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STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE
BOARD

18 Official Opinions of the Compliance Board 117 (2024)

July 29, 2024

Mayor and Council of the City of Rockville

The Complaint alleges that the Mayor and Council of the City of Rockville (the “Council”) violated the notice and agenda provisions of the Open Meetings Act (the “Act”) with respect to a meeting held on May 24, 2024. We conclude that the Council violated the Act by failing to provide reasonable advance notice of the meeting and by failing to make an agenda available in a timely manner. We further conclude, however, that the Council did not violate the Act by omitting a matter from the agenda.

A. Notice

The Council usually meets on Monday evenings. The May 24 meeting in question here, however, occurred on a Friday. Near the end of the regular meeting on the previous Monday, May 20, the Mayor briefly stated that the Council needed to consider a development agreement and that the matter could not wait until the next regular Monday meeting, which was set for June 3. The Mayor mentioned the possibility of holding a special meeting that same week and of taking a scheduling poll to fix the date and time. It was not until two days later, however—on the night of Wednesday, May 22—that the Council decided to hold the meeting at 10 a.m. Friday, May 24. The City posted notice of the meeting on its website the following morning, May 23, at 10:04 a.m., approximately 24 hours before the meeting.

The Complainant contends that the “unusual” date and time of the May 24 meeting “hindered public participation.” We understand this to be an allegation that the Council did not provide adequate notice of the meeting.

A public body must give “reasonable advance notice” of a meeting governed by the Act. § 3-302(a).¹ We conclude that the Council violated this requirement by providing

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

notice of the meeting only one day in advance. “[N]otice of a meeting one day in advance is insufficient when a public body could have anticipated the need for the meeting earlier.” 8 *OMCB Opinions* 76, 80 (2012). The Council maintains that the meeting was “urgent” because “the City was accommodating the developer’s request to expedite approval of the agreement.” The Council does not tell us when the developer submitted this request; nor does the Council explain why it felt that the request warranted a special session on short notice. But as we have said before, we generally “will not second-guess a public body’s decision that it must meet on short notice, at least without evidence suggesting an improper motive.” 18 *OMCB Opinions* 52, 54 (2024) (quoting 16 *OMCB Opinions* 55, 58 (2022)). We have also said, however, that “[i]f a public body knows of the need for a meeting in advance, its delay in scheduling that meeting does not justify giving notice at the last minute.” 10 *OMCB Opinions* 112, 113 (2016). Thus, even if we accept the Council’s explanation of urgency, it does not justify the Council’s failure to schedule the meeting promptly and provide the public more than 24 hours’ notice. At least by the regular May 20 session—four days in advance of the special meeting—the Council recognized the need for the special meeting. Yet the Council then took two days to schedule the meeting and gave notice just one day in advance. This did not constitute “reasonable advance notice” under the Act. *See id.*; 9 *OMCB Opinions* 273, 275 (2015) (finding a violation where scheduling delays caused a public body to give only three days’ notice of a meeting); *cf.* 4 *OMCB Opinions* 12, 22 (2004) (concluding that notice one day in advance did not violate the Act where the meeting was scheduled and notice was provided on the same day that the public body learned of the need to meet).²

We do not think that the Council’s public discussion at the regular May 20 meeting of the potential for a special meeting that week ameliorated this deficiency. This brief discussion, which lasted about thirty seconds and came at the end of a three- and one-half-hour meeting, was unlikely to reach a substantial segment of the public and, in any event, signaled only the prospect of a special meeting without establishing details of date or time. *See* 8 *OMCB Opinions* at 80. The public, in short, was entitled to better notice of the special Friday session.³

B. Agenda

The Complainant’s primary allegation is that the Council violated the Act by

² In the future, if Council members are having difficulty fixing the time and date of a meeting to be held on short notice, they might consider posting a tentative date and time on the website and instructing the public to check back for confirmation, while also sending this information by email to the City’s list of interested persons. *See* 10 *OMCB Opinions* at 113.

³ Due to an inactive hyperlink in the record, we cannot tell whether the meeting notice that the Council posted on the morning of May 23 included the time of the meeting. We assume that it did, as the other notices we have seen from the Council include this information. If the notice did not include the time, then it was deficient for that reason also. *See* § 3-302(b) (providing that the notice must be in writing and “include the date, time, and place of the session”).

appointing an Acting City Manager at the Friday meeting without including that item of business in the meeting agenda in advance. The facts underlying this allegation are somewhat convoluted, as the Council posted various versions of the meeting agenda.

At 6:14 p.m. on the evening before the meeting, the City posted an agenda on its website and notified an email distribution list of 500 interested people, including Complainant, that it had been posted. This was, as the Council concedes, untimely under the Act, which requires generally that a public body make the agenda available when the body provides notice (if the agenda has been set by that time) or, alternatively “as soon as practicable” after the agenda is set, but no later than 24 hours before the meeting. § 3-302.1(a)(2) & (3).⁴ We thus find a violation of § 3-302.1(a).⁵

As to the content of the agenda, the first version posted on the website included the Acting City Manager appointment as an item of business. But the Mayor requested almost immediately that the agenda be taken down, because the Council planned to discuss the appointment at a private meeting before the 10 a.m. open session. At 6:30 p.m., staff re-posted a version of the agenda that did not include the appointment item. The next morning (Friday) at 9 a.m., the Council met privately to discuss the appointment before the open session.⁶ Thereafter, at the beginning of the open session at 10 a.m., the Mayor announced the addition of the appointment as an item of business on the agenda. The Council proceeded to vote in favor of the appointment.

The Act requires the Council, before meeting in an open session, to “make available to the public an agenda” that contains “*known* items of business or topics to be discussed.” § 3-302.1(a)(1) (emphasis added). The key inquiry is whether the Council knew in advance that the appointment would come up as an item of business at the open session. This is a factual inquiry. 14 *OMCB Opinions* 102, 103 (2020).

⁴ “If a public body is unable to comply” with those timing requirements “because the meeting was scheduled in response to an emergency, a natural disaster, or any other unanticipated situation, the public body shall make available on request an agenda of the meeting within a reasonable time after the meeting occurs.” § 3-302.1(b).

⁵ Although the Complainant did not raise the timeliness of the agenda, “we would be remiss if we did not point out other violations that are apparent from the submissions.” 18 *OMCB Opinions* 52, 53 (2024). “Because our primary purpose is to provide guidance ‘so as to prevent future violations of the Act,’” *id.* (quoting 12 *OMCB Opinions* 98, 101 (2018)), “we often point out violations that were not raised by a complaint,” *id.*; *see also, e.g.*, 17 *OMCB Opinions* 83, 90 (2023) (finding a violation of § 3-104, requiring certain public disclosures following an open session adjourned to convene in closed session to perform an administrative function, even though the Complainant did not raise that issue); 16 *OMCB Opinions* 12, 16-17 (2022) (finding a violation of § 3-305(c)(2)(iii) based on a public body’s failure to cite the proper statutory authority in a written closing statement, even though not raised in the complaint).

⁶ The Council has authority to appoint the City Manager under local law, *see* Rockville City Charter, Art VI, §§ 1, 3, which means that the appointment is an administrative function, 6 *OMCB Opinions* 57, 61 (2008). The Council’s preliminary meeting to discuss the appointment is therefore not governed by the Act. § 3-103(a) (providing that the Act generally does not apply to a public body when it is carrying out an administrative function); *see* 6 *OMCB Opinions* 57, 60-61 (2008) (same).

We note, at the outset, that we do not think the initial version of the agenda that the Council posted and sent to Complainant and other interested persons satisfied the agenda requirement with respect to the appointment item. Because the Council quickly replaced the initial version with a revision that omitted the appointment item, it led the public to believe that the Council would not discuss this matter at the open session. As such, the revision undermined the informational value of the first posting with respect to the appointment business. *See, e.g., 17 OMCB Opinions* 3, 4 (2023) (“The purpose of the agenda requirement is to provide members of the public information that will help them decide whether to attend a particular meeting.” (quoting *16 OMCB Opinions* 62, 62 (2022))).

The question, then, is whether the second agenda, posted at 6:30 p.m., violated the content requirements for an agenda under the Act by omitting the appointment item. We cannot conclude that it did. The record does not establish conclusively that the Council *knew* that the appointment would come up at the open session. Although members of the Council may have suspected that the issue *might* arise at the 10 a.m. Friday meeting, it apparently was not until after the 9 a.m. private discussion that the Council knew that the appointment would be an item of business at the open meeting. Put another way, it appears from the record that, on Thursday evening, when the Council posted the revised agenda, the Council had not decided that it would vote on the appointment during the Friday open session. It was for this reason, we imagine, that the Council caused the initial version of agenda to be taken down and scheduled a private discussion the next morning to make up its mind before the open session. In our view, the Council did not violate the Act by omitting the item from the agenda under these circumstances.

When a public body encounters this situation—where it has not decided whether to take up a matter before a public meeting—it can proceed in either of two ways. First, the body may do as the Council did here: omit the item from the agenda at the outset, and then add the item to the agenda if the body later decides to address it. § 3-302.1(e) (“Nothing in this section may be construed to prevent a public body from altering the agenda of a meeting after the agenda has been made available to the public.”); *see 14 OMCB Opinions* 42, 43 (2020). Alternatively, the body may include the item in its initial agenda and subsequently remove it if the body ultimately decides not to address it. *See 12 OMCB Opinions* 93, 95 (2018). The second approach may be preferable where the public body thinks it likely that the matter will be addressed. Indeed, that approach may well have been preferable here, given that the Council was obviously considering addressing the appointment at the Friday meeting. Whatever approach a public body takes, it may not omit an item from the agenda that the body knows, at the time the agenda is made public, that the body will discuss at the meeting. Nor should a body deliberately delay its decisions about what items it will discuss at a meeting, in order to avoid disclosing those items to the public on an agenda. Although the record here does give us some cause for concern, it does not clearly show that the Council violated the Act in either of these ways.

Conclusion

We conclude that the Council violated § 3-302(a) by failing to provide reasonable advance notice of the Friday meeting. The Council also violated § 3-302.1(a) by failing to provide an agenda in a timely manner. The record does not sufficiently support the conclusion, however, that the Council violated the content requirements for an agenda by failing to include a known item of business in the agenda that it posted the night before the meeting.

This Opinion is subject to the acknowledgement and announcement requirements of § 3-211.

Open Meetings Compliance Board

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