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STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

15 *Official Opinions of the Compliance Board* 19 (2021)

Housing Opportunities Commission of Montgomery County

January 27, 2021

The complainant alleges that the Housing Opportunities Commission of Montgomery County ("HOC") violated the closed-session provisions of the Act on multiple occasions during the calendar year 2018. In addition, the complainant alleges that HOC violated the Act by meeting out of public view, at some point prior to July 1, 2018, to discuss the HOC executive director's performance, compensation, and contract renewal. HOC acknowledges that its closed-session procedures did not fully comport with the Act but states that it has overhauled those procedures. HOC denies that it discussed the executive director at any meetings between January 1, 2018 and July 1, 2018 and, alternatively, that, to the extent a quorum of commissioners discussed such matters, they would have been performing an administrative function not subject to the Act.

In the interest of resolving this complaint promptly and ensuring that our advice does not get lost in the details of 17 meetings, we have grouped the allegations into five categories and will address each in turn: (1) failure to provide notice of a closed session; (2) failure to convene in open session before entering closed session; (3) failure to disclose the topics of a closed session; (4) failure to provide information on a closed session in the minutes of the next open session; and (5) discrepancies between verbal and written closing statements. For the reasons stated below, we find multiple violations that recurred because they were embedded in closed-session procedures that HOC admits were flawed in 2018. We are unable to reach a conclusion as to whether any discussions about the HOC executive director violated the Act, because we cannot tell from the submissions what discussions occurred.

1. *Failure to provide notice of a closed session*

The complainant alleges that HOC failed to provide notice to the public that it would be meeting in closed session.[1] HOC responds that the one-year retention period for the meeting notice—where that disclosure is made—has lapsed. *See* § 3-302(d) (requiring a public body to "keep a copy of a notice provided under [the Act] for at least 1 year after the date of the session").[2]

[1] This allegation is directed at the meetings on February 6, May 18, and August 14, 2018. It is not entirely clear whether the complainant also alleges that the May 18 meeting notice was insufficient as to the *open* portions of that meeting. If so, HOC disputes that the meeting notice was insufficient in that regard, and we agree. The written notice included the date, time, and place of the open session. *See* Md. Code Ann., Gen. Prov. § 3-302(b)(1)-(2).

[2] Unless otherwise noted, statutory references are to the General Provisions Article of the Maryland Annotated Code.

However, a public body may keep its notices longer than that, and HOC submitted notices for all but one (February 6, 2018) of the meetings identified by the complainant as having issues. We do not find a violation regarding the missing notice, because the one-year retention period has in fact lapsed, but we nonetheless consider the documentation that is available to us, because preparing the meeting notice and retaining it are distinct requirements. *See* § 3-302(b)(3) (providing that a notice must, "if appropriate, include a statement that a part or all of a meeting may be conducted in closed session"). HOC admits that its notices failed to indicate when it would meet in closed session. We thus find a violation of § 3-302(b)(3).

2. Failure to convene in open session before entering closed session

The complainant alleges that HOC met in closed session without first convening in open session.[3] HOC acknowledges that this occurred on occasion. The Act prohibits meeting in closed session "[u]nless a majority of the members of a public body present and voting vote in favor of closing the session." § 3-305(d)(1). In other words, a public body may not meet in closed session without first recording a vote in open session. HOC admits that it did not consistently adhere to this requirement. We thus find a violation of § 3-305(d)(1).

3. Failure to disclose the topics of a closed session

The complainant alleges that the topics of closed sessions were not disclosed before those closed sessions.[4] HOC responds that the one-year retention period for the written statement—where that disclosure is made—has lapsed. *See* § 3-305(d)(5) (requiring a public body to "keep a copy of the written statement for at least 1 year after the date of the session"). However, a public body may keep its written statements longer than that, and HOC submitted written statements for all but one (February 6, 2018) of the meetings identified by the complainant. We do not find a violation regarding the missing written statement, because the one-year retention period has in fact lapsed, but we nonetheless consider the documentation that is available to us, because preparing a written statement and retaining it are distinct requirements. *See* § 3-305(d)(2)(outlining what must be contained in a written statement). As we have explained, the Act requires written statements to "include three separate items of information: the topic to be discussed; a citation to the provision of the Act that permits a closed session discussion of that topic; and the public body's reason for deciding to exclude the public from its discussion of the topic." 14 *OMCB Opinions* 19, 22 (2020). The written statements submitted by HOC include just one of those, the legal citation, but do not go beyond the language of the legal authority to identify the topic to be discussed or the reason for excluding the public from that discussion. We thus find a violation of § 3-305(d)(2).

4. Failure to provide information on a closed session in the minutes of the next open session

The complainant alleges that information pertaining to closed sessions was not disclosed in the minutes of subsequent open sessions.[5] HOC responds that it effectively complied with the Act by ratifying—in subsequent open sessions—resolutions that passed in closed sessions. (HOC

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[3] This allegation is directed at the meetings on January 31, April 6, and September 28, 2018.

[4] This allegation is directed at all 17 meetings identified by the complainant.

[5] This allegation is directed at all 17 meetings identified by the complainant.

admits that it violated the Act on February 7, 2018, because there were no resolutions to be ratified at the next open meeting.). Accordingly, the available meeting minutes include a section called "Administrative and Special Session Ratifications," which provides the text of the resolutions that were discussed in closed session and indicates how the commissioners voted on each. As an initial matter, we note that the title of that section creates confusion as to whether HOC carried out an "administrative function" not subject to the Act, performed a covered function in "closed session" pursuant to the Act, or both. *See* 14 *OMCB Opinions* 92, 96 (2020). Although that title appears to have been replaced in some of the more recent meeting minutes, we note that some agendas still refer to a "closed administrative session," which could similarly create confusion as to the purpose of the session. In any event, we disagree with HOC that its past practice was an adequate substitute for what the Act expressly requires. The minutes for the next open session must include four elements: "(i) a statement of the time, place, and purpose of the closed session; (ii) a record of the vote of each member as to closing the session; (iii) a citation of the authority under § 3-305 of [the Act] for closing the session; and (iv) a listing of the topics of discussion, persons present, and each action taken during the session." § 3-306(c)(2). Although these elements appear to be present in some of the more recent meeting minutes, the minutes in question lacked most of them. We thus find a violation of § 3-306(c)(2).

5. *Discrepancies between verbal and written closing statements*

The complainant alleges discrepancies between what was contained in the written closing statements and what was said aloud during meetings.[6] HOC admits that, as to the legal authority identified under § 3-305 for closing the meeting, discrepancies existed between the written closing statement and the audio recording for each of the meetings identified by the complainant except two (August 14 and December 5, 2018). Based on our review, the audio recordings of those two meetings do indeed match the content of the written closing statement. As to the other meetings, we have expressed concern with "the adequacy of the disclosures" in the written statement when that statement is inconsistent with what was said aloud to the public, even though the Act imposes no specific requirement to read the statement aloud. *See* 14 *OMCB Opinions* 92, 93 (2020); 9 *OMCB Opinions* 57, 68-69 (2013). It is also important for the members themselves to vote on an accurately-stated basis before entering closed session. Both the agenda and the written statement for the April 4, 2018 meeting, for example, indicate the meeting was closed under § 3-305(b)(3) (to consider the acquisition of real property), (5)(to consider the investment of public funds), and (13)(to comply with other law). However, the audio recording indicates the meeting was closed under § 3-305(b)(3)(to consider the acquisition of real property) and (8)(to consult with staff about pending or potential litigation). As HOC admits, similar discrepancies occurred on other occasions as well, and that raises questions about the adequacy of the written disclosures and the accuracy of the stated bases for entering closed session. We thus find a violation of § 3-305(d)(2).

6. *Discussions about the executive director out of public view*

The complainant alleges that HOC met to discuss the executive director's performance, compensation, and contract renewal, without disclosing it in meeting notices, agendas, or minutes.

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[6] This allegation is directed at the meetings on April 4, May 2, July 11, August 14, September 5, October 3, November 7, and December 5, 2018.

HOC denies that such matters were discussed at any of its meetings between January 1, 2018 and July 1, 2018, and responds that, to the extent a quorum of commissioners discussed these matters, they would have been performing an administrative function not subject to the Act. We have often lamented the confusing nature of the Act as applied to discussions of personnel matters—that is, whether they constitute an "exclusion" or an "exception" under the Act. 9 *OMCB Opinions* 290, 292 (2015) (discussing this question at length). To be sure, there may be some overlap depending on the context and topic of discussion. *See* 9 *OMCB Opinions* 110, 113 (2014) (recognizing that an employee's performance evaluation could be conducted outside the Act as an administrative function or in a closed session as a personnel matter). And when a public body is "making rather than approving an appointment," we have acknowledged that it is engaged in an administrative function. *See* 6 *OMCB Opinions* 23, 28 (2008) (discussing 1 *OMCB Opinions* 123 (1995)).

But discussions about contracts do *not* fall within the administrative function exclusion, because they fall within the definition of a function covered by the Act. *See* § 3-101(j) (defining "quasi-legislative" functions to include "approving, disapproving, or amending a contract"). Thus, a public body cannot exclude the public from a meeting to discuss a contract unless it invokes one of the exceptions to close a meeting. *See, e.g.*, 14 *OMCB Opinions* 92, 93 (2020) (applying personnel exception to contract renewal); 10 *OMCB Opinions* 57, 58-59 (2016) (same). Under the personnel exception, a public body may enter closed session to discuss "the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation" of an employee. *See* § 3-305(b)(1).

In this case, we are unable to determine whether HOC violated the Act because we cannot determine from the submissions what discussions occurred. To the extent we are dealing with a specific individual's employment contract, and the public body is discussing the performance of an employee whose contract is up for renewal, we have advised that the "safest route" is to treat the meeting as subject to the Act and to close it under the personnel exception. 13 *OMCB Opinions* 71, 72 (2019). The advantages of that approach are two-fold: "first, it allays public suspicion that the public body is meeting secretly to discuss unknown topics, and, second, it gives the members the flexibility to stray into discussions bearing on the employee's contract." *Id*. The same goes for when a public body is discussing the compensation of an employee whose contract is up for renewal. That is because, if the discussion "implicate[s] an amendment to the current budget or an item for the upcoming budget, as opposed to the mere administration of an already-budgeted item, the discussion would likely have been quasi-legislative in nature." 10 *OMCB Opinions* 22, 27-28 (2016). Based on the record before us, we cannot conclude that HOC engaged in a quasi-legislative function, rather than an administrative one.

Conclusion

As to its closed-session procedures in 2018, we find that HOC violated: § 3-302(b)(3) when its meeting notices failed to indicate that all or some of the meeting would be held in closed session; § 3-305(d)(1) when it met in closed session without first recording a vote in open session; § 3-305(d)(2) when its written closing statements did not identify the topic to be discussed or the reason for excluding the public from that discussion, as well as when its written statements diverged from the legal basis upon which the commissioners voted to close the meeting; and § 3-306(c)(2) when the minutes of the next open session did not provide all necessary disclosures about a closed

session. Although we are unable to determine whether HOC discussed the executive director's performance, compensation, and contract renewal in ways that violated the Act, we encourage HOC to use its closed-meeting procedures if there is a question as to whether a personnel matter constitutes a quasi-legislative function or an administrative one. We commend HOC's efforts to reexamine its procedures and hope that our guidance here proves useful in that regard.

This opinion is subject to the acknowledgment requirement set forth in § 3-211.

Open Meetings Compliance Board
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