

LAWRENCE J. HOGAN, JR.
Governor

BOYD K. RUTHERFORD
Lt. Governor



LYNN MARSHALL, ESQ.
CHAIR

JACOB ALTSHULER, ESQ.
VACANT

STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

15 Official Opinions of the Compliance Board 136 (2021)

October 27, 2021

Board of Education of Carroll County

The Complainants allege that a recent closed meeting of the Board of Education of Carroll County (“Carroll County School Board” or “Board”) violated the Open Meetings Act (“Act”). For the reasons that follow, we conclude that the Board violated the Act by failing to provide reasonable advance notice of the meeting, by not allowing the public an opportunity to object to the closure of the meeting, and by exceeding the scope of discussions allowed in a closed session.

Background

On Wednesday, August 25, 2021, the Maryland State Board of Education (“State Board”) announced that it would have a special meeting at 3 p.m. the next day to discuss “statewide school masking requirements.”¹ Shortly after 10 a.m. on Thursday, August 26, 2021, the Carroll County School Board issued the following press release via email to notify various media outlets that it would meet in closed session at 6 p.m. to consult with counsel:

CLOSED SESSION
Thursday, August 26, 2021

The Board of Education of Carroll County will meet in closed session at 6:00 p.m. on Thursday, August 26, 2021, as permitted by the Maryland Open Meetings Act, Section 3-305(b) of the General Provisions Article of the Annotated Code of Maryland and Section 3-103 of the General Provision Articles [sic] of the Annotated Code of Maryland, to consult with legal counsel.

¹ Press Release, Maryland State Dep’t of Educ., “Maryland State Board of Education Hosts Special Meeting Thursday, August 26th (Aug. 25, 2021), <https://news.maryland.gov/msde/wp-content/uploads/sites/12/2021/08/MSBE-Special-Meeting-8.26.21-1.pdf> (last visited Oct. 27, 2021).

15 Official Opinions of the Compliance Board 136 (2021)

October 27, 2021

Page 137

From the submissions, it appears that the emailed press release was the only notice the Board provided. At 3 p.m., the State Board convened and adopted an emergency regulation requiring masks in Maryland schools to mitigate the spread of COVID-19.² At 6:03 p.m., the Carroll County School Board convened and a member moved to enter closed session. The Board prepared a closing statement indicating that the purpose of the closed session was to obtain legal advice about the mask mandate. Board members voted unanimously to close the meeting, which lasted nearly two hours.

Discussion

The Complainants allege that the Carroll County School Board violated several provisions of the Act by meeting in closed session without providing the public reasonable advance notice of the meeting and by failing to follow the proper procedures for excluding the public. We agree.

The Act generally requires a public body to conduct its business in meetings open to the public, § 3-301,³ except when the public body carries out a function outside the scope of the Act,⁴ or discusses a matter that falls within one of fifteen exceptions that allow for closed meetings, § 3-305(b). Before meeting in closed session under one of the exceptions, “the public body must meet in open session and disclose, in a written statement, the exception that it is relying on, the topic to be discussed, and the public body’s reason for excluding the public.” 11 *OMCB Opinions* 74, 74 (2017); *see also* § 3-305(d) (setting forth the procedure for closing a meeting). A majority of the body’s present members must vote to close the meeting, and the body must provide the public an opportunity to object to the closure. § 3-305(d)(1) (requiring a vote by a majority of the members present to close); § 3-305(d)(3) (discussing the process when “a person objects to the closing of a session”); 15 *OMCB Opinions* 5, 7-8 (2021) (finding a violation of the Act when a public body’s vote to close took place in a closed session, depriving members of the public the opportunity to object to the closure).

Before taking any of these steps, however, a public body must first provide the public reasonable advance notice, including the date, time, and place of the meeting. § 3-302(b). Even when a public body intends to hold an open session “only for the purpose of voting to close the session,” the body “must publish notice reasonably in advance, so that interested individuals may exercise their right to attend.” 12 *OMCB Opinions* 25, 25,

² Minutes, Maryland State Bd. of Educ., Aug. 26, 2021, meeting, available at <https://marylandpublicschools.org/stateboard/Documents/minutes/2021/August262021Minutes.pdf> (last visited Oct. 27, 2021).

³ Unless otherwise noted, statutory references are to the General Provisions Article of the Maryland Annotated Code.

⁴ The Act does not apply when a public body is carrying out administrative, judicial, or quasi-judicial functions, or to chance encounters, social gatherings or any other occasions not intended to circumvent the Act. § 3-103(a).

15 Official Opinions of the Compliance Board 136 (2021)

October 27, 2021

Page 138

(2018). The notice must make clear that the body will meet in open session, even if only to vote to close the session. 8 *OMCB Opinions* 150, 158 (2013). A notice that describes only a “closed” meeting “effectively exclude[s] the public from the open portion of that meeting and thereby violate[s] the mandate of [§ 3-301] that a public body’s meetings be open “[e]xcept as otherwise expressly provided” *Id.*

As for the timing and method of giving notice, the Act “is flexible,” “particularly where exigent circumstances require that a public body convene on short notice.” 8 *OMCB Opinions* 137, 143 (2013). Thus, “[t]he ‘reasonableness’ of the public notice given is to be assessed in light of the circumstances making the meeting necessary.” *Id.* “In every circumstance, however, the public body has an affirmative duty to provide such notice as it reasonably can.” *Id.* See also 1 *OMCB Opinions* 38, 39 (1993) (noting that, when “a meeting is scheduled on short notice,” the public body “must provide the best public notice feasible under the circumstances”). “When a meeting must be called on an urgent basis, the public body may need to take extra measures to provide the best notice feasible under the circumstances.” 10 *OMCB Opinions* 22, 28 (2016); see also 9 *OMCB Opinions* 110, 115 (2014) (“[L]ast-minute meetings require the public body to make extra efforts to get the word out to the press, and ideally to the members of the public, who follow its activities.”).

Applying these principles, we find that the Carroll County School Board violated the Act’s notice requirements in two respects. First, the content of the notice was deficient because it described only a “closed session,” with no indication that the Board would first meet in an open session that the public was entitled to attend. See, e.g., 12 *OMCB Opinions* 19, 19 (2018) (finding that a public body violated § 3-302 by “wording its meeting notice in such a way as to convey that no part of the meeting would be public”). The notice also failed to provide the location of the meeting. Although the press release appeared on letterhead that includes an address for “Carroll County Public Schools,” the notice did not specify whether the meeting would take place at that location, only that the meeting would occur at 6 p.m. on August 26, 2021. See § 3-302(b)(2) (requiring, whenever reasonable, a notice to include the date, time, and location of the meeting). Indeed, in its response, the Board asserts only that the notice provided the date and time of the meeting, not its location. Second, we find that the Board’s method of providing notice was not “the best public notice feasible under the circumstances.” 10 *OMCB Opinions* at 28. We commend the Board for providing notice to the press, but we reiterate that meetings called “on an urgent basis” may require a public body “to take extra measures” to provide notice. *Id.* For example, when the Board called a special meeting on August 30, 2021, the Board provided notice on its Twitter feed⁵ and on its website.⁶ We find that, by not using all the methods at its disposal, such as social media, to provide notice of the August 26 special meeting, the

⁵ See <https://twitter.com/CCPSk12/status/1432403835398492169> (last visited Oct. 27, 2021).

⁶ See <https://www.carrollk12.org/about/news/Lists/Posts/Post.aspx?ID=2991> (last visited Oct. 27, 2021).

15 Official Opinions of the Compliance Board 136 (2021)

October 27, 2021

Page 139

Board failed to provide the best public notice feasible. Accordingly, we find that the Board violated § 3-302.⁷

The Board's failure to provide adequate notice produced a domino effect, making it impossible for the Board to comply with the Act's procedural requirements for meeting in closed session. *See* § 3-305(d) (requiring a public body, before meeting in closed session, to conduct a recorded vote on the closure, make a written statement explaining the reason and statutory authority for the closure, and afford the public an opportunity to object). While the Board followed the Act's requirements by entertaining a motion to close the session, preparing a closing statement (a copy of which the Board has provided us), and voting to enter closed session, the Board's inadequate notice—describing only a closed session—effectively excluded the public from what the Board describes as the “open” portion of its meeting. *See* 8 *OMCB Opinions* at 158 (recognizing that a notice that describes only a “closed” meeting “effectively exclude[s] the public from the open portion of that meeting”).⁸ And because the meeting was effectively closed from the start, the Board did not provide the public an opportunity to object to the closure. Accordingly, we find that the Board violated § 3-305(d) by not fully following the proper procedures for closing a meeting. *See* 15 *OMCB Opinions* at 8.

We address one final concern: whether the Board's discussion in closed session stayed within the bounds of the claimed legal advice exception. *See* § 3-305(b)(7) (allowing a public body to meet in closed session to “consult with counsel to obtain legal advice”). The Board asserts that it discussed “no topic other than the one identified in its written closing statement”: seeking legal advice about the mask mandate. In support of this assertion, the Board offers the confidential meeting minutes, which we discuss in only general terms. *See* § 3-206(b)(3) (requiring us to maintain the confidentiality of closed session minutes). From the minutes, we agree that the Board's discussion involved only the mask mandate. But it appears that the Board nonetheless exceeded the scope of the legal advice exception. As we have previously explained, 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.” 10 *OMCB Opinions* 128, 130 (2016) (quoting 1 *OMCB Opinions* 1, 5 (1992)). “After that advice has been provided,

⁷ One of the complainants, in arguing that the Board failed to provide reasonable advance notice, asserts that no agenda for the meeting is available on the Board's website. To the extent that the Complainant alleges a violation of the Act's agenda requirements, we lack sufficient information to reach a conclusion. The Board does not address the agenda in its response and, while we see no agenda for the August 26 meeting on the Board's website, the Act requires only that a public body “make available to the public an agenda” before a meeting. § 3-302.1(a)(1). A public body need not post an agenda online. 12 *OMCB Opinions* 108, 110 (2018). Based on the submissions, we do not know whether an agenda exists for the August 26 meeting and, if so, whether the Board made it available to the public by other means. Thus, we simply remind the Board of its obligation under the Act to make an agenda available. Although a public body need not “make available any information in the agenda regarding the subject matter of the portion of the meeting that is closed,” § 3-302.1(c), the body must indicate if it “expects to close any portion of the meeting,” § 3-302.1(a)(1).

⁸ Indeed, the Board notes that no member of the public attended the meeting.

15 Official Opinions of the Compliance Board 136 (2021)

October 27, 2021

Page 140

however, the public body must return to open session to discuss the matter.” 10 *OMCB Opinions* 77, 79 (2016). The legal advice exception “does not allow for closed discussion among members of the public body merely because an issue has legal ramifications.” 10 *OMCB Opinions* at 130 (quoting 1 *OMCB Opinions* 53, 54-55 (1993)); *see also* 8 *OMCB Opinions* 38, 39 (2012) (noting that the legal advice exception “extend[s] to a meeting with counsel to ‘obtain’ legal advice, but not to the public body’s own discussions of the policy implications of that advice”). Here, we believe the Board went beyond simply obtaining legal advice and veered into discussion about policy, i.e., how the Board would communicate to the public its position on the state mask mandate. Accordingly, we conclude that the Board violated § 3-305(b) by having a discussion in closed session that exceeded the scope of the legal advice exception. *See, e.g.*, 6 *OMCB Opinions* 127, 130-31 (2009) (concluding that a public body permissibly met in closed session to obtain legal advice about its options on what to include in a contract but “crossed the line” when it “acted on the recommendations, instructing counsel to finalize a document for presentation to [the other party]”).

Conclusion

We conclude that the Carroll County School Board violated the Act by failing to provide reasonable advance notice of its August 26, 2021 meeting, by not allowing the public to object to the closure of the meeting, and by engaging in a closed session discussion that exceeded the scope of the legal advice exception. *See* §§ 3-302, 3-305(b)(7), 3-305(d). This Opinion is subject to the acknowledgment requirement set forth in § 3-211.

Open Meetings Compliance Board
Lynn Marshall, Esq.
Jacob Altshuler, Esq.