- **Closed Session Procedures –** *Written Statement –*
  ◇ practices in violation

- **Exceptions Permitting Closed Sessions –**
  Personnel, §10-508(a)(1) – Within exception, discussion of:
  ◇ specific individual's employment contract

- **Minutes** – *Generally –*
  ◇ timely adoption required

- **Notice Requirements –** *Content –*
  ◇ describing entire meeting as "closed" when vote to close required to be held in public

- **Notice Requirements –** *Method* – practices permitted
  ◇ posting on website

- **Notice Requirements –** *Timing* – practices permitted
  ◇ posting six days in advance

***Topic headings correspond to those in the Opinions Index (2010 edition) at http://www.oag.state.md.us/opengov/openmeetings/appf.pdf**

March 4, 2013

Re: Board of Regents of Morgan State University
Ralph Jaffe and Craig O'Donnell (Complainants)

We have consolidated and considered the complaints of Ralph Jaffe and Craig O'Donnell ("Complainants") that the Board of Regents (the "Board") of Morgan State University ("University") violated the Open Meetings Act ("the Act") by closing its December 4 and December 28, 2012 meetings to discuss whether to renew the contract of its president. Complainant O'Donnell alleges specific violations regarding the content of the notice given by the Board of its meetings, the timeliness of its adoption of minutes, and the content of those minutes. He states that the Board's documentation of its meetings in 2011 and 2012 reflect similar deficiencies.

The Board has responded with documentation on the December meetings, a discussion of its adoption of minutes for meetings in 2011 and 2012, an offer to produce the minutes for those meetings, and a pledge to review its meetings procedures for compliance with the Act. All agree that

the Board is a public body and that the two December 2012 meetings were subject to the Act.

As we explain below, we conclude that the subjects discussed at the two Board meetings fell within the scope of the provisions of the Act that permit a public body to close a meeting to discuss personnel matters pertaining to employees over which the public body has jurisdiction and to receive legal advice from counsel. To close a meeting under those provisions, or "exceptions," however, a public body must adhere to certain requirements: the public body first must give notice of an open meeting and, at that open meeting, follow the procedures set forth in the Act for closing a meeting. The Board did not take all of these steps before closing its December 4 meeting and therefore violated the Act with respect to that meeting. The Board did not repeat those mistakes when it met on December 28.

The Board's full compliance with respect to the December 28 meeting, along with the Board's pledge to review and correct the procedures it followed in prior years, makes it unnecessary to address the pre-December 2012 allegations at length.[1] Of those allegations, we will discuss only the timeliness of the Board's adoption of the minutes of its regular quarterly meetings. We do not discuss the allegations that the Board should have posted minutes and closing statements on its website or sent them to one of the complainants; the Act does not so require.[2]

I
Facts

A. The December 4, 2012 meeting

On November 20, 2012, the following notice was posted on the Board's webpage on the University website:

PUBLIC NOTICE

> There will be a called meeting of the Morgan State University Board of Regents on Tuesday, December 4, 2012, beginning at 9:30 a.m. until 1:00 p.m. The meeting will take place in

[1]With regard to the Board's 2012 retreat, the Board's counsel stated her understanding that minutes had not been kept, that the meeting largely involved administrative matters not subject to the Act, and that steps would be taken in the future to ensure compliance with the Act as to any discussions within the scope of the Act. She has since advised our staff that minutes were in fact kept and adopted for that meeting, and so we need not examine whether the Act applied to those discussions.

[2]We deny Complainant Jaffe's various requests that we engage outside counsel, require "the Attorney General or his aide" to testify about privileged matters, and "enforce" the Act. Such actions lie beyond our statutory powers.

> the Boardroom on the 4th Floor of The Earl S. Richardson Library. The purpose of this "CLOSED" meeting will be to discuss legal and personnel matters.

On December 4, 2012, the Board convened in what its minutes describe as a public session. According to the minutes of that session, the "Chair read in its entirety the Citation of Authority for Closed Session," and the fifteen members present at the meeting voted "to convene in closed session for the purposes set forth in the attached Statement of Authority for Closed Session." The "Statement" attached is the "Citation of Authority." It provides only the following information about the Board's decision to meet in closed session:

> As permitted by § 10-508 of the State Government Article of the Annotated Code of Maryland . . . , the Board of Regents of Morgan State University will meet in closed session:
>
> > (1) To discuss the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees or officials over whom the Board has jurisdiction; or
> >
> > (2) Any other personnel matter that affects 1 or more specific individuals SG § 10-508(a)(1)(i) and (ii),
> >
> > And
> >
> > (3) To consult with counsel to obtain legal advice, SG § 10-508(7). . . .

The minutes of the closed session show that the Board then convened in closed session. Those minutes list the persons present and describe the actions taken as follows:

> A. Personnel Matter—Renewal of Contract
>
> The Board considered two motions. A majority of the Board voted against a motion to renew a personnel contract in the manner contained in the contract as an option. Second, a majority of the Board voted in favor of a motion not to extend the employment agreement under consideration beyond its initial term (June 30, 2013), and authorized the Chair of the Board to communicate this result to the affected employee.

> B. Personnel Matter—Findings of EEO Complaint (Also present: . . . .) The Board acted to receive the report of Dr. Hayes regarding his investigation of a complaint filed by a Morgan employee.

The Board adopted both sets of minutes during an open session at its next meeting, which occurred on December 28, 2012.

B. The December 28, 2012 meeting

The Board's counsel explains that the December 28, 2012 meeting was specially "called" on short notice. On December 21, 2012, the following public notice was posted on the Board's webpage:

PUBLIC NOTICE:

> There will be a called meeting of the Morgan State University Board of Regents on Friday, December 28, 2012, beginning at 12:00 noon. The meeting will take place in the Boardroom on the 4th Floor of The Earl S. Richardson Library. The purpose of this open and closed meeting will be to discuss legal and personnel matters.

On that date, the Board convened in public session and heard comments from members of the public. The Chair then read the Board's "Citation of Authority for Closing a Meeting under the Open Meetings Act." That form, evidently adapted from the model closing form posted on the Attorney General's website,[3] and signed by the Chair, cited two exceptions (1), the discussion of personnel matters, and (7), consultation with counsel to receive legal advice, as the statutory authority to close the session. Under the heading for "the reasons for closing and topics to be discussed," the Board provided this information:

> (1) To hear from Dr. David Wilson concerning his employment as President of Morgan State University
>
> (2) To take possible action regarding Dr. Wilson's appointment with the University
>
> (3) To obtain advice of counsel regarding the above personnel issues.

[3] http://www.oag.state.md.us/Opengov/Openmeetings/AppC.pdf.

The model form also provides a space in which the public body may record, for use in its minutes of its next regular meeting, "the topics discussed and action(s) taken, if any." In that space, the Board stated that it "heard remarks from Dr. Wilson," "received legal advice regarding a personnel matter," voted to affirm its December 4 decision not to renew the president's contract, and voted to negotiate a new employment agreement for a stated term, "with this action to be finalized in open session of the Board." The sealed minutes of that closed session confirm that the Board discussed those matters and did not discuss others.[4]

After the closed session, the Board reconvened in open session. It adopted the minutes of its December 4 meeting, voted to reaffirm its December 4 decision not to renew the president's contract, and voted to negotiate to enter into a new employment agreement with him for the period through June 30, 2014. The Board also took an action pertaining to a University retirement plan. The Board adopted the minutes of its December 28 meeting at its February 5, 2013, meeting.

II
Discussion

A. Whether the subjects discussed in the Board's two closed meetings fell within the statutory authority the Board cited as authority for excluding the public

The Act provides, "Except as otherwise expressly provided in this [Act], a public body shall meet in open session." State Government Article ("SG") § 10-505. Section 10-503 expressly excludes a public body from that requirement when its members are meeting only to perform certain functions, such as the "judicial" function, or have only encountered each other at an occasion where no public business is discussed. None of the § 10-503 exclusions applies here. SG § 10-508 expressly provides that a public body may meet in closed session for any of the fourteen reasons, or "exceptions," specified in SG § 10-508(a). The Board cited two of those exceptions as the express authority for closing its December 4 and 28 meetings: the discussion of a specific personnel matter, as permitted by State Government Article ("SG") § 10-508(a) (1), and the receipt of legal advice from counsel, as permitted by SG § 10-508(a) (7).

To fall within the scope of the "personnel matter" exception, the discussion must involve individual employees, as opposed to an entire class of employees, and must pertain to an individual whose "appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation" falls within the public body's "jurisdiction." SG § 10-508(a) (1); *see also, e.g.*, 7 *OMCB Opinions* 131, 134 (2011). The "receipt of legal advice from counsel" exception is self-explanatory.

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[4] In accordance with SG § 10-502.5(c) (iii), we keep the contents of sealed minutes confidential and therefore describe them only in general terms.

The Board's discussions at both December meetings about whether to renew the contract of the University president, who is an employee within the Board's jurisdiction, fell within the personnel matters exception, and the Board's receipt of legal advice from counsel on that subject fell additionally within the legal advice exception. The Board's discussion on December 4 about an Equal Employment Opportunity complaint asserted by a University employee, and receipt of counsel's advice on that subject, also fell within the exceptions the Board claimed, and would also have fallen within the exception in SG § 10-508(a)(8) for consultations with staff or others about pending litigation, had the Board claimed that exception. We note that the Board properly reopened its December 28 meeting to discuss the University retirement plan issue, an issue pertaining to a broad class of employees.

In short, nothing suggests to us that the Board used its closed sessions to conduct discussions that the public was entitled to hear. Further, the Act does not prohibit a public body from taking an action in a closed meeting if the action falls within the exception claimed for closing the meeting. *See, e.g*, 1 *OMCB Opinions* 73, 79 (1994) (finding that the Act did not prohibit a city council, meeting in closed session under the personnel exception, from taking actions on raises for specific individuals).

The question then becomes whether, as to each meeting, the board complied with the requirements of the Act on notice, closing procedures, and documentation.

B. Whether the Board violated the Act with regard to the notice it gave for the December meetings

SG § 10-506 requires public bodies to give notice of their meetings and specifies the timing, method, and contents of that notice. As for timing, SG § 10-506(a) requires a public body to give "reasonable advance notice" to the public before meeting to perform a function subject to the Act.[5] We

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[5] SG § 10-506, "Notice of meetings," provides, in full:

(a) Before meeting in a closed or open session, a public body shall give reasonable advance notice of the session.

(b) Whenever reasonable, a notice under this section shall:
(1) be in writing;
(2) include the date, time, and place of the session; and
(3) if appropriate, include a statement that a part or all of a meeting may be conducted in closed session.

(c) A public body may give the notice under this section as follows:
(1) if the public body is a unit of the State government, by publication in the
Maryland Register;

have often addressed what "reasonabl[y in] advance" means. In 6 *OMCB Opinions* 85, 86 (2009), for example, we found that the public body had met that standard when it posted notice 5 days before the meeting, and we noted a lack of evidence that the public body had delayed giving notice in order to discourage attendance. Here, we find that the Board met that standard by posting the December 4 meeting notice almost two weeks in advance and the December 28 meeting notice six days in advance.

As for method, Section 10-506(c) permits a public body to use its website after initially giving notice of that method. The Board posted the meeting notices on its webpage, which is located on the University's website. The Board states that it has used that method "for a number of years" and that the method is effective. The Board further acknowledges Complainant O'Donnell's concern that full notices be consistently posted in one place on its webpage, and we see that the Board's Executive Committee has done so for its February 22 meeting. We find that the method the board used for its December meetings complied with the Act.

Section 10-506(b) sets three standards for the content of the notice. Under the first two standards, notice must, "whenever reasonable," be written and must specify the date, time and place of its meeting. SG § 10-506(b)(1), (2). The Board met those standards for both meetings. Under the third standard, SG § 10-506(b)(3), the notice must, "whenever reasonable" and "if appropriate," "include a statement that a part or all of a meeting may be conducted in closed session." That requirement gives rise to the question of whether a public body may post an entire meeting as "closed," as the Board did for the December 4 meeting, when an exception in § 10-508 provides the authority for the closing.

The Act has given rise to occasional confusion on whether a public body may close a meeting under an exception in SG § 10-508 in a closed

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(2) by delivery to representatives of the news media who regularly report on
sessions of the public body or the activities of the government of which the public body is a part;
(3) if the public body previously has given public notice that this method will be used:

(i) by posting or depositing the notice at a convenient public location at or near the place of the session; or
(ii) by posting the notice on an Internet website ordinarily used by the public body to provide information to the public; or

(4) by any other reasonable method.

(d) A public body shall keep a copy of a notice provided under this section for at least 1 year after the date of the session.

session, or whether, instead, it must first hold an open session. *See, e.g.*, 1 *OMCB Opinions* 191, 193 (1996); 2 *OMCB Opinions* 74, 75 (1999). On the one hand, SG § 10-506(a)(3) appears to contemplate that a meeting subject to the Act may be entirely closed, because, on its face, that provision requires the public body to include in its notice, "when appropriate," that "a part or all of a meeting may be conducted in closed session." On the other hand, SG § 10-508 unambiguously prohibits a public body from closing its meeting in order to discuss one of the excepted topics until the members have voted in open session:

> Unless a majority of the members of a public body present and voting vote in favor of closing the session, the public body may not meet in closed session.

SG § 10-508(d)(1). SG § 10-508(d)(2) then repeats, and elaborates on, that requirement:

> Before a public body meets in closed session, the presiding officer shall:
>
> (i) conduct a recorded vote on the closing of the session; and
>
> (ii) make a written statement of the reason for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed.

Moreover, SG § 10-508(d) (3) provides the public with the opportunity to object to the action of closing a meeting subject to the Act: "If a person objects to the closing of a session, the public body shall send a copy of the written statement . . . to the Board." In 1996, we explained the purpose of the open-session vote requirement: "members of a public body are accountable for their decision to hold a closed session, and part of their accountability is to make that decision before the public that is about to be excluded." 1 *OMCB Opinions* at 193.

So, despite the language in § 10-506 that suggests that a meeting may be entirely closed, a meeting may only be closed under a § 10-508 exception, as the Board's December meetings were, after the public body conducts a public vote and completes a closing statement. *See, e.g., id*. ("A public body has no authority under the Act to conduct the vote or issue the [closing] statement in closed session"); 3 *OMCB Opinions* 4, 6 (2000) (explaining the requirement that the vote be conducted in open session). A public body therefore may not effectively exclude the members of the public from observing the vote by advertising the meeting as entirely closed. *See* 6 *OMCB Opinions* 77, 82 (2009) ("When a vote is conducted under § 10-508(d), it is important that the public understand that it has

access to this part of the meeting if the meeting is to be open in practice, and not just in theory.").

Certainly, it does not serve the public well to convey the impression that the public body will discuss substantive matters at a meeting when, in fact, the only events open to observation will be the presiding officer's completion of the written statement and the members' recorded vote to close the meeting. We have construed SG § 10-506(b) (3) to address that circumstance. *See* 5 *OMCB Opinions* 165, 167-68 (2007) (addressing a complaint that a public body failed to inform the public in its notice that part of the meeting would be closed). We have not construed § 10-506 to nullify the closed-session procedures mandated by § 10-508(d).

Accordingly, when a public body intends to exclude the public from either part of a meeting or all of its meeting except for the initial closing motion and vote, SG § 10-506 requires the public body to convey that message in its notice, unless the need to exclude the public arises too late to amend the notice. For the December 4 meeting, the Board could have conveyed that message by posting a notice to the effect that "The Board will meet in open session only for the purpose of voting to close its meeting to discuss matters that the Open Meetings Act permits it to discuss in closed session."[6] When a public body posts such a notice, of course, it should not discuss any other matters in open session.

By posting a notice that described the Board's December 4 meeting as "closed," the Board effectively excluded the public from the open portion of that meeting and thereby violated the mandate of SG § 10-505 that a public body's meetings be open "[e]xcept as otherwise expressly provided . . . ." The December 28 notice complied with the Act.

C. Whether the Board's written statements of the basis of its decisions to close the December meetings complied with the Act

As discussed above, a public body may not close a meeting under SG § 10-508 until the presiding officer has conducted a recorded vote on a motion to close and has "ma[de] a written statement of the reason for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed." SG § 10-508(d)(2). The minutes submitted to us demonstrate that the presiding officer conducted a recorded vote at both December meetings, so we turn to the adequacy of the written statements, which we term "closing statements."

The December 28 closing statement, which bears the presiding officer's signature and contains sufficient detail on the topics to be discussed to make clear the reason to discuss them in closed session, complies with SG

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[6] The Board's Executive Committee adequately conveyed the message for its February 22, 2013, meeting: "The Committee will meet in public session, for the purpose of adjourning to closed session, in accordance with the Maryland Open Meetings Act."

§ 10-508(d)(2). The December 4 statement, which merely repeats the statutory language of the claimed exceptions, does not. *See, e.g.,* 6 *OMCB Opinions* 77, 82 (2009) ("The statement . . . must disclose the topic of discussion in order to allow the public to assess compliance by comparing the cited authority and reported topic."); 5 *OMCB Opinions* 160, 163 (2007)("saying nothing beyond the statutory language deprives the public of information to which it is entitled").

D. Whether the Board's adoption of its minutes was timely under the Act

As applicable to the Board, SG § 10-509 (b) (1) requires, "as soon as practicable after a public body meets, it shall have written minutes of its session prepared."[7] The provision requires us to strike a balance between, on the one hand, the goal of promptly informing members of the public who cannot attend a meeting of the events that occurred there, and, on the other, the practical constraints faced by the public body that must prepare and adopt the minutes. In attempting that balance, we have consistently found "routine delays of several months to be unreasonable." *See, e.g*, 7 *OMCB Opinions* 237, 241 (2011); 8 *OMCB Opinions* 111-12 (2012). We find that the Board's adoption of its December 4 and 28 minutes complied with the Act, especially in light of the University's winter break, but that its earlier practice of adopting minutes only at its regular quarterly meetings did not.

We have recommended to other public bodies that "minutes should be approved by circulation among the members of a public body when the public body does not meet often enough to approve them promptly in an open meeting." 8 *OMCB Opinions* 125-26 (2012). We repeat the caution we stated there:

> [O]ur encouragement, only to public bodies that meet infrequently, to adopt minutes by e-mail should not be taken either as an encouragement to regularly-meeting public bodies to adopt minutes that way or as our approval of any more general practice of taking actions by e-mail. As we have stated before, the practice of taking actions by e-mail does not serve the goal of the Act that public business be conducted publicly. The distinction between the adoption of minutes by e-mail when a public body meets rarely and any broader use of the practice is simple: the prompt availability of minutes serves the interest of transparency, though at some sacrifice to the ability of the public to observe the public body's discussion of the draft, while the discussion of other issues by e-mail serves no goal of the Act.

[7] The Act excuses a public body from keeping written minutes requirement when "live and archived video or audio streaming of the session is available," and, for legislative bodies, when they post certain votes on the Internet. SG § 10-509(b)(2). Neither exception applies here.

Id. at 126.

We also recognize that some public bodies have bylaws, or may be subject to other laws, that require the members to take all actions, including the approval of minutes, in a public meeting. Under SG § 10-504, "[w]henever [the Act] and another law that relates to meetings of a public body conflict, [the Act] applies unless the other law is more stringent." On the limited subject of adopting minutes, *and* in the limited case of public bodies who seldom meet, the Act's promptness requirement is more stringent than a requirement that minutes be adopted at a meeting scheduled for the distant future. We therefore encourage the Board to consider alternative ways of adopting minutes when the gaps between its meetings will be long. *See* 8 *OMCB Opinions* at 126 (describing Northeast Waste Disposal Authority's recently-adopted schedule for adopting minutes).

Conclusion

We find that the Board's public notice of the December 4 meeting violated the Act because it effectively excluded the public from the open portion of the meeting by describing the entire meeting as "closed." Additionally, the closing statement on which the Board voted at that meeting violated the Act because it did not contain the information required by the Act. Nonetheless, the December 4 meeting was not a meeting convened secretly to discuss substantive public business that should have been discussed in the open: the Board had announced publicly that it was meeting, and the renewal of the University president's contract was a subject well within the exception provided by the Act for discussions about individual employees. Likewise, the Board's receipt of legal advice from counsel on that and other subjects fell within the exception provided for those communications.

Commendably, the Board brought both its notice procedures and its closed-meeting procedures into compliance in time for its December 28 meeting. Finally, although the Board's adoption of minutes in the past appears to have been untimely, its adoption of the December meetings minutes complied with the Act.

Open Meetings Compliance Board

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