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*Lt. Governor*



**LYNN MARSHALL, ESQ.**  
**CHAIR**

**JACOB ALTSHULER, ESQ.**  
**VACANT**

**STATE OF MARYLAND**  
**OPEN MEETINGS COMPLIANCE BOARD**

***16 Official Opinions of the Compliance Board 224 (2022)***

**December 7, 2022**

**Montgomery County Board of Education**

The Complainants allege that the Montgomery County Board of Education (the “Board of Education” or “Board”) violated the Open Meetings Act (the “Act”) by failing to make sufficiently detailed disclosures before meeting in closed session. For the following reasons, we agree that the disclosures lacked details required by the Act.

The Act generally requires a public body to conduct its business in meetings open to the public, § 3-301,<sup>1</sup> except when the body carries out a function outside the scope of the Act,<sup>2</sup> or discusses a matter that falls within one of fifteen exceptions that allow for a closed session, § 3-305(b). Before a public body meets in closed session to discuss a matter that falls under one of the exceptions, the Act requires that the presiding officer “conduct a recorded vote on the closing of the session” and “make a written statement of the reason for closing the meeting, including a citation of the authority” for closing the meeting under § 3-305, “and a listing of the topics to be discussed.” § 3-305(d)(2).

On September 22, 2022, the Board of Education met and, before entering closed session, adopted a resolution disclosing its intent to discuss the following matters:

- a. Various quasi-judicial matters outside the purview of the Open Meetings Act, which shall be summarized in the Report of Previous Closed Session;
- b. Various administrative matters, including matters related to the operating budget and capital budget strategy, which are outside the purview of the Open Meetings Act, as permitted under General

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<sup>1</sup> Statutory references are to the General Provisions Article of the Maryland Annotated Code.

<sup>2</sup> The Act does not apply when a public body is carrying out administrative, judicial, or quasi-judicial functions, or to chance encounters, social gatherings or any other occasions not intended to circumvent the Act. § 3-103(a).

Provisions Article, Section 3-103(a), and which shall be summarized in the Report of Previous Closed Session;

- c. Personnel matters, including the appointment, employment, assignment, promotion, discipline, compensation, resignation, and/or performance evaluation of possible future appointees or current employees, and any matters related to and stemming from the discussion that is likewise permissible under General Provisions Article, Section 3-305(b)(1), which must take place in closed session to allow Board members to discuss the qualifications of the candidates in a candid manner, protect the privacy of the confidential, personal information of the individuals discussed, and/or to prevent any harm to the reputation of any individuals discussed;
- d. The Board's strategy, positions, and parameters concerning collective bargaining negotiations, permitted by General Provisions Article, Section 3-305(b)(9), and to receive legal advice in connection therewith, permitted by General Provisions Article, Section 3-305(b)(7), which discussions must remain confidential to protect the negotiation strategy of the Board and to protect and maintain attorney-client privilege; moreover, to the extent that these matters are discussed in the context of Operating Budget and Capital Budget Strategy, and how such matters may impact the formulation of the budget, they are administrative matters outside of the purview of the Open Meetings Act; and
- e. Legal advice regarding litigation, which is permissible pursuant to General Provisions Article, Sections 3-305(b)(7) and 3-305(b)(8).

The Complainants assert that the resolution “contains only uninformative boilerplate language” and therefore violates the Act. We agree that the required disclosures are missing necessary details.

While “there is no hard and fast rule for how much information is required” in a closing statement, 7 *OMCB Opinions* 216, 224 (2011), there must be “some account beyond uninformative boilerplate,” 4 *OMCB Opinions* 43, 48 (2004), 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* 99, 101 (2021) (quoting 15 *OMCB Opinions* 37, 39 (2021)). “Someone reading the written statement ought to have the answer to two questions: what are the [members of the public body] planning to talk about (‘topics to be discussed’), and why should this topic be discussed in closed session (‘the reason for closing the meeting’).” 4 *OMCB Opinions* at 49. Thus,

“[w]e have often cautioned public bodies about merely repeating or paraphrasing the words of the statutory exception in lieu of meaningfully disclosing the topics of the closed session or reasons for closure.” 15 *OMCB Opinions* 63, 65 (2021).

Here, the Board of Education invoked four exceptions under § 3-305(b) that required disclosures: the personnel matters exception of § 3-305(b)(1), the collective bargaining exception of § 3-305(b)(9), and the legal advice and litigation exceptions of §3-305(b)(7) and (8).<sup>3</sup> Each disclosure is lacking in some respect.

The Board’s disclosure in subsection (c) of the closing statement, about personnel matters, provides both the authority for the closure (§ 3-305(b)(1)) and the reason for the closure: to allow Board members “to discuss the qualifications of the candidates in a candid manner, protect the privacy of the confidential, personal information of the individuals discussed, and/or to prevent any harm to the reputation of any individuals discussed.” But the disclosure fails to provide a topic of discussion, offering instead a near-verbatim restatement of the exception itself. *Compare* closing statement (referring to “[p]ersonnel matters, including the appointment, employment, assignment, promotion, discipline, compensation, resignation, and/or performance evaluation of possible future appointees or current employees”), *with* § 3-305(b)(1)(i) (authorizing a public body to meet in closed session to discuss “the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom it has jurisdiction”). “As we have explained on a number of occasions, ‘while a public body need not disclose a level of detail about a topic to be discussed in closed session that would undermine the confidentiality permitted by the Act, saying nothing beyond the statutory language deprives the public of information to which it entitled.’” 13 *OMCB Opinions* 1, 3 (2019) (quoting 12 *OMCB Opinions* 28, 31 (2018)). We believe the Board could have provided more detail about the personnel matters under discussion without compromising confidentiality, perhaps by identifying the positions of the personnel under discussion or, at the very least, specifying which category or categories of personnel matters listed in the exception would be the focus of the discussion. *Id.* (finding a closing statement invoking the personnel matters exception to be insufficiently detailed). Merely restating the language of the exception itself was insufficient and a violation of the Act.

As for the disclosure in subsection (d) of the closing statement, relating to the collective bargaining exception, we commend the Board of Education for identifying a topic (“strategy, positions, and parameters concerning collective bargaining negotiations”) and a reason for excluding the public from the discussion (“to protect the

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<sup>3</sup> The closing statement also references quasi-judicial and administrative matters, but these are generally outside the scope of the Act. *See* § 3-103(a)(1)(i), (iii) (providing that the Act does not apply to a public body when it is carrying out an administrative or quasi-judicial function); *but see* § 3-104 (requiring a public body to make certain post-meeting disclosures when a public body “recesses an open session to carry out an administrative function in a meeting that is not open to the public”).

negotiation strategy of the Board”). But a public body invoking this exception should, “at a minimum, identif[y] on the closing statement which labor union [is] involved.” 16 *OMCB Opinions* 123, 126-27 (2022). The Board’s failure to do so violated the Act.

Finally, the Board’s disclosure in subsection (e) of the closing statement (referring to “legal advice regarding litigation”) was too vague to satisfy the Act. We note that the litigation exception of § 3-305(b)(8), one of the two exceptions that the Board invokes in subsection (e) of the closing statement, applies “only when the discussion directly relates to . . . pending or potential litigation.” 1 *OMCB Opinions* 56, 61 (1994); *see also* § 3-305(b)(8) (authorizing a public body to meet in closed session to “consult with staff, consultants, or other individuals about pending or potential litigation”). Although we have said that a public body’s disclosure may be sufficient when it refers only to “possible litigation,”<sup>4</sup> the closing statement here does not say even that much, referring only to “litigation.” Thus, a person reading this would not know whether the Board intended to discuss ongoing litigation, impending litigation, or potential litigation.

We further note, regarding the legal advice exception of § 3-305(b)(7) (the other exception that the Board invokes in subsection (e) of its closing statement), that “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)). To be sure,

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,<sup>[5]</sup> 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.

10 *OMCB Opinions* at 6 (emphasis added). Likewise, a public body may invoke the litigation exception “to preserve the attorney-client and work-product privileges” or “to discuss the strengths and weaknesses of their case and their options for dealing with potential or pending litigation.” 3 *OMCB Opinions* 61, 65 (2000). But whatever the reason, a public body should disclose it. 10 *OMCB Opinions* at 6.

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<sup>4</sup> *See* 1 *OMCB Opinions* 242, 244 (1997) (declining to decide whether such a description violated the Act because of the Compliance Board’s inability to substitute its judgment for that of the public body’s attorney about “the possible consequences of saying anything more than the two words ‘possible litigation’”).

<sup>5</sup> Indeed, the Board provided that very reason for invoking the legal advice exception along with the collective bargaining exception in subsection (d) of the closing statement.

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The Board asserts that the reason for having this particular discussion in closed session was to “protect attorney-client communications,” a reason that was implicit, the Board says, in the information provided in the closing statement. We disagree. As we have previously said, “even when the need for secrecy ‘may be apparent upon reflection,’ there is ‘no excuse for omitting it . . . from the written statement.’” 15 *OMCB Opinions* at 101 (quoting 4 *OMCB Opinions* at 49). The Board’s failure to provide any reason here violated the Act.

In conclusion, we find that the Board of Education violated § 3-305(d) by failing to provide sufficiently detailed disclosures to the public before meeting in closed session.<sup>6</sup> This opinion is subject to the acknowledgement and announcement requirements of § 3-211.

**Open Meetings Compliance Board**

*Lynn Marshall, Esq.*

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<sup>6</sup> We do not address an allegation, raised for the first time by one of the Complainants in a reply to the Board’s response, that the Board’s agenda for the September 22 meeting omitted a known item of business. Our complaint process permits a complainant to file a reply to correct alleged factual misstatements in a response, not to raise new issues. See Open Meetings Compliance Board Complaint Procedures, <https://www.marylandattorneygeneral.gov/Pages/OpenGov/openmeetings/complaint.aspx> (last visited Nov. 23, 2022).