statement, the performance of that duty is not a mere formality. A properly-completed written statement serves to prompt each member of the public body, before voting, to consider whether the reason is sufficient to depart from the Act's norm of openness. It helps members of the public who will be barred from the closed session to understand that this exception to the principle of openness is well-grounded. It serves as an accountability tool, because it enables the public to compare the pre-meeting disclosures with the minutes summarizing the actual conduct of the meeting and thereby to assess whether the discussion stayed within the exceptions that the public body had claimed. And, in the event that a complaint is filed, it tells us that the members of the public body considered the legality of closing the meeting and gives us their reason at the time for doing so. An after-the-fact justification for closing a meeting is not a good substitute for that information.

9 *OMCB Opinions* 15, 22-23 (2013) (citing and quoting 4 *OMCB Opinions* 46, 48 (2004) (quotation marks omitted)). See also 8 *OMCB Opinions* 166, 168 (2013) (“[T]he public body’s objective should be to treat each decision to exclude the public as a substantive decision for which each member of the public body is accountable and to demonstrate that fact to the public in the ways required by the Act.”).

Closing statements that merely parrot the words of the statutory exception rarely convey enough detail about the topics to be discussed and the reason for excluding the public. Particularly, the text of the claimed exception does not tell the public why the closed session was necessary; after all, the exceptions allow, but do not require a public body to close a meeting.¹ For example, a closing statement that merely states the words of the business relocation exception, which allows the public body to exclude the public from its discussion of a proposal for a business to locate in the public body’s jurisdiction, does not tell the public anything about why the discussion has to be secret, especially if the identity of the business has already been made public. See, e.g., 9 *OMCB Opinions* 46, 50 (2013).

¹ For a list of the opinions in which the Compliance Board has found that a public body violated the Act by adopting a closing statement that contained only “uninformative boilerplate,” see Topic 5(C)(3) in the index under the “Compliance Board” heading at www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx.

In most cases, a description of the topic alone also does not convey why the public body needs to exclude the public. Occasionally, though, the Compliance Board has found that a description of the topic to be discussed adequately conveyed the public body's reason for closing a meeting, as when the public body has described the topic as discipline matters respecting individual employees. *See, e.g., 4 OMCB Opinions* 188, 196 (2005). The better practice is to state the citation, topic, and reason for closing as separate pieces of information.

Practice notes on avoiding closing statement violations:

- Closing statements must be prepared and adopted *before* the public body closes the meeting. That means that the public must be given notice of an open meeting. If the only public portion of a meeting will be the motion and vote to close, the meeting notice should say so. § 3-202(b)(3); *see also 8 OMCB Opinions* 150, 158 (2013) (suggesting wording for notices of such meetings).
- Public bodies may use the model closing statement forms posted on the open meetings page of the Attorney General's website. Use of the forms is not mandatory, but they prompt the presiding officer to provide the required information. *8 OMCB Opinions* 166, 168 (2013).
- Public bodies may use a closing statement pre-prepared by staff, so long as it remains accurate when the members vote to close the meeting. *9 OMCB Opinions* 1, 6 (2013). To ensure that, it is a good practice for the presiding officer to read the closing statement out loud, entertain a motion to adopt it, and then conduct the recorded vote.
- When someone other than the presiding officer has prepared the closing statement, it is a good idea for the presiding officer to sign or initial it to show compliance with the Act's requirement that the presiding officer "make" the statement. *See 8 OMCB Opinions* 166, 168 (2013) (stating that although a "public body may record the presiding officer's acknowledgment of the written statement in its minutes if it prefers," the "better practice is to include it in the written statement, which is immediately available to the public").

- The presiding officer should take a copy of the closing statement into the closed session as a reminder of the permissible scope of the discussion. The original, as adopted before the closed session, should be left outside with staff in case a member of the public requests a copy and also as a record of the disclosures made before the closed session. 8 *OMCB Opinions* 182 (2013).
- Topics should be described as fully as possible without compromising the confidentiality of the discussion. *See, e.g., 9 OMCB Opinions* 71, 75 (2013) (finding the description of the topics as “institutional strategic, budgetary and administrative matters” to be “so vague as to be insufficient”).
- A “public body may close a meeting to discuss several topics—if each topic falls within an exception and if each is clearly traceable to the relevant statutory exception and reason for closing.” 9 *OMCB Opinions* 1, 3 (2013).
- Ideally, the need for a closed session will be anticipated beforehand so that the presiding officer, staff, and counsel, as appropriate, can evaluate whether the Act authorizes excluding the public from the particular discussion.
- When a member unexpectedly calls for a closed session during the open session, and the presiding officer does not know what the discussion will entail or whether an exception applies, the presiding officer must gather the information needed for the closing statement and for the other members’ informed vote on why they are voting to exclude the public. Those goals might be met by recessing the meeting briefly to confer separately with the particular member and counsel, if counsel can be reached. Or, if counsel is present, the presiding officer might entertain a motion to close the meeting to receive legal advice under § 3-305(b)(7), consult with counsel on whether the session may be closed, and then reconvene in open session to present the closing statement and conduct the vote to close. *See 9 OMCB Opinions* 46, 51 (2013) (“The Act neither requires nor permits members of a public body to vote to exclude the public from a meeting without information on the merits of that action.”).

B. During the session, the duty to discuss only the disclosed topics, only within the scope of the claimed exception

As discussed in Chapter 4, the public body's discussion in a meeting closed under § 3-305 must stay within the confines of the exception or exceptions that the presiding officer disclosed on the closing statement. For example, the discussions about an individual employee in a meeting properly closed under the personnel exception may not stray into discussions of more general employment matters. *See, e.g., 6 OMCB Opinions* 180, 185 (2009). In that example, the topic identified, such as "retirement benefits of specific employee," might seem to include policy matters on the provision of retirement benefits generally, but a discussion of those matters would not fall within the personnel exception.

When the discussion begins to stray beyond the topics and exceptions claimed beforehand, the presiding officer must stop the discussion so that it may be conducted in the open. *See, e.g., 9 OMCB Opinions* 195, 196 (2014) ("Whether or not a topic falls within one of the fourteen exceptions, it may not be discussed in a closed session if it has not been disclosed beforehand on the written statement."). If the closed session was the last item on the agenda of the public body's meeting, the public body may not immediately return to an open session; the public would have had no notice of the session.

C. After the closed session, the disclosure of the events of the session

After meeting in a closed session under § 3-305, the public body must disclose what actually transpired in the closed session in as much detail as it can without disclosing the information that the claimed exception permitted the public body to keep confidential. The requirements for post-session disclosures and minutes are discussed in Chapter 6, Part B.4.