

15 Official Opinions of the Compliance Board 11 (2021)

- ◆ 1(C)(1) Administrative Function – Generally. 2-Part test summarized.
- ◆ 1(C)(3) Administrative Function-Outside Exclusion. Discussion of future measures and approving plans pertaining to Covid-19 pandemic exceeded scope of exclusion. (Violation)
- ◆ 5(A)(1) Closed Session-Generally. Closed-session procedures, summarized. (No Violation)
- ◆ 6(D)(1) Closed Session-Minutes-Generally. Meeting recessed for closed session under administrative function exclusion – required disclosures. (Violation)
- ◆ 7(A) Compliance Board – Generally. Sealed minutes of closed sessions treated as confidential.
- ◆ Violations: § § 3-301, 3-104

* *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 21, 2021

Wicomico County Board of Education

The complainant alleges that the Board of Education of Wicomico County (“County Board”) has violated the Open Meetings Act (“Act”) by virtue of how its meetings have been conducted for the past several months and by failing to open its September 29, 2020, meeting to the public at all. Counsel for the County Board responded.

I. *The County Board’s Meeting Structure Generally*

First, the complainant alleges that, at its meetings, the County Board “immediately” goes into a closed session lasting about 90 minutes before re-opening the meeting for about 30 minutes and “immediately” voting on agenda items. The complainant suggests that “this practice is designed to keep the public in the dark for matters of public record.” The County Board responds that closing a session immediately after convening in open session is not uncommon and does not violate the Act. In a prior opinion concerning this County Board, we observed that its “practice is to begin each meeting with a motion and vote to meet in closed session, and then to reconvene in open session after the closed session has ended.” *See 12 OMCB Opinions 41, 42 (2018)*. From the County Board’s website, we see that it still follows this practice.¹ This practice comports with the Act, so long as the proper procedures are followed and any disclosure obligations fulfilled.

To the extent that the complaint can be read to encompass an allegation that the County Board has failed to comply with the disclosure provisions governing closed sessions, we will address each of those provisions in turn. Initially, it is helpful to bear in mind that different rules apply depending upon the reasons for a closed session. The Act itself does not apply when a public

¹ We also see that notice of the time, place and location (“virtual webinar”) of each meeting, as well as a statement that some or all of the meeting may be conducted in a closed session, is posted on the County Board’s web calendar, along with a link to join the meeting. Md. Code Ann., Gen. Prov. § 3-302.

body is carrying out an administrative, judicial, or quasi-judicial function, § 3-103(a)(1),² except that when a public body recesses an open meeting to perform an administrative function, following the closed session it must provide certain information about that closed session in the minutes of the next meeting. The information required is “a statement of the date, time, place, and persons present at the administrative function meeting,” and “a phrase or sentence identifying the subject matter discussed at the administrative function meeting.” § 3-104.

When the Act applies, § 3-305 governs closed sessions. The statute lists fifteen specific reasons for which a public body may close its meeting, including to discuss, e.g., the appointment, discipline, or resignation of an employee over whom the body has jurisdiction, § 3-305(b)(1)(i), to obtain legal advice from counsel, § 3-305(b)(7), and to consult on matters pending litigation. § 3-305(b)(8). Prior to closing the meeting, the presiding officer must “conduct a recorded vote on the closing of the session,” and “make a written statement of the reason for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed.” § 3-305(d)(2). The written closing statements are public records and must be kept for at least one year. § 3-305(d)(4), (5). When a closed session is held, the minutes for its next open session must include the following information: (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 . . . for closing the session”; and (4) “a listing of the topics of discussion, persons present, and each action taken during the session.” § 3-306(c)(2). For more detail about the permissibility of and procedures for closed sessions, see the Open Meetings Act Manual (9th ed. 2016), <https://www.marylandattorneygeneral.gov/Pages/OpenGov/omaManual.aspx>.

Here, there are indications that the County Board recessed its recent open meetings into closed sessions for reasons that were both exempt from and subject to the Act—i.e., it recessed both to perform an administrative function and also for reasons listed in § 3-305. Though a close question, we ultimately find no violations as to whether the County Board properly adhered to the Act when it closed its sessions pursuant to § 3-305. The agendas, which contain the County Board’s closing statements and to which the presiding officer refers during the vote to close the meetings, indicate that the County Board recessed into a closed session on the following dates for the following reasons:

September 8, 2020—to approve minutes of previous closed sessions (July 28, and August 11, 2020); to discuss personnel matters, § 3-305(b)(1)(i) (“superintendent presents certificated and classified personnel matters for discussion”); to consult with attorney, § 3-305(b)(7) (“discussion of pending legal matters”); and to perform an administrative function, § 3-103 (“discussion of confidential administrative matters”).

October 13, 2020—to approve minutes of previous closed sessions (August 25, and September 8, 2020); to discuss personnel matters, § 3-305(b)(1)(ii) (“superintendent presents certificated and classified personnel matters for discussion”); to consult with attorney, § 3-305(b)(7) (“discussion of pending legal matters”); to perform an administrative function, § 3-103 (“discussion of

² Citations are to the General Provisions Article of the Maryland Annotated Code, unless otherwise noted.

confidential administrative matters”); and to perform a quasi-judicial function, § 3-103(1)(iii) (“discussion of an appeal”).

November 10, 2020—to approve minutes of previous closed sessions (September 29, and October 13, 2020); to discuss personnel matters, § 3-305(b)(1)(ii) (“superintendent presents certificated, classified personnel matters as well as resignations for discussion”); to consult with attorney, § 3-305(b)(7) (“discussion of pending legal matters”); and to perform an administrative function, § 3-103 (“discussion of confidential legal matters”).

The closing statements, as adopted from the agenda items, comply with § 3-305(d)(2)’s requirement that a public body include the reasons for closing a meeting and a citation to the authority permitting it to do so.³ The provision also requires that a closing statement contain a “listing of the topics to be discussed,” *id.*, which “must do more than merely restate the statute.” 7 *OMCB Opinions* 131, 134 (2011). Given the somewhat repetitive nature of the lists of topics to be discussed, the County Board skirts fairly close to the “boilerplate”—and thus uninformative—language we have disapproved of in the past. *E.g.*, 8 *OMCB Opinions* 99, 100 (2012). However, we recognize that the nature of the exceptions invoked here, particularly the exceptions for attorney consultation, do not necessarily permit very detailed disclosure without also permitting revelation of matters appropriately kept confidential. *See* 12 *OMCB Opinions* 28, 31 (2018) (“We have recognized that in areas where the need for confidentiality is acute, it is not up to us to assess the level of detail that preserves the confidentiality permitted by the Act.”). Thus, we find no violations of the Act but nevertheless encourage the County Board to consider, in its continuing efforts to keep the public informed of the business it transacts, whether it might be possible to include more detail in its closing statements.

Next, we turn to the County Board’s disclosure obligations following its closed sessions. Section 3-306(b) requires a public body to have its minutes prepared “as soon as practicable” after it meets. As detailed *supra*, when a public body meets in a closed session under § 3-305, the minutes for its next open session must include certain information, including a record of the vote to close the meeting and a list of the topics discussed, people present, and each action taken. When an open meeting is recessed for the public body to go into a closed session to perform an administrative function, § 3-104 requires that it disclose in the minutes of its next meeting “a statement of the date, time, place, and persons present at the administrative function meeting,” and “a phrase or sentence identifying the subject matter discussed at the administrative function meeting.”

The County Board’s policy suggests that its written minutes are the official minutes. After review of these written minutes, we have no concerns that the County Board is not including what § 3-306 requires. However, we do have concerns that the County Board may not be meeting its

³ Meetings closed to perform administrative and quasi-judicial functions are not subject to the Act, § 3-103, and thus not subject to the requirements of § 3-305(d)(2). However, the County Board’s practice of including information about sessions closed to perform an administrative function in its closing statements is sound as it furthers the Act’s general purpose of promoting the public’s knowledge about the deliberations and actions of its government. § 3-102. *See also* 9 *OMCB Opinions* 206, 214 (2015). We note that there is no citation provided for the portion of the session closed to approve the minutes of prior closed sessions. The County Board was likely performing an administrative function, discussed in more detail *supra*, when it approved those minutes and therefore citation was not required.

disclosure obligations under § 3-104, regarding sessions closed to perform an administrative function. The minutes of the September 8, 2020, County Board meeting—which were approved by the County Board at its October 13, 2020, meeting—indicate the following: (1) that the closed meeting minutes of a July 28, 2020, special closed meeting and August 11, 2020, regular closed meeting were approved and the vote thereon; (2) that the County Board discussed personnel matters under § 3-305(b)(1)(i) and “[r]eviewed the personnel matters reports for appointments, leave of absences and separations”; (3) that the County Board consulted with an attorney under § 3-305(b)(7) and “[r]eceived information regarding a confidential concern”; and (4) that the County Board performed an administrative function and “[s]hared updated information regarding confidential concerns,” and “[r]eviewed information related to a possible upcoming agenda item.” The minutes also contain a list of the people present during the closed session and a record of the vote to close the session, as required by § 3-306(c)(2). The minutes of the October 13, 2020, and November 10, 2020, meetings contain similar information. As with the closing statements, we note that the particular exceptions at issue here may make it difficult to provide more detail without also compromising confidentiality.

Because the reasons for the County Board’s closed sessions fell under both § 3-305 and § 3-103, the County Board was subject to the disclosure provisions of both § 3-306 and § 3-104. While the minutes we reviewed satisfy § 3-306, they do not necessarily satisfy § 3-104. For example, the minutes of the October 13, 2020, meeting indicate that, during the portion closed to perform an administrative function, the County Board “[s]hared updated information regarding confidential concerns,” and “[d]iscussed an open session agenda item.” These vague descriptions do not contain a “phrase or sentence identifying the subject matter discussed at the administrative function meeting,” as required by § 3-104. We found similarly in 2018 when we considered the matter involving the County Board referenced above. *See* 12 *OMCB Opinions* at 41 (“Phrases like ‘received information regarding a concern’ or ‘received updated information’ fail to identify the subject matter of the meeting, as the Act requires.”). We find that the County Board violated the Act when it failed to comply fully with § 3-104’s disclosure obligations following its sessions closed to perform an administrative function on September 8, 2020, October 13, 2020, and November 10, 2020.

II. *The September 29, 2020, Closed Session*

The complainant has also alleged that the County Board improperly met in a closed session on September 29, 2020, for inappropriate reasons—i.e., “to avoid having to deal with concerned parents during this very difficult time.” The County Board responds by noting that not all meetings are subject to the Act and cites as an example the performance of an administrative function. The County Board asserts that, at the September 29, 2020, closed meeting it received information from Wicomico County Superintendent of Schools Dr. Donna Hanlin about the administration of schools—specifically, about “the possibility of resuming in-person education and athletic competitions and various considerations she and her staff were in the process of weighing in terms of how such matters might impact the timing of these events.” The receipt of this information, the County Board maintains, fell within the administrative function exclusion from the Act. The County Board also points out that Dr. Hanlin’s final “Return to School Plan” was presented to the County Board and public during an open meeting held on October 13, 2020. The question before us is thus whether the County Board’s September 29, 2020, closed session was indeed closed to perform an administrative function and therefore was not subject to the Act, save for the disclosure

provisions of § 3-104. To aid in our inquiry, the County Board has provided us with the sealed minutes of the September 29, 2020, closed session. As required by § 3-306(c)(3), we will maintain the confidentiality of the sealed minutes.

As a preliminary note, we see that the County Board provided the notice of its intent to meet and vote to go into a closed session both on its web calendar and in the weekly newsletter dated September 24, 2020. Both the calendar and the newsletter provided the date, time, and location (“virtual webinar”) of the meeting, and a notice that the County Board intended to vote immediately to go into a closed session. The newsletter indicated that the session would be closed “To Perform Administrative Functions.” A link to an agenda was also posted in both the calendar and the newsletter. The agenda indicated that the County Board would be discussing “confidential administrative matters.”

If the County Board was indeed performing an administrative function, then its only obligation following notice of the initial open meeting was to comply with § 3-104’s disclosure requirements.⁴ Proper application of the Act’s administrative function exclusion can be elusive, and “the line between administrative functions and those functions that are covered by the Act ... is not always clear.” 14 *OMCB Opinions* 92, 94 (2020). A two-step inquiry is necessary to determine whether a particular topic of discussion comes under a public body’s administrative function. First, the discussion cannot fall within one of the other functions—e.g., it cannot be advisory, legislative, or quasi-legislative in nature. 9 *OMCB Opinions* 1, 8 (2013). If the discussion does fall within one of these functions, the inquiry ends because the discussion necessarily cannot be administrative in nature. *Id.* If the first part of the inquiry is satisfied, then the second step requires that the discussion involve the administration of an existing law (or laws) that the public body is legally responsible for administering. 7 *OMCB Opinions* at 135 (quoting 5 *OMCB Opinions* 42, 44 (2006)); see also 10 *OMCB Opinions* 31, 32 (2016) (“[W]e have ordinarily deemed a public body’s oversight of its facilities and property to be administrative in nature when that management role lies with the particular public body *and the particular discussion does not implicate the development of new policy.*”) (emphasis added). “[D]iscussions about prospective policies and recommendations of future actions on subjects of public concern very seldom, if ever, qualify for the administrative function exclusion.” 7 *OMCB Opinions* 250, 254 (2011); see, e.g., 95 Op. Md. Att’y Gen 152, 152–53 (2010) (explaining that closed sessions where a superintendent “reports to [a board of education] solely for informational purposes on matters that are within the purview of the [s]uperintendent, that do not involve the formulation of substantive policy, and that do not require any action by the [b]oard” would be an administrative function not subject to the Act). For more examples of other school board-related administrative functions, see 10 *OMCB Opinions* at 32.

The County Board’s response asserts that, during the closed session, Dr. Hanlin provided information about the possible resumption of in-person education and sports competitions and the various considerations she and her staff were weighing regarding the timing of these things. The response also asserts that Dr. Hanlin is generally responsible for the administration of school activities and programming. The sealed minutes of the September 29, 2020, closed meeting

⁴ Generally, “[w]hen a public body meets separately to perform an administrative function, no section of the Act applies,” and the public body is therefore not required to provide notice of its meeting or keep minutes. 12 *OMCB Opinions* 37, 38 (2018). However, if the public body recesses an open meeting to perform an administrative function, as the County Board did here, it is subject to § 3-104.

generally support the County Board’s response. However, the minutes also suggest that Dr. Hanlin sought the County Board’s approval on certain matters. It thus appears that the closed discussion strayed from the application of “set standards to a set of facts,” 9 *OMCB Opinions* at 10, and did not entirely “involve[] implementation rather than content.” 12 *OMCB Opinions* 25, 27 (2018). To determine whether the discussion strayed into areas that the Act required be discussed in public, we apply the two-step inquiry outlined above.

First is the question of whether the closed session included discussion that could be characterized as advisory, legislative, or quasi-legislative and therefore subject to the Act. Review of the minutes as a whole does not suggest that this is clearly the case. The inquiry does not end here, however. Rather, we must also be satisfied that the discussion encompassed only the administration of existing law that the County Board is charged with administering. *See, e.g.*, 3 *OMCB Opinions* 39, 46–47 nn.6–7 (2000) (noting that under the Education Article, the consideration and approval of a redistricting plan might be an administrative function, and that managing school constructions projects is also an administrative function under state law). The Education Article provides that county boards of education, “[s]ubject to this article and to the applicable bylaws, rules, and regulations of the State Board, determine, with the advice of the county superintendent, the educational policies of the county school system.” Md. Code Ann., Educ. (“ED”) § 4-108(3). Although “[m]uch of the day-to-day administration of the schools is delegated to the local superintendent . . . the school board has ultimate responsibility for the school system.” 95 Op. Md. Att’y Gen at 160. The Covid-19 pandemic presents a somewhat novel question as to who ultimately sets the policy for, e.g., remote education or a return to in-person classes. There are several entities involved in issuing guidance to local school systems, including the Maryland Department of Health (“MDH”), the State Board of Education (“SBE”), and the Governor’s Office. A document entitled Covid-19 Guidance for Maryland Schools, jointly authored by MDH, SBE, and the Governor’s Office, states that “[a]ll Maryland public and nonpublic schools must follow the guidance contained in this document regarding COVID-19 mitigation actions.” *Covid-19 Guidance for Maryland Schools*, 1, 2 (Nov. 13, 2020), <http://marylandpublicschools.org/newsroom/Documents/COVID/COVID-19-Guidance-Maryland-Schools.pdf>. The guidance further provides that “[e]ach school or school system must develop a plan for reopening. The plan should address COVID-19 mitigation policy and processes. The plan should, at a minimum, address policy and procedures as recommended by the Maryland Department of Health, local health department, and the CDC.” *Id.* at 3. Thus, while the local boards of education must stay within certain parameters and adhere to certain metrics regarding the resumption of in-person educational activities, there is some flexibility as to what each locality’s individual return to school plans might contain.

With the above in mind, the sealed minutes show that a large portion of the September 29, 2020, closed session was indeed dedicated to the matters described in the response. However, it also appears that the County Board provided input on several aspects of those matters and, in so doing, strayed outside of its administrative function. We are reminded of a recent opinion of ours addressing a closed discussion by the SBE of matters related to the Covid-19 pandemic. There, the SBE contended that the discussion was “merely informational” and “was not used to determine policy and required no action by the State Board.” 14 *OMCB Opinions* at 95. We agreed and remarked, “[h]ad the State Superintendent advised the State Board in order to set policy, then that would have constituted a function subject to the Act.” *Id.* We also observed, as relevant here, “[g]iven the profound impact of the COVID-19 emergency, such discussions could potentially

have devolved into the consideration of policy matters for the State Board, but the minutes indicate that the State Superintendent was merely keeping the State Board apprised as she responded to the emergency.” *Id.* The minutes of the County Board’s September 29, 2020, meeting indicate that the County Board did more than listen to the Superintendent’s report on how she had responded to the emergency; it then acted on that information by, among other things, discussing information about future measures and approving her plans. *Compare, e.g., 14 OMCB Opinions* 108, 111 (2020) (“[T]he County Board thus took action to approve a ‘recommendation’ that reflected judgments as to where the necessary layoffs should best be made. . . . [W]e find that the County Board was making a policy decision when it voted to concur with the layoffs as proposed by the superintended and thus was not merely expressing support for a decision taken by the superintendent.”).

The County Board’s response points out that the plans for returning to in-person classes and sports were later presented at the County Board’s open meeting on October 13, 2020, where the County Board voted publicly to move forward with the plan. However, the public is entitled to witness not only the adoption of policy, but also the deliberative process that leads a public body to make certain decisions. *See, e.g., City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) (“It is . . . the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the transaction of public business.”). That principle effectuates the purpose of the Act, to “prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.” 9 *OMCB Opinions* at 12 (quoting *J.P. Delphey Lt’d P’ship v. Mayor and City of Frederick*, 396 Md. 180, 201 (2006)). We find that the County Board violated the Act by discussing during a closed session policy matters that fell outside of its administrative function. We again “stress that the administrative exclusion is not a shield for matters that do not fall within an exception but that the public body deems confidential.” *Id.* at 11.

To the extent that some topics discussed during the September 29, 2020, closed meeting fell within the administrative function, the County Board was subject to § 3-104’s disclosure provisions. At its November 10, 2020, meeting, the County Board released the public minutes of that session. Those minutes contain the date, time, place, and people present at the September 29, 2020, meeting. They do not, however, contain a sufficient “phrase or sentence identifying the subject matter discussed at the administrative function meeting.” § 3-104. Below the statement that the meeting was closed to perform an administrative function, only the phrase “[d]iscussed confidential concerns” appears. This did not satisfy the County Board’s disclosure obligations. With regard to matters that properly fell within the administrative function, there should have been some indication of the topic under discussion. Though the County Board points out that the return to school plan was presented in public on October 13, 2020, there is nothing to indicate to the public that the plan was the subject of discussion on September 29, 2020. Thus, to the extent that § 3-104 applied, we find that the County Board violated it by failing to include a “phrase or sentence identifying the subject matter discussed at the administrative function meeting” on September 29, 2020. We also note that the disclosure was released at the County Board’s November 10, 2020, meeting and not at its “next meeting,” § 3-104, which was on October 13, 2020.

Conclusion

The order in which the County Board holds its open and closed sessions does not violate the Act—so long as the County Board votes in open session to hold its closed sessions. Here, the

submissions establish that the County Board does hold that vote in open session. Further, review of the documents publicly available demonstrates the County Board's efforts to remain in compliance with the procedural intricacies of the Act. However, we find that the County Board violated § 3-104 of the Act by failing to include sufficient information about the subject matter discussed when it met in closed session to perform an administrative function on the dates discussed above. We also find that the County Board violated the Act when its September 29, 2020, closed session discussion exceeded the scope of the administrative function.

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

Open Meetings Compliance Board

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