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STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

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November 21, 2022

Maryland 529 Board

The Complainant alleges three violations of the Open Meetings Act (the “Act”) related to a September 9, 2022, meeting of the Maryland 529 Board (the “Board”). Specifically, the Complainant alleges that the Board violated the Act by: (1) providing improper notice of the meeting; (2) improperly invoking the administrative function in order to close the meeting; and (3) failing to provide information about the closed administrative session in accordance with the Act. In addition, the Complainant states that, since the Board’s May 2022 meeting, no meeting minutes have been posted to the Board’s website and the Board has not otherwise provided for public review of those minutes. As explained more fully below, we find that the Board violated §§ 3-104 and 3-306(b)¹ of the Act, regarding disclosure of information about the closed administrative session and the preparation of minutes for the Board’s June and July, 2022, meetings, respectively. As to the allegation that the Board violated § 3-302(a)’s notice provision, we conclude that we do not have enough information to resolve the complaint. Finally, we find no violations regarding the Board’s decision to close its September 9 meeting to perform an administrative function or as to the Board’s preparation of the August 2022 meeting minutes.

Background

The General Assembly created the Maryland 529 Program² in 1997 with the intent to “enhance the accessibility and affordability of higher education” by “establishing a method to provide for the prepayment of tuition at eligible institutions of higher education.” Md. Code Ann., Educ. (“ED”) § 18-1902. The Maryland 529 Board administers the plans and trusts established under Subtitles 19A, 19B, and 19C of Title 18 of the Education Article, ED § 18-1904(b), and consists of eleven members, including the State

¹ Statutory references are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise specified.

² The 529 Program was originally called the Maryland Higher Education Investment Program. See 1997 Md. Laws, ch. 110. The program was renamed in 2016. 2016 Md. Laws, ch. 39; see also Md. Code Ann., Educ. § 18-1902.1.

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Superintendent of Schools, the State Comptroller,³ and five members of the public who are appointed by the Governor and serve staggered terms of four years, ED § 18-1904(c) and (f). According to the Board’s website,⁴ the Board meets regularly to discuss “the plans’ performance and goals,” and portions of some of those meetings are held in closed session. The website also indicates that “meetings are scheduled months in advance and are subject to change.”

The Board is required to appoint an executive director. ED § 18-1905(d)(1)(i). In its response to the complaint, the Board explains that it recently hired a new executive director who began employment on September 1, 2022. This new executive director came on board while the Board was “in the midst of addressing a calculation error for the Maryland Prepaid College Trust [“MPCT”] that was affecting thousands of families trying to pay tuition for the fall 2022 semester.”⁵ Describing the situation as one of “crisis management,” the Board further explains that the executive director wanted to engage outside counsel, a move that required approval by the Board. It was in this context, the Board stresses, that the Board’s September 9, 2022, meeting took place.

Discussion

A. Notice of the September 9, 2022, Meeting

The Board’s website indicates that its monthly meetings are held on Thursdays from 9:30 a.m. to 1:00 p.m. Pursuant to the 2022 schedule on its website, the regularly-scheduled meeting in September was to be held on Thursday, September 15, 2022. The Complainant advises that he had requested time to speak at that meeting, and was therefore checking the Board’s website on a daily basis for an agenda. On September 9 at around 1:00 p.m., the Complainant visited the Board’s website and discovered that notice and an agenda for a meeting later that day had been posted.

In response to the complaint, the Board asserts that an urgent matter—specifically, the Board’s consideration of the retention of outside counsel to assist with addressing the MPCT error—required an expeditious meeting of the Board. The new executive director did not want to wait until the September 15 meeting to address the question of retaining counsel and potentially move forward with doing so. Thus, the executive director and the Board together determined a date when a quorum could meet and, when a date was selected, the Board posted notice and an agenda to the Board’s website. The Board emphasizes that all such notices and agendas are typically found on its website. According

³ Board members who are State officials may designate an employee to represent them. ED § 18-1904(d).

⁴ See Maryland 529, Board and Committee Meeting Schedule, <https://maryland529.com/About-Us/Our-Board-and-Staff/Board-Meeting-Agendas-and-Minutes> (last visited Nov. 21, 2022).

⁵ The Complainant states that the Board has “withheld payment of earnings on Maryland Prepaid College Trust accounts since April 2022.”

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to the Board, notice was posted at 3:09 p.m. on September 8—just over 24 hours before the 5:30 p.m. meeting on September 9. The Board posted a “revised version” of the notice at 9:50 a.m. the morning of the meeting.

The Act requires a public body to give “reasonable advance notice” of its meetings. § 3-302(a). Ordinarily, that notice must be in writing, include the date, time, and place of the meeting, and “if appropriate, include a statement that a part or all of [the] meeting may be conducted in closed session.” § 3-302(b). The Act also provides methods for giving notice of meetings, including “by posting the notice on an Internet website ordinarily used by the public body to provide information to the public,” or “by any other reasonable method.” § 3-302(c).

The Act does not prevent a public body from meeting on short notice when it is necessary to do so. *See 8 OMCB Opinions* 46, 51 (2012). Instead, as we have explained, “the touchstone” of reasonableness as it relates to notice of meetings is “whether a public body gives notice of a future meeting as soon as is practicable after it has fixed the date, time, and place of the meeting.” *5 OMCB Opinions* 83, 84 (2006); *see also, e.g., 16 OMCB Opinions* 178, 179-80 (2022) (finding notice reasonable even though it was provided the day before the meeting). At the same time, when a public body determines that an urgent matter requires a prompt and previously unscheduled meeting, it is incumbent upon the public body to “take extra measures to provide the best notice feasible under the circumstances.” *16 OMCB Opinions* at 179 (quoting *10 OMCB Opinions* 22, 28 (2016)). Meetings called on short notice may “require the public body to make extra efforts to get the word out to the press, and ideally to the members of the public who follow its activities.” *9 OMCB Opinions* 110, 115 (2014). For example, we have found that notice provided the day before a rescheduled meeting was reasonable when the public body not only posted notice to its website and calendar, but also sent the notice to the interested public via its text and email messaging services. *16 OMCB Opinions* at 179-80.

Here, we do not question the Board’s judgment that it needed to meet sooner than its next regularly-scheduled meeting to address what plainly appear to be urgent circumstances. Similarly, there is nothing in the submissions that causes us to doubt that the Board posted notice of the September 9 meeting as soon as practicably possible after it had determined the date. However, there is also no indication as to whether the Board undertook extra efforts to notify the public that it was meeting on short notice. *See 9 OMCB Opinions* 199, 200 (2014) (“[S]imply posting a notice on the public body’s website shortly before the meeting is likely not effective; a public body cannot expect the public to continuously check its website.”). Given this lack of information about what, if any, extra steps the Board took to provide notice of its September 9 meeting, we cannot conclude that there was no violation of § 3-302(a). At the same time, we cannot definitively find that the Board failed to give “advance reasonable notice” as that section requires. Thus, we are unable to resolve this particular allegation. *See* § 3-207(c)(2) (recognizing that “[a]n

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opinion of the [Compliance] Board may state that the Board is unable to resolve the complaint).

If, in the future, the Board determines that it is necessary to meet on as short notice as it did here, the Board should ensure that it takes “extra measures,” 10 *OMCB Opinions* at 28, to provide advance notice of its meeting to the public. For a meeting that must be called on such an urgent basis, simply posting notice to the Board’s website likely will not be sufficient to avoid a violation of § 3-302(a). While we do not prescribe the exact measures that the Board should take, the Board might, for instance, send notice to its list of E-Newsletter subscribers⁶ to alert them that it is meeting outside of its regularly-scheduled meetings. In addition, the Board might take advantage of any social media platforms it uses to make sure the interested public is informed.

B. Invocation of the Administrative Function

After the Board discussed the retention of outside counsel during the open portion of its September 9 meeting, the Board voted to close the meeting to perform an administrative function—i.e., to discuss the formation of a “temporary working group focused on the Maryland Prepaid College Trust.” The Complainant alleges, essentially, that the Board exceeded the scope of the administrative function during that closed session. Noting that there was disagreement amongst the Board members as to whether the topic would fall under the administrative function—and thus generally be exempt from the Act’s provisions—the Complainant takes the position that, while discussion about the creation and composition of such a workgroup might be administrative in nature, the Board’s determination of the powers of the workgroup is not.

In response, the Board points out that its bylaws permit it to form Special Committees and to delegate authority to those committees. Thus, the Board contends that it was administering its bylaws when it closed the September 9 meeting to discuss whether to “form a special committee to address the urgent matters of the Maryland Prepaid College Trust” and “delegate any particular authority to such a committee.” The Board also explains that, though it lawfully closed the meeting, the “unique circumstances” surrounding the meeting led the Board to approve the release of the minutes from the closed session. The Board approved the minutes at its October 17, 2022, meeting and subsequently posted the minutes to its website.

We find no violation. With the exception of certain disclosure obligations that are triggered when a public body closes an open meeting to perform an administrative function, § 3-104, the Act does not apply to a public body that is carrying out an “administrative

⁶ See Maryland 529 Board, E-Newsletter Sign-Up, <https://maryland529.com/About-Us/E-Newsletter-Sign-Up> (last visited Nov. 21, 2022).

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function,” § 3-103(a)(1)(i). The Act defines an “administrative function” as, among other things, “the administration of . . . a rule, regulation, or bylaw of a public body.” § 3-101(b)(1)(iii).⁷ Though, in practice, the precise contours of the administrative function can sometimes be difficult to divine, *e.g.*, 14 *OMCB Opinions* 92, 94-96 (2020), here we have no trouble concluding that the Board was administering its bylaws during the September 9 closed session. The Board’s bylaws, adopted in 2002 and amended and restated most recently in 2019, permit the Board to establish “both Standing and Special Committees,” and to delegate authority to those committees. Bylaws of the Maryland 529 Board, Art. VII, §§ 1, 6, 7. Thus, a meeting to determine whether to form a special committee and, if formed, the composition and powers of that special committee is a meeting to administer Article VII, §§ 1, 6, and 7 of the Board’s bylaws. *Cf.* 16 *OMCB Opinions* 85, 86 (2022) (concluding that a public body was performing an administrative function when it met to interview candidates for a position that the law required it to fill, and citing to other cases concerning appointments and hiring).

The minutes of the September 9, 2022, closed session—which, as noted above, the Board voted to make public—confirm that the closed session fell wholly within the administrative function. The minutes indicate that the primary topic of discussion was whether or not to form a special committee and to delegate to that special committee authority to act on the Board’s behalf regarding urgent issues related to the MPCT. When the Board ultimately rejected that proposal, it decided instead to convene weekly meetings between the executive director and a quorum of the Board in order to assist the executive director and program staff with resolving those urgent issues.

Thus, although the discussion strayed from one solely focused on the formation of a special committee, it nonetheless remained within the scope of the administrative function because the coordination of communication between Board members and staff can be fairly characterized as a “housekeeping matter,” which we have previously determined falls within the administrative function. *See, e.g.*, 14 *OMCB Opinions* at 94-95 (finding that a public body was addressing “housekeeping matters” when it prepared for onboarding new members at one meeting and then discussed the video platforms available to conduct remote meetings at another); *see also* 12 *OMCB Opinions* 104, 107 (2018) (“The purpose of the administrative function exclusion is to enable public bodies to perform routine, non-policy-oriented tasks efficiently.”). The minutes make it clear that the Board was not discussing “a new policy to apply generally,” 14 *OMCB Opinions* 83, 87 (2020), but, rather, figuring out the logistics of coordinating necessary communication between the Board and its executive director so that together they could carry out their duty to

⁷ An “administrative function” does not include an advisory, judicial, legislative, quasi-judicial, or quasi-legislative function. § 3-101(b)(2). There is no contention that the Board was performing any of these functions when it closed the meeting to discuss the formation of a special workgroup, and nothing in the facts before us causes us to believe that it was.

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administer the MPCT, ED § 18-1904(b)(1)—a duty which includes responding to problems related to the trust in a timely way.

C. *Compliance with § 3-104*

The Complainant alleges that the Board violated § 3-104 of the Act, which contains disclosure obligations for public bodies who close an open meeting to perform an administrative function. Specifically, § 3-104 requires that the minutes for the public body's next meeting include "a statement of the date, time, place, and persons present at the administrative function meeting," and "a phrase or sentence identifying the subject matter discussed at the administrative function meeting." At the time he lodged his complaint, the Complainant indicates that the minutes for the September 9 and 15 meetings were not yet publicly available. However, the Complainant states that he attended the meeting on September 15 and that nobody "read the proceedings of the closed meeting on September 9 into the record."

The Board responds that the Board reconvened its open meeting on September 9, 2022, after its administrative session. When it returned to open session, the Board Chair reported that the Board had met in administrative session to discuss "the Board streamlining the process for voting to support the Executive Director and staff," and provided detail about the options considered and the Board's decision. The Board further explains that it is its practice, when possible, to "reconvene an open session following a closed session in order to have the open session minutes of such a meeting reflect the topics discussed and actions taken during the closed session." The Board indicates that it does this in order to provide the public with access to the information sooner, given that the minutes from the "same-day" session will be approved before the minutes from the next-scheduled meeting.

The Board's "next meeting" following its September 9, 2022, administrative session was held on September 15, 2022. Thus, under a literal reading of § 3-104, the minutes of that meeting were required to contain the "date, time, place, and persons present" at the September 9 session, and "a phrase or sentence identifying the subject matter discussed." To the extent that the September 15, 2022, "recorded session" constitutes the Board's minutes of that meeting,⁸ it is clear that those minutes do not include what § 3-104 requires. As the Board points out, however, the minutes of the September 9, 2022, open meeting include information about the administrative session, and we have previously said that a public body may include a closed-session summary in the minutes of the meeting in which

⁸ See § 3-306(b)(2)(i) ("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."). Cf. also 12 *OMCB Opinions* 28, 32 (2018) ("[W]here a body orally reads an otherwise sufficient closed-session summary in the streaming minutes, it has complied with the requirements of § 3-306(c)(2).").

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the closed session occurred. *See, e.g.*, 10 *OMCB Opinions* 77, 78 (2016). We thus find no violation as to the Board’s decision to disclose details of the administrative session in the September 9 minutes rather than the September 15 minutes.

We do, however, find a violation based on the content of the summary. While not explicitly indicated, the “date, time, and place,” § 3-104(1), of the administrative session are obvious, given that the information pertains to a closed session that immediately preceded the Board’s return to open session. And, the September 9 open session minutes provide a sufficient level of detail about “the subject matter discussed,” § 3-104(2): the minutes indicate discussion about “streamlining the process for voting to support the Executive Director and staff,” including an “option of forming a Special Committee with certain delegated authorities . . . which was rejected by the Board.” In addition, the summary in the open session minutes indicates that “the Board will institute a weekly call with a Board quorum to assist . . . with issues pertaining to the resolution of the MPCT issues.”

As to § 3-104’s requirement that the minutes of the next meeting indicate who attended the closed administrative session, however, the summary falls short. Although the minutes list attendees for the open portion of the meeting and indicate that the Treasurer left the meeting after the Board resolved to move into closed session to perform an administrative function, it is not entirely clear whether everyone else listed as an attendee of the open session also attended the closed administrative session. We thus find a violation of § 3-104 based on the Board’s failure to clearly specify who was present during the administrative session. *See* 9 *OMCB Opinions* 206, 215 (2015) (finding, where the minutes “beg[a]n with a list of the members and staff present at the outset and then identif[ied] the staff and others who present[ed] information on each matter,” that a public body violated § 3-104 by “not specify[ing], in one place, whether everyone identified as present at the outset remained for the closed sessions”); *see also* 10 *OMCB Opinions* 85, 89 (2016) (advising “public bodies to put all of the required closed-session information in one place in the open-session minutes, under a heading that tells the public that the information is a summary of the closed session”). We commend the Board for making the minutes of the closed administrative session public,⁹ thus disclosing far more than what § 3-104 requires. But that does not absolve the Board of its obligation to comply with § 3-104.

D. Delay in Posting Meeting Minutes

Finally, the Complainant alleges that there have been significant “non-conformities” regarding the Board’s meeting minutes. In particular, the Complainant states that no

⁹ *See*

<https://maryland529.com/LinkClick.aspx?fileticket=qUPuecbqSrCM%3d&tabid=1156&portalid=0&mid=4659&language=en-US> (last visited Nov. 21, 2022).

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meeting minutes have been posted to the Board’s website—where minutes are typically posted—since its May 2022 meeting. In response, the Board explains that meeting minutes are ordinarily approved at the following monthly meeting but that, recently, staff turnover and the urgent issues related to the MPCT resulted in a delay in the preparation and approval of meeting minutes. The Board advises that, at its October 17, 2022, meeting the Board approved all outstanding meeting minutes from meetings held between June 23 and September 9. The Board posted those minutes to its website the following day, on October 18, 2022.

Section 3-306(b)(1) of the Act requires a public body to prepare the minutes of its meetings “as soon as practicable after [it] meets.” Those minutes are “public records and [they] shall be open to public inspection during ordinary business hours.” § 3-306(d). The Act also requires a public body to post its minutes online “[t]o the extent practicable.” § 3-306(e)(2). We have said that “[r]outine delays of over several months . . . violate [the ‘as soon as practicable’] standard.” 12 *OMCB Opinions* 80, 81 (2018). Instead, “[a]s a general rule,” minutes should be “available on a cycle paralleling a public body’s meeting.” 6 *OMCB Opinions* 164, 169 (2009). At the same time, we have recognized that sometimes “special circumstances might justify a delay,” *id.*, and that the standard requires us to consider the specific facts and circumstances surrounding each claimed delay, *see, e.g.*, 8 *OMCB Opinions* 173, 174-75 (2013) (finding no violation of the Act where the public body routinely adopted minutes approximately eight weeks post-meeting given the public body’s “particular circumstances,” most notably its lack of sufficient funding and staffing).

While we are sympathetic to the circumstances that may have caused the Board to deviate from its normal practice of approving and posting its meeting minutes at each monthly meeting, on balance we find that the Board violated § 3-306(b) by failing to prepare the minutes of its June and July 2022 “as soon as practicable.” However, as explained below, we do not find a violation regarding the Board’s August meeting.

It is clear that, during the months following its May meeting, the Board was operating under less than ideal conditions. But, as to the June and July meetings, the delays were longer and the staffing and other issues less dire than in other matters where we have declined to find a violation of the Act. *See, e.g., id.* (finding no violation for an eight-week delay where the public body routinely operated with approximately two hours of administrative support time per week); 16 *OMCB Opinions* 47, 48 n.2, 53-54 (2022) (finding no violation for a five-week delay for a public body that was temporarily without a fiscal agent or administrative support). The delays here amounted to more than 16 weeks (for the June meeting) and more than 13 weeks (for the July meeting). And, though the Board points to vacancies in the executive director and, subsequently, the acting executive director positions, it does not claim that there were other staffing shortages—e.g., for support staff—that affected the process. Regarding the Board’s August meeting minutes, however, we find no violation. Based on the exigent circumstances described above, as

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well as our prior opinions, we do not think a delay of approximately eight weeks in the adoption of minutes for that meeting violates the Act.

Given all that is before us, we find that the Board's June and July meeting minutes were not prepared "as soon as practicable." We find no violation as to the August meeting minutes. In any event, the minutes for all three meetings are now posted to the Board's website, along with the minutes for its October 17, 2022, meeting.

Conclusion

In sum, based on the information we have, we cannot determine whether the Board provided reasonable advance notice of its September 9, 2022, meeting. Thus, we are unable to resolve the allegation that the Board violated § 3-302(a). But, we find that the Board properly closed its September 9 meeting to perform an administrative function, and the (now public) minutes of that closed session indicate that the Board did not exceed the scope of the administrative function. However, the Board violated § 3-104 by failing to unambiguously disclose who attended the administrative session. Finally, we conclude that the Board violated § 3-306(b) by failing to prepare the minutes of its June and July 2022 meetings as soon as practicable after those meetings. We find no violation as to the preparation of the August meeting minutes. This opinion is subject to the announcement and acknowledgement requirements set forth in § 3-211.

Open Meetings Compliance Board

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