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**STATE OF MARYLAND**  
**PUBLIC INFORMATION ACT COMPLIANCE BOARD**

**PIACB 23-27**

**June 16, 2023**

**Town of Berlin, Custodian**  
**Jason Walter, Complainant**

The complainant, Jason Walter, alleges that the Town of Berlin (“Berlin”) has violated the Public Information Act (“PIA”) by denying his request for copies of the minutes and recordings from certain closed meetings of the Mayor and Council. Berlin maintains that the minutes are exempt from disclosure. As explained below, we conclude that Berlin has not violated the PIA.

**Background**

In 2016, Berlin bought the land at a former chicken processing plant with plans for redeveloping the area into a park.<sup>1</sup> Five years later, in 2021, and after the property was assessed at a lower value than what Berlin had paid for it, the Mayor and Council held a “listening session” to get citizen feedback about a proposal to sell certain parcels of the land.<sup>2</sup> Later that year, Berlin issued a request for proposals (“RFP”).<sup>3</sup> By December 2022, Berlin had set up a subcommittee to negotiate with one of the entities that had responded to the RFP.<sup>4</sup>

Later, in April of 2023, the complainant sent a PIA request to Berlin seeking “the full, unredacted minutes/voice recordings from all closed sessions regarding the sale/development of [H]eron [P]ark.” Berlin denied the complainant’s request, taking the

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<sup>1</sup> See Matthew Prensky, *Berlin Officials Debate Future of Heron Park After Potential Buyers Come Forward*, Salisbury Daily Times (Mar. 16, 2021), <https://www.delmarvanow.com/story/news/local/maryland/2021/03/16/berlin-heron-park-future-tyson-chicken-plant/4706224001/>.

<sup>2</sup> Prensky, *supra*, note 1.

<sup>3</sup> See Charlene Sharpe, *Heron Park Sale Negotiations Continue With Pre-Demolition Process Underway*, The Dispatch (Dec. 29, 2022), <https://mdcoastdispatch.com/2022/12/29/heron-park-sale-negotiations-continue-with-pre-demolition-process-underway/>.

<sup>4</sup> Sharpe, *supra*, note 3.

position that the records were exempt from disclosure under § 3-306(c)(3)(ii),<sup>5</sup> a provision in the Open Meetings Act (“OMA”) that generally forbids inspection of the minutes or recordings of closed sessions.

Unhappy with Berlin’s response, the complainant sought dispute resolution assistance through the Public Access Ombudsman, who was unable to resolve the dispute. In his complaint to this Board, the complainant contends that the minutes and recordings of the closed meetings are not exempt from production under the PIA because the exception in the OMA that Berlin cited to close the meetings does not apply. According to the complainant, the topic of those closed sessions was “backroom horsetrading with a developer” regarding the sale of property “tied to a heavy debt service obligation and demolition grant . . . approaching expiration.” Put differently, because, in the complainant’s view, Berlin improperly closed the meetings at issue, it cannot rely on § 3-306(c)(3)(ii) to withhold the minutes and recordings of those meetings.

In response to the complaint, Berlin stands by its assertion that § 3-306(c)(3)(ii) applies to preclude production of the requested meeting minutes and recordings. Berlin also maintains that the exceptions to § 3-306(c)(3)(ii) provided in the statute do not apply because the meetings were not closed pursuant to the specific provisions cited in subsections (c)(4)(i) and (ii), and a majority of the members of the Council have not voted to unseal the minutes or recordings, as provided in subsection (c)(4)(iii). Berlin explains further that the meetings at issue were closed pursuant to § 3-305(b)(14), which allows a public body to meet in a closed session to “discuss, before a contract is awarded or bids are opened, a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.” In support, Berlin attaches the meeting agendas for three meetings of the Mayor and Council: (1) March 21, 2022; (2) July 25, 2022; and (3) March 23, 2023.

In reply, the complainant reiterates his position that § 3-305(b)(14) did not justify closure of the relevant meetings. To support his position, he cites several opinions of the Open Meetings Law Compliance Board (“OMCB”) interpreting that provision. In addition, regarding § 3-306(c)(4)(iii)’s exception for instances in which a public body votes to unseal the minutes of closed sessions, the complainant argues that the Council has not “been given the opportunity to vote to unseal anything,” and suggests that the Council is not “aware they can vote to unseal minutes.”

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<sup>5</sup> Statutory citations are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise specified.

## Analysis

The PIA authorizes us to review and resolve complaints alleging certain violations of its provisions, *see* § 4-1A-04(a) and (b), including allegations that a custodian wrongfully denied inspection of public records, § 4-1A-04(a)(1)(i).<sup>6</sup> If we conclude that a violation of the PIA has occurred, we must issue a written decision and order an appropriate remedy, as provided by the statute. § 4-1A-04(a)(2) and (3). For example, if we determine that a custodian improperly withheld or redacted records, we must order the custodian to “produce the public record[s] for inspection.” § 4-1A-04(a)(3)(i).

The PIA favors disclosure of public records. *See Kirwan v. Diamondback*, 352 Md. 74, 80 (1998) (explaining that the PIA “establishes a public policy and a general presumption in favor of disclosure of government or public documents,” and citing cases). At the same time, the PIA also contains exceptions to disclosure, including for instances where another law outside of the PIA precludes release of certain records or information. *See* § 4-301(a). Section 4-301(a)(2)(i) requires a custodian to deny inspection when “the inspection would be contrary to . . . a State statute.” For example, in *MacPhail v. Comptroller*, the Appellate Court of Maryland (then known as the Court of Special Appeals), held that § 13-202 of the Tax-General Article, which prohibits State employees from disclosing “tax information,” operated via what is now § 4-301(a)(2)(i) of the PIA to preclude disclosure of an estate tax return. 178 Md. App. 115, 122 (2008).

Though Berlin did not cite to § 4-301(a)(2)(i) specifically, its argument is essentially that § 3-306(c)(3)(ii) applies via that provision in the PIA and requires that Berlin deny inspection of the meeting minutes and recordings that the complainant has requested. Section 3-306(c)(3)(ii) of the OMA states that “[e]xcept as otherwise provided in paragraph (4) of this subsection, the minutes and any recording of a closed session *shall* be sealed and *may not* be open to public inspection.” (emphasis added). The language of the provision is mandatory; a custodian cannot publicly disclose the minutes or recordings of closed sessions unless one of the exceptions in paragraph (4) applies. Paragraph (4) provides that “[t]he minutes and any recording *shall* be unsealed and open to inspection” under certain circumstances, including “on request of a person or on the public body’s own initiative, if a majority of the members of the public body present and voting vote in favor of unsealing the minutes and any recording.”<sup>7</sup> § 3-306(c)(4)(iii) (emphasis added).

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<sup>6</sup> Before filing a complaint, a complainant must attempt to resolve a dispute through the Public Access Ombudsman and receive a final determination that the dispute was not resolved. § 4-1A-05(a).

<sup>7</sup> The other circumstances, which are not relevant here, relate to the exceptions to the OMA’s requirement that public bodies meet in open session found in §§ 3-305(b)(5) and (6), and require unsealing of minutes “when the public body invests the funds” and “when the public securities being discussed have been marketed.” § 3-306(c)(4)(i) and (ii).

In our view, Berlin has demonstrated that §§ 4-301(a)(2)(i) and 3-306(c)(3)(ii) preclude disclosure at this point in time. *See Lamson v. Montgomery County*, 460 Md. 349, 366-67 (2018) (custodian must sufficiently demonstrate that an exemption to the PIA prevents disclosure). To support its decision to deny inspection of the requested meeting minutes and recordings, Berlin has provided the agendas for the relevant meetings. The agendas indicate that, for each of those meetings, the Mayor and Council went into closed session pursuant to § 3-305(b)(14), which permits meeting closure to discuss matters directly related to “a negotiating strategy or the contents of a bid or proposal” if certain circumstances are present. And, for each meeting, the agendas contain a brief discussion of what was to be addressed during the closed session, e.g., for the March 21, 2022, meeting, “RFP 2021-02; Disposition and Development of Parcel 57, and Parcel 410, and Parcel 191 at Heron Park,” and, for the March 23, 2023, meeting, “[o]ngoing negotiations in reference to the sale of parcels at Heron Park.” Further, the media coverage of the issue cited *supra*, notes 1 and 3, supports the assertion that Berlin has been engaged in negotiations regarding the potential sale of Heron Park for at least the last two years. Thus, the meeting agendas and the contemporaneous news coverage of the issue both support the contention that the Mayor and Council indeed discussed the sale of Heron Park during closed sessions. In turn, the minutes and recordings of those closed sessions must be “sealed and may not be open to public inspection.” § 3-306(c)(3)(ii). Per § 4-301(a)(2)(i) of the PIA, Berlin was required to deny inspection of the meeting minutes and recordings because “inspection would be contrary to . . . a State statute”—i.e., § 3-306(c)(3)(ii) of the OMA. At this point in time, none of the exceptions provided in § 3-306(c)(4) appear to apply.<sup>8</sup>

We recognize that the complainant strenuously disputes Berlin’s invocation of § 3-305(b)(14) to close the relevant meetings, and that he argues that, because the meetings were improperly closed, Berlin cannot invoke § 3-306(c)(3)(ii) to withhold the minutes and recordings of those meetings. We also recognize that evaluation of whether § 4-301(a)(2)(i) applies will often require an evaluation of whether or not the relevant State statute actually operates to preclude disclosure. *See, e.g.*, 92 Md. Op. Att’y Gen. 26, 41, 49-50 (2007) (concluding that mug shots do not constitute “criminal history information” protected by a statute outside of the PIA; therefore, what is now § 4-301(a)(2)(i) did not *require* denial of inspection of mug shots). But, here there is a separate administrative body specifically charged with determining whether violations of the OMA have occurred. *See* § 3-204 (providing the duties of the OMCB). Further, the submissions indicate that that body—the OMCB—is currently considering allegations related to these very same circumstances to determine whether Berlin’s closure of the meetings at issue here violated the OMA. It is thus not for us to make that determination. *Cf.* 16 *OMCB Opinions* 170, 171 (Aug. 19, 2022) (declining to determine whether a public body was subject to the PIA);

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<sup>8</sup> If it is indeed the case, as the complainant suggests, that the Council is unaware that it has the power to vote to unseal the meeting minutes and recordings he seeks, we note that the provision allows for “a person” to request that a public body take such action. § 3-306(c)(4)(iii).

*cf. also 16 OMCB Opinions 133, 139 & n.10 (June 16, 2022) (finding no violation of the OMA because there was an authorized no-trespassing order in effect, and “[d]eciding whether that order should have been issued [was] beyond [the OMCB’s] authority”).<sup>9</sup>*

### **Conclusion**

Based on the submissions before us, we conclude that Berlin did not violate the PIA when it denied inspection of the meeting minutes and recordings that the complainant requested. Rather, because, at this point in time, the OMA requires that those minutes and recordings be sealed and not open to public inspection, § 4-301(a)(2)(i) precludes disclosure.

### **Public Information Act Compliance Board**

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<sup>9</sup> Opinions of the OMCB can be found on the Attorney General’s website, here: <https://www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx>.