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BOYD K. RUTHERFORD
Lt. Governor



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CHAIR

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VACANT

STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

16 Official Opinions of the Compliance Board 144 (2022)

June 30, 2022

Maryland-National Capital Park and Planning Commission

In a series of complaints, the Complainant alleges several violations of the Open Meetings Act (the “Act”) by the Maryland-National Capital Park and Planning Commission (the “Commission”), the Commission’s Executive Committee, the Commission’s Employees’ Retirement System Board of Trustees (the “Retirement Board”), and several of the Retirement Board’s committees. As we explain below, we conclude that the Commission and its Executive Committee failed to make sufficiently detailed disclosures to the public before and after meeting in closed sessions. The Commission also violated the Act by engaging in closed-door discussions that exceeded the scope of the statutory provisions that the Commission claimed as authority for excluding the public. With respect to the Commission’s Retirement Board, we note several instances in which the Board failed to satisfy the Act’s requirements for disclosures before and after closed sessions, but we stop short of finding violations because we do not know whether, during the closed sessions in question, the Retirement Board was performing functions that are not subject to the Act. We similarly lack the information necessary to conclude whether the Retirement Board or its committees violated certain other provisions of the Act, because the Commission did not provide us closed session minutes for any of the involved bodies, and the Commission did not provide a detailed response to certain allegations. We thus find a violation of the Act’s provision governing a public body’s response to a complaint.

Background

In 1927, the General Assembly created the Commission to develop parks and perform planning and zoning functions in parts of Montgomery and Prince George’s counties. Today, the Commission exercises planning, zoning, and subdivision authority in those counties, administers a regional system of parks, and operates the Prince George’s County recreation program. In addition to its ten-member governing body, the Commission has several committees and boards.

This case involves four complaints, all filed by the same Complainant, alleging violations by the Commission, its Executive Committee, the Commission’s Retirement Board, and several of the Retirement Board’s committees. Because the complaints allege many of the same types of violations, and to avoid having to issue four separate opinions applying the same provisions of the Act, we consolidated the four complaints.

Analysis

Due to the overwhelming number of allegations—involving multiple meetings of several different bodies over a period of one year—we have streamlined our analysis by categorizing the allegations by body and by type of alleged wrongdoing, and then focusing on only one or a few meetings or practices that typify a particular wrong alleged. *Cf.* 15 *OMCB Opinions* 37, 39 (2021) (addressing an alleged violation of the Act, “directed at multiple meetings but manifest[ing] in similar ways each time,” by “discussing one meeting that the complainant reference multiple times as an example”).

A. Alleged violations by the Commission

The Complainant alleges that, from December 2020 until December 2021, the Commission’s governing board failed to satisfy several of the Act’s requirements regarding closed sessions. In its response, the Commission suggests that, in evaluating each of the allegations, “attention should be paid to the type of function being performed by the Commission,” as administrative functions are not subject to the Act. *See* § 3-103(a)(1)(i)¹ (providing that the Act does not apply to a public body when it is carrying out an administrative function); *see also* § 3-101(b) (defining “administrative function”). The Commission does not, however, rebut any specific allegation with an argument that the challenged practice involved a meeting convened to perform an administrative function. Nor does the Commission argue that the Commission *only* performs administrative functions (an argument that the Commission makes below with respect to the Retirement Board). We thus assume, in reviewing the Complainant’s specific allegations, that none involved a meeting at which the Commission was performing an administrative function.

1. Alleged violations before meeting in closed sessions

“Before a public body meets in closed session, the presiding officer shall: (i) conduct a recorded vote on the closing of the session; and (ii) make a written statement of the reason for closing the meeting, including a citation of the authority under” § 3-305 to close the meeting,² “and a listing of the topics to be discussed.” § 3-305(d)(2). The

¹ Statutory references are to the General Provisions Article of the Maryland Annotated Code.

² 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, such as an administrative function, § 3-

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Complainant asserts that the Commission’s governing body failed to prepare any closing statements. The Commission disputes this allegation, arguing that its meeting agendas served as closing statements.

We have said that “[a] pre-prepared statement or agenda satisfies § 3-305(d)” so long as “it contains the required information” and “the public body adopt[s] it as the public body’s closing statement at the time of closing.” 11 *OMCB Opinions* 22, 23 (2017) (citing 9 *OMCB Opinions* 1, 6 (2013)); *see also* 15 *OMCB Opinions* 156, 157 (2021) (finding a violation of § 3-305(d) when there was “no indication in either the minutes or the recordings of the two meetings” in question “that the [public body] adopted the agenda as its closing statement”); 15 *OMCB Opinions* 5, 8 (2021) (cautioning that information in an agenda “is not deemed to be the closing statement until such time as the presiding officer has adopted it as such when conducting the vote on the motion to close”); 10 *OMCB Opinions* 4, 6 (2016) (noting that the “presiding officer must acknowledge the agenda description as his or her written closing statement”).

Available recordings of the Commission’s meetings from December 2020 through December 2021 show that the Commission’s presiding officers never explicitly adopted meeting agendas as closing statements.³ Even assuming that a public body’s implicit adoption of the agendas is sufficient, the Commission’s reliance on agendas as closing statements for its meetings in February and June 2021 nonetheless violated the Act because the agendas did not cite all the same statutory authorities for closure that the Commission invoked during the meetings. *See* 4 *OMCB Opinions* 46, 48 (2004) (presuming that the presiding officer of a public body “viewed the agenda item as the written statement that he was required to make,” and finding “no legal objection” to the practice, “assuming that the session [was] in fact closed *on the basis described in the agenda item*”) (emphasis added); *see also* 15 *OMCB Opinions* 19, 21-22 (2021) (finding a violation when a presiding officer’s verbal statement cited a basis for closing that was not contained in the written statement and omitted grounds cited in the written statement). At the Commission’s February and June 2021 meetings, the presiding officer invoked § 3-305(b)(10) (the public security exception) as authority to enter closed session, but neither of the agendas for those meetings cited that exception.⁴ Whether one views these inconsistencies as the

103(a), or discusses a matter that falls within one of fifteen exceptions enumerated in § 3-305(b).

³ Links to recordings of the Commission’s meetings are available at <https://www.mncppc.org/AgendaCenter/Commission-Meetings-of-the-Full-MNCPPC-6> (last visited June 29, 2022). The Commission did not enter closed session at its January 2021 meeting, and the recording of the April 2021 was not available when we visited the website.

⁴ Compare Commission Meeting Agenda, at 1 (Feb. 17, 2021), available at <https://www.mncppc.org/AgendaCenter/ViewFile/Agenda/02172021-517>, with Recording of Commission’s Feb. 17, 2021 Meeting, at 42:14-43:20, available at https://mncppc.granicus.com/MediaPlayer.php?view_id=7&clip_id=2377; compare Commission Meeting Agenda, at 1 (June 16, 2021), available at <https://www.mncppc.org/AgendaCenter/ViewFile/Agenda/06162021-555>, with

Commission’s failure to adopt the agendas as closing statements or, alternatively, as the adoption of closing statements that contained incomplete information, the Commission violated § 3-305(d)(2).

The Complainant further asserts that the agendas fell short of the Act’s requirements for closing statements because they failed to provide sufficient details about the topics of discussion or the reasons for the closures. As we have previously explained, each of the three items required by § 3-305(d)(2)(ii)—the reason for the closed session, the statutory authority for closure, and the topics of discussion—“serves a distinct purpose and must be included” in a closing statement. 15 *OMCB Opinions* 99, 100 (2021). After all, “the decision to close a meeting” under § 3-305(b) “is discretionary,” so “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.” 8 *OMCB Opinions* 95, 96 n.2 (2012) (emphasis added). Thus, while “there is no hard and fast rule for how much information is required in every circumstance,” 7 *OMCB Opinions* 216, 224 (2011), there must be “some account beyond uninformative boilerplate,” 4 *OMCB Opinions* at 48, and public bodies should “disclose as much information as they can without compromising the confidentiality of matters discussed within the claimed exception,” 15 *OMCB Opinions* at 101 (quoting 15 *OMCB Opinions* 37, 39 (2021)).

The Complainant asserts that, for several closed sessions, the Commission invoked the collective bargaining exception in § 3-305(b)(9) but failed to sufficiently “describe whatever actual topic was under discussion.” The December 2021 agenda, for example, simply lists “Collective Bargaining Update.” We agree that this was insufficiently detailed to satisfy the Act’s requirements for closing statements. The collective bargaining exception permits a public body to enter closed session to “conduct collective bargaining negotiations or consider matters that relate to the negotiations.” §3-305(b)(9). In the past, we have found that a public body invoking this exception, and identifying which labor unions are involved, would satisfy minimal disclosure obligations. *Cf.* 6 *OMCB Opinions* 96, 100 (2009) (finding disclosures in minutes insufficiently detailed when they “provided the public no meaningful information beyond the fact that the sessions involved labor negotiations,” but concluding that “minutes would certainly satisfy the minimal disclosure

Recording of Commission’s June 16, 2021 Meeting, at 7:40-8:14, available at https://mncppc.granicus.com/MediaPlayer.php?view_id=7&clip_id=2429.

The original agenda for the Commission’s December 2021 meeting, which appears to be the only agenda available online for that meeting, also failed to cite all the exceptions that the Commission actually invoked to enter closed session at the December 2021 meeting. Compare Commission Meeting Agenda, at 2 (Dec. 15, 2021) (citing § 3-305(b)(7) (the legal advice exception) and § 3-305(b)(9) (the collective bargaining exception) as authorities for the anticipated closed session), available at <https://www.mncppc.org/AgendaCenter/ViewFile/Agenda/12152021-610>, with Recording of Commission’s Dec. 15, 2021 Meeting, at 38:16-38:33 (invoking those exceptions and also § 3-305(b)(8) (the pending or potential litigation exception) and § 3-305(b)(15) (the cybersecurity exception), available at <https://www.youtube.com/watch?v=3LQhHtEnni4>. But an amended agenda, prepared a day before the meeting, included all the claimed exceptions.

requirements under the Act” if they identified the various unions involved).⁵ We find that the failure to include that detail violated § 3-305(d)(2), and we encourage the Commission to adopt the suggested practice of listing the affected unions on future closing statements.

The Complainant further asserts that the Commission failed to provide enough details when invoking the legal advice exception of § 3-305(b)(7). We agree. The February 2021 agenda, for example, states that the Commission planned to enter closed session to, among other things, “consult with counsel for legal advice.” The agenda listed the closed session topics of discussions as “Quarterly CIO Report” and “I495-I270 Managed Lanes Project Update.” But the agenda failed to explain whether the need for legal advice related to both or only one of those topics, and the Commission gave no reason for why it needed to receive legal advice behind closed doors. As we have previously observed,

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* at 101 (quoting 10 *OMCB Opinions* 4, 6 (2016)). We thus find another violation of § 3-305(d)(2) based on the Commission’s invocation of the legal advice doctrine without providing enough information about the topics of discussion or reasons for entering closed sessions.⁶

2. Alleged violations after meeting in closed sessions

Following closed sessions, the Complainant alleges that the Commission violated the Act by failing to prepare minutes with enough details about the closed sessions. The Act provides that, “[i]f a public body meets in closed session, the minutes for its next open session shall 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 (i) a listing of the topics of

⁵ As discussed more below, in part A.2, the Act requires minutes to provide much of the same information about closed sessions that closing statements must include.

⁶ We commend the Commission on its pledge to provide more details in its agendas, beginning with the December 2021 amended agenda, in which the Commission invoked, among others, the legal advice exception and said the reasons for meeting in closed session included the preservation of confidential deliberations related to ongoing litigation and the protection of legal privileges.

discussion, persons present, and each action taken during the session.” § 3-306(c)(2).

The Complainant asserts that the Commission’s minutes have failed to specify the purpose of the closed sessions, topics of discussion, and who attended the closed sessions. The Commission concedes that it has omitted these details from minutes in the past but now includes them. Although we commend the Commission for amending its practice to comply with the Act’s requirements, we find that the Commission’s past failure to include the required details in its minutes violated § 3-306(c)(2).

The Complainant also asserts that the Commission violated the Act by not making agendas that served as closing statements available to the public “during normal business hours.” The Act provides that a written closing statement “shall be a matter of public record” and “[a] public body shall keep a copy of the written statement for at least 1 year after the date of the session.” § 3-305(d)(4) & (5).⁷ But the Act imposes no requirement that closing statements be available for inspection during normal business hours. *Compare* § 3-306(d) (providing that “*minutes* of a public body are public records and shall be open to public inspection during ordinary business hours”) (emphasis added), *with* § 3-305(d)(4) (providing only that closing statements are public records).⁸ In any event, the Commission’s agendas, which serve as closing statements, generally are available online.⁹ We find no violation based on the allegation that closing statements are not available to the public during normal business hours.

3. Alleged violations during closed session

The Complainant asserts, “[b]ased on the rote deployment” of the legal advice and collective bargaining exceptions, that at least some of the Commission’s discussions in closed sessions must have exceeded the scope of these claimed exceptions. Although we understand why the Complainant may suspect this, given the Commission’s failures to adequately describe topics of discussion and reasons for closure, we decline to address this speculative claim. *See, e.g.,* 16 *OMCB Opinions* 69, 75 (2022) (noting that we ordinarily do not address “hypothetical or speculative allegations”).

With respect to other allegations about closed session discussions, however, the Complainant provides enough details for our review. The Complainant asserts, based on comparisons of closing statements and subsequent minutes, that the Commission’s closed

⁷ Effective October 1, 2022, the retention period for closing statements will be three years, instead of one year. 2022 Md. Laws ch. 345.

⁸ Beginning October 1, 2022, the Act will require that, “[t]o the extent practicable,” public bodies post closing statements online. 2022 Md. laws, ch. 345.

⁹ As noted earlier, *see* n.4 above, we have been unable to locate the amended December 2021 meeting agenda online. But other agendas are available on the Commission’s webpage devoted to agendas.

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session discussions at several meetings exceeded the scope of the claimed exceptions. We agree. For the February 2021 meeting, for example, the closing statement indicates that the Commission closed the session to discuss matters authorized by the legal advice and collective bargaining exceptions; but the minutes indicate that the Commission also discussed “public security issues related to the agency’s information systems.” The Commission concedes that it relied on an outdated closing statement template that had not been updated to include § 3-305(b)(15), the exception allowing for closed session discussions about cybersecurity. As a result, the Commission admits that it should have—but failed—to cite that exception for more than one discussion involving cybersecurity. Because these closed session discussions did not fall within the exceptions cited in the closing statements, they violated § 3-305(d)(2). *See* 11 *OMCB Opinions* 74, 76 (2017).

The Complainant also alleges, based on closing statements and matters that the Commission considered in *open* sessions on corresponding dates, that the Commission must have improperly approved contracts in closed session. For example, he “assume[s]” that the Commission discussed and “approved illegally” a wage adjustment for its Park Police bargaining unit in closed session in June 2021, because the closing statement indicates that the Commission would engage in a “Collective Bargaining and Compensation Discussion (followed by [a] vote on Resolutions),” and the minutes indicate that the Commission approved the Park Police wage adjustment in open session in what the Complainant describes as “a ceremonial vote.” He asserts that, “once the negotiation phase is over, a union contract is like any other contract and must be discussed in open session.” We find no violation. As we have previously explained, “[c]ollective bargaining agreements, like procurements, are exceptions to the Act’s general rule that contract approvals must be conducted in public.” 9 *OMCB Opinions* 71, 76 (2013) (accepting the argument that “negotiations are not actually over” until the public body formally approves the contract).¹⁰

The Complainant further asserts that the Commission’s repeated closed-session discussions of COVID-19-related employment policies exceeded the scope of the collective bargaining and legal advice exceptions. For example, the minutes of the July 21, 2021, meeting indicate that, during its June 16, 2021 closed session, for which the Commission invoked the collective bargaining exception, the Commission discussed return-to-work protocols and a mask mandate for certain employees. Similarly, the October 20, 2021 and April 21, 2021 closing statements, both of which invoked the legal advice and collective bargaining exceptions, indicate, respectively, that the Commission discussed a “Vaccination Mandate for Return-to-Office,” and “COVID Cases Update and Trends.” The Complainant argues that neither the collective bargaining nor legal advice exceptions “cover discussions about policy.” The Commission responds that “the issue of

¹⁰ In any event, the Commission asserts that the wage adjustments were not the topic of discussion in the June 2021 closed session.

vaccine mandates raised significant legal and contractual issues between” the Commission and its employees represented by labor unions, and discussion of the mandates and “COVID cases and trends directly related to the Commission’s ongoing negotiations with both unions in 2021.”

We are unable to resolve this allegation. *See* § 3-207(c)(2) (noting that the Board may be unable to resolve a complaint). “We cannot firmly conclude whether a closed meeting violated the Act or not unless we know what was said during the meeting,” 4 *OMCB Opinions* 99, 107 (2004), but the Commission did not provide us copies of its closed session minutes, nor did it produce them upon our request. In correspondence with our staff, counsel for the Commission stated that releasing the closed session minutes for our review would require the consent of the Commission (and the Commission’s committees and boards, against which the Complainant makes similar allegations, which we discuss below), and such consent cannot be obtained in time for us to issue a timely decision. *See* § 3-207(a)(2) (providing, generally, that “within 30 days after receiving the response the Board shall issue a written opinion”). Counsel also noted that the Complainant’s multiple allegations, involving about thirty different meetings of the Commission and its committees and boards, have already required Commission staff to expend more than fifty hours to assemble materials necessary to respond to the complaints. According to the Commission’s counsel, the Complainant has not satisfied the Act’s implied burden of proof so as to require the Commission to produce closed session minutes, and the Commission worries that providing us closed session minutes would forfeit the Commission’s privilege to maintain the confidentiality of its communications with its attorney.

We address these concerns in reverse order. With respect to maintaining the attorney-client privilege, a lawyer generally may “disclose confidential client information when required by law,” Restatement (Third) of the Law Governing Lawyers § 63 (2000), and the Act requires that, upon our request, a public body must provide us copies of minutes, § 3-206(b)(2). The Act also requires that we maintain the confidentiality of closed session minutes, § 3-206(b)(3), and, in opinions, we refer to the contents of those minutes in only the most general terms, *e.g.*, 15 *OMCB Opinions* 136, 139 (2021). We thus fail to see how providing us the closed session minutes would waive the Commission’s attorney-client privilege. As to the issue of a complainant’s burden of proof, we have previously explained that, “[w]hen a complainant requests an advisory opinion of this Board, ‘there is no ‘burden of proof.’” 15 *OMCB Opinions* 132, 132 (2021) (quoting 3 *OMCB Opinions* 30, 32 (2000)). A complainant need only identify the public body and describe the alleged violation with enough specificity to establish that the assertion is not “merely speculative,” 12 *OMCB Opinions* 33, 34 (2018), or hypothetical, 12 *OMCB Opinions* 23, 23 (2018). We believe that the Complainant has done that here with these specific allegations. As to the time Commission staff have already devoted to the Complainant’s numerous allegations, we appreciate the time and effort required for a public body to respond to complaints, particularly when, as here, the complaints entail numerous allegations related to meetings

spanning a year-long period. That is one reason we “encourage complainants to focus on concerns with a public body’s current practices or recent conduct.” 12 *OMCB Opinions* 37, 38 (2018). But the Act does not limit the number of allegations that a complainant may assert. Moreover, providing us closed-session minutes that have already been prepared should not, in and of itself, require much effort for a public body. In this case, where the Commission’s internal policies apparently require the Commission members’ approval before releasing closed session minutes, Commission staff could seek that approval outside of a Commission meeting by, for example, polling the members by email or phone. In any case, “[w]hat is important to us is that we receive a response that provides us with the necessary documents” to resolve a complaint. 9 *OMCB Opinions* 307, 312 (2015). Because that is lacking here, we find that the Commission’s failure to provide the closed session minutes violated the Act. *See* § 3-206(b)(2)(iii); 5 *OMCB Opinions* 14, 20 (2006).

In the absence of the closed session minutes, we can offer only general guidance about the scope of the collective bargaining exception, which the Commission asserts covered its closed session discussions about COVID-19 policies. We have previously acknowledged that changes to personnel policies may fall within the exception, provided that the changes “would require collective bargaining negotiations with employee unions.” 12 *OMCB Opinions* 69, 71-72 (2018). Even policies that affect non-union employees may fall within the exception, if “the discussion of non-represented staff actually relate[s] to ongoing negotiations with [a] union.” 15 *OMCB Opinions* 37, 44 (2021). Without access to the closed session minutes here, however, we cannot determine whether the Commission’s closed session discussions about COVID-19 exceeded the scope of the collective bargaining exception.

Finally, regarding alleged violations during closed sessions, the Complainant asserts that the Commission violated the Act by not having a person trained in the Act’s requirements present during closed sessions. The Act provides that “[a] public body may not meet in a closed session unless the public body has designated at least one member of the public body to receive training on the requirements of the open meetings law.” § 3-213(d)(2). The Commission asserts that its chair, who attended each closed session, has received such training. Thus, we find no violation of § 3-213(d)(2).

B. Alleged violations by the Commission’s Executive Committee

The Complainant alleges that, in 2021, the Commission’s Executive Committee violated several of the Act’s requirements related to agendas and closed sessions. The Commission concedes that it is a public body subject to the Act but argues that its Executive Committee is not. *See, e.g.,* 14 *OMCB Opinions* 98, 99 (2020) (recognizing that the Act applies only to entities that meet the Act’s definition of “public body”). We must thus determine whether the Executive Committee is a “public body” subject to the Act’s requirements.

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The Commission established the Executive Committee in 1957. Minutes of the Commission's August 21, 1957 meeting indicate that a member of the Commission suggested that "the Commission's operations would run more smoothly by the appointment of an Executive Committee which would be empowered to approve all matters not requiring the action of the full Commission and thus reduce the number of items brought to the attention of the Commission." Minutes of Aug. 21, 1957, Meeting, at 2. The Commission unanimously adopted a motion to appoint the Chairman, Vice-Chairman and Secretary-Treasurer to the Executive Committee. *Id.*

In 1960, the Commission gave the Secretary-Treasurer the additional title of Executive Director. In 1967, the Executive Director role became an independent position, and the Executive Director replaced the Secretary-Treasurer on the Executive Committee.

In the 1970s, a series of Commission resolutions further clarified the roles and responsibilities of the Commission, the Planning Boards of Prince George's and Montgomery counties, and the Executive Committee. Resolution No. 74-46 stated:

The Executive Committee of the Commission shall consist of the Chairman and Vice-Chairman of the Commission and the Executive Director. It shall be assisted by such other Commission staff as the Committee may from time to time require. The Committee, as described by the Commission, shall supervise the activities of the Executive Director and, through the Executive Director, the bi-county offices. It shall oversee and coordinate the activities of other committees of the Commission; it shall coordinate the administrative needs and the provision of administrative services to the Planning Boards when necessary. It shall prepare the agenda for Commission meetings and supervise the scheduling of business for the full Commission. It shall undertake such other matters as may be assigned by the Commission.

In Resolution No. 76-15, the Commission further clarified that the Executive Committee of the Commission is

empowered to act . . . for the full Commission, referring to the Boards or Commission for action only such practices as in its judgment require the approval of those bodies. Other practices, after action by the Executive Committee, shall be subject to the requirement that such actions be conveyed to all Commissioners promptly.^[11] Commissioners shall have thirty days or until the next Commission meeting, whichever occurs first, provided there are at least five (5) days between receipt of the item and the next Commission

¹¹ A subsequent resolution, No. 76-34, amended this sentence to refer specifically to "*Commission-wide practices*" (emphasis added).

meeting, to request that any such item be placed on the following Commission agenda for review. If such review action is not requested, the Executive Committee action shall take effect on the day following the date of the first Commission meeting after the Executive Committee action[.]¹²

The resolution further provided that the Executive Committee is

empowered to issue in the form of notices (or otherwise) regulatory and informational material that will be issued as practices (or otherwise) in due course, but which requires such expeditious action as to preclude using the completely coordinated practice procedure[.]

With this history in mind, we turn now to the statutory definition of “public body” to determine whether the Executive Committee is subject to the Act. “The Act defines ‘public body’ in several ways but, as is relevant here, that term includes a multimember entity that is either created by ‘rule, resolution, or bylaw.’” 15 *OMCB Opinions* 24, 25 (2021) (quoting §3-101(h)(1)). “The fact that a committee might have started off as an informally-created group does not matter; if it is then constituted or mandated by one of the listed legal instruments, it becomes a public body.” 10 *OMCB Opinions* 12, 15 (2016) (concluding that a committee, created by its parent public body’s chief compliance officer, became a public body itself when the parent body adopted a resolution setting the committee’s membership, mandating its performance of various compliance functions, and assigned it a role in making policy recommendations to the parent body); *see also* 14 *OMCB Opinions* 98, 101 (2020) (finding that a committee “not expressly created by resolution” was nonetheless a public body because its parent public body formally acknowledged the entity as a committee of the full parent public body and resolved to assign it precise functions). In this case, the Commission initially created the Executive Committee by informal motion and, thus, did not establish a public body. But the Commission subsequently adopted a series of resolutions that formally acknowledged the Executive Committee and specifically assigned it specific roles. We thus conclude that, with these resolutions, the Executive Committee became a public body subject to the Act. *See* 10 *OMCB Opinions* at 15.

We are unpersuaded by the Commission’s argument that the Executive Committee is not a public body because it is akin to the Governor’s cabinet. To be sure, the Act expressly excludes from the definition of “public body” the Governor’s cabinet, § 3-101(h)(3)(vii), and “a local government’s counterpart to the Governor’s cabinet,” § 3-101(h)(3)(viii). But the Commission’s Executive Committee is neither. The Commission is “an agency of the State,” Md. Code Ann., Land Use § 15-101(b), not a local government.

¹² Resolution No. 76-34 clarified that the Executive Committee action takes effect “on the day following the last day of *either of the two periods of time specified above*” (emphasis added), i.e., on the day following the next Commission meeting or the day after thirty days have passed with no action by the full Commission.

Thus, the Commission’s reliance on 1 *OMCB Opinions* 50 (1993) is unavailing. In that case, we concluded that, for certain meetings, a board of county commissioners was “a local government’s counterpart to the Governor’s cabinet,” because the county in question was not a home rule jurisdiction and, thus, the board of county commissioners, in addition to performing legislative duties, served as the “executive branch decisionmaker,” much like a county executive in a county with charter home rule. 1 *OMCB Opinions* at 51-52. But the facts of that case are too easily distinguishable to support the Commission’s argument here.

Contrary to the Commission’s argument, the exclusion for certain subcommittees, found in § 3-101(h)(3)(ix), also does not apply to the Executive Committee. That exclusion states that, “*except as provided in [§ 3-101(h)(1)], a subcommittee of a public body as defined in [§ 3-101(h)(2)(i)]*”¹³ is not a public body. § 3-101(h)(3)(ix) (emphasis added). As already noted, however, the Executive Committee satisfies § 3-101(h)(1)’s definition of public body, because the Commission, through a series of resolutions, formally acknowledged the Executive Committee and assigned it specific roles. *See* § 3-101(h)(1)(ii)(6) (including in the definition of “public body” an entity that is created by “a rule, resolution, or bylaw”). Thus, the exclusion in § 3-101(h)(3)(ix) does not apply.

Having determined that the Executive Committee is a public body, we turn now to the Complainant’s allegations that, in 2021, the Executive Committee violated provisions of the Act that govern agendas and closed sessions.¹⁴

1. Alleged failure to publish agendas

The Complainant alleges that the Commission did not publish the Executive Committee’s agendas online, as it did with other committees and subgroups. The Complainant says that he obtained the Executive Committee’s agendas through a Public Information Act request, but he asserts that such a request “should never be necessary for agendas.”

¹³ Section 3-101(h)(2)(i) defines “public body” to include “any multimember . . . committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least two individuals not employed by the State or the political subdivision.” The Commission’s ten-member governing body is comprised of five members from Montgomery County—who are appointed by the Montgomery County Council, subject to the approval of the Montgomery County Executive—and five members from Prince George’s County—who are appointed by the Prince George’s County Executive, *subject to the approval of the Prince George’s County Council*. Thus, it is not clear to us that the Commission satisfies § 3-101(h)(2)(i)’s definition of “public body,” which applies to bodies whose members are appointed by the “chief executive authority of a political subdivision” or an official subject to the chief executive’s policy direction. We need not resolve that question, however, because the Commission unquestionably meets the definition of public body in § 3-101(h)(1).

¹⁴ Although the Commission argues that the Executive Committee is not a public body, the Commission contends that “the Committee conducts its meetings in accordance with the Act’s requirements to ensure compliance with the law.”

The Act requires that, “before meeting in an open session, a public body shall make available to the public an agenda.” § 3-302.1(a)(1). As for *how* a public body makes the agenda available, the Act allows a public body to use any method that is authorized for giving notice (though a public body need not use the same method for notice and agendas). § 3-302.1(d). The permissible methods are publication in the Maryland Register (if the public body is a unit of State government), delivery to news media, posting on a website or “at a convenient public location at or near the place of the session” (if the public body has previously notified the public that it would use this method), and “any other reasonable method.” § 3-302(c).

The Commission responds that copies of agendas “have always been made available to the public upon request.” We have previously said that this is all that the Act requires. *See* 11 *OMCB Opinions* 25, 33 (2017) (noting that “[t]he purpose of the requirement is to provide information about a meeting in advance so that people can decide whether to attend, and, to that end, a public body must make the agenda ‘available,’ before the meeting, *to anyone who asks for it*”) (emphasis added).¹⁵ Regarding the Complainant’s assertion that he had to make a Public Information Act request to obtain agendas, we assume that his request was for agendas of meetings that had already passed. We find no violation of the Act, which does not expressly require public bodies to retain agendas or make them available to the public following meetings. *Compare* § 3-306(d) & (e) (requiring a public body to retain copies of *minutes* for at least five years, make them open to public inspection during ordinary business hours, and, “[t]o the extent practicable,” post them online), *with* § 3-302.1 (imposing none of the same requirements for agendas). The Complainant’s allegations regarding agendas fail to state a violation of the Act.

2. Alleged violations related to closed sessions

a. Alleged violations before closed sessions

The Complainant alleges that, before meeting in closed sessions, the Executive Committee failed to prepare closing statements that were sufficiently detailed to satisfy § 3-305(d)(2)(ii). We agree. Like the Commission’s closing statements, *see* Section A.1 above, those of the Executive Committee violated the Act by invoking the legal advice exception of § 3-305(b)(7) without explaining *why* the Committee needed to seek such advice in closed session. *See* 15 *OMCB Opinions* at 101. In addition, several closing statements invoked the collective bargaining exception of § 3-305(b)(9) but failed to provide sufficient details about the topic of discussion. The Executive Committee did not, for instance, identify the labor unions involved in “collective bargaining updates” that the

¹⁵ This presupposes, of course, that the public body has provided adequate notice of a meeting, so that members of the public would know to ask for an agenda. In this case, the Complainant makes no allegation that the Commission failed to provide adequate notice of Executive Committee meetings.

Committee received in closed sessions.¹⁶ See Section A.1 above; *cf.* 6 *OMCB Opinions* at 100. And in at least one instance, the Executive Committee invoked § 3-305(b)(9) “to consider matters that relate to negotiation,” specifically, a “Vaccination Mandate for Return-to-Work.” Because “there is no exception in the Act for ‘negotiation issues’ as such,” 1 *OMCB Opinions* 233, 234 (1997), this vague reference to “matters that relate to negotiation,” even when paired with the topic of “Vaccination Mandate,” did not provide the public enough information to determine whether the intended topic of discussion actually fell within the scope of § 3-305(b)(9), which applies only to *collective bargaining* negotiations. The Executive Committee’s failures to provide sufficiently detailed topics of discussion or reasons for closures violated § 3-305(d)(2)(ii). The Committee states that it has since begun using the form closing statement available on the Attorney General’s website,¹⁷ a practice that we have previously encouraged, *see, e.g.*, 15 *OMCB Opinions* at 102, and which will hopefully prevent in the future the problems that we have identified here.

b. Alleged violations after closed sessions

The Complainant alleges two violations of § 3-306(c)(2): first, that the Executive Committee’s minutes failed to include closed session summaries and, second, that the Committee’s closed session summaries failed to include the requisite details. We find no merit in the first allegation, as the Commission has provided us minutes containing summaries of each of the Executive Committee’s closed sessions in 2021. As to the second allegation, however, the Commission concedes that the summaries fail to include the topics of discussion and reasons for closure, the identities of people who attended the closed sessions, and any actions that the Executive Committee took. We thus find a violation of § 3-306(c)(2).¹⁸

c. Alleged violations during closed sessions

As he did in his complaint against the Commission’s governing body, the Complainant asserts that the Executive Committee’s closed session discussions—often involving COVID-19-related policies—exceeded the scope of the collective bargaining

¹⁶ We are not persuaded by the Executive Committee’s argument that the public could infer which labor unions the Committee intended to discuss in closed sessions because the agendas, which also served as the closing statements, referred elsewhere to the Commission’s two labor unions. The phrase “collective bargaining update,” without more, did not inform the public whether the Committee intended to discuss both or only one of the labor unions in closed session.

¹⁷ PDF and Word versions of the form are available at <https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx> (last visited June 29, 2022).

¹⁸ For the reasons stated above, *see* Section A.2, we find no violation based on the Complainant’s additional allegation that the Executive Committee failed to make closing statements “immediately available” for inspection during business hours.

exception of § 3-305(b)(9). For the reasons stated above, *see* Section A.3, we lack access to the closed session minutes and, thus, cannot determine whether the discussions did, indeed, violate the Act.

Finally, the Complainant alleges that the Executive Committee violated the Act by not having a person trained in the Act's requirements present during closed sessions. *See* § 3-213(d)(2). The Commission responds that the Executive Committee's chair, who served through the end of 2021, was trained in the Act's requirements. We thus find no violation based on this allegation.

C. Alleged violations by the Commission's Retirement Board

The Complainant's next set of allegations pertain to the Commission's Retirement Board, which, the Commission argues, is not a "public body" subject to the Act. We thus consider the Retirement Board's origin to determine whether the entity satisfies the statutory definition of "public body."

On June 14, 1972, the Commission adopted a resolution approving the Maryland-National Capital Employees' Retirement Plan (the "Retirement Plan"). Two weeks later, following approval by the Commission's employees, the Retirement Plan took effect. Section 2 of the Retirement Plan establishes the Retirement Board, which consists of eleven members responsible for administering the Commission's retirement system.¹⁹

Based on this brief history, we conclude that the Retirement Board is a "public body" for purposes of the Act. As noted above, *see* Section B, a multimember entity is a "public body" "if it was created by, among other legal instruments, 'a rule, resolution, or bylaw.'" 13 *OMCB Opinions* 21, 22 (2019) (quoting § 3-101(h)(1)(ii)(6)). In this case, the Retirement Board is a product of a Commission resolution, which approved the Retirement Plan establishing the Retirement Board. In two prior cases—including one involving the Commission—we found that, when a public body adopts a resolution that merely *recommends* the creation of an entity, that entity may qualify as a "public body." *See* 16 *OMCB Opinions* 90, 95 (2022) (concluding that an advisory committee, recommended in a master plan that the Commission adopted by resolution, was a public body); 10 *OMCB Opinions* 117, 118-19, 123 (2016) (concluding that an entity, recommended in a strategic economic development plan that a public body approved by resolution, was a public body). Here, the Commission adopted a resolution that did more than merely *recommend* the creation of the Retirement Board; the Commission's resolution adopted the Retirement Plan that *required* the Retirement Board's creation.²⁰ We thus conclude that the Retirement

¹⁹ A copy of the plan is available at <https://www.mncppc.org/DocumentCenter/View/4029/Plan-Documents-PDF?bidId=> (last visited June 29, 2022).

²⁰ That the Retirement Plan, establishing the Retirement Board, also required the approval of the Commission's

Board is a public body subject to the Act and turn now to the Complainant's allegations against this entity.

As with the Commission and its Executive Committee, the Complainant alleges that the Retirement Board violated the Act's various requirements related to closed sessions. The response does not address the specific allegations but instead argues that, "[a]s administrator of the Commission's Retirement System," the Retirement Board "did not perform any judicial, quasi-judicial, legislative, quasi-legislative, or advisory functions in 2021," only "administrative functions." We understand this to be an argument that none of the Retirement Board's meetings were subject to the Act, which does not apply to "a public body when it is carrying out . . . an administrative function." § 3-301(a)(1).²¹

"Proper application of the Act's administrative function exclusion can be elusive, and 'the line between administrative functions and those functions that are covered by the Act is not always clear.'" 15 *OMCB Opinions* 11, 15 (2021) (quoting 14 *OMCB Opinions* 92, 94 (2020) (ellipsis omitted)). To determine whether a particular topic of discussion falls within a public body's administrative function, we apply a two-step inquiry. "First, the discussion cannot fall within one of the other functions—e.g., it cannot be advisory, legislative, or quasi-legislative in nature." 15 *OMCB Opinions* at 15. "If the discussion does fall within one of these functions, the inquiry ends because the discussion necessarily cannot be administrative in nature." *Id.*; see also § 3-101(b)(2) (providing that "administrative function" does not include advisory, legislative, or quasi-legislative functions). "If the first part of the inquiry is satisfied, then the second step requires that the discussion involve the administration of an existing law (or laws) that the public body is legally responsible for administering." 15 *OMCB Opinions* at 15.

Although the Commission now asserts that the Retirement Board's 2021 meetings involved nothing but administrative functions, minutes of those meetings suggest that the Board's members understood only some of their functions to be administrative and, thus, beyond the reach of the Act.²² Minutes of the February 2, 2021 meeting, for example, indicate that the Retirement Board recessed "to perform administrative functions," a statement that suggests that the Board's members believed that the rest of the functions

employees, does not change our conclusion. We have previously "emphasized the need to interpret the Act in a manner that does not 'undercut the Act's effectiveness' or its 'broad public policy' that 'public business be performed in an open and public manner.'" 16 *OMCB Opinions* at 94-95 (quoting *Avara v. Baltimore News American Division*, 292 Md. 543, 550-51 (1982)). Here, the Retirement Board "was established 'in pursuance' of the Commission's resolution adopting" the Retirement Plan and, "thus, 'plainly the creation' of that action." 10 *OMCB Opinions* at 123 (quoting *Avara*, 292 Md. at 550).

²¹ The Act also does not apply to a public body when it carries out judicial or quasi-judicial functions. § 3-301(a)(1).

²² Despite the Commission's argument that the Retirement Board is not a "public body" subject to the Act (an argument that we have rejected), the Retirement Board's rules of procedure require compliance with the Act.

they performed during that meeting were subject to the Act.

Having reviewed the minutes, we agree with the Commission that many of the functions the Retirement Board performed—such as evaluating and voting to adopt certain investment strategies—were likely administrative and, thus, not subject to the Act. Under the Retirement Plan, adopted by Commission resolution, the Retirement Board is legally obligated to hold, invest, and reinvest assets held in trust. Thus, the Retirement Board performs an administrative function when it carries out those duties. *See* 3 *OMCB Opinions* 122, 126 (2001) (concluding that, when a committee “carrie[d] out or implement[ed] its existing legal responsibility for overseeing [a public library’s] financial and accounting systems and the investment of endowment funds,” it was engaging in an administrative function (formerly known as an executive function)). However, other functions that the Retirement Board carried out during its 2021 meetings—such as amending a personnel policy to grant employees more time to use accrued leave, or awarding an auditing services contract—do not plainly fall within the definition of “administrative function.” *See, e.g.,* 10 *OMCB Opinions* 22, 26, (2016) (providing, generally, that a public body “is not performing an administrative function when it is discussing the adoption of a new policy”); *see also* § 3-301(j)(3) (defining “quasi-legislative function” to include “approving, disapproving, or amending a contract”) and § 3-301(b)(2)(v) (providing that a quasi-legislative function is not an administrative function). We thus decline the Commission’s invitation to conclude that the entirety of each of the Retirement Board’s 2021 meetings was administrative in nature and beyond the scope of the Act.

We turn, then, to the substance of the Complainant’s allegations. The Complainant makes many of the same allegations that he made against the Commission and its Executive Committee, namely that the Retirement Board violated the Act’s requirements for closing statements, engaged in closed session discussions that exceeded the scope of claimed exceptions, and failed to prepare minutes and closed session summaries that complied with the Act. The Commission, perhaps assuming that we would agree that every function the Retirement Board performed was administrative and, thus, beyond the scope of the Act, does not respond to the Complainant’s specific allegations against the Retirement Board. The Commission also, for the reasons we explained above, *see* Section A.3, has not provided us copies of the Retirement Board’s closed session minutes. We are thus unable to determine whether any of the Complainant’s allegations relate to closed sessions during which the Retirement Board performed an administrative function; if so, violations of the Act’s requirements relating to those closed sessions would not matter. *Cf.* 4 *OMCB Opinions* 67, 70-72 (2004) (recognizing that a public body, whose discussion during a meeting and whose subsequent minutes were so cryptic that they failed to satisfy the Act’s provisions pertaining to the public’s right to attend a meeting and the level of detail required of minutes, would not violate the Act if the cryptic discussion fell within the administrative function exclusion). As such, we proceed to review the Complainant’s

specific allegations, pointing out instances in which the Retirement Board apparently failed to satisfy the Act's requirements but stopping short of declaring a violation, due to our uncertainty of whether closed sessions involved only administrative functions that were not subject to the Act.

a. Alleged violations before closed sessions

The Complainant alleges, and we have confirmed, that the Retirement Board's closing statements for meetings in 2021 failed to provide topics of discussion or reasons for closure. For the reasons already stated, *see* Section A.1 above, such omissions generally violate § 3-305(d)(2).

We agree, too, with the Complainant's assertion that many of the Retirement Board's closing statements are unnecessarily confusing because, on a checklist beneath the heading "Statutory Authority to Close Session," the statements check specific exceptions but do not refer to those exceptions in a narrative portion of the closing statement and, in fact, invoke other exceptions that are not checked on the checklist. On the January 5, 2021, closing statement for example, the checklist indicates that the Retirement Board was invoking only § 3-305(b)(5), the exception to discuss the investment of public funds; but the narrative portion of the closing statement makes no mention of that exception and instead refers to § 3-305(b)(1) (the personnel matters exception) and § 3-305(b)(13) (the exception allowing a closed session in order to "comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter"). The discrepancy makes it unclear whether the Retirement Board intended to invoke all three exceptions, or only some.²³

The Complainant further asserts that several of the closing statements have dates that do not match the dates of the corresponding meetings. Closing statements for the January 5, 2021, and July 13, 2021, meetings, for example, indicate that they were signed and dated by the Retirement Board's presiding officer many months after those meetings, on December 7, 2021. The Complainant infers that these closing statements were not actually prepared before the Retirement Board entered its closed sessions, as required by § 3-305(d)(2). Because the Retirement Board does not respond to this specific allegation, we lack the facts necessary to conclude whether the closing statements were prepared before or after the closed sessions. We emphasize, however, that only statements prepared "[b]efore a public body meets in closed session" satisfy § 3-305(d)(2).

²³ As discussed below, the minutes indicate that the Retirement Board entered closed session only to obtain legal advice under § 3-305(b)(7), which was neither checked nor mentioned in the narrative portion of the closing statement.

b. Alleged violations during closed sessions

The Complainant asserts that the Retirement Board engaged in closed session discussions that exceeded the scope of the claimed exception. At the January 5, 2021, meeting, for instance, the Retirement Board invoked the personnel matters exception of § 3-305(b)(1), the exception for the investment of public funds, found in §3-305(b)(5), and the exception permitting a public body to enter closed session in order to “comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter,” found in § 3-305(b)(13).²⁴ The closed session summary that appears in the minutes, however, indicates that the Retirement Board also obtained advice from legal counsel under § 3-305(b)(7). If, in fact, the Retirement Board sought legal advice and that discussion did not fall within the administrative function exclusion, the Retirement Board violated the Act, because “discussions at closed meetings must fall within the scope of the exception claimed by the public body in advance.” 7 *OMCB Opinions* 125, 127 (2011).

The Complainant further asserts that, on more than one occasion, the Retirement Board must have exceeded the scope of the claimed legal advice exception. In support of his assertion, the Complainant points to the May 4, 2021, closed session, immediately after which the Board approved an amended ethics policy, “as recommended by legal counsel.” From this, the Complainant infers that the Retirement Board must have engaged in policy discussions in closed session. Although we agree that such discussions would have exceeded the scope of the legal advice exception, *see, e.g.*, 10 *OMCB Opinions* 98, 100 (2016), we cannot know, without the closed session minutes, whether the Retirement Board did, in fact, engage in such a policy discussion. The Complainant also points to the Retirement Board’s September 14, 2021, minutes, which indicate that the Board entered closed session under the legal advice exception and, during that closed session, approved a “Side Letter Election Form,” a limited partnership agreement, and an amendment to another agreement. We agree with the Complainant that the legal advice exception alone would not have authorized such action, as the exception is “limited to the obtaining of legal advice.” 10 *OMCB Opinions* at 100. “[O]nce advice by an attorney has been provided, a public body must return to open session to discuss policy implications of the advice it ha[s] received,” 6 *OMCB Opinions* 127, 130 (2009), or to finalize a contract based on counsel’s advice, 6 *OMCB Opinions* 127, 131 (2009) (concluding that, “to the extent that the [members of a public body] gave final instructions to counsel as to what they felt should be included with respect to the substantive terms of the proposed agreement,” the members “crossed the line and acted beyond the confines of” the legal advice exception).

²⁴ The closing statement’s narrative section mentioned only § 3-305(b)(1) and (13), but another section, beneath the heading “Statutory Authority to Close Session,” showed a checkmark next to § 3-305(b)(5).

c. Alleged violations after closed sessions

The Complainant asserts that the closed session summaries in the publicly available minutes violate the Act by failing to identify the individuals who attended the closed sessions. We agree that this detail is missing from the Retirement Board’s closed session summaries and, assuming that the closed session discussions were not excluded from the Act as an administrative function, this deficiency in the closed session summaries violated § 3-306(c)(2)(iv).

The Complainant also alleges that the summary of the February 2, 2021 closed session violates the Act by failing to provide enough detail about the topic of discussion. The summary indicates that the Retirement Board entered closed session to obtain legal advice and discuss the investment of public funds; during the closed session, the Retirement Board “[a]pproved the transition from the Loomis Sayles Full Discretion Trust to Loomis Sayles U.S. High Yield Bond Trust following the Groom Law Group’s review of the Third Amended and Restated Declaration of Trust.” The Complainant asserts that this summary is deficient because it fails to provide the specific amounts of money involved. We disagree that this detail is necessary to sufficiently describe the topic of discussion under § 3-306(c)(2).

Regarding other topics of discussion, however, we agree with the Complainant that the descriptions are insufficiently detailed to satisfy § 3-306(c)(2). In the May 4, 2021 closed session summary, for example, the Retirement Board describes the topic of discussion as “Eaton Vance’s Letter Dated April 5, 2021.” But the summary provides no further information about the substance of that letter—and, thus, the substance of the Retirement Board’s conversation—or how the discussion fell within the claimed legal advice exception. To comply with § 3-306(c)(2), the summary should have provided more details about the letter or simply attached it to the minutes.²⁵ *See 8 OMCB Opinions* 122, 123-24 (2012) (concluding that a reference to “line item adjustment only” was an insufficient description of a motion to amend the budget, and, to be sufficiently informative, the minutes should have provided a more detailed description or attached documents that explained the item); *see also 9 OMCB Opinions* 132, 138 (2014) (noting that, “when an action bears no apparent relation to the claimed exception,” a public body must “explain the connection”).

The Complainant further asserts that the Retirement Board failed to provide a required summary of what occurred when it recessed its February 2, 2021 meeting to carry out administrative functions. The Act provides that, “[i]f a public body recesses an open session to carry out an administrative function in a meeting that is not open to the public, the minutes for the public body’s next meeting shall include: (1) a statement of the date,

²⁵ The letter is apparently a public record, as the Complainant attached it to his complaint.

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time, place, and persons present at the administrative function meeting; and (2) a phrase or sentence identifying the subject matter discussed at the administrative function meeting.” § 3-104. The minutes of the February 2 meeting indicate that the Retirement Board recessed to perform administrative functions, but the minutes provide no details about the people who were present at the administrative function meeting or the subject matter discussed at the meeting. Generally, this would violate § 3-104. Our only hesitation in declaring a violation here is our uncertainty, based on the limited information we can glean from the rest of the minutes, as to whether the other functions at the open meeting that the Retirement Board recessed were, in fact, functions subject to the Act. It appears that, during the open session, the Board received updates from the Retirement System’s Administrator about the evaluation and performance of the Retirement Plan and received ethics and fiduciary responsibility training. Based on the limited details before us, we cannot rule out the possibility that these topics fell within the administrative function exclusion. *See, e.g., 3 OMCB Opinions* at 126 (finding that a committee performed an administrative function when it “carrie[d] out or implement[ed] its existing legal responsibility for overseeing [a public library’s] financial and accounting systems and the investment of endowment funds”); *6 OMCB Opinions* 23, 27 (2008) (finding that a public body’s receipt of a briefing on an internal audit fell within the administrative function because it related to the body’s oversight responsibilities, did not go “beyond reviewing current operations,” and did not “result[] in any suggested changes in policy.”); *5 OMCB Opinions* 33, 39 (2006) (concluding that a public body engaged in an administrative function when it received training on the Act, “a law that the [public body] must consider and apply regularly”). If all the topics of discussion at the February 2 meeting were administrative in nature, none would have been subject to the Act, and the Retirement Board would not have needed to recess the meeting to address other administrative matters or needed to comply with § 3-104. Thus, in light of our uncertainty about the Act’s general applicability to the February 2 meeting, we stop short of finding a violation and merely emphasize that the summary in the minutes does not satisfy the requirements of § 3-104.

We find also that a vague reference to “actions” that the Retirement Board took following the closed session on July 13, 2021, is insufficiently detailed to satisfy § 3-306(c)(1), which requires minutes to reflect “the action that the public body took on each item.” An item “must be described in sufficient detail so that a member of the public who reviews the minutes can gain an appreciation of the issue under discussion.” *4 OMCB Opinions* 67, 70-71 (2004) (finding minutes insufficiently detailed when they indicated only that there was a “[m]otion to approve the legal recommendation by” the public body’s attorney, a member seconded the motion, and the motion “passed by unanimous votes”). The description here—providing only that the Retirement Board ratified “actions taken in Closed Session”—fails to satisfy the Act, because the minutes do not describe any actions taken in closed session.

The Complainant further alleges that the Retirement Board should have, but failed

to, “proactively unseal[] and enter[] into the public record” the minutes of closed sessions for which the Retirement Board invoked § 3-305(b)(5), the exception that permits a public body to close a session to “consider the investment of public funds.” Although the minutes of closed sessions are generally sealed and confidential, *see* §§ 3-206(b)(3), 3-306(c)(3)(ii), the Act provides that minutes “shall be unsealed and open to inspection . . . for a meeting closed under § 3-305(b)(5) . . . , when the public body invests the funds,” § 3-306(c)(4). The Complainant concedes that the minutes here were unsealed, but he complains that “[t]hey were only unsealed when [he] asked for them,” and “[m]ost members of the public wouldn’t have the first clue that they are entitled to these minutes.” We think the Complainant asks too much. The Act provides only that minutes “shall be unsealed and open to inspection,” which was done here. We thus decline to find a violation of § 3-306(c)(4).

The Complainant also alleges a violation of the Act based on the Retirement Board’s failure to provide a full, unredacted copy of the unsealed minutes. From our review of the minutes, it appears that the Retirement Board unsealed and provided to the Complainant only that portion of the minutes dealing with the discussion of the investment of public funds. That is all that the Act requires.

The Complainant next alleges that the Retirement Board failed to timely post minutes online. 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, “[t]o the extent practicable,” posted online, § 3-306(e)(2). The Complainant asserts that, as of mid-December 2021, no minutes had been posted online since July 2021. But “what is ‘practicable’ depends on the facts,” 12 *OMCB Opinions* 80, 81 (2018), and the Retirement Board’s response fails to address whether posting minutes more quickly was practicable between July and December 2021. In any event, we note that, as of late May 2022, the Retirement Board had posted all minutes through April 2022.

Finally, the Complainant alleges that the Retirement Board violated the Act by not having a person trained in the Act’s requirements present during closed sessions. *See* § 3-213(d)(2). Because the response fails to address this allegation, we cannot determine whether the Board violated § 3-213(d)(2).²⁶

D. Alleged violations by the Retirement Board’s committees

In his final set of allegations, the Complainant asserts that the Retirement Board’s Investment Monitoring Group and Administration and Personnel Oversight Committee violated the Act by failing to provide notice of their meetings, failing to allow the public

²⁶ The Complainant also repeats the allegation that the Commission violated the Act by not having the Retirement Board’s closing statements available for inspection during normal business hours. For the reasons stated above, *see* Section A.3, this fails to state a violation of the Act.

to attend, and failing to prepare minutes. The Commission responds that the two committees' members consist of the Retirement Board members and "carry out day to day duties outside of the Board's regular monthly meetings." But the response tells us nothing about the origin of these committees (and, thus, whether they constitute "public bodies" subject to the Act), nor does the response provide specific rebuttals to the Complainant's allegations regarding notice, the openness of the committees' meetings, and the preparation of minutes. The response simply asserts that none of the committees' meetings were subject to the Act, because the committees "performed solely administrative functions." But the response provides no further details or supporting documentation that would allow us to evaluate the Complainant's allegations or the Commission's assertion that the committees performed only administrative functions. We thus find a violation of § 3-206(b) (requiring a response to a complaint); *see also* 8 *OMCB Opinions* 8, 17 (2012) (finding a violation when the response "offered no facts" by which we could gauge the public body's compliance with the Act).

Conclusion

We find that the Commission and its Executive Committee violated § 3-305(d)(2) by failing to prepare sufficiently detailed closing statements, and § 3-306(c)(2) by failing to prepare sufficiently detailed closed session summaries. The Commission also violated § 3-305(d)(2) by engaging in closed session discussions that exceeded the scope of the claimed exceptions. With respect to the Commission's Retirement Board, we note several instances in which the Board failed to satisfy the Act's requirements for closing statements and closed session summaries; but we stop short of finding violations because we do not know whether the Retirement Board, during the closed sessions in question, was performing administrative functions beyond the scope of the Act. We similarly cannot conclude whether any of the Retirement Board's closed session discussions exceeded the scope of the claimed exceptions, whether the Retirement Board was required, but failed, to prepare a summary of a meeting closed to perform an administrative function, or whether committees of the Retirement Board violated the Act's requirements requiring notice of meetings, the public's right to attend, and the preparation minutes. Our inability to resolve these matters stems partly from the Commission's failure to provide closed session minutes for any of the involved bodies, and the Commission's failure to provide a sufficiently detailed response to some of the allegations. We thus find violations of § 3-206(b). This Opinion is subject to the acknowledgement and announcement requirements of § 3-211.

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