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Governor

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Lt. Governor



LYNN MARSHALL, ESQ.
CHAIR

JACOB ALTSHULER, ESQ.
VACANT

STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

15 Official Opinions of the Compliance Board 174 (2021)

December 29, 2021

Montgomery County Revenue Authority

The Complainant alleges that the Montgomery County Revenue Authority (“Revenue Authority” or “Authority”) has violated several provisions of the Open Meetings Act (“Act”), repeating many of the same violations that we found in a 2019 opinion. *See 13 OMCB Opinions 1 (2019)*. We have regrouped and reordered the allegations to address them most efficiently. As we did in 2019, we find that the Revenue Authority has failed to make required disclosures before and after closed sessions. We also find that the Revenue Authority has violated certain provisions of the Act pertaining to agendas, minutes, and the permissible scope of discussions in closed session.

Analysis

A. Meeting Notices

The Act requires that, “[b]efore meeting in a closed or open session, a public body shall give reasonable advance notice of the session.” § 3-302(a).¹ “Whenever reasonable,” a notice shall be in writing, include the date, time and place of the meeting, and, “if appropriate, include a statement that a part or all of a meeting may be conducted in closed session.” § 3-302(b). As for the method of providing notice, the Act affords some flexibility: A public body may, for example, give notice “by posting the notice on an Internet website ordinarily used by the public body to provide information to the public,” or “by any other reasonable method.” § 3-302(c).

The Complainant alleges that the Revenue Authority has violated these requirements by providing notice via Montgomery County’s “very complicated” calendar webpage, rather than posting notice on the Revenue Authority’s own website. The Revenue Authority responds that its method of providing notice is the same method we found sufficient in 2019. *See 13 OMCB Opinions at 2*. Indeed, as was the case in 2019, we have located the Revenue Authority’s meeting notices by navigating through the online

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

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calendar function on the county’s website, which allows a user to search by keywords (such as “revenue authority”) or view only the meetings of the county’s boards and commissions. Although the Revenue Authority may, as the Complainant suggests, post notices elsewhere, the Act does not prohibit the use of a calendar function. *See 10 OMCB Opinions 95, 96 (2016)* (recognizing that a public body may provide notice of meetings via a calendar function, provided “the meeting notice appears on the date block for the day of the meeting”). Nor does the Act require, as the Complainant would like, that the Revenue Authority provide agenda information in the meeting notices posted on the calendar. We thus find no violation of § 3-302.

B. Agendas

The Complainant alleges that the Revenue Authority has violated the Act by failing to list “closed session topics” of discussion on agendas. But “[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). The Act requires only that, “before meeting in an open session, a public body shall make available to the public an agenda: (i) containing known items of business or topics *to be discussed at the portion of the meeting that is open*; and (ii) indicating whether the public body expects to close any portion of the meeting.” § 3-302.1(a)(1) (emphasis added). Because the Revenue Authority has indicated on its agendas when it expected to enter a closed session, we find no violation based on this allegation.

The Complainant also alleges that the Revenue Authority violated the Act by stating, in its May 2021 agenda, that the open portion of the meeting would include a “‘recap’ of [a] closed session from April.” The Complainant asserts that “recap” does not provide enough information to satisfy the Act’s requirement of disclosing each known item of discussion. We agree. “The purpose of the agenda requirement is to provide information about a meeting in advance so that people can decide whether to attend.” *15 OMCB Opinions 141, 142 (2021)* (brackets omitted) (quoting *11 OMCB Opinions 25, 33 (2017)*). Although “closed session recap” provides some notice that the public body will discuss openly something that it previously discussed only behind closed doors, the failure to include any detail about the substance or topic of discussion makes it difficult for a member of the public to decide whether to attend the meeting. Thus, we find this sparse description a violation of § 3-302.1(a)(1)(i).

Finally, with respect to agendas, the Complainant also asserts that the Revenue Authority failed to timely post the agenda for its September 30, 2021 meeting. The Act provides, “If an agenda has been determined at the time the public body gives notice of the meeting . . . , the public body shall make available the agenda at the same time the public body gives notice of the meeting.” § 3-302.1(a)(2). “If an agenda has not been determined at the time the public body gives notice of the meeting, the public body shall make available

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the agenda as soon as practicable after the agenda has been determined but no later than 24 hours before the meeting.” § 3-302.1(a)(3). The submissions do not establish when the Revenue Authority first posted notice of the September 30 meeting or whether the agenda was available then, but the Complainant asserts that the agenda was not posted as of September 26, and the Revenue Authority concedes that it was practicable for the body to have provided the agenda by that date. The Revenue Authority admits that the agenda was not posted “as far in advance as is [the Authority’s] standard practice” because its web designer failed to post the September 30 agenda when posting another meeting agenda. However unintentional, we find this omission violated § 3-302.1(a), though we commend the Revenue Authority on its pledge, “going forward[,] to confirm that its meeting agendas are timely posted.”

C. Closing statements

“Before a public body meets in closed session,” the Act requires “the presiding officer” to “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 Complainant alleges that the Revenue Authority’s closing statements are often impermissibly vague, failing to “disclose a meaningful topic, a reason, or the statutory citation under which the meeting is closed.” Having reviewed the closing statements for fiscal years 2021 and 2022, we agree that the Revenue Authority has often violated the Act by failing to provide sufficient detail about the topic of discussion or the reason for closing the meeting.

“We have often cautioned public bodies about merely repeating or paraphrasing the words of the statutory exception in lieu of meaningfully disclosing the topics of the closed session or reasons for closure.” 15 *OMCB Opinions* 63, 65 (2021) (citing 15 *OMCB Opinions* 5, 8 (2021)). A public body “need not provide extensive detail,” but it “must go beyond boilerplate.” *Id.* The Revenue Authority has failed to satisfy this requirement on several occasions. For example, on its July 27, 2021 closing statement, the body invoked the “personnel matters” exception but offered as the reason only: “[d]iscuss personnel matter.” A public body “may preserve the confidence of information that led to the session’s being closed in the first place,” 15 *OMCB Opinions* at 65, but it must provide minimal details, as the Revenue Authority did on its September 22, 2020, closing statement. At that meeting, the Authority also invoked the personnel matters exception but offered more details: “[p]erformance evaluation of CEO.”

The Revenue Authority has also repeatedly failed to provide sufficiently detailed reasons for closing meetings under the legal advice and pending litigation exceptions. *See* §§ 3-305(b)(7) & (8). As we have previously recognized:

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[A] public body might decide to receive legal advice from its lawyer in a closed session because the public body does not want to waive the attorney-client privilege as to a particular matter, or because public disclosure would adversely affect the public body's position in litigation, or even because the public body wants the lawyer's advice on whether a matter should or must be kept confidential. If so, the public body should disclose those reasons; it is not necessarily a foregone conclusion that a public body's attorney should only address the members' questions in a closed session.

15 *OMCB Opinions* 99, 101 (2021) (quoting 10 *OMCB Opinions* 4, 6 (2016)). Thus, "the public body must explain why secrecy is appropriate under the particular circumstances at hand." *Id.* (quoting 15 *OMCB Opinions* at 8). The Revenue Authority has repeatedly failed to do so, parroting the language of the statutory exceptions without offering even the most basic details. *See, e.g.*, 15 *OMCB Opinions* 63, 65 (2021) (finding sufficient details in a closing statement that identified the specific case that the public body wanted to discuss); 5 *OMCB Opinions* 33, 36 (2006) (noting that explanations such as "[c]onsult with counsel re probability of success in defending pending lawsuit" and "to obtain legal advice regarding interpretation and application of an attorney general's opinion" would have been sufficient). Thus, while we commend the Revenue Authority on its pledge to "make it a practice of adding a fuller description of the reason for any closed session on future closing statements," we find that the Authority violated § 3-305(d)(2).

D. Scope of closed session discussions

The Act generally requires a public body to conduct its business in meetings open to the public, § 3-301, except when the public body carries out a function outside the scope of the Act,² or discusses a matter that falls within one of fifteen exceptions that allow for a closed session, § 3-305(b). The Complainant asserts that, on several occasions, the Revenue Authority violated the Act by closing a meeting to discuss matters that exceeded the claimed exception under § 3-305(b), each of which "must be narrowly construed." 7 *OMCB Opinions* 58, 61 (2009).

The Revenue Authority concedes that the closed session discussion at its October 22, 2019, meeting did not fall within the claimed "personnel matters" exception (§ 3-305(b)(1)), because the conversation involved an incentive plan and leave policy affecting an entire class of employees, rather than a personnel issue involving specific, identifiable individuals. *See, e.g.*, 12 *OMCB Opinions* 69, 71 (2018) ("The exception does not extend to discussions about broadly applicable personnel policies."); 6 *OMCB Opinions* 180, 184 (2009) (noting that "a public body must ensure that its discussion is limited and only

² 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).

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address personnel matters concerning identifiable individuals”). We thus find a violation of §§ 3-301 and 3-305(b)(1).

The Complainant also alleges that the Revenue Authority violated the Act by closing its February 26, 2019 meeting “to discuss a new position.” As we have previously noted, a discussion of “whether to promote a particular individual by creating” a new position may take place in closed session under the personnel matters exception. 1 *OMCB Opinions* 73, 80 (1994). But the “discussion of the creation of [a] new position . . . in the abstract” falls outside the exception. *Id.* The Revenue Authority does not respond to this particular allegation but provides the closed session minutes for our review. Unfortunately, the minutes are so vague that we cannot draw any conclusions from them. Thus, while we cannot determine whether the February 2019 closed session discussion improperly exceeded the personnel matters exception, we find that the Revenue Authority violated § 3-306(c)(1). That provision requires minutes to “reflect: (i) each item that the public body considered; (ii) the action that the public body took on each item; and (iii) each vote that was recorded.” This requirement, which applies equally to open session and closed session minutes, requires those minutes to “convey meaningful information” about what transpired. 7 *OMCB Opinions* 245, 248 (2011). Here, however, the closed session minutes are so lacking in detail that we cannot determine whether the discussion about a new position involved a particular individual or a new position in the abstract. We thus find a violation of § 3-306(c)(1).

The Complainant also alleges, based on the Revenue Authority’s summary of a September 2020 closed session, that the public body impermissibly amended a contract in secret. The Revenue Authority responds that the closed session summary, included in the minutes of the October 2020 meeting, is inaccurate. That is, although the summary indicates that the Revenue Authority’s “Board approved modifications to an employment agreement” and a “one-time bonus payout” in the September 2020 closed session, the public body now asserts that neither happened. According to the Revenue Authority’s submissions to us, its chief executive officer waived his annual contractual salary increase and bonus “due to the COVID-19 related economic downturn.” Assuming without deciding that the waiver of a contractually permitted salary increase does not constitute a contract modification that must happen in open session,³ we find that the Revenue Authority violated the Act’s requirement to include an accurate summary of a closed session in the minutes for its next open session. Section 3-306(c)(2) requires a closed session summary to include, among other things, “a statement of the . . . purpose of the closed session” and “a listing of the topics of discussion, persons present, and each action taken during the session.” *Id.* The Revenue Authority admits that the closed session

³ “[A]pproving, disapproving, or amending a contract” is a “quasi-legislative function,” that is generally subject to the Act’s openness requirement. §§ 3-101(j) (defining “quasi-legislative function”), 3-103(a) (excluding from the Act’s coverage administrative, judicial, and quasi-judicial functions, but not quasi-legislative functions).

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summary of the September 2020 meeting is “an inaccurate representation of what actually occurred.” We thus find a violation of § 3-306(c)(2).⁴

Finally, with respect to closed session discussions, the Complainant asserts that the Revenue Authority violated the Act by improperly closing its July 27, 2021 meeting to discuss bids and to award contracts. On its closing statement, the Revenue Authority claimed that two exceptions permitted closure: § 3-305(b)(5), which allows a public body to close a meeting to “consider the investment of public funds,” and § 3-305(b)(14), which permits closure to “discuss, before a contract is awarded or bids are opened, a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.”

We cannot tell whether the closed session discussions actually fell within the scope of these claimed exceptions, because the Revenue Authority did not prepare minutes as required by the Act. *See* § 3-306(b)(1) (providing that, “as soon as practicable after a public body meets, it shall have minutes of its session prepared”); *see also* 9 *OMCB Opinions* 156, 158 (2014) (noting that “[t]he Act requires public bodies to keep minutes of all of their meetings, whether open or closed,” and “[s]ealed minutes” of closed sessions “are to be produced to the Compliance Board upon its request”).⁵ We therefore find a violation of § 3-306(b)(1), requiring the preparation of minutes, and § 3-306(e), requiring the retention of minutes for five years.

Because we lack sufficient information to determine whether the closed session discussions exceeded the scope of the claimed exceptions, we can offer only general guidance. To fall within the public investment exception of § 3-305(b)(5), a discussion must be “sufficiently related to a concrete investment possibility,” 4 *OMCB Opinions* 114, 117 (2005), and not merely “the expenditure of public funds,” Office of the Attorney General, *Open Meetings Act Manual* 4-5 (10th ed., Jan. 2021). Once the investment has been made, the need for confidentiality no longer exists. *See* § 3-306(b)(4)(i) (providing that minutes for a meeting closed under § 3-305(b)(5) shall be unsealed and open to inspection “when the public body invests the funds”); *see also* 11 *OMCB Opinions* 59, 62 (2017) (noting that a “report on the status of the funding for a building project that was underway” fell outside the scope of the public investment exception). Here, the Revenue Authority represents that the discussions involved the Crossvines project and “financial and debt service projections.” From this vague description, we cannot tell whether the

⁴ Because we find a violation based on the Revenue Authority’s concession that the September 2020 closed session summary is inaccurate, we do not address the Complainant’s related allegation that the summary lacks sufficient detail.

⁵ Although the Revenue Authority’s response refers to “the closed session minutes” for the July 27, 2021 meeting, the public body did not include any with its response. When the Compliance Board requested the closed session minutes, the Revenue Authority said that it prepared only open session minutes, which include a closed session summary.

projections related to investments the Authority had already made or investments the public body was merely considering.

As for § 3-305(b)(14), the procurement exception “applies to discussions about a competitive procurement that is either pending or impending and actually in the works,” 14 *OMCB Opinions* 49, 54 (2020) (internal quotation marks omitted), when such discussions in public “would work against competition,” 9 *OMCB Opinions* 99, 101 (2014). Importantly, the exception applies “before a contract is awarded or bids are opened,” and the discussion must focus on “a matter directly related to a negotiating strategy or the contents of a bid or proposal”). § 3-305(b)(14). Here, the Revenue Authority asserts that the closed session discussion involved construction bids for the Crossvines project and “terms related to contracts” the Authority “was negotiating with general contractors for the . . . project.” Accepting as true the Revenue Authority’s representation that no contracts had actually been approved, we nonetheless cannot tell whether the procurement exception applied because we have no way of knowing whether the discussion involved “a matter directly related to a negotiating strategy or the contents of a bid or proposal,” or whether discussions in public would “adversely affect the board’s ability to participate in the competitive proposal process.” § 3-305(b)(14).

E. Minutes

The Complainant alleges several violations with respect to the content of minutes and the timeliness of posting them online.

1. Level of detail

The Act generally provides that, “as soon as practicable after a public body meets, it shall have minutes of its session prepared,” reflecting “(i) each item that the public body considered; (ii) the action that the public body took on each item; and (iii) each vote that was recorded.” § 3-306(b)(1) & (c)(1).⁶ The Complainant alleges that several sets of minutes lack a sufficient level of detail to satisfy the Act. For example, the Complainant asserts that the Revenue Authority’s July 2019 meeting minutes violate the Act because they mention a “Poolesville Project” “without any explanatory information.” In fact, the minutes indicate that the Revenue Authority’s chief executive officer discussed a potential agreement with a particular company for “project predevelopment services”; the minutes further indicate that the Authority’s board authorized the CEO to finalize negotiations with the company and execute an agreement that the board reviewed that day. We think that this was sufficiently detailed to satisfy the Act, which “does not envision a transcript” but,

⁶ “A public body need not prepare minutes of an open session if: (i) live and archived video or audio streaming of the open session is available; or (ii) the public body votes on legislation and the individual votes taken by each member of the public body who participates in the voting are posted promptly on the Internet.” § 3-306(b)(2).

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rather, requires only “sufficient detail to allow a member of the public who reviews the minutes to gain an appreciation of the issue under discussion.” 7 *OMCB Opinions* 42, 47 (2010). We thus find no violation of the Act.

2. Closed session summaries

As noted above, *see supra* p.178, § 3-306(c)(2) of the Act states that, when a public body meets in closed session, it must include in “the minutes for its next open session” a summary of the closed session. The summary must include “(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 . . . 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, and the Revenue Authority concedes, that the public body failed to include closed session summaries in its 2019 minutes and in its February 2021 minutes.

The Complainant further alleges that other sets of minutes contain impermissibly vague closed session summaries. We agree. The summary of the February 23, 2021, closed session, for example, says only that the “meeting adjourned into closed session to discuss pending litigation with legal counsel.” The summary does not cite the specific statutory authority for closing the meeting, nor does it provide details about the vote to enter closed session, the topics of discussion, persons present, or whether any action was taken. § 3-306(c)(2); *see also* 8 *OMCB Opinions* 182, 184 (2013) (noting that a summary that “repeats the words of the statutory exception” fails to provide all the required information). The closed session summary for the April 27, 2021 meeting, while providing some additional details, is also insufficient, as the Revenue Authority concedes. Although the summary lists those who attended the closed session and explained that no action was taken, the summary does not include details on the vote to enter closed session or any meaningful description of the topics discussed, only that the meeting was adjourned into a closed session “to discuss pending litigation and a potential real estate transaction with legal counsel.” *See* 11 *OMCB Opinions* 12, 17 (2017) (“As with written closing statements, post-session summaries must include meaningful information.”). Likewise, the September 30, 2021, closed session summary indicates that the meeting was closed to “discuss litigation with counsel,” but the Revenue Authority provides no further information about the litigation, why the discussion had to take place in closed session, the citation to the statutory authority authorizing the closure, or the tally of the vote to close the meeting.

The Complainant also alleges that the Revenue Authority failed to provide a summary of its July 27, 2021 closed session. The Authority did, in fact, summarize two closed sessions that occurred on that date but included them in the minutes of the July 27, 2021, meeting as opposed to the minutes of a subsequent open session. The Revenue

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Authority was entitled to do so,⁷ though we still note deficiencies in the substance of those summaries, specifically, that they fail to provide the actual tally on the votes to enter closed session and fail to cite the statutory authority to enter closed session.

By providing insufficient detail in various closed session summaries, and by failing to summarize some closed sessions at all, the Revenue Authority violated § 3-306(c)(2) of the Act.

3. *Posting minutes online*

Generally, “minutes of a public body are public records and shall be open to public inspection during ordinary business hours.” § 3-306(d). But, “[t]o the extent practicable,” a public body shall post its minutes online. § 3-306(e)(2).

The Complainant alleges that the Revenue Authority violated the Act by failing to timely post its minutes online. The Authority concedes that, as of September 25, 2021, it had not posted minutes of meetings that took place in April, May, or June 2021. The Revenue Authority asserts that this is “not its standard practice” and attributes the delay to an oversight—an apparent acknowledgment that posting the minutes sooner was, in fact, “practicable.” We therefore find a violation of § 3-306(e)(2).

F. *Other miscellaneous allegations*

The complaint includes additional assertions about “possible . . . secret contracts or [memoranda of understanding]” that the Revenue Authority may have “discussed in secret.” But the Complainant alleges no other facts that would aid us in determining whether a violation has occurred. See § 3-205(b)(2) (providing that a complaint shall “describe the action of the public body, the date of the action, and the circumstances of the action”). As we have stated before, we “were not set up as a fact-finding body,” and “we lack investigative powers.” 8 *OMCB Opinions* 56, 60 (2012). “Thus, while we ‘consider the well supported allegations of actual violations of the Act by public bodies,’ we ordinarily do not address hypothetical or speculative allegations” such as these. 13 *OMCB Opinions* 61, 64 (2019) (quoting 9 *OMCB Opinions* 304, 306 (2014)); see also 3 *OMCB Opinions* 143, 144 (2001) (noting that a complaint should be based on “a reasonable inquiry into the available facts”).

⁷ See, e.g., 9 *OMCB Opinions* 226, 227 (2015) (noting that many public bodies include the closed session summary in the minutes of the meeting that was closed); 9 *OMCB Opinions* 180, 184 (2014) (same). We have recommended, however, that public bodies “mention the . . . closed-session summary in the minutes of the next regular session to ensure that the public knows . . . where to find the summary.” 9 *OMCB Opinions* at 184.

Conclusion

We find that the Revenue Authority violated the Act by failing to timely post an agenda and provide sufficient details about an item of discussion, § 3-302.1(a), failing to make proper disclosures in closing statements, § 3-305(d)(2), discussing matters in closed session without statutory authority to do so, §§ 3-301, 3-305(b)(1), failing to prepare and retain closed session minutes, § 3-306(b) & (e), failing to include adequate closed session summaries in the minutes of open sessions, § 3-306(c), and failing to timely post minutes online, § 3-306(e)(2). This opinion is subject to the announcement and acknowledgment requirements of § 3-211 of the Act.

Open Meetings Compliance Board

Lynn Marshall, Esq.

Jacob Altshuler, Esq.