

15 Official Opinions of the Compliance Board 05 (2021)

- ◆ 2(A) Notice-Generally. Notice required when only open portion of meeting will be vote to close. (Violation)
- ◆ 2(E)(2) Notice-Timing-Practice Permitted. Notice provided 2 days before meeting, absent any evidence suggesting intentional delay. (No Violation)
- ◆ 2(F)(3) Agenda-Contents. Failure to include expectation of vote to close. (Violation)
- ◆ 4(J)(2) Closed-session Discussion-Public Security-Outside Exception. Public health protective measures. (Violation)
- ◆ 5(B)(3) Closed Session Vote-Practice in Violation. Failure to vote publicly to close. (Violation)
- ◆ 5(C)(1) Closed Session Statement-Generally. Agenda not a substitute unless complete and adopted as closing statement. (Violation)
- ◆ 6(D)(3) Closed Session-Minutes-Practice in Violation. Failure to identify attendees or provide other required information. (Violation)
- ◆ 7(A) Compliance Board – Generally. Sealed minutes of closed sessions treated as confidential.
- ◆ Violations: §§ 3-302, 3-302.1, 3-305(c)(d), 3-306(c)

* *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.*

January 20, 2021

Mayor and Council of the Town of Berlin

The complainant alleges that the Mayor and Council of the Town of Berlin (“Council”) routinely violates the provisions of the Open Meetings Act (the “Act”) that govern the Council’s closed sessions. The Town Attorney responded on the Council’s behalf and provided us with the sealed minutes of the Council’s November 16, 2020 closed session. We keep sealed minutes confidential, and we will refer to their contents in broad terms and as needed to fulfill our function of providing meaningful guidance. § 3-206(b)(3).¹

In this opinion, we will refer to the meeting documents regarding the November 16 meeting and the Council’s November 23, 2020 meeting as representative examples of the Council’s practice. For a summary of the steps that a public body must take before, while, and after it excludes the public from a meeting subject to the Act, we refer the Council to Chapter 5 of the Open Meetings Act Manual. As explained below, we find violations of the following requirements: *first*, the pre-meeting notice and agenda requirements of Sections 3-302 and 3-302.1; *second*, the requirements for properly closing a session to the public as set forth in Section 3-305(d); *third*, the requirement that closed-session discussion be limited to matters within the exception claimed on

¹ The Act is codified at Title 3 of the General Provisions Article of the Maryland Annotated Code. Unless otherwise noted, statutory references are to the General Provisions Article.

the closing statement, as set forth in Section 3-305(c); and *fourth*, the requirement of a closed-session summary in the minutes of the next open session, per Section 3-306(c)(2).

A. Whether the Council violated the notice requirement

Notice of the Council's November 16, 2020 meeting was posted on November 12, 2020, on the Town's website and Facebook page, and at Town Hall. The notice stated that the Council would meet on November 16 at 6:00 P.M. via the Zoom videoconferencing platform for a "Special Executive Session."

Section 3-302 governs pre-meeting notice requirements for public bodies. If a public body plans to close part of a meeting to the public, the notice must state as much. § 3-302(b)(3). In such a case, the notice must also invite the public to an open meeting at which a vote on whether to close the meeting will be taken prior to the anticipated closed session. 8 *OMCB Opinions* 150, 158 (2013). By failing to notice an open session prior to its "Special Executive Session," the Council violated Section 3-302. *See, e.g., 12 OMCB Opinions* 19, 19-20 (2018) (finding violation where public body "word[ed] its meeting notice in such a way as to convey that no part of the meeting would be public").

The complainant also suggests that the meeting notice was untimely, observing that the meeting was noticed only two business days in advance. Section 3-302(a) requires that a public body give "reasonable advance notice" of its meetings. However, the Board "will not second-guess a public body's decision that it must meet on short notice, at least without evidence suggesting an improper motive." 4 *OMCB Opinions* 99, 101 (2004).

No such evidence appears here. In response to the complaint, the Council stated that the November 16 meeting was held in response to Governor Hogan's November 10 announcement of additional measures to slow the spread of COVID-19 in Maryland. In particular, the Council sought to plan for the potential public health risk of holiday events which had been scheduled in Berlin for November 27 and 28. Because the issue was time-sensitive, and absent evidence that the Council had known earlier that it would meet and had delayed giving notice, holding a meeting on two business days' (four calendar days') notice does not appear unreasonable under the circumstances. *See 4 OMCB Opinions* 99, 101 (no violation when notice of Tuesday meeting to discuss time-sensitive matter was given the prior Friday).

We understand that during the ongoing pandemic, the Council may need to meet on relatively short notice to address new or amended Executive Orders and other public health directives. Such exigencies do not eliminate the requirement that the Council provide reasonable advance notice of its meetings, but they are a factor to be considered in assessing the reasonableness of notice. The Council may wish to advise the public to check the Council's website often while the current public health emergency continues.

B. Whether the Council violated the agenda requirement

The Council's notice of its November 16 meeting included an agenda for the meeting. The document is entitled "Meeting Agenda," although it is the same document that was posted as notice of the meeting, according to the Council. In addition to the date and time of the meeting, and the

fact that it would be a “Special Executive Session” occurring via Zoom, the only information provided on the meeting agenda was that the meeting would be:

Pursuant to Section § 3-305(b)(10) To discuss public security, if the public body determines that public discussion would constitute a risk to the public or to public security, including (i) the deployment of fire and police services and staff; and (ii) the development and implementation of emergency plans[.]

Section 3-302.1 governs the requirement of a pre-meeting agenda. When a public body plans to close a meeting, the agenda, like the notice, must include an open session, prior to the closed session, at which the vote to close will be taken. The Council’s agenda for the November 16 meeting, like its notice, violates this requirement, as it failed to clearly notify the public that the meeting would be entirely closed, nor did it invite the public to a separate open session preceding the closed session. *See 14 OMCB Opinions 19, 21 (2020)* (explaining this requirement applies to both the notice and the agenda).

The complainant observes that the Council’s agenda for the November 16 meeting provided the statutory exception on which the Council planned to rely to close the meeting, but did not state what topic(s) the closed meeting would address. In this respect, however, the Council complied with the Act: “A public body is not required to make available any information in the agenda regarding the subject matter of the portion of the meeting that is closed.” § 3-302.1(c); *11 OMCB Opinions 78, 83 (2017)*. However, as discussed in part C, below, if the Council wishes to adopt the agenda as its closing statement for the meeting, it must include in the agenda “a listing of the topics to be discussed” at the meeting. § 3-305(d)(2)(ii).

C. Whether the Council violated the requirements for properly closing a session to the public

Section 3-305(d) sets forth the procedures a public body must follow before it may close a meeting to the public. As relevant here, the public body must, in an open session held prior to closure of the session, “conduct a recorded vote” on a motion to close the session. The body must also “make a written statement of the reason for closing the meeting, including a citation of the authority” for doing so under the Act “and a listing of the topics to be discussed.” (This statement is commonly referred to as a “closing statement.”) The vote to close must be taken at the open session which is to be closed, not at an earlier meeting. *11 OMCB Opinions 12, 16 (2017)*.

The complainant alleges that the Council’s November 16, 2020 meeting was closed from beginning to end. The Council responds that a vote to close the session was taken and that a written closing statement was prepared. However, the Council does not dispute that the vote to close itself was taken in the November 16 closed session, out of public view. This nonpublic closure vote violated the Act. *See 9 OMCB Opinions 141, 144 (2014)*.

Nor does the Council dispute that the closing statement was not made available to the public in an open session prior to closure. The preparation of a closing statement prior to a vote on closure “is not a mere formality” because it “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.” *9 OMCB Opinions 15, 22-23 (2013)* (internal citation omitted). The Council attached a form closing statement for the November 16 meeting to its response to the instant complaint. We assume for purposes of this opinion that the form closing statement was available to the members

of the Council prior to the vote to close. But because the vote to close was taken in a closed session, members of the public were deprived of the opportunity to object to closure, which violates the Act. *See* 14 *OMCB Opinions* 92, 97 (2020); 7 *OMCB Opinions* 5, 6 (2010).

Ordinarily, the Act does not require that the closing statement be read aloud prior to the vote. 12 *OMCB Opinions* 10, 10 (2018). When a public body is meeting virtually, however, we recommend 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. *See* 14 *OMCB Opinions* at 97. Alternatively, if the Council anticipates that it will close a meeting, it could include a draft closing statement as part of the agenda for the session, with a caution that the information is not deemed to be the closing statement until such time as the presiding officer has adopted it as such when conducting the vote on the motion to close. 11 *OMCB Opinions* 22, 23 (2017) (public body may not use the agenda as its closing statement unless the public body “adopt[s] it as the public body’s closing statement at the time of closing”).

The agenda posted on November 12 did identify the statutory exception under which the Council claimed authority to close the meeting, namely Section 3-305(b)(10). However, setting aside the Council’s failure to adopt the agenda as its closing statement in a public vote, the agenda contained insufficient information to qualify as a closing statement, as it disclosed neither the actual topics to be discussed at the closed session nor the Council’s reasons for excluding the public from the session. *See* § 3-305(d). Merely quoting the language of a § 3-305(b) exception does not satisfy the closing statement requirement. *See, e.g.,* 12 *OMCB Opinions* 93, 96 (2018); 9 *OMCB Opinions* 46, 49-50 (2013). Section 3-305(b) exceptions give a public body discretion to close a meeting, but do not *require* closure. Thus, the public body must explain why secrecy is appropriate under the particular circumstances at hand. *See, e.g.,* 14 *OMCB Opinions* 49, 56 (2020).

The Council may find helpful the model closing statement currently posted on the Attorney General’s website; this most recent version has been formatted to more clearly remind the presiding officer to include, for each topic to be discussed, the public body’s reasons for discussing that topic behind closed doors. The closing statement can then serve as a reminder to the presiding officer, once the closed session has begun, of the limits within which the discussion must be kept.

D. Whether the Council violated the requirement that the closed-session discussion be limited to matters within the claimed exception

When a public body meets in closed session, it may not discuss any topics other than those enumerated in the closing statement, even if the additional topics would otherwise fall within one of the Section 3-305(b) exceptions. *See* § 3-305(c); 9 *OMCB Opinions* 195, 196 (2014). The pre-meeting agenda invoked Section 3-305(b)(10), which allows a public body to close a meeting to discuss “public security, *if* the public body determines that public discussion would constitute a risk to the public or to public security” (emphasis added). Topics covered by this exception include “the deployment of fire and police services and staff” and “the development and implementation of emergency plans.” § 3-305(b)(10).

Here the confidential meeting minutes the Council submitted to the Board indicate that the Council discussed a number of topics at the November 16 meeting extending beyond matters that would threaten public safety if discussed publicly. As the text of the Act indicates, closure is not

allowed simply because the discussion relates to safety or security matters; rather, the body must “determine[]” that the issues are sensitive enough that an open discussion would itself imperil the public (for example, by identifying the locations where police officers will be deployed). *See* 7 *OMCB Opinions* 112, 116 (2011). Nothing in the submissions indicates that the Council made the requisite determination before it voted to close the meeting. Moreover, it appears from the sealed minutes that at least portions of the discussion at the November 16 meeting, relating to public health protective measures, fell short of the standard of Section 3-305(b)(10). While these issues did concern public safety, it is unclear to us how discussing them openly would have imperiled the public. We find that the Council violated Section 3-305(c).

E. Whether the Council violated the requirement that a summary of the closed session be included in the minutes of the next open session

After holding a closed session, a public body must disclose, at its next open session, information about the closed session. Specifically, under Section 3-306(c)(2), the minutes of the next open session after the closed session must include (1) “a statement of the time, place, and purpose of the closed session”; (2) “a record of the vote of each member as to closing the session”; (3) “a citation of the authority under § 3-305 of this subtitle for closing the session”; and, as especially relevant here, (4) “a listing of the topics of discussion, persons present, and each action taken during the session.” “[T]he closed-session summary serves as the members’ representation of what occurred out of the public’s view.” 9 *OMCB Opinions* 160, 162 (2014).

The Council’s next public session after its November 16 closed session was held on November 23. The Council has posted minutes of the November 23 meeting on the Town website and Facebook page in the form of archived video and audio. *See* § 3-306(b)(2)-(3). During the November 23 meeting [video beginning at 2:00: <https://www.facebook.com/berlinmaryland/videos/216076329901162/>], the Council unanimously approved a summary of the November 16 closed session. The mayor, presiding over the meeting, stated that a closed session occurred on November 16 and that the vote to close the session was unanimous with all members present, and cited Section 3-305(b)(10) as authority for closing the meeting. Significantly, however, there was no “listing of the topics of discussion, persons present, and each action taken during the session.” § 3-306(c)(2)(iv); *see* 14 *OMCB Opinions* 49, 56 (2020) (finding violation where municipal council “did not disclose the actions it took, whether by consensus or vote, in closed sessions”). “A public entity’s summary of a closed session, like its closing statement, must provide meaningful information. The [Council’s] summary, which merely recites its version of the [relevant statutory] exception . . . violates the Act.” 7 *OMCB Opinions* 208, 213 n.3 (2011). To ensure that its closed-session summaries contain all of the information required by the Act, the Council might find it helpful to refer to the template posted on the Attorney General’s website.

Conclusion

We conclude that the Council, in its conduct of its November 16 and November 23, 2020 meetings, violated Section 3-302 of the Act, by noticing an entirely closed session without a public vote on closure; Section 3-302.1, by failing to include a public vote on closure on the meeting agenda; Section 3-305(d), by failing to take a public vote on whether to close the November 16 meeting and by failing to afford the public an opportunity to object to closure; Section 3-305(c), by discussing topics at its closed session that fell outside the cited statutory exception to openness;

and Section 3-306(c)(2), by failing to disclose the requisite information about the November 16 closed session at the next open Council meeting on November 23.

The complainant has alleged that the Council has a regular practice of committing similar violations in its conduct of closed sessions. While we do not address whether any other such violations have in fact occurred, we encourage the Council in the conduct of future meetings to comply with the procedures as set forth in the Act and explained in Chapter 5 of the Open Meetings Act Manual. These procedures are designed to ensure that bodies will conduct public business in secrecy only when there is a genuine need for secrecy, and, even when there is such a need, to ensure that the public is made aware of that need, and is meaningfully informed after the fact about the actions the public body has taken.

This opinion is subject to the announcement and acknowledgment requirements set forth in § 3-211.

Open Meetings Compliance Board

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