STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

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March 17, 2025

Baltimore County Council

Several Complainants allege that the Baltimore County Council (the "County Council" or "Council") violated the Open Meetings Act (the "Act") by meeting in a closed session on January 3, 2025, to discuss the appointment of a new County Executive, without notice or an opportunity for the public to attend. The County Council does not dispute this assertion. We, too, agree that, if the Act applied, the failure to provide notice and an opportunity to attend was a violation. But, as we shall explain below, it is not clear from the record that the Act applied to this meeting. We conclude that, when the Council was discussing matters related to the appointment of the County Executive, it was performing an administrative function, and the Act did not apply. Although the County Council also discussed the appointment of a new County Auditor, we do not have enough details about that conversation to know whether it constituted an administrative function. For that reason, it is unclear whether the Act applied to that portion of the meeting and, thus, we cannot determine whether the County Council violated the Act by failing to provide notice or an opportunity for the public to attend the January 3 meeting.

Background

On December 3, 2024, the Baltimore County Executive announced that he would resign with about one year and eleven months remaining in his term.[1] The County Charter states, "Whenever for any cause the office of the county executive shall become vacant, the same shall be filled by the affirmative vote of a majority of the total number of county council members established by this Charter." Baltimore County Charter § 402(b).

On December 10, 2024, the County Council hosted a hybrid meeting (inviting the public to attend in person and via a remote platform) to solicit input from the public on

[1] Voters had elected him to represent Maryland's second congressional district in the United States House of Representatives, beginning on January 3, 2025.

what qualities and attributes the next County Executive should have. On December 16, 2024, the Council conducted public interviews with five finalists for the position.

Over the next several weeks, the Council's Legislative Counsel/Secretary conferred with each member of the County Council individually about their choice to fill the County Executive vacancy, learned that there was "a unanimous, informal consensus," and suggested to the Council that the body issue a press release in advance of the official vote to fill the vacancy, indicating who the Council intended to appoint. The Council planned to elect the new County Executive during an open meeting on January 6, 2025.

On January 2, 2025, the Council's Legislative Counsel/Secretary learned that a significant winter storm could impact the Council's planned January 6 meeting. Believing it "necessary to bring the Councilmembers together to discuss weather-related issues, as well as to confirm the continuation of the Council's County Executive selection process," the body's Legislative Counsel/Secretary scheduled a WebEx virtual meeting for the following day. The Council asserts that the Legislative Counsel/Secretary "failed to recognize that the meeting was a 'private' WebEx, as opposed to a 'public webinar' WebEx meeting that is normally characterized by the Council's public Work Sessions and Legislative Sessions." In addition to scheduling the WebEx meeting, the Legislative Counsel/Secretary also reached out to the Clerk of the Circuit Court to ask about the lawfulness of a virtual (rather than in-person) swearing-in ceremony, so that he "could provide accurate legal advice to the Councilmembers."

At 2 p.m. on January 3, 2025, the Council, its Legislative Counsel/Secretary, and Assistant Legislative Counsel convened for the virtual meeting. The Council asserts that members voted to enter closed session to discuss "the County Executive appointment/personnel matter" and to receive legal advice "regarding the swearing-in" "in the context of the weather and the selection process moving forward." The Council further asserts that, following the closed session discussion, the body "re-opened" the meeting and shortly thereafter adjourned.

A written closing statement prepared before the closed session indicates that the Council intended to discuss:

> CE Election logistics and weather contingencies; and to also discuss appointment/personnel matter—confirm each Councilmember direction on CE election and next steps; brief discussion of vacant County Auditor position.[2]

[2] As with the County Executive position, the County Auditor is appointed by the Council. *See* Baltimore County Charter § 311 ("The county council shall by resolution appoint a county auditor who shall hold office for an indefinite term at the pleasure of the council . . . .").

The closing statement further states that the Council intended to "[r]eceive legal advice from Legislative Counsel/Secretary regarding County Executive vacancy and process; and County Auditor vacancy."

A closed-session summary that appears in the minutes of the County Council's January 7, 2025, open session indicates that, on January 3, the Council discussed "the appointment/personnel matter" involving the County Executive position, "receive[d] legal advice," and discuss[ed] . . . contingency plans in the event the Council's [January 6] Legislative Session was postponed due to inclement weather." The Council also discussed "another personnel matter involving a vacancy in the Office of the County Auditor." The statement indicates that the Council took no votes on any matter, but the Council chairman directed the Legislative Counsel/Secretary "to issue a Press Release on Monday morning, January 6, 2025," unless "the Legislative Session was postponed," in which case the press release would be issued "on Tuesday morning, January 7, 2025."[3]

Discussion

The County Council acknowledges that it met on January 3 without providing notice to the public. The Complainants assert that doing so violated the Act. The County Council does not dispute this assertion; indeed, the Council asserts that it violated the Act in two respects: by not notifying the public of the January 3 meeting, and by not providing the public an opportunity to attend the parts of the meeting before the Council voted to enter closed session and after the Council "re-opened" the meeting.

When a public body acknowledges a violation of the Act, we often forego an "extensive analysis." 6 *OMCB Opinions* 171, 174 (2009). But we do not always accept concessions if the "assert[ed] facts, if true, would undermine those apparent concessions." 17 *OMCB Opinions* 7, 7 (2023) (concluding that we lacked enough information to determine whether a violation had occurred, even though the involved public bodies "appear[ed] to concede that they violated the Act"); *see also* 15 *OMCB Opinions* 144, 145 (2021) (recognizing that, "[d]espite the [public body's] apparent concession," there might not have been a violation of the Act). After all, our role is to "educate . . . the public body that responded to the complaint[s]" and "to create a body of guidance that other public bodies can refer to." 3 *OMCB Opinions* 111, 112 & n.3 (2004).

Here, we think a more extensive analysis is appropriate because the facts before us implicate an issue not raised by either the Complainants or the County Council: whether the body's meeting involved the performance of an administrative function that was not subject to the Act's openness requirements.

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[3] We have reviewed the closed session minutes. Without divulging confidential details, *see* Maryland Code Ann., Gen. Prov. § 3-206(b)(3) (requiring us to "maintain the confidentiality of the minutes" of closed sessions), we can confirm that these minutes reflect what the County Council has disclosed publicly.

We begin with a few guiding principles. "A public body must meet in open session unless the Act expressly provides otherwise." 11 *OMCB Opinions* 12, 14 (2017) (citing § 3-301.2[4]). "The Act expressly permits public bodies to hold a closed session when the discussion falls either within a function that is explicitly excluded from the Act—an '*exclusion*'—or within one of the [fifteen] topics that are explicitly excepted from the Act[5]—an '*exception*.'" *Id.* (emphasis added). The exceptions are listed in § 3-305(b). "If the public body's discussion falls within one of these exceptions, the body may exclude the public from its meeting, but only after the presiding officer 'conduct[s] a recorded vote on the closing of the session' and 'make[s] a written statement of the reason for closing the meeting, including a citation of the authority . . . , and a listing of the topics to be discussed.'" 18 *OMCB Opinions* 129, 130 (2024) (quoting § 3-305(d)(2)). Moreover, the vote to enter closed session must occur in an open session for which the public provides notice and an opportunity for the public to attend. *See, e.g.*, 18 *OMCB Opinions* 52, 53 (2024).

"If, by contrast, the public body's meeting falls within an *exclusion*—because the body is performing an administrative, judicial, or quasi-judicial function—the Act generally does not apply." 18 *OMCB Opinions* at 130 (citing § 3-103(a)); *see also* § 3-101(b) (defining "administrative function"); § 3-101(e) (defining "judicial function"); § 3-101(i) (defining "quasi-judicial function"); *but see* § 3-103(b) (providing that the Act still applies to a public body when it is meeting to consider granting a license or permit or certain zoning matters); § 3-104 (requiring a public body to make certain public disclosures after recessing an open session to meet in closed session to perform an administrative function).

Neither the Complainants nor the County Council raise the possibility that the Council was performing an administrative function during its January 3 meeting. But "[w]e have long concluded that a public body is fulfilling an administrative function when it convenes to fulfill its own statutory duty to make an appointment." 8 *OMCB Opinions* 84, 85 (2012) (citing 1 *OMCB Opinions* 252 (1997) and 6 *OMCB Opinions* 53 (2008)).

The Act defines "administrative function" "by what it is—the 'administration' of laws, rules, regulations, or bylaws—and by what it is not—the other functions defined by the Act." 10 *OMCB Opinions* 12, 15 (2016) (quoting § 3-101(b)). "Thus, to determine whether a particular topic of discussion falls within a public body's administrative function, we apply a two-step inquiry." 17 *OMCB Opinions* 83, 87 (2023) (citing 16 *OMCB*

[4] Statutory references are to the General Provisions Article of the Maryland Annotated Code.

[5] When we issued our 2017 opinion, the Act recognized only fourteen exceptions; the fifteenth exception, allowing certain discussions about cybersecurity to take place in closed session, was added to the Act in 2018. See 2018 Md. Laws, ch. 304.

Opinions 140, 155 (2022)). "First, the discussion cannot fall within one of the other functions defined by the Act—i.e., it cannot be advisory, judicial, legislative, quasi-judicial, or quasi-legislative in nature." 18 *OMCB Opinions* 62, 63 (2024); *see also* § 3-101(b)(2) (providing that "administrative function" does not include these other functions); *id.* (c) (defining "administrative function"); *id.* (e) (defining "judicial function"); *id.* (f) (defining "legislative function"); *id.* (i) (defining "quasi-judicial function"); *id.* (j) (defining "quasi-legislative function"). "If the discussion does fall within one of these functions, the inquiry ends because the discussion necessarily cannot be administrative in nature." 18 *OMCB Opinions* at 63. "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* 11, 15 (2021).

Applying the first step of the analysis to the facts before us, we conclude that the County Council was not performing any non-administrative function defined by the Act when it discussed matters pertaining to the appointment of the County Executive. In so doing, the County Council was not "study[ing] . . . a matter of public concern" or "making . . . recommendations" on such a matter, which are advisory functions under § 3-101(c) and are usually performed by task forces and commissions appointed to study a particular issue and report back. *See* Office of the Attorney General, *Open Meetings Act Manual* 1-21 (12th ed. Oct. 2023). Nor was the County Council exercising "power of the Judicial Branch of the State government" (defined as a judicial function under § 3-101(e)), deciding a contested case under the Administrative Procedure Act or a matter before an administrative agency (quasi-judicial functions under § 3-101(i)); or approving, disapproving, or amending a rule, regulation, bylaw, budget, or contract (defined as quasi-legislative functions under § 3-101(j)).

Finally, the County Council was not performing a legislative function, which is defined as: approving or disapproving an appointment; proposing or ratifying a constitutional or charter provision; or approving, disapproving, enacting, amending or repealing a law or any "other measure to set public policy." § 3-101(f). To be sure, the County Council discussed the appointment of the County Executive, and "approving an appointment is a legislative function." 18 *OMCB Opinions* at 64. But "[a]s we explained long ago, 'the terms approving or disapproving denote a response to someone else's proposal of an appointment.'" 18 *OMCB Opinions* 1, 2 (2024) (quoting 1 *OMCB Opinions* 123, 125 (1995) (some internal quotation marks omitted)). "When a public body itself makes an appointment, however, it is 'not approving one.'" 1 *OMCB Opinions* at 125 (some internal quotation marks omitted). "Moreover, if the body is making the appointment pursuant to a legal obligation, the body is 'administering a law and so engaged in an [administrative] function.'" 18 *OMCB Opinions* at 64 (quoting 1 *OMCB Opinions* at

125)[6]; *see also* 2 *OMCB Opinions* 45, 47 (1999) (recognizing that "the process by which a public body itself makes an appointment (as distinct from the process of considering the confirmation of an appointment made by someone else) is an [administrative] function not covered by the Act").

Moving to the second step of the analysis, we conclude that, when the County Council met on January 3 to discuss the appointment of the County Executive, it was administering an existing law that the County Council is legally responsible for administering. 8 *OMCB Opinions* at 85. As already noted, the County Charter requires the County Council to fill a vacancy in the County Executive position. When a public body has such an appointment power, we have said that the body performs an administrative function not only when the body votes to make the appointment but when it engages in certain preliminary discussions leading up to the appointment. *See* 18 *OMCB Opinions* 129, 130 (2024) (concluding that a public body was performing an administrative function when the body interviewed candidates for a vacant position); 18 *OMCB Opinions* 85, 86 (2024) (same); 7 *OMCB Opinions* 264, 267 (2011) (referring to "evaluating and interviewing candidates" as an administrative function); 6 *OMCB Opinions* 53, 55 (2008) (recognizing that a discussion "to consider which candidates would merit an interview" was an administrative function); 4 *OMCB Opinions* 182, 184 (2005) (concluding that interviews and discussions about candidates to fill a vacancy were administrative); 1 *OMCB Opinions* 123, 125 (1995) (recognizing that a school board was engaged in what is now called an administrative function when it "considered whom it might wish to name as interim Superintendent" because it was administering a State law that obligated the board to appoint someone to the position).

We recognize that, during the January 3 meeting, the County Council also sought legal advice related to the appointment. But we have also previously recognized that, if an attorney's counsel is necessary for the public body to carry out an administrative function, the act of seeking and obtaining that legal advice might be part of performing the administrative function. *See* 10 *OMCB Opinions* 104, 107-108 (2016) (recognizing, with respect to a public body's legal obligation to oversee and evaluate an employee, that "a meeting merely to hear counsel's explanation of terms in the existing [employment] contract and the [public body's] options under that contract are administrative in nature"); 13 *OMCB Opinions* 27, 30 (2019) (indicating that a meeting at which a public body received legal advice about how to respond to allegations of police misconduct may have been an administrative function, because the body had authority under its charter to "operate and maintain a police force"); *see* 9 *OMCB Opinions* 110, 113 (2014) (recognizing that "a public body's exercise of its administrative function might overlap with one of the . . . subjects for which a public body may close a public meeting under" §

[6] In 1 *OMCB Opinions* 123 (1995), we used the term "executive function," but that term has since been replaced, without substantive change, by "administrative function." See 2006 Md. Laws, ch. 584.

3-305(b)). The legal advice here related directly to the County Council's appointment of the County Executive and whether that person could be sworn in virtually. We thus conclude that this portion of the discussion was administrative in nature.

We think the County Council was also engaged in an administrative function when it discussed the logistics of its next meeting, specifically whether the January 6 meeting would have to be postponed a day because of inclement weather. *See* 14 *OMCB Opinions* 92, 95 (2020) (recognizing that "a general discussion about the schedule, including on what dates members are available to meet, is an administrative function"). And we likewise conclude that the discussion about issuing a press release about the appointment of the County Executive was administrative. *See, e.g.*, 9 *OMCB Opinions* 110, 113 (2014) (recognizing that "we have found that the wording of press releases and the procedures for issuing them are topics that fall within the [administrative] exclusion").

But "[n]ot every discussion touching on an appointment within the public body's own powers falls within the definition of 'administrative function.'" 8 *OMCB Opinions* 85 n.1. The administrative function exclusion does not apply "if the discussion at issue pertains to the process for making an appointment rather than, say, an individual's suitability for appointment or which of several candidates should be appointed." 18 *OMCB Opinions* at 3. Thus, "[f]or example, a public body's discussion of whether to form outside committees to broaden participation in the appointment process falls more into the realm of forming policy, a quasi-legislative function." 8 *OMCB Opinions* 85 n.1 (citing 7 *OMCB Opinions* 264 (2011)). And quasi-legislative functions must be performed in a meeting open to the public, unless an exception applies. *See* § 3-301 (providing generally that "a public body shall meet in open session" except as otherwise provided in the Act); § 3-305(b) (enumerating fifteen exceptions under which a public body may convene in a closed session).

With respect to the Council's January 3 discussion of matters pertaining to the appointment of the County Executive, the County Council was "merely discussing the implementation of procedures that it ha[d] already adopted," 10 *OMCB Opinions* at 105 (recognizing that such a discussion is administrative), not devising in the first instance the process for making the appointment. We thus conclude that the discussions pertaining to the appointment of the County Executive were administrative in nature and the Act did not apply. *See id.* at 109 (concluding that a public body was performing administrative functions when it met to "implement[] the process that it had already decided to follow, discussed the release of information to the press, and interviewed candidates for" a position that the body was obligated to fill).

As for the discussions about the appointment of the County Auditor, we lack enough details to know if the conversation was administrative in nature. Publicly, the Council has said only that it intended to engage in a "brief discussion of [the] vacant County Auditor

position," and the Council did, in fact, discuss a "personnel matter involving a vacancy in the Office of the County Auditor." The closed-session minutes provide more detail but do not eliminate the possibility that the discussion touched on establishing a process for appointing a new County Auditor. Because that would "fall[] more into the realm of forming policy, a quasi-legislative function," 8 *OMCB Opinions* 85 n.1 (citing 7 *OMCB Opinions* 264 (2011)), we cannot conclude with certainty that the conversation about the appointment of the County Auditor was administrative. Thus, we cannot determine whether the Act applied to that portion of the meeting. In short, we cannot say whether the County Council violated the Act with respect to its conversation regarding the appointment of the County Auditor. *See* § 3-207(c)(2) ("An opinion of the [Compliance] Board may state that the Board is unable to resolve the complaint.").

We acknowledge that the County Council does not claim that any portion of the meeting was administrative and thus beyond the scope of the Act. We acknowledge, too, that, even when the administrative function exclusion is applicable, a public body may "voluntarily treat[]" the matter "as if the Act applie[s] and close[]" the meeting under one of the fifteen statutory exceptions in § 3-305(b). 5 *OMCB Opinions* 33, 37 (2006). That may have been what the County Council intended to do here. After all, the body performed some of the tasks required when a public body convenes in a closed meeting subject to the Act: The body prepared a written closing statement, § 3-305(d)(2)(ii), voted to enter closed session, § 3-305(d)(1), and prepared a closed-session summary for the public following the meeting. § 3-306(c)(2). Moreover, the Council's response to the complaints asserts that, in scheduling the January 3 meeting, the body's Legislative Counsel/Secretary "failed to recognize that the meeting was a 'private' WebEx, as opposed to a 'public webinar' WebEx meeting that is normally characterized by the Council's public Work Sessions and Legislative Sessions." This suggests that the County Council may have intended to "voluntarily treat[]" the matter "as if the Act applied," 5 *OMCB Opinions* at 37, but inadvertently neglected to provide the public notice of the January virtual meeting or an opportunity to log on and observe the meeting.

Even so, we have never said that, if the Act does not apply, a public body nonetheless violates the law if the body voluntarily complies with some of the Act's requirements but not all of them. The plain language of the Act is clear: the Act does not apply to a public body when it is carrying out an administrative function. We thus decline to find a violation with respect to the discussion of topics pertaining to the appointment of the County Executive. And we simply do not have enough information to determine if the conversation about the appointment of the County Auditor was administrative or whether that part of the meeting was subject to the Act.

Regardless, we hasten to add that nothing in the Act *precluded* the Council from treating the January 3 meeting as one subject to the Act and inviting the public to attend

the open portions.[7] We simply conclude that the Council's failure to invite the public did not, on the facts before us, necessarily violate the Act, because we do not have enough information about the Council's discussion about the appointment of the County Auditor.[8]

Conclusion

It is not clear from the record before us whether the Act applied to any portion of the County Council's January 3 meeting. When the Council was discussing matters related to the appointment of the County Executive, it was performing an administrative function, and the Act did not apply. Although the County Council also discussed the appointment of a new County Auditor, we do not have enough details about that conversation to know whether it constituted an administrative function. For that reason, it is unclear whether the Act applied to that portion of the meeting and, thus, we cannot determine whether the County Council violated the Act by failing to provide notice or an opportunity for the public to attend the January 3 meeting.[9]

Open Meetings Compliance Board
Lynn Marshall, Esq.
Runako Kumbula Allsopp, Esq.
Jacob Altshuler, Esq.

[7] None of the Complaints dispute that the County Council was entitled to meet in closed session to discuss appointments and/or to receive legal advice. Although we find that at least part of the January 3 meeting involved administrative functions beyond the scope of the Act, we agree that the Act allows a public body to convene in closed session to discuss appointments, *see* § 3-305(b)(1), and to receive legal advice, *see* § 3-305(b)(7).

[8] Because it is not clear that the Act applied to any portion of the January 3 meeting, we do not address the assertion, raised by some Complainants, that there was no emergency requiring the Council to convene on January 3. We note, however, that, generally, when the Act applies, "we 'will not second-guess a public body's decision that it must meet on short notice, at least without evidence suggesting an improper motive.'" 16 *OMCB Opinions* 55, 58 (2022) (quoting 15 *OMCB Opinions* 5, 6 (2021)).

[9] We do not address the assertion by some Complainants that the Council violated County law by convening in a meeting that was not open to the public. "Our authority is limited to interpreting the Open Meetings Act." 18 *OMCB Opinions* 84, 86 n.6 (2024).