

## **11 Official Opinions of the Compliance Board 59 (2017)**

- ◆ 1(C)(2) Administrative Function Exclusion–Within the Exclusion: Operational Aspects of Compliance with Federal Law
- ◆ 1(C)(1) Administrative Function Exclusion Generally–Applicability to Various School Board Topics Unclear
- ◆ 4(E) Investment of Public Funds Exception—Outside the Exception: Briefing on Building Project
- ◆ 4(I)(1) Collective Bargaining Exception–Within the Exception: Discussion of Salaries, Wages, Hours and Working Conditions.
- ◆ 5(A)(2) Closed Session–In Violation: Discussing Topics Not Disclosed on Written Statement
- ◆ 5(A)(2) Closed Session–In Violation: Discussion of Topics Not Within Any Exception.
- ◆ 5(C)(2) Closed Session–Written Statement: In Violation, Failure to Include Information Required By Act
- ◆ 6(D)(1) Closed Session Summary–Generally: Public Body Not Required to List Topics It Did Not Reach in Closed Session
- ◆ 7(F) Acknowledgment Of Violation–In Violation: Failure to Announce Opinion
- ◆ Violations Found: §3-211, §3-305, and §3-301

**Topic numbers and headings correspond to those in the Opinions Index (2016 edition) posted on the Open Meetings webpage at [www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/ index.aspx](http://www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx)**

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**October 31, 2017**

### **Board of Education of Queen Anne’s County**

The complaint alleges that the Board of Education of Queen Anne’s County (“school board”) violated the Open Meetings Act in multiple ways in 2016 and 2017. The school board’s counsel responded on its behalf. Counsel states that the school board is now working on its meeting protocols and has scheduled members for training on the Act.

We have grouped the allegations into four main categories and will state our conclusions as we go along.

## Discussion

### **1. Acknowledgment of May 2016 opinion.**

When we determine that a public body has violated the Act,<sup>1</sup> the public body must acknowledge receipt of the opinion both in writing, § 3-211(a)(2), and orally, by announcing it at the next public meeting. § 3-211(a)(1). On May 9, 2016, we issued 10 *OMCB Opinions 35 (2016)*, in which we determined that the school board had violated the Act's provisions on closed sessions. The school board acknowledged the opinion in writing. The school board did not announce the violation orally and thereby violated § 3-211(a)(1).

The response acknowledges the omission and states that the school board will announce the violation at its next meeting. More substantively, we see from the school board's website that it acted promptly on our guidance on giving notice of meetings that will be entirely closed but for the initial vote on the motion to close. However, as noted below, the school board's written closing statements still do not meet all of the requirements of the Act.

### **2. Contents of written closing statements.**

We refer the school board to 10 *OMCB Opinions* at 38-39 for our explanation of the three items of information that § 3-305(d)(2)(ii) requires the presiding officer to include on the written statement required for meetings closed under § 3-305. The Act does not require closing statements for topics that fall within the administrative function. That function is generally excluded from the Act; it is only subject to § 3-104, a post-session disclosure provision. *See, e.g., 9 OMCB Opinions 206, 214 (2015)* (explaining these provisions). The County Board's discussions about contract negotiations were not administrative, so § 3-305(d) applied to every session that included that topic.

The school board's closing statements lack information on the "reason for closing" and therefore still fall short of the § 3-305(d)(2)(ii) requirements. The omission of the "reason for closing" is a common violation. Staff who pre-prepare a closing statement for the presiding officer cannot always be expected to know, in advance, why the members want to exclude the public, and, ideally, the presiding officer should add that information at the time of the vote. A model closing statement is posted on the open meetings page of the Attorney General's website, and it was reformatted recently to make it harder to overlook that item.

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<sup>1</sup> References are to the General Provisions Article of the Maryland Annotated Code (2014, with 2016 supp.).

The school board acknowledges that its June 14, 2017 closing statement lacked all three items of information. The oral motion, which can be viewed on the school board’s video of the meeting, gave some information about the topics to be discussed but did not disclose the reason for closing the session.

Finally, the closing statements do not show, for each of the multiple topics to be discussed, which of the cited exceptions supports the exclusion of the public from each discussion. We can ascertain some from the context, but the written statement must specify, for each topic to be discussed, what provision permits its discussion behind closed doors. The reformatted model closing statement might help the school board in this regard.

We thus find various violations of § 3-305(d) provisions on the contents of written closing statements.

**3. Permissible scope of discussions in meetings closed under § 3-305**

When a public body performs a function subject to the Act, the public body may only exclude the public to discuss a topic that falls within one of the fourteen exceptions listed in § 3-305. The complaint alleges that some of the school board’s closed-session discussions, as described in its later summaries, exceeded the scope of the exception that the school board had claimed for the particular topic.

Section 3-305 does not apply to discussions that are not subject to the Act, as when the public body performs an administrative function. § 3-103(a); *see also, e.g., 9 OMCB Opinions* 213-14 (explaining the principles). Because the scope of the administrative function is often unclear, many public bodies treat those discussions, when the topic coincides with a § 3-305 exception, as a discussion subject to the Act, and identify them on the closing statement. A public body’s decision to err on the side of caution that way does not affect the applicability, or not, of the Act to the actual discussion. *See, e.g., id.* at 214 (although ethics commission acted “prudently” in treating administrative topics as topics subject to the Act, that “[did] not change the fact” that § 3-305 did not apply to the sessions in question).

- a. *“Retirement amendment” and “Policy” on retroactive pay for employees who had served in the military.* On December 14, 2016, the school board cited § 3-305(b)(9) as authority for closing its meetings to discuss these topics. That exception permits public bodies to close a meeting in order to “conduct collective bargaining negotiations or consider matters that relate to the negotiations.” *Id.* The collective bargaining agreements that the school board signed in June and July 2017 “concern[ed] salaries, wages, hours, and other working conditions.” Seemingly, both topics fell within the exception. However, the relationship of the retirement plan amendment to the collective bargaining negotiations is unclear, especially because the school board adopted the

amendment in open session that day. We find that the military pay topic fell within the discussion, and we do not reach a determination on the retirement plan amendment.

- b. *“Cell phone policy.”* The school board’s summary for its January 4, 2017 closed session discloses a “consensus” to “approve” the policy in open session. The summary also reflects a member’s statement concerning the administration of the policy and the school board’s decision to revisit the policy in May 2017. The school board had not listed this topic on its closing statement, and it did not fall within the scope of any of the exceptions claimed there. Although the minutes reflect the school board’s awareness that it should discuss the topic in open session and its decision to do so, the minutes also show that the school board briefly considered it in closed session. We find that the school board violated § 3-301, which states the Act’s openness mandate. *See, e.g., 11 OMCB Opinions 25, 29 (2017)* (public body violated § 3-305 when discussion strayed “fleetingly” to matters not within any § 3-305 exception).
- c. *Briefing on an addition to an elementary school.* On December 14, 2016, the school board cited § 3-305(b)(5) as authority for closing its meetings to discuss this topic. Section 3-305(b)(5) exception permits public bodies to “consider the investment of public funds” behind closed doors. The minutes disclose a report on the status of the funding for a building project that was underway. The school board concedes that the topic did not fall within the exception claimed and should have been discussed in open session. That certainly would have been the safest course. However, we are unable to determine whether the discussion violated the Act. We have found that a status report on the staging of an ongoing project fell within the administrative function exclusion because it fell within that public body’s “oversight of operational matters within its purview,” 9 OMCB Opinions 151, 153 (2014), and this report may have been similar in nature. *See also 7 OMCB Opinions 69, 75 (2010)* (administrative function exclusion applied to briefing by superintendent on matter that had been delegated to him, but the “better course” would have been to hear the briefing in open session).
- d. *“Drug Free Work Place Policy.”* On April 5, 2017, the interim superintendent reported to the school board that staff would “update” the school board’s policy to clarify that it did not apply to events not sponsored by the school system or not on school grounds. The response states that the discussion actually centered on the placement of heroin-related signs at schools. The principles in (c), above, apply here, too. We do not reach a conclusion on whether the discussion was solely administrative, or, instead, was a step in the formulation of policy. The surest way to comply with the Act would have been to discuss the matter openly.
- e. *“Policy” for web accessibility.* On April 5, 2017, the school board heard a staff presentation on Americans with Disabilities Act requirements regarding website access for the seeing impaired. The school board decided to table the “Americans with

Disabilities Act – Accommodations in Employment Policy” to give staff time to incorporate language to bring the school system into compliance. The school board’s exercise of oversight regarding the operational aspects of compliance with federal law was likely administrative in nature; the school board was applying existing federal law, not creating its own policy, no matter how it labeled its measures. *See, e.g., 10 OMCB Opinions 22 (2016)* (election board acted administratively when it merely implemented regulations set by town law). We do not find a violation as to this discussion.

- f. *Other “administrative function” topics.* The school board treated as “administrative functions” various discussions about the appointment of a superintendent and “appeals.” The appeals likely fell within either the administrative function or the quasi-judicial function. *See, e.g., 4 OMCB Opinions 76, 79 (2004)* (public body’s application of existing policy to facts of a particular case was either quasi-judicial or administrative). However, some superintendent discussions pertained to the school board’s adoption of a contract and thus were not administrative in nature. *See 10 OMCB Opinions 57, 58 (2016)* (addressing school board’s discussions about a superintendent’s contract). Those discussions likely fell within the “personnel matters” exception provided by § 3-305(b)(1), but the school board did not claim that exception. We find that the school board violated § 3-301 by excluding the public without meeting the Act’s conditions for doing so.

The Board also treated budget and agenda topics as administrative functions. We caution that matters pertaining to upcoming budget recommendations often are not administrative. *See 9 OMCB Opinions 234 (2015)* (addressing functions performed by school boards when recommending budgets). Likewise, we have long advised that the decision of whether to put an item on the agenda, when the subject falls within the act, is part of the process of the public body’s consideration of the item. *See, e.g., 1 OMCB Opinions 94, 92 (1994)* (“set[ting] the agenda for discussion” is to be done in open session); *6 OMCB Opinions 69, 71 (2009)* (distinguishing between putting an item on an agenda, which is not administrative, and scheduling the order of items already on the agenda, which can be). When a quorum of the members of a public body (as opposed to its staff or chair) discusses whether, as a substantive matter, to add or subtract an item from the agenda, they are discussing public business that lies within the scope of the Act unless the item itself is excluded from the Act as administrative, quasi-judicial, or judicial.

#### **4. Contents of summaries of closed sessions.**

After a public body has met in closed session, it must disclose, in the minutes of its next open meeting, the topics it discussed and other items of information. § 3-306(c)(2). The complaint states that the school board’s post-session summary for its May 4, 2016 closed session omitted one of the topics that its pre-session closing statement had disclosed.

Without some basis for the complaint’s speculation that the school board actually discussed the topic in question and then failed to disclose the discussion, the variation between the school board’s closing statement and its post-session summary does not state a violation. *See 8 OMCB Opinions 95 (2012)* (finding that the public body was not required to include in its summary the topics that it did not reach in the closed session). The Act does not require a public body to reach, in its closed session, every topic it has identified beforehand. Violations occur instead when a public body’s post-session summary disclosed more topics than the presiding officer disclosed on the pre-session statement.

The complaint also asserts that the school board’s use of an acronym for the Office for Civil Rights in its April 5, 2017 summary is meaningless “jargon.” We find that the school board’s reference to “OCR” does not rise to the level of a violation; an interested member of the public who did not recognize the agency could have identified it within seconds through a search engine. By contrast, we have discouraged the use of terms known only within the public body, *see 9 OMCB Opinions 71 (2013)*, and public bodies should avoid using acronyms for lesser-known agencies.

### **Conclusion**

The school board streams its meetings live, posts its minutes promptly, and, for the most part, discloses in detail the topics that it discusses in closed session. Nonetheless, we have found violations of §§ 3-211, 3-305, and 3-301. The school board has undertaken to make the announcement required by § 3-211, and it is already addressing its compliance with § 3-305 by reviewing its meetings protocols. With regard to § 3-301, we encourage the school board to review its use of the administrative function exclusion, particularly regarding discussions by the body as a whole on whether an item should be placed on its agenda for open discussion. Under § 3-211, a member of the school board must summarize this opinion at its next open meeting.

Open Meetings Compliance Board

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