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Lt. Governor



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CHAIR

JACOB ALTSHULER, ESQ.
VACANT

STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

15 Official Opinions of the Compliance Board 156 (2021)

November 29, 2021

Frederick County Council

The Complainant alleges that the Frederick County Council (“Council”) violated the Open Meetings Act (“Act”) before, during, and after the closed sessions that it held on August 16 and 24, 2021. The Council states that it complied with the Act’s disclosure requirements “in such a way as to not compromise the confidentiality of the discussion.” While we appreciate the need to keep the details of closed sessions confidential, we nonetheless find that the Council violated the Act by failing to adequately document and provide the public any meaningful information about the topics discussed.

1. Alleged violations before the closed sessions

The Act provides that, before a public body meets in closed session, the presiding officer must, in addition to conducting a recorded vote on the decision to enter closed session, “make a written statement of the reason for closing the meeting, including a citation of the authority under [§ 3-305], and a listing of the topics to be discussed.” § 3-305(d).¹ Although the Council clearly held a recorded vote in open session, as shown in both the minutes and a recording of the meeting, the Complainant alleges that the presiding officer did not read or make public the written statement prior to closing the Council’s meetings on August 16 and 24. The Council responds that the Act does not require the presiding officer to read the written statement aloud and that the written statement was included in the meeting agenda, which staff made available to the public one week prior to the meeting.

The Council is correct that the Act neither requires the presiding officer to read the written statement aloud nor to “affirmatively display” it. 15 *OMCB Opinions* 37, 41 (2021). Although we recommend reading the written statement aloud as a “good practice,” 12 *OMCB Opinions* 13, 14 (2018), because it informs both the members of the public body and the public of the reason for closing a meeting, we find no violation here in that regard.

¹ Unless otherwise noted, statutory references are to the General Provisions Article of the Maryland Annotated Code.

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However, the Complainant also alleges that the written statement itself failed to provide the reason for closing the meeting and did not disclose the topics to be discussed, as is required by § 3-305(d). As we have explained, “[a] pre-prepared statement or agenda satisfies § 3-305(d) when (1) it contains the required information, and (2) the public body adopted it as the public body’s closing statement at the time of closing.” 11 *OMCB Opinions* 22, 23 (2017). Although the Council relies upon the agenda in its response, we see no indication in either the minutes or the recording of the two meetings that the Council adopted the agenda as its closing statement.

As to the required information, the agendas for the August 16 and 24 meetings indicate that the Council went into closed session, pursuant to § 3-305(b)(4) (the business location exception) and (b)(7) (the legal advice exception), to discuss the following topics: “[t]o consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State and [t]o consult with counsel to obtain legal advice.” That statement provides the requisite citation of authority, but the language supposedly describing the topics merely repeats the statutory language of the exceptions. “Although we have recognized that it is not up to us to assess the level of detail a public body can provide that nonetheless preserves the confidentiality permitted by the Act, saying nothing beyond the statutory language deprives the public of information to which it is entitled.” 12 *OMCB Opinions* 93, 96 (2018) (internal citations and quotation marks omitted). Indeed, in applying the business location exception, we have observed that at least some details may already be public and, “even when the identity of the proposal or property must be secret, the public body can usually add some additional detail beyond the very broad words of the statutory exception.” 12 *OMCB Opinions* 62, 63 (2018). As to the Council’s reason for closing the meeting, the agendas are silent on that matter, even though “[t]he topic to be discussed and the reason for closing the session are separate items that should be addressed separately.” 15 *OMCB Opinions* 99, 101 (2021).

We thus find that the Council violated § 3-305(d), both by failing to adopt the agenda as its closing statement at the time of closing and by failing to include the topics to be discussed or the reason the Council decided to discuss those topics in private. Because “the decision to close a meeting is discretionary, and the mere identification of the topic to be discussed will not always convey why the public body has elected to discuss it behind closed doors,” we have encouraged “the use of a form which calls on the presiding officer to enter (and thus consider) the reason for closing as well as the statutory basis and topics to be discussed.” 8 *OMCB Opinions* 95, 96 n.2 (2012). The model closing statement on the Attorney General’s website is one such form, and we recommend it to the Council for consideration.²

² See <https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx> (last visited Nov. 5, 2021).

2. Alleged violations during the closed sessions³

The Complainant alleges that the Council exceeded the scope of the claimed exceptions during its closed sessions on August 16 and 24. As discussed above, on both dates, the Council relied upon § 3-305(b)(4) (the business location exception) and (b)(7) (the legal advice exception) to enter closed session. The Council states in its response that the minutes “reflect that no action (vote) was taken at the closed session.” To be clear, a public body need not take action at a closed session for it to exceed the scope of the claimed exceptions. The Court of Appeals has made clear that “every step of the process, including the final decision itself, constitutes the consideration or transaction of public business.” *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980). Thus, deliberations must occur in the open, regardless of whether the public body ultimately takes action, unless the deliberations stay within one of the Act’s exceptions.

Per our request, the Council submitted its sealed minutes for the closed sessions on August 16 and 24. We keep those sealed minutes confidential, and we refer to their contents only in broad terms and as needed to fulfill our function of providing meaningful guidance. § 3-206(b)(3). Unfortunately, the Council’s sealed minutes give us no useful information about the discussion that occurred; instead, they merely restate the statutory language of the exceptions again. “As for any meeting governed by the Act, minutes for a closed meeting must be kept . . . [and] also must convey meaningful information.” 7 *OMCB Opinions* 245, 248 (2011). At a minimum, then, closed-session minutes should reflect each item that the public body considered, the action taken on each item, and each recorded vote. § 3-306(c)(1). In failing to provide any information about the items considered in closed session, the Council again asserts the need for confidentiality, even though closed-session minutes are not open to public inspection. § 3-306(c)(3). Indeed, that is why the Act separately requires public bodies to include a summary of the closed session in their open-session minutes. § 3-306(c)(2). Where, as here, closed-session minutes give no meaningful information about the discussion, we are left in the dark. As a result, we are unable to determine whether the discussion exceeded the scope of the claimed exceptions but find instead that the Council violated § 3-306(c) by failing to keep adequate closed-session minutes.

3. Alleged violations after the closed sessions

As noted above, the Act requires a public body’s minutes after a closed session to include a summary of the closed session that contains 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

³ Although the Complainant alleged that the Council failed to include a member trained in the Act at its closed sessions on August 16 and 24, as is required by § 3-213, that allegation was withdrawn when the Council provided training certificates for several members who were present.

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to closing the session; (iii) a citation of the authority under § 3-305 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). The Complainant alleges that the Council did not disclose in the minutes for its meetings on August 16 and 24 what topics were discussed in closed session or the actions taken. The Council responds that “[t]here is no statutory requirement to include a detailed account of the discussion on any topic, only the topic discussed.”

To be sure, the minutes prepared by the Council after its closed sessions on August 16 and 24 include most of the required elements. The minutes provide the time, place, and purpose of the sessions, record the vote to close the meeting, cite to legal authority, list the persons present, and indicate that no actions were taken. But the minutes prepared after the closed sessions ultimately suffer from the same deficiency as the written statement prepared before the closed sessions—the listing of topics merely repeats the statutory language of the exceptions.

Merely parroting the words of the particular exception on a closing statement does not satisfy [the Act]; instead, the presiding officer completing the form must provide meaningful information that apprises the public of the reason for closing the meeting without compromising the confidentiality of the session. *That same standard applies to the summary of the open session that is to be provided in the minutes of the subsequent open session.*

7 *OMCB Opinions* 250, 257 (2011) (emphasis added) (internal citations omitted). Again, we are not in a position to assess the level of detail the Council could have provided in its disclosures, but the language of the statutory exception is generally not a replacement for the listing of the topics of discussion. As such, we find that the Council violated § 3-306(c)(2). We encourage the Council to approach each closed session on a case-by-case basis and provide in its disclosures “enough detail to establish the applicability of the exception claimed and as much detail as it can without compromising truly confidential information.” 8 *OMCB Opinions* 35, 37 (2012).

Conclusion

We conclude that the Council violated §§ 3-305(d) and 3-306(c) by failing to provide any meaningful information about the topics discussed in closed session in its written closing statement or the closed-session summary, and by failing to maintain adequate closed-session minutes. This opinion is subject to the acknowledgment requirement set forth in § 3-211.

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Lynn Marshall, Esq.

Jacob Altshuler, Esq.