

13 Official Opinions of the Compliance Board 68 (2019)

- ◆ **4(G)(3) Closed Session – Legal Advice – Outside Exception. Topics beyond rendering of legal advice. (Violation)**
- ◆ **6(B)(3) Minutes: Timeliness – Failure to approve minutes without undue delay. (Violation)**
- ◆ **5(B)(1) Closed Session Vote – Vote to close must be in properly-noticed open session (Violation)**
- ◆ **Violations: §§ 3-301, 3-305, 3-305(d), 3-306**

* Topic numbers and headings correspond to those in the Opinions Index posted on the Open Meetings webpage at www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx

November 14, 2019

Re: City of Rockville Planning Commission

The complaint alleges that the City of Rockville Planning Commission (“Commission”) violated the Open Meetings Act with regard to closed meetings that the Commission held on November 5, 2018, and August 7, 2019. The complaint states that the Commission held both meetings behind closed doors in order to discuss the question of whether it could entertain a civic association’s motion to reconsider an earlier decision on a land use matter. The Commission’s attorney responded on its behalf and provided us with minutes of the closed sessions. Under § 3-206(b)(3),¹ we must keep those minutes confidential, and so we will refer to their contents only in general terms. In the Commission’s response, it argues that its closed-door discussions did not include a reconsideration of its earlier decision and asserts that it acted correctly in denying the motion. We will only address the question of whether the Commission violated the Open Meetings Act.

1. The November 5, 2018 meeting

The Commission met on November 5, 2018, in what its notice described as a “special meeting.” The notice listed two agenda items. The first was: “Closed Session pursuant to Sections 3-305(b)(7) and 3-305(b)(8) of the General Provisions Article of the Annotated Code of Maryland to consult with 1) staff regarding pending litigation and 2) counsel to obtain legal advice (Site Plan STP2018-00354, 107 West Jefferson Street).”² The second agenda item was “Adjourn.” The Commission’s subsequent

¹ Statutory references are to the General Provisions Article of the Annotated Code of Maryland.

² We refer the Commission to the Act’s requirements for giving notice of an open session held only for the purpose of holding a vote on a motion to close. A notice that describes an entirely closed session does not convey to the public that it may attend. *See* Open Meetings Act Manual, Chapter 2, Part B. In this case, Commission staff told the civic association’s president, after she asked whether there would be a public vote on a motion to close the meeting, that the public could attend to observe the Commission vote to close the meeting. However, that information, provided to her on the afternoon before the meeting, was not the same

public disclosures, made in its November 14, 2018 open session minutes, show that the purpose of the November 5 closed session was to obtain legal advice on an association's request for reconsideration. The open session minutes further show that, during the closed session, the Commission voted to adopt a motion to "have the City Attorney's Office respond to the request on behalf of the Commission, to clarify any inaccuracies and to not consent to the request."

Under § 3-305, a public body may close a public meeting to discuss a subject that falls within one of the fifteen exceptions listed in § 3-305(b), so long as the public body makes certain disclosures both before and after the meeting, and so long as its presiding officer conducts a vote, in open session, on a motion to close the meeting. § 3-305(d). We are to construe the exceptions "strictly in favor of open meetings of public bodies." § 3-305(a). Sections 3-305(b)(7) and 3-305(b)(8), respectively, permit a public body to close a meeting "to consult with counsel to obtain legal advice" and to "consult with staff . . . about pending or potential litigation."

The Commission's summary of the closed session causes us to focus our discussion on the applicability of § 3-305(b)(7), the "legal advice" exception.³ That exception, as we have long construed it, "does not allow for closed discussion among members of the public body merely because an issue has legal ramifications." 1 *OMCB Opinions* 53, 54 (1993); *see also* 11 *OMCB Opinions* 38, 39 (2017). Instead, the exception "is to be narrowly construed to cover only the interchange between the client public body and its lawyer in which the client seeks advice and the lawyer provides it." 1 *OMCB Opinions* 1, 5 (1992). The exception thus ceases to apply "[o]nce the advice has been sought and provided." *See* 1 *OMCB Opinions* 145, 149 (1995); *see also* Open Meetings Act Manual, Chapter 4, Part G (summarizing our opinion on this exception). Here, the Commission permissibly heard the legal advice in closed session, but then, impermissibly, remained in closed session to decide on its course of action. We find that the Commission violated § 3-301, the general requirement that public bodies meet in open session, and § 3-305 by exceeding the scope of the legal advice exception.

We note that this violation was entirely avoidable. On the evening before this "special meeting," for which the Commission apparently gave short notice,⁴ the association's president emailed staff to say that she had just learned of it and to ask some questions about compliance with the Act. Noting that the meeting had only one substantive agenda item, she asked:

After the consultations [with staff and counsel] are completed, will the Planning Commission hold deliberations and make a decision on whether or not to consider the

thing as published notice to the general public of its right to attend. We find that the Commission violated § 3-305(d), because, given the deficient notice, the vote was not truly public.

³ The summary is borne out by the closed session minutes, which, we note, the Commission did not adopt until October of this year. Minutes, including closed session minutes, are to be adopted "as soon as practicable after a public body meets." § 3-306(b). We find that the Commission did not meet that requirement.

⁴ One member of the public received the Commission's email notice of the meeting, which was held on a Monday, with a transmission time of the evening of the preceding Friday. We have no information either on when the meeting was posted on the website or on whether the matter was so urgent as to require counsel's advice on short notice.

request for reconsideration? Will these deliberations and the decision be held in public in accordance with the Maryland Public Meetings Act?

In response, staff, “on behalf of” the Chair and Commission, stated: “The Planning Commission will not be considering the requests for reconsideration in the closed session. Should the matter be remanded back to the Planning Commission, any deliberations on the requests will be held in open session.” Unfortunately, it appears that the Commission did not stick to that plan; after the closed session, it reported that it had decided, in closed session, “to not consent to the request.”

2. The August 7, 2019 meeting

In Summer 2019, the complainant, as president of a second civic association, asked the Commission about the status of the request for reconsideration that his association had submitted to the Commission. On August 7, 2019, the Commission published a meeting agenda that listed various items. The first item, under a heading for “Closed Session,” was a “Vote to go into Closed Session pursuant to Section 3-305(b)(7) of the General Provisions Article of the Annotated Code of Maryland to consult with counsel to obtain legal advice regarding reconsideration of Site Plan STP2018-00354, 107 West Jefferson Street.” In that session, too, the Commission heard counsel’s advice, as permitted by § 3-305(b)(7), and, there again, in closed session, the Commission took action on that advice, as was not permitted by the Act. By contrast to the November 2018 closed session, which was called specially to consider the matter, the August 2019 meeting was a regular session, and the Commission considered a number of items in open session. Our point is that the Commission could have easily discussed the matter in the open session that it held immediately after the closed session; certainly, there were no logistical obstacles. In any event, the Commission violated the Act with regard to both closed sessions.

Conclusion

With regard to the Complainant’s allegations that the Commission violated the Act by holding closed-session discussions not authorized by the Act, we find that the Commission violated §§ 3-301 and 3-305 during both closed sessions. We encourage the Commission to view open discussion as the default route.

We have also noted a violation of § 3-305(d), regarding the wording of the Commission’s notice in such a way as to effectively exclude the public from observing the Commission’s vote on the motion to close, and § 3-306(b), regarding the timeliness of the Commission’s adoption of the closed session minutes of the 2018 special meeting.

Open Meetings Compliance Board

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