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STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

15 Official Opinions of the Compliance Board 184 (2021)

December 29, 2021

Montgomery County Council

The Complainant alleges that the Montgomery County Council (“Council”) violated the Open Meetings Act (“Act”) by discussing a deal to buy and lease real property in closed sessions, failing to provide adequate details in closing statements and minutes, and taking too long to prepare and post minutes. As we explain more fully below, we decline to find that the Council’s closed session discussions violated the Act. But we find deficiencies in some closing statements and minutes, and we agree that, in at least one instance, the Council took too long in preparing and posting minutes.

Discussion

A. Propriety of closed sessions on March 9 and May 12, 2021

On March 9 and May 12, 2021, the Council met in closed sessions to discuss whether to reacquire real property that the County had previously sold to a private entity with a right of first refusal. On June 22, 2021, the Council unanimously agreed to reacquire the property for \$7.6 million, lease the property back to the same private entity, and hold that entity financially responsible for all building improvements.

The Complainant alleges that the Council violated the Act by discussing the acquisition and leaseback in closed sessions. “When a public body holds a meeting subject to the Act, the meeting must be open to the public unless the topic of discussion falls within one of fifteen exceptions.” 15 *OMCB Opinions* 97, 97 (2021) (citing §§ 3-301, 3-305).¹ The Council asserts that two exceptions allowed the discussions here to take place in closed session: the real property acquisition exception of § 3-305(b)(3), and the legal advice exception of § 3-305(b)(7).

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

1. Real property acquisition exception (§ 3-305(b)(3))

The Council argues that it properly closed its meetings on March 9 and May 12, 2021, pursuant to the real property acquisition exception of § 3-305(b)(3). That provision allows a public body to meet in closed session to “consider the acquisition of real property for a public purpose and matters directly related to the acquisition.” § 3-305(b)(3). The Council contends that this exception authorized the closed sessions, because councilmembers discussed whether the County should purchase the private entity’s property.

The Complainant, while not disputing that § 3-305(b)(3) authorizes closed door discussions about acquiring real property for a public purpose, argues that the exception was inapplicable here, at least insofar as the Council’s discussions involved leasing the property to the private entity. Citing our decision in 12 *OMCB Opinions* 10 (2018), the Complainant argues that the exception does not apply to the sale, lease, or disposal of public land.

The Complainant is correct—up to a point. In 12 *OMCB Opinions* 10, we found that a public body’s discussions about the possible sale, lease, or transfer of several of the public body’s properties exceeded the scope of the real property acquisition exception, 12 *OMCB Opinions* at 12, which “does not apply to discussions about real property the public body already owns,” 9 *OMCB Opinions* 29, 34 (2013); *see also* 11 *OMCB Opinions* 74, 75 (2017) (finding that discussions about a lease offer for a county owned property or the sale of properties that a county acquires through tax sale procedures do not fall under the exception). But we have also said that discussions about leasing property may fall within the exception if the lease is connected to the public body’s acquisition of the property. In 15 *OMCB Opinions* 37 (2021), we found that a public body’s discussion of a purchase contract for real property fell within the exception, which extends to “matters directly related to the acquisition.” 15 *OMCB Opinions* at 43 (quoting § 3-305(b)(3)). We further found that the public body’s discussions about leasing the same property, “pursuant to the terms of the purchase contract,” also fell within the scope of the exception, if “discussion of leasing the property could [not] have been separated from discussion of its acquisition.” *Id.*²

In this case, the Council asserts that “the lease was discussed . . . as part of the Council’s consideration to acquire the Property and was a matter directly related to the acquisition.” In support of that assertion, the Council offers the affidavit of the deputy director of the County’s Department of General Services, who testifies that “leasing back” the property to the private entity was a “material term of the acquisition.” We recognize

² We could not reach a conclusion on that point, based on the limited information available in the submissions. 15 *OMCB Opinions* at 43.

15 Official Opinions of the Compliance Board 184 (2021)

December 29, 2021

Page 186

that such “leaseback” provisions are common,³ and we have no basis to dispute the deputy director’s representation about the terms of the transaction here. We thus decline to find that the March 9 or May 12, 2021 closed session discussions exceeded the scope of the real property acquisition exception of § 3-305(b)(3).

The Complainant argues that, because the Council had an option on the property, “there could be no other buyer to step in and begin a bidding war” and “[t]here was no reason for confidentiality.” The Council responds that, “[w]hile the County had an option on the property,” there were “numerous factors” that the Council “had to consider on whether to exercise that option,” “such as price, other potential buyers should the County not exercise the option, and terms.” We agree with the Council that the County’s option on the property did not necessarily obviate the need to discuss the acquisition out of public view. As we have previously recognized, “[i]t would be quite unrealistic to construe the exception as if a discussion of ‘acquisition’ were some kind of abstraction that could be divorced from the underlying financial and policy issues.” 12 *OMCB Opinions* 15, 17 (2018). Thus, we have found, “the exception encompasses discussion of the pros and cons of an acquisition.” *Id.*

2. Legal advice exception (§ 3-305(b)(7))

The Complainant alleges that the second claimed exception—the legal advice exception of § 3-305(b)(7)—also did not apply to the closed session discussions. In support, the Complainant references “a suspicion that the lawyer was only there as an agent for the [C]ouncil,” in which case, he argues, the legal advice exception was inapplicable.

Although “we ordinarily do not address hypothetical or speculative allegations,” 13 *OMCB Opinions* 61, 64 (2019), the Council has provided an affidavit of the County attorney who attended the closed sessions. He testifies that his role was only to provide legal advice about the County’s right to acquire the property under its option; he did not act as the Council’s agent during any part of the acquisition process. He further testifies that “[o]nce [his] legal advice was rendered,” his role in the closed sessions was complete, and any further closed-door discussions proceeded under the real property acquisition exception, not the legal advice exception. We thus decline to find that the March 9 or May 12, 2021 closed session discussions exceeded the scope of the legal advice exception of § 3-305(b)(7).

Before leaving the matter of the Council’s closed session discussions, we raise one additional concern. The Council provided us the minutes of the two closed sessions in question, but both sets of minutes “are worded so generally as to convey no meaningful

³ See, e.g., *Grinnell Co. v. City of Crisfield*, 264 Md. 552, 553–54 (1972) (noting that “sale-leaseback” normally refers to a method of financing whereby a seller sells property to a buyer on the condition that the buyer leases back the property to the seller).

15 *Official Opinions of the Compliance Board 184 (2021)*

December 29, 2021

Page 187

information” about whether the discussions did, in fact, stay within the bounds of the claimed exceptions. 7 *OMCB Opinions* 245, 248 (2011) (relying on “counsel’s affidavit, not the minutes of the closed session” to resolve a matter, because the “minutes [were] worded so generally as to convey no meaningful information about the scope of the discussions”); *see also* § 3-306(c) (requiring 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”). The closed session minutes say hardly more than the publicly available closed session summaries. We understand that, “[b]ecause closed-session minutes are not typically prepared with an eye toward their potential usefulness to the public, such minutes are frequently less detailed than minutes kept of open sessions.” 8 *OMCB Opinions* 137, 148 (2013). But “[o]ne purpose of the requirement to prepare and maintain closed-session minutes . . . is to aid in the complaint process.” *Id.* Thus, as we have previously explained, “closed-session minutes should, generally speaking, be sufficiently detailed to serve this purpose.” *Id.*; *see also* Office of the Attorney General, *Open Meetings Act Manual* 6-4 (10th ed., January 2021) (noting that “closed [session] minutes must be provided to the Compliance Board upon its request, and implicit in that requirement is the assumption that closed-session minutes will enable the Compliance Board to determine whether the discussion exceeded the bounds of the disclosures on the closing statement”). In this case, we relied on the Council’s affidavits in declining to find that the closed session discussions exceeded the scope of the claimed exceptions. But we also find, based on the lack of detail in the closed session minutes, a violation of § 3-306(c). *See* 7 *OMCB Opinions* 274, 281 (2011) (finding a violation of the Act based on a public body’s failure to provide adequate information in its closed session minutes); 7 *OMCB Opinions* at 248-49 (same)).

B. Closing Statements

Before a public body convenes in a closed session, the presiding officer must “make a written statement of the reason for closing the meeting, including a citation of the authority under [the Act], and a listing of the topics to be discussed.” § 3-305(d)(2). The Complainant alleges that the Council’s closing statements “consistently fail to state a reason for closed sessions.” For example, he asserts that a February 11, 2021 closing statement “has no indication of the topic or reason.” Indeed, the statement indicates only that the Council intended to enter closed session under § 3-305(b)(3) to “consider acquisition of real property for a public purpose and matters directly related thereto.” “We have often explained that ‘[r]epetition of the words of the statute does not usually suffice as a description of the topic to be discussed and reason for closing.’” 15 *OMCB Opinions* 37, 39 (2021) (quoting 8 *OMCB Opinions* 182, 186 (2013)). But “we have also recognized in the context of [the real property acquisition] exception that, ‘in some cases, the disclosure of the property or public use in question compromises the confidentiality of the discussion.’” *Id.* (quoting 8 *OMCB Opinions* at 186). “Because ‘there is no hard and fast rule for how much information is required in every circumstance,’ we have advised public

15 Official Opinions of the Compliance Board 184 (2021)

December 29, 2021

Page 188

bodies to ‘disclose as much information as they can without compromising the confidentiality of matters discussed within the claimed exception.’” *Id.* (quoting 7 *OMCB Opinions* 216, 224 (2011)).

Here, the Council does not address the alleged inadequacy of the reason given for the February 11 closed session because, according to the Council, the session involved a discussion about acquiring property for a homeless shelter, not the private entity’s property that is central to most of the Complainant’s allegations. The Council’s failure to address this alleged violation leaves us unable to conclude whether the Council could have revealed more specific or identifying information about the property in question without compromising the confidentiality of the matters discussed. But we note that, “[w]hile there may be instances where [a public body] [cannot] reveal specific or otherwise identifying information about a particular acquisition,” there may be occasions when the body can at least disclose, “in general terms, the nature of nonspecific location of the property, or the type of acquisition being explored.” 15 *OMCB Opinions* at 39.

The Complainant also alleges that the March 9, 2021 closing statement “is obviously misleading and overly general” in that it cites the real property acquisition and legal advice exceptions “[w]ithout explanation.” The Council responds that, in addition to the language from the statutory exceptions, the closing statement lists the topic of discussion as “[name of private entity].” Although the Council did identify the property at issue on the March 9 closing statement, we nonetheless find the statement lacking with respect to the reason for invoking the legal advice exception, an issue that appears in several of the Council’s closing statements. As we have said many times,

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)). Because the March 9, 2021 closing statement fails to provide any explanation for the Council’s invocation of the legal advice exception, we find a violation of § 3-305(d)(2).

C. Minutes

1. Contents

The Act requires 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. § 3-306(c)(2). 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 that the Council failed to summarize its February 11, 2021 closed session. As it did with the allegation involving the closing statement for this closed session, the Council provides no response. Like the Complainant, we have been unable to locate a summary of the February 11, 2021, closed session in the public record. Thus, we find a violation of § 3-306(c)(2).

We find further violations of that provision based on the insufficiently detailed summaries of the March 9 and May 19, 2021 closed sessions. Like the closing statements for these sessions, the summaries invoke the legal advice exception without explaining the purpose of the closed session, that is, why the Council needed to obtain legal advice in secret. Although the May 19 summary lists the topics of discussion as “social worker licensing” and “pending litigation against the County Revenue Authority,” the Council offers no further explanation. As we have said before, “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* at 101 (quoting 10 *OMCB Opinions* at 6 (2016)). Similarly, the summary of the March 9 closed session invokes the legal advice exception but does not say more, except that the topic was “[name of private entity].” The summaries thus fail to adequately explain the purpose of the closed sessions, as required by § 3-306(c)(2).

The Complainant also alleges that the summary of the May 12, 2021, closed session violates the Act by failing to list any action that the Council took behind closed doors. *See* § 3-306(c)(2)(iv) (requiring that a closed session summary include, among other things, “a listing of . . . *each action taken* during the session” (emphasis added)). The Council concedes that, during that closed session, the Council discussed the private entity’s property and gave staff a “directive to exercise the County’s purchase option.” But the Council “disputes that action was taken” in the closed session, apparently because the Council did not vote to approve the sale and leaseback until its June 22, 2021 open session.

The Act does not define “action,” but we think it encompasses more than just the formal vote to finally resolve a particular matter, as the Council seems to believe. The

15 *Official Opinions of the Compliance Board 184 (2021)*

December 29, 2021

Page 190

purpose of the closed session summary provision “is to enable interested members of the public to find out the basics of what happened at a closed session,” 1 *OMCB Opinions* 110, 112 (1995) (cleaned up), which may include steps short of finally resolving an issue. “At the same time,” we recognize that “a public body is not obliged to disclose information that falls within the scope of an exception permitting a closed session.” *Id.* Thus, “the public body must disclose what actually transpired in the closed session in as much detail as it can without disclosing the information that the claimed exception permitted the public body to keep confidential.” Office of the Attorney General, *Open Meetings Act Manual* 5-6 (10th ed., Jan. 2021).

In this case, we suspect the Council omitted details of its directive simply because the Council did not think it qualified as an “action” under § 3-306(c)(2)(iv). But we hesitate to find a violation based on the failure to list it in the closed summary session, without knowing that disclosure of that fact would not have “adversely affect[ed] the [County] in its property acquisition efforts.” 1 *OMCB Opinions* 110, 112 (1995) (noting that a public body need not always disclose the fact “that a particular property was under consideration for acquisition”). In the future, the Council might avoid that concern by disclosing actions, such as directing a staff member to negotiate terms of an acquisition deal, without disclosing the precise property.

2. *Preparation and posting*

The Complainant alleges “a regular and significant lag in” the Council’s “approval and posting of minutes.” The Act provides that, “as soon as practicable after a public body meets, it shall have minutes of its session prepared,” § 3-306(b)(1), and, “to the extent practicable,” post the minutes online, § 3-306(e)(2). A public body need not prepare minutes of an open session if “live and archived video or audio streaming of the open session is available.” § 3-306(b)(2)(i). Council meetings are streamed live and available for subsequent viewing on YouTube, but the Council still prepares written minutes, which include the closed session summaries required by § 3-306(c)(2). The Complainant asserts that the Council has sometimes taken as long as four months to approve written minutes, which, the Complainant argues, is too long under the Act.

“With respect to preparing minutes, we have said that ‘the Act permits a public body to take a reasonable amount of time to review draft minutes for accuracy and to approve the minutes.’” 15 *OMCB Opinions* 107, 109 (2021) (quoting 2 *OMCB Opinions* 87, 88 (1999); see also 2 *OMCB Opinions* 11, 13 (1998) (“As a legal matter, the ‘minutes of a public body’ become such only after the public body itself has had an opportunity to review and correct the work of whoever prepared the draft minutes.” (emphasis omitted))). Thus, “[a]s a general rule, minutes should be available on a cycle that parallels a public body’s meetings, with the only lag time being that necessary for drafting and review.” 6 *OMCB Opinions* 161, 162 (2009); see also 8 *OMCB Opinions* 176, 177 (2013) (“Public bodies

15 Official Opinions of the Compliance Board 184 (2021)

December 29, 2021

Page 191

that meet monthly generally comply with [the] requirement [to prepare minutes as soon as practicable] by adopting minutes at each meeting.”).

The Council, which generally meets weekly, asserts that the County clerk prepares and posts minutes as quickly as possible.” The Council does not deny occasional “lag[s] in posting minutes” but asserts that such delays occur only “during busier times of the year (budget season), when there are multiple sessions, and/or when there are lengthy and complex sessions such that clerks need to listen to sessions again.” Be that as it may, we have cautioned against “routine delays of several months” and have, on at least one prior occasion, found that a delay of four months violates the Act. 10 *OMCB Opinions* 112, 114 (2016); *see also* 8 *OMCB Opinions* 176, 177 (2013) (noting that a public body that meets only quarterly “should find an alternative way of adopting minutes so that people who could not attend the meeting do not have to wait three months to find out what the public body did”); 8 *OMCB Opinions* 111, 111-12 (2012) (disagreeing with the suggestion “that a delay of three months would be generally acceptable”).

Here, the Complainant points out that the Council did not approve minutes of the May 19, 2021 meeting until September 21, 2021, meaning the public had to wait about four months for the summary of the May 19 closed session. We find that such a delay violates the Act. *See* 10 *OMCB Opinions* at 114; *see also* 12 *OMCB Opinions* 108, 111 (2018) (finding a violation of the Act based on a public body’s failure to produce a closed session summary four months after the body met in closed session). Although we recognize “that special circumstances might justify a delay” in preparing minutes, 6 *OMCB Opinions* 164, 169 (2009), the Council has offered no explanation for this particular delay. To avoid a similar violation in the future, we encourage the Council to prepare and approve minutes on a rolling basis, as opposed to compiling several sets of minutes for approval at one meeting. Alternatively, we advise the Council to prioritize the preparation and approval of closed session summaries, even if that means issuing them before the full written minutes are approved. After all, a member of the public can refer to the video recordings available on YouTube to determine what occurred in prior open sessions, but the public has no way of knowing, without the closed session summaries, what happened in closed sessions.

Conclusion

We decline to find that the Council’s closed session discussions violated the Act. We do, however, find deficiencies in several of the Council’s closing statements and minutes, in violation of §§ 3-305(d)(2) and 3-306(c). We further conclude that the Council violated § 3-306(b)(1) on at least one occasion by taking four months to approve written minutes. This opinion is subject to the announcement and acknowledgment requirements of § 3-211 of the Act.

15 Official Opinions of the Compliance Board 184 (2021)

December 29, 2021

Page 192

Open Meetings Compliance Board

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