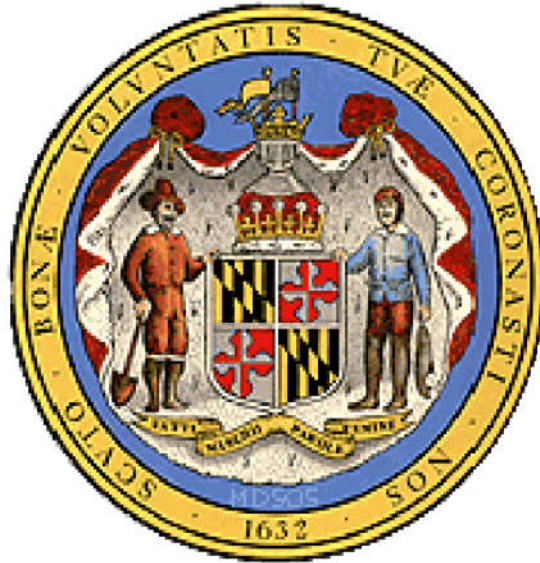


OPEN MEETINGS ACT MANUAL



OFFICE OF THE
MARYLAND ATTORNEY GENERAL

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PREFACE

As Supreme Court Justice Louis D. Brandeis famously said, “Sunlight is said to be the best of disinfectants.” In that spirit, the Maryland Open Meetings Act was adopted so that government bodies in the State would open their meetings to the public. Beyond that straightforward premise, however, lie important implementation considerations. Some arise from the rules that govern meetings subject to the Act. Others arise from the exceptions, exclusions, and special definitions that carry out the General Assembly’s decisions on which entities in the State do not have to discuss their business in public, which types of public business do not have to be conducted in public, and which topics do not have to be discussed in public.

Some of the provisions of the Act are easy to understand and apply; some are not. A few have been construed and explained by the courts; most have not. The overall policy of the Act—that it “is essential to the maintenance of a democratic society that, except in special and appropriate circumstances . . . public business be conducted openly and publicly”—can get lost in the details.

In 1991, fourteen years after the first version of the Act took effect, the General Assembly recognized that public bodies needed guidance on compliance with the Act, and it amended the Act to establish an independent board, the Open Meetings Compliance Board, to provide that guidance. The Board was directed to provide guidance by issuing advisory opinions in response to complaints from the public and by conducting educational programs for the staffs and attorneys of public bodies and the local government associations. The Office of the Attorney General was directed to share the education responsibilities and provide staff for the Board. Over the years, the Board has issued advisory opinions on almost every aspect of the Act. Under the aegis of this Office and as resources allow, the Board’s staff have conducted seminars on the Act, developed forms and other written guidance, indexed and published the Board’s opinions, and, in a collaborative effort with the Institute for Governmental Service and Research at the University of Maryland, developed the online course that public bodies’ designees may take to fulfill the training requirement now set by the Act.

This latest edition of the Open Meetings Act Manual supplements those efforts. Although it is not a substitute for advice from a public body’s own counsel, we hope it gives public bodies some practical guidance on how to comply with the Act. We hope also that this manual, along with the FAQs - A Quick Guide to Maryland’s Open Meetings Act, provides members of the media and the public with information on what they may expect.

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October 2022

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INTRODUCTION

A. The Open Meetings Act – its policy and purpose

When it adopted the Open Meetings Act, the Maryland General Assembly declared the goals to be achieved by ensuring that public business be conducted openly:

- (1) The ability of the public, its representatives, and the media to attend, report on, and broadcast meetings of public bodies and to witness the phases of the deliberation, policy formation, and decision making of public bodies ensures the accountability of government to the citizens of the State.
- (2) The conduct of public business in open meetings increases the faith of the public in government and enhances the effectiveness of the public in fulfilling its role in a democratic society.

§ 3-102(b).¹

To those ends, the General Assembly stated the overriding policy of the Act that public bodies meet in public:

Except in special and appropriate circumstances when meetings of public bodies may be closed under this [Act], it is the public policy of the State that the public be provided with adequate notice of the time and location of meetings of public bodies, which shall be held in places reasonably accessible to individuals who would like to attend these meetings.

§ 3-102(c).

¹ As currently codified, the Act appears at §§ 3-301 through 501 of the General Provisions Article of the Maryland Annotated Code. The “§” and “Section” citations in this Manual are to that article. Links to the Act are posted under “Other Resources” on the Open Meetings page of the Attorney General’s website: <https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx>

To implement this policy, the General Assembly has defined the entities that are subject to the Act, detailed the circumstances in which meetings could be closed to the public, exempted some types of public business from the Act entirely, and set minimum standards for giving notice and disclosing in minutes the events of open and closed sessions. The Act thus reflects the balance that the General Assembly struck between the public’s need to know about the conduct of public business and the government’s need, in “special and appropriate circumstances,” to address certain types of matters behind closed doors. In case of doubt, the balance tilts towards openness: the default set by the Act is “except as otherwise expressly provided by [the Act], a public body shall meet in open session.” § 3-301.

B. Other laws

This manual only addresses the Maryland Open Meetings Act, §§ 3-101 through 3-501 of the General Provisions Article of the Maryland Code. Some public bodies are additionally subject to open meetings requirements set forth in different laws, such as a county charter or other law applicable only in certain political subdivisions. *See, e.g.*, 89 Op. Att’y Gen. 22 (2004) (discussing the St. Mary’s County Open Meetings Act). Under the Act, when the other law contains a provision that “is more stringent,” that provision will apply. § 3-105. As explained by the Court of Appeals in *City of College Park v. Cotter*, 309 Md. 573 (1987):

This provision establishes that, although the Maryland Sunshine Law is the touchstone by which public bodies are to conduct their meetings, the statute is not exclusive in its application. The statute only outlines the minimum requirements for conducting open meetings. . . . It does not supersede legislative enactments designed to bring more openness to public meetings.

Id. at 586. *See also* 94 Op. Att’y Gen. 161 (2009) (discussing the provision that is now § 3-105).

C. How to use this manual

This manual is based on four sources of information about the Act: the Act itself, the published opinions of Maryland’s appellate courts, the opinions that the Attorney

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General has issued in response to public officials' questions about the Act,² and the advisory opinions of the Open Meetings Compliance Board. Only the first two sources are binding authority. The other two, like this manual, are other sources that the courts sometimes consult.³ So, while this manual attempts to explain the current state of the open meetings law, it is not binding authority.

We have organized this manual by seven broad topics that correspond to the broad topics in the online index to the Compliance Board's opinions. By turning to the index, the reader can often find specific examples of the principles explained here. For example, a reader who has consulted Chapter 2 in the manual for information about the Act's meeting notice requirements can turn to Section 2 of the topical index for a list of the Compliance Board's opinions on subtopics such as timing, method, and content.

Compliance Board opinions are cited by volume, page number, and year. They can be found through the link for the particular volume and then by page number in that volume. For example, 9 *OMCB Opinions* 283 (2015) can be found by clicking on the link for volume 9, by scrolling down past the earlier opinions in that volume to the one at p. 283, near the end, and, finally, by clicking on that link. The opinions are posted on the Open Meetings page of the Attorney General's website under the link for "Compliance Board." <https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx>.

D. A note about § 3-307

Effective October 1, 2022, the Act includes a new provision, § 3-307, which applies only to seventeen enumerated entities.⁴ Public bodies subject to this provision should be

² Opinions of the Attorney General are posted at <https://www.marylandattorneygeneral.gov/Pages/Opinions/default.aspx>

³ See, e.g. *Grant v. County Council of Prince George's County*, 465 Md. 496, 533 (2019) (quoting an earlier edition of this manual); *Dyer v. Board of Education*, 216 Md. App. 530, 536-38 (2014) (after noting the dearth of cases on the question before it, citing an Opinion of the Attorney General that, in turn, cited Compliance Board opinions and an earlier edition of this manual).

⁴ They are: (1) the Board of Directors of the Bainbridge Development Corporation, (2) the Canal Place Preservation and Development Authority, (3) the Maryland 911 Board, (4) the Board of Directors of the Maryland Agricultural and Resource-Based Industry Corporation, (5) the Board of Directors of the Maryland Clean Energy Center, (6) the Board of Directors of the Maryland Economic Development Corporation, (7) the Board of Directors of the Maryland Environmental Service, (8) the Maryland Food Center Authority, (9) the Maryland Health and Higher Educational Facilities Authority, (10) the Maryland Industrial Development Financing Authority, (11) the Maryland Stadium Authority, (12) the Maryland Transportation Authority, (13) the Northeast Maryland Waste Disposal Authority, (14) the Public Service

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aware that “[t]he requirements of this section are in addition to the other requirements” of the Act. § 3-307(k). Although the manual generally focuses on the requirements applicable to all public bodies, the manual highlights the stricter requirements of § 3-307 when relevant to the topic at issue.

Commission, (15) the State Board of Elections, (16) the Maryland Technology Development Corporation, and (17) the Historic St. Mary’s City Commission.

Chapter 1: Applicability of the Act

Chapter One: When does the Act apply?

(Index Topic 1)

Chapter Summary: Determining whether the Act applies to a particular gathering is a three-step process. First, to be subject to the Act, an entity must fall within the Act’s definition of a “public body.” Second, for a gathering of the public body’s members to be subject to the Act, the members must be “meeting,” as defined by the Act. Third, the public body must be performing one of the “functions” subject to the Act.¹ In turn, each step has multiple elements, some with multiple sub-elements. The Act’s threshold provisions are more complicated than the rest of the Act.

A. Is the entity a “public body” subject to the Act? (Index topic 1-A)

The Act only applies to “public bodies.” An entity is a “public body” if it meets any of the three tests set by the definition of that term in § 3-101(h). An additional consideration is whether the entity is one of those expressly excluded from the definition. And, the courts have sometimes deemed seemingly private entities to be “public bodies” by virtue of considerations such as the government’s control over the particular entity’s existence, governance, and functions. The General Assembly has added specific entities and types of entities to the statutory definition over the years, so the Compliance Board’s opinions on the subject should be checked against the current law.

To figure out whether an entity meets the definition, a person first needs to gather the facts on how the entity was created (for example, by a statute, or by a person?), by whom its members are appointed, and what functions it serves. Only then can one apply the five sets of principles discussed below. If an entity does not meet the Act’s definition of a “public body,” the Act does not apply to that entity’s gatherings.

¹ For an illustration of the Compliance Board’s application of the three-step process, see 6 *OMCB Opinions* 21 (2010).

1. The first test - more than one member; created by a law, bylaw, resolution, or other legal instrument (the “created by law” test)

The “created by law” test, which is set forth in § 3-101(h)(1), is usually easy to apply. First, the entity must consist of “at least two individuals.” *Id.* Therefore, a single person, while perhaps an official or government employee, does not constitute a “public body.” For example, one hearing officer is not a “public body,” 1 *OMCB Opinions* 176 (1996), nor is a county executive, 9 *OMCB Opinions* 234, 237 (2015). Also, an agency run by a secretary or department head is not an entity that “consists” of the government employees who work for it; the Act, read as a whole, contemplates an entity that consists of members whose presence can create a quorum. *See* 4 *OMCB Opinions* 132, 137 (2005) (“agency staff meetings are not generally subject to the Open Meetings Act, because staff members are not a ‘public body’”); 7 *OMCB Opinions* 284 (2011) (the Maryland Department of the Environment is “not a body either of ‘individuals,’ for purposes of [§ 3-101(h)(1)] or of ‘members appointed by the Governor’”); 9 *OMCB Opinions* 53 (2013) (State procurement personnel who were invited to attend periodic updates on developments in the field were not “conducting public business as ‘members’ of a ‘public body,’” but rather were “simply agency employees attending agency information sessions”); 9 *OMCB Opinions* 302 (2015) (mediation session held by Department of Natural Resources employees for lease applicant and protestants was not a gathering of a “public body”); 14 *OMCB Opinions* 1 (2020) (“public body” was not created by attendance of county employees at community meetings hosted by their departments).

Next, the entity has to have been created by one of the eight types of legal instruments listed in the definition. Among other things, the list includes State and local laws and executive orders, the State constitution, local governments’ charters, and a “rule, resolution, or bylaw.” § 3-101(h)(2). The State’s Board of Public Works meets this test; it was created by Article XII, § 1 of the Maryland Constitution. *See* 6 *OMCB Opinions* 69, 72 (2009). By contrast, a gathering of government employees by their own volition does not meet the test. 80 Op. Att’y Gen. 90, 92 (1995).

The list of instruments includes master agreements and memoranda of understanding (“MOUs”) between the Department of Education and a majority of the county boards of education. § 3-101(h)(ii)(4). The list does not include other MOUs. However, the Compliance Board has stated that when a public body, by resolution, enters into an MOU with another entity to create a new board, commission, or other body, the new entity might well meet this first test. *See* 9 *OMCB Opinions* 94, 97 (2013) (“[T]he Act should not be interpreted to allow a parent public body to sidestep the Act by creating committees through MOUs with private entities[.]”). The determination of whether a purely intergovernmental MOU that creates a multimember board has created a “public

body” under the “created by law” test has also depended on how the signatories adopted the MOU. *See* 14 *OMCB Opinions* 14 (2020).

Questions arise as to when a committee or other sub-entity of a public body has been “created by law,” either expressly or impliedly. A committee is clearly a public body when its parent public body expressly created it by name in the parent’s bylaws, resolutions, or rules, as when a bylaw provision states, “There shall be a Finance Committee.” *See, e.g.,* 14 *OMCB Opinions* 98 (2020); 9 *OMCB Opinions* 151 (2014). Generally, the Compliance Board has concluded that a committee created informally, as by an “informal consensus,” does not meet the test. *See, e.g.,* 4 *OMCB Opinions* 132, 137 (2005) (“We have long distinguished between entities established by formal action of a public body versus entities established less formally, at the prerogative of a presiding officer or consensus of the body. While the former are subject to the Open Meetings Act, the latter are not.”); 14 *OMCB Opinions* 60 (2020). However, the committee’s status when first created “does not matter” if the public body later takes formal actions that create it. 10 *OMCB Opinions* 12, 15 (2016).

Whether a committee has been impliedly created as a public body is often less obvious. The opinion of the Court of Appeals in *Avara v. The Baltimore News American*, 292 Md. 543 (1982), provides one example of the circumstances under which public body status should be implied from an instrument that does not expressly create the committee, and the Compliance Board’s opinions provide others. Generally, it appears that the outcome in a given situation will vary with the degree to which the formal instrument identifies the function of the committee—that is, the more precisely the instrument identifies or mandates the committee’s tasks or role, the more likely it is that the committee will be deemed a public body.

In *Avara*, the Court of Appeals addressed the status of the House-Senate Conference Committee appointed in 1981 under the rules of each house of the General Assembly. Those rules, as described by the Court, “authorize[d] the appointment of conference committees where the two Houses ‘are unable to concur on the final form of a Bill.’” *Id.* at 546. The committee had been appointed to “resolve differences between the two Houses in the budget.” The Court noted that such a committee had been appointed in every year since 1976 and that it was “likely” that a similar committee would be appointed in 1982. *Id.* at 547. Rejecting the State’s argument that the committee was not a “public body” because it was not created by the rules themselves, the Court stated that “Conference Committees are established and exist only in pursuance of House and Senate Rules and in the sense contemplated by [the definition] are plainly the creation of a rule.” *Id.* at 550. To conclude otherwise, the Court stated, “would be to ascribe an intention to the legislature to exclude from the Act’s coverage all those entities which, though lawfully transacting public business and exercising legislative or advisory functions, were nevertheless merely

authorized but not required to exist.” *Id.* at 550-51. The Court further stated that such a result “would seriously undercut the Act’s effectiveness and would be wholly at odds with the broad public policy underlying its passage.” *Id.* at 551. Later that year, the Court concluded that a school board had created a public body when, as authorized by statute, the school board designated representatives to engage in collective bargaining negotiations, “because they are an entity of two or more persons created or authorized by statute or resolution.” *Carroll County Educ. Ass’n, Inc. v. Board of Educ. of Carroll County*, 294 Md. 144, 155 (1982).

Accordingly, the Compliance Board has deemed a committee to be a “public body” when one of the listed instruments either requires the creation of an entity to perform certain tasks or mandates that a committee, though not originally created as a public body, perform certain tasks. In 10 *OMCB Opinions* 12, for example, the Compliance Board found that a committee that was not originally a public body became one when the parent “adopted a resolution that set its membership, mandated its performance of various compliance functions, and assigned it a role in making policy recommendations to [the parent].” *Id.* at 15. In 14 *OMCB Opinions* 98 (2020), the Compliance Board found that a committee became a public body when its parent adopted resolutions that “acknowledged it as a committee of the [parent body] itself, detailed the precise advisory functions it [was] to perform, and delegated to it the receipt of reports on the [parent public body’s] behalf.” Other matters in which the Compliance Board has found a committee to be a public body by implication include 5 *OMCB Opinions* 189 (2007) (panel “established in accordance with a statute that required the Critical Area Commission to appoint a panel of 5 of its members to conduct a public hearing on a proposal to amend a local critical area program”); 7 *OMCB Opinions* 21, 27 (2010) (boundary study committee appointed by an assistant superintendent in accordance with Board of Education policy requiring the appointment of such committees to advise on school districting); 7 *OMCB Opinions* 176, 184 (2011) (committee, after parent body adopted a resolution requiring it to perform certain functions); *cf.* 10 *OMCB Opinions* 117 (2016) (development corporation that city created as private entity to perform city function).

By contrast, the Compliance Board has found that the “created by law” test was not met by a library board’s finance committee that had been appointed pursuant to the board president’s broad power, under the bylaws, to appoint special committees and the board’s power to appoint “such standing committees as the [b]oard may desire.” 7 *OMCB Opinions* 105 (2011). Unlike the provisions in *Avara*, the boundary committee matter, and the Critical Area Commission matter, that board’s bylaws neither described the particular committee nor delegated particular functions to a committee. The Compliance Board found that the committee had not been created by the bylaws.

A further consideration in determining the status of an informally-created subcommittee is whether it falls into the exception provided for the subcommittees of a public body that meets the definition in the second test. *See* § 3-101(h)(3)(ix); *see also* 13 *OMCB Opinions* 51 (2019) (applying the exception); 14 *OMCB Opinions* 60 (2020) (same).

2. The second test:

For State entities – members appointed by the Governor or someone subject to the Governor’s policy direction, with at least two individuals who are not employed by the State government.

For local entities – members appointed by the chief executive authority or someone subject to the executive’s policy direction, with at least two individuals who are not employed by the local government (the “executive appointment” test)

The “executive appointment test,” which is set forth in § 3-101(h)(2)(i), is not always easy to apply. A multi-member entity is a “public body” if it was appointed by “an official subject to the policy direction” of the Governor or the chief executive authority of the political subdivision, *and* if it includes at least two people not employed by the State or political subdivision—unless the group is a “subcommittee” of such a body. § 3-101(h)(2)(i). For example, the Compliance Board found that a task force created by the Secretary of the Environment was a public body because the secretary was an “official subject to the policy direction of the Governor.” 5 *OMCB Opinions* 182 (2007).

The Act does not provide guidance on who is “subject to the policy direction” of the executive. The Compliance Board addressed that question in the case of a committee appointed by a county police captain. The police captain, a merit system employee, was supervised by the deputy to the police chief, who had been appointed by the county executive. Relying on the legislative history of the provision, the Compliance Board found that the police captain was too far removed from the county executive to be deemed subject to the executive’s policy direction. 9 *OMCB Opinions* 279 (2015).

Applying the “executive appointment test” to a local-government board or commission may also require looking at laws other than the Act in order to identify both the “chief executive authority” and the scope of that authority’s “policy direction.” For example, the “chief executive authority” might be a board of commissioners in some jurisdictions and a mayor or county executive in others, depending on the jurisdiction’s form of government and any applicable charter provisions.

Section 3-101(h)(3)(ix) expressly excludes subcommittees of this type of public body from the definition of a “public body.” For the scope of that exclusion, see part 4, below.

3. The third test (for State entities only) – appointed either by an Executive Branch public body whose members were appointed by the Governor *or* by someone subject to that entity’s policy direction, with at least two individuals who are not employed by the State (the “executive entity appointment” test)

The “executive entity appointment” test, which is set forth in § 3-101(h)(2)(ii), is best explained through an example. When a gubernatorially-appointed board or its director creates a committee that includes at least two people who are neither members of the board nor employees of the State, that committee will be a “public body.” The test thus brings under the Act committees that are made by the State agencies that are headed by boards. *See, e.g., 12 OMCB Opinions 53 (2018)* (applying the test; finding that a committee created by the board’s director was not a public body because the committee members were all board members). This definition of “public body” was added in 2009 with the enactment of House Bill 1194.

4. The exclusions – entities that are specifically excluded from, or included in, the definition

The General Assembly has provided that some entities are not subject to the Act, even though those entities would meet one of the Act’s three tests, and that other entities expressly are subject to the Act. *See* § 3-101(h)(2), (3). Among the specific exclusions are certain subcommittees, judicial nominating commissions, grand juries, petit juries, courts (except when they are engaged in rulemaking), the Governor’s Cabinet, and a local counterpart to the Governor’s Cabinet. § 3-101(h)(3). One entity, the Maryland School for the Blind, is expressly identified as a public body. § 3-101(h)(2)(iii).

The subcommittee exclusion, § 3-101(h)(3)(ix), applies only to subcommittees of public bodies that meet the executive appointment test. In *7 OMCB Opinions 284 (2011)*, for example, the Compliance Board concluded that the exclusion applied to a subcommittee of a task force that had been appointed by the Secretary of the Environment. *See also 12 OMCB Opinions 53 (2018)* (reaching the same conclusion for subcommittees created by the director of the Maryland Medical Cannabis Commission); *13 OMCB Opinions 51 (2019)* (applying the exception); *14 OMCB Opinions 60 (2020)* (same).

Practice notes on the subcommittee exception:

- A subcommittee meeting will be deemed to be a meeting of the parent public body if a quorum of the members of the parent body attends.
- “Subcommittees,” in the usual sense, are comprised only of members of the parent public body.
- Subcommittee should not be used as a way to perform the parent body’s functions behind closed doors. The courts construe the Act so as to prohibit “evasive devices,” and a subcommittee that conducts the parent body’s own business risks being deemed a public body.

5. The final set of considerations – the courts’ “constructive public body” factors

The Maryland appellate courts have sometimes deemed a privately-incorporated entity to be a “public body” subject to the Act. When doing so, they have looked to various factors, including the degree to which the entity’s board is controlled by the government (as when the board members are appointed and subject to termination by a government official), whether the entity performs a purely public function, and whether the entity has few private functions. The inquiry is fact-specific. *See, e.g., City of Baltimore Development Corp. v. Carmel Realty Associates*, 395 Md. 299 (2006). The fact that a private entity receives or administers government funds is not enough by itself. In 9 *OMCB Opinions* 203 (2015), for example, the Compliance Board found that the facts that the private entity had applied to provide services to a government agency and that the agency selected it and regulated the provision of the services did not make it a “public body.” *Id.* at 204.

In addressing an entity incorporated by the city attorney, at the mayor’s direction, to operate the city’s zoo, the Court of Special Appeals explained:

A private corporate form alone does not ensure that the entity functions as a private corporation. When a private corporation is organized under government control and operated to carry on public business, it is acting, at least, in a quasi-governmental way. When it does, in light of the stated purposes of the statute, it is unreasonable to conclude that such an entity can use the private corporate form as a parasol to avoid the statutorily-imposed sunshine of the Open Meetings Act.

Andy's Ice Cream v. City of Salisbury, 125 Md. App. 125, 154-55 (1999). The Compliance Board discussed these principles in 7 *OMCB Opinions* 195 (2011) and 9 *OMCB Opinions* 246 (2015). A key consideration is whether the privately-incorporated entity is structured in such a way that a governmental entity controls its governance, as when a governmental entity has the power to dissolve it or appoint its board. *See* 7 *OMCB Opinions* 195, 199-201 (2011) (discussing cases). Applying these principles, the Compliance Board found that a privately-incorporated and controlled volunteer fire company was not a “public body.” 12 *OMCB Opinions* 65 (2018).

B. Is the public body holding a “meeting,” or did the members instead gather merely by chance, for social reasons, or for some other occasion not intended to evade the Act? (Index topic 1B)

The next threshold question is whether the members of the public body are holding a “meeting,” because the Act only applies when a public body “meets.” The Act does not govern whether a particular public body must conduct public business in a meeting; the Act simply sets the rules that apply when a public body *does* meet. *See* 94 Op. Att’y Gen. 161, 173 (2009) (“[O]ur longstanding advice has been that the Open Meetings Act does not specify when a public body must hold a meeting[.]”).

The Act defines the verb to “meet” as “to convene a quorum of a public body to consider or transact public business.” § 3-101(g). The Act does not apply to a “chance encounter, social gathering, or other occasion that is not intended to circumvent” the Act. § 3-103(a)(2). As explained by the Court of Appeals, the Act does not apply unless there is “evidence of any actual meeting or any exchange of emails or other communications between members of the [public body] which might rise to the level of a ‘meeting’ or any evasive device purposefully designed to avoid the requirements of the Act.” *Grant v. County Council of Prince George’s County*, 465 Md. 496, 533 (2019). So, the “meeting” requirement is met when the public body considers public business in any of the following circumstances: (1) a quorum of the public body’s members is present at an “actual meeting”; (2) a quorum is deemed present by virtue of communications that would “rise to the level of a ‘meeting,’”; (3) if the quorum came together only by chance or social reasons, it nevertheless used the occasion to discuss public business; or (4) the members considered public business by “a device purposefully designed to avoid the requirements of the Act.” *Id.* at 533; §§ 3-101(g), 3-103(a)(2).

To figure out whether a public body has “met,” a person needs to gather the facts on how many members of the particular body it takes to create a quorum (sub-part 1 below), how many members were “present,” (whether actually, virtually, or through the exchange of communications which might “rise to the level of a ‘meeting’” or constitute an evasive

device) (sub-part 2), and whether the group was discussing the public body's business (sub-part 3).

1. The number of members required to create a quorum

A "quorum" is "a majority of the members of a public body" or else "the number of members that the law requires." § 3-101(k). For example, if eight members of a 15-member board gather, their presence will usually create a quorum. Their presence will not create a quorum, however, if the statute that creates the board requires the presence of nine members for a quorum. A particular public body's quorum might also be defined in regulations and executive orders. However, the Compliance Board has concluded that a bylaw, by itself, is not an "other law" that would override the Act's definition of a quorum as the majority. *See 9 OMCB Opinions* 307, 310 (2015); *cf.* 73 Op. Att'y Gen. 6 (1988) (explaining that administrative agencies lack the authority to alter by rule or bylaw the definition of a "quorum" set by a statute or, if none, the common law).

2. The presence of a quorum, whether physically or by other means

As explained above, a quorum may be deemed "present" in several ways: through the quorum's presence together at one time (an "actual meeting"), through an exchange of communications that "rise[s] to the level of a 'meeting,'" or through the use of an evasive device to avoid meeting openly. *See Grant*, 465 Md. at 533 (describing the requirement). Public bodies have been found to have "met" in the following sets of circumstances:

a. Quorum created by physical presence, in one place at one time

A quorum of members in one place at one time can be created regardless of the group's location or intent of the group to gather. For example, three members of a five-member public body formed a quorum when they encountered each other at a coffee shop by happenstance and then sat together. *7 OMCB Opinions* 269 (2011) (finding no violation of the Act because the quorum did not discuss business subject to the Act); *see also 7 OMCB Opinions* 92 (2011) (noting that the presence of a majority of a town council's members at a county council's meeting created an "accidental quorum" of the town council); *3 OMCB Opinions* 30 (2000) (noting that a quorum occurred by accident when a council member "poked her head into the room" where others were hearing a budget presentation and then stayed; finding a violation). As explained by the Court of Appeals, "[t]he Act makes no distinction between formal and informal meetings of the public body; it simply covers all meetings at which a quorum of the constituent membership of the public body is convened 'for the purpose of considering or transacting public business.'" *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) (quoting what is now § 3-101(g)). The fact that the presiding officer did not expect a small-group discussion of public business to

evolve into a gathering of a quorum thus did not provide a defense to an action brought for violation of the Act. *Cnty. and Labor United For Baltimore Charter Comm. v. Baltimore City Bd. of Elections*, 377 Md. 183, 195 (2003) (“C.L.U.B.”).

b. Quorum created by “presence” at one time, not in one place

A quorum may also be formed when a quorum of the members is not physically present together. *Grant*, 465 Md. at 533 (“There may be instances where the Court may find a violation of the Open Meetings Act in the absence of a physical meeting consisting of a quorum of a public body.”). For example, a member who participates in a meeting by telephone will be deemed present for purposes of the Act. 9 *OMCB Opinions* 40 (2013); *cf. Tuzeer v. Yim, LLC*, 201 Md. App. 443, 471 (2011) (stating that the Act does not “prohibit[] a meeting with one or more members participating by telephone conference as long as the conference call is broadcast over a speakerphone so it can be heard by members of the public”); *see also, e.g., 14 OMCB Opinions* 72 (2020) (addressing meeting held entirely by telephone). A discussion conducted by teleconference or videoconference is thus a “meeting” when a quorum is on the call or in the virtual meeting.

c. Exchanges of electronic communications among a quorum, not during a scheduled meeting

Depending on the circumstances, the exchange of electronic communications among a quorum can be deemed a “meeting.” *See Grant*, 465 Md. 496, 533 (noting that the record did not reflect “any exchange of emails or other communications between members . . . which might rise to the level of a ‘meeting’”); *see also 13 OMCB Opinions* 39 (2019) (concluding that a county council’s exchanges of emails and texts over a discrete period of time rose to the level of a meeting); 9 *OMCB Opinions* 259 (2015) (explaining that the exchange of electronic communications can constitute a meeting); 81 Op. Att’y Gen. 140, 143-44 (1996) (opining that, at the time, sequential e-mail communications were analogous to the exchange of information through regular mail and thus did not constitute a “meeting” but that the “result would be different” if the members were able to “use e-mail for ‘real time’ simultaneous interchange”).

In addressing whether an exchange of emails or texts rises to the level of a meeting, the Compliance Board has referred to the Wisconsin Attorney General’s prediction of the factors that courts would likely consider in addressing whether an email exchange was a meeting: “(1) the number of participants involved in the communication; (2) the number of communications regarding the subject; (3) a time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.” 9 *OMCB Opinions* at 265.

The lack of “actual interaction” was key in 9 *OMCB Opinions* 259, 10 *OMCB Opinions* 18 (2016), and 13 *OMCB Opinions* 47 (2019), where the Compliance Board found that the communications did not amount to a “meeting.” By contrast, in 13 *OMCB Opinions* 39 (2019), the Compliance Board applied the factors and found, from the “totality of the circumstances,” that a board’s continuous deliberations and vote by texts and emails exchanged over two days reflected “conversation-like interactions” and therefore rose to the level of a “meeting.” The Compliance Board reached a similar result in 14 *OMCB Opinions* 33, 37 (2020), where it “conclude[d] with little difficulty” that a series of emails on one topic, exchanged among a school board’s members over about fourteen hours, “was so tightly grouped as to amount to a meeting of a quorum.”

As for practical guidance, the Compliance Board advised in 9 *OMCB Opinions* 259 that the use of electronic communications for substantive business is risky at best. There, the Compliance Board suggested that members either “simply forebear from conducting business electronically” or avoid using the “reply all” and “forward” functions. *Id.* at 264. The Compliance Board then conveyed the following “practical advice” from Wisconsin’s Attorney General:

Inadvertent violations of the open meetings law through the use of electronic communications can be reduced if electronic mail is used principally to transmit information one way to a body's membership; if the originator of the message reminds recipients to reply only to the originator, if at all; and if message recipients are scrupulous about minimizing the content and distribution of their replies.

Id. at 265 (quoting 2005 Wisc. AG LEXIS 29, 2-4 (Wisc. AG 2005) (internal quotation marks and citation omitted)).²

² Some states’ open meetings laws expressly include “electronic communications” in the definition of “meeting.” *See, e.g.*, Iowa Code Ann. § 21.2 (West) (“Meeting” means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties.”). Others prohibit the use of electronic communications to avoid open meetings. For example, the Alabama Open Meetings Act provides that “Serial meetings or electronic communications shall not be utilized to circumvent any of the provisions of this chapter.” Ala. Code § 36-25A-1. In other states, courts have interpreted open meetings laws to extend to email communications when the circumstances show deliberations among a quorum. The Arkansas Supreme Court, in construing a statute that, like Maryland’s, does not mention electronic communications, stated its reasoning for interpreting the Arkansas Freedom of Information Act (“FOIA”) to apply to them in some circumstances:

We . . . have no difficulty in concluding that FOIA's open-meeting provisions apply to email and other forms of electronic communication between governmental officials just as surely as they apply to in-person or telephonic

d. Exchanges of communications among fewer than a quorum, in the course of a public meeting of a quorum

The Court of Appeals, and, more recently, the Compliance Board, have sometimes applied the Act, and found violations of it, in instances in which fewer than a quorum of members exchanged communications out of the public eye during an open meeting of the public body, whether while a quorum was briefly absent, during a brief recess, or by electronic communications among themselves during the meeting.

In the first such instance, the Court applied the Act to discussions from which a city council excluded the public when fewer than a quorum were in the meeting room. *C.L.U.B.*, 377 Md. at 185. There, the Court held that the council violated the Act when the city council president instructed staff to keep track of the number of council members in the room and then excluded the public whenever the number fell below a quorum. Implicitly rejecting the council's argument that the Act did not apply to a gathering of fewer than a quorum of members, the Court noted the council president's testimony that she had not wanted the meeting to be public because the discussion would be "heated." The Court then held that the council had willfully violated the Act. *Id.* at 189, 196-97. The Court did not specify whether it deemed that carefully-managed gathering to be an "evasive device," that could be subject to the Act regardless of the number of members actually present, *see Grant*, 465 Md. at 533, or whether the gathering instead "[rose] to the level of

conversations. It is unrealistic to believe that public business that may be accomplished via telephone could not also be performed via email or any other modern means of electronic communication. Neither this court nor the [Arkansas] General Assembly can be expected to list all such communication methods or anticipate others yet to emerge. Exempting electronic communication would allow governmental officials who are so inclined to make decisions in secret, leave the public in the dark, and subvert the purpose of FOIA's open-meeting provisions.

City of Fort Smith v. Wade, 578 S.W.3d 276, 280 (Ark. 2019), *reh'g denied* (Aug. 1, 2019). In considering whether Maryland's Open Meetings Act should be amended to address electronic communications, the Open Meetings Compliance Board has similarly stated that the Act can already be interpreted to extend to them in certain circumstances. *See* Annual Meeting Minutes, September 8, 2016, available at <https://www.marylandattorneygeneral.gov/OpenGov%20Documents/Openmeetings/min090816.pdfA> (reporting that "the Board concurred that the Act gave it the flexibility to address the issue on a case-by-case basis and that legislation was not needed at this time").

A survey of the states' laws on this topic and others can be found in the online Open Government Guide published by the Reporters Committee for Freedom of the Press: <https://www.rcfp.org/open-government-guide/>. The Reporters Committee has also published a guide to the federal open meetings law: www.rcfp.org/federal-open-government-guide.

a ‘meeting,’” *id.*, given that the requisite number of members seemingly cycled in and out of the room in such a way to enable collective deliberation among a quorum.³

In the second instance of a finding of a violation without proof that a quorum was together at the same time, the Compliance Board held that a county board of appeals violated the Act when the board abruptly called a ten-minute recess in the middle of detailed deliberations on a special exception application and then returned to open session with a complete resolution of the matter. 9 *OMCB Opinions* 283 (2015). The board had recessed after its counsel suggested a break to “let your thoughts settle down,” and all of the members left the meeting room together. Immediately upon their return, the chair stated: “We’ve had a little bit more discussion . . . OK, would someone like to make a motion at this point?” *Id.* at 285. Noting that the public body had not closed the meeting for reasons permitted by the Act, and that a consensus was reached during the recess whether or not the discussion was held in the presence of a simultaneous quorum, the Compliance Board stated that it did not “construe the Act to permit the use of recesses as a setting in which to consider public business behind closed doors.” *Id.* at 284. The Compliance Board further advised: “Public bodies may not use behind-the-scenes recesses as a means of shortcutting further public discussion of a matter that they have just been considering in open session.” *Id.* at 288. Citing the result in *C.L.U.B.*, 377 Md. 183, the Compliance Board cautioned that “the Act does not automatically switch off during a discussion when the number of members present falls briefly below the number required for a quorum.” *Id.* “Of more significance” for such recesses, the opinion states, “will be the totality of the circumstances, including whether the deliberations have continued during the break.” *Id.*⁴

³ Either way, the *C.L.U.B.* Court seemingly deemed a quorum to be sufficiently available to vote in some fashion; the Court faulted the presiding officer for “simply decid[ing] to close the meeting,” when the number of members in the room dropped below a quorum, without having conducted the vote to close required by § 3-305. *See* 377 Md. at 195. Although the facts stated in the opinion show that the public was asked to leave whenever a quorum was not in the room, that staff was asked to keep track of the quorum, and that the presiding officer did not want the public to observe the discussion, the opinion does not specify that the presiding officer either asked members to leave or otherwise knew in advance when a member would leave and break the quorum. The point at which the presiding officer should have required the quorum to vote on a motion to close is thus unclear from the facts stated in the opinion, even had the Act permitted the particular topic to be discussed in closed session.

⁴ For another example of a “totality of the circumstances” approach to the quorum requirement, *see Armstrong v. Mayor & City Council of Baltimore*, 409 Md. 648 (2009). There, the Court of Appeals quoted at length, but did not explicitly review, the circuit court’s finding that a council committee had violated the Act by circulating a draft zoning bill among its members for their approval at separate times. Noting that “it is true that a quorum is technically necessary to trigger the Act,” the circuit court had nonetheless examined whether, from the “totality of the circumstances,” the committee had violated the Act. The circuit court found that the committee had “intentionally avoid[ed] holding a meeting” of a quorum. The circuit court then concluded that it was “not consistent with the goal of the [Act]” to meet publicly on a bill without

In the third such instance, the Compliance Board found that a school board violated the Act when, during a meeting, two members—fewer than a quorum of the board’s members—exchanged text messages about the public business under discussion at that moment. The Compliance Board reasoned that the members were conducting the public business that the public body was conducting and that the public was entitled to observe the members’ deliberations. 14 *OMCB Opinions* 29 (2020).⁵

- e. Communications among individual members whose presence would not create a quorum and who are not in a public meeting at the time - the question of “evasive devices”*

Maryland’s courts have repeatedly instructed that open meetings laws “should be construed so as to frustrate all evasive devices.” *See, e.g., WSG Holdings, LLC v. Bowie*, 429 Md. 598, 619 (2012); *cf.* § 3-103(a)(2) (providing that Act itself provides that it does not apply to a “chance encounter, social gathering, or other occasion that is not intended to circumvent” the Act). Accordingly, when the members of a public body have not demonstrably deliberated as a group, whether in each other’s presence or through communications that rise to the level of a meeting, but nonetheless reached a consensus somehow, the courts will look to whether there is “evidence of . . . any evasive device purposefully designed to avoid the requirements of the Act.” *Grant*, 465 Md. at 533.

In *C.L.U.B.*, 377 Md. 183, the Court of Appeals found that a public body violated the Act by structuring a meeting in such a way as to avoid deliberating on a matter in the presence of a quorum. There, the city council president “had indicated that she did not want the media to be present at the August 8 meeting ‘because of her fear of how the media might portray the Council when it was having heated discussions.’” *Id.* at 189.⁶ As

discussing it and then to circulate it later “from member to member without the public being permitted to observe any of the deliberative process.” *Id.* at 662-63 (quoting the circuit court’s opinion). The extent to which the Court adopted the circuit court’s reasoning is unclear. *See* 94 Op. Att’y Gen. 161 (2009).

⁵ In the same matter, the Compliance Board found, “with some reluctance,” that the board did not violate the Act either when one member passively received text messages from a member of the public during the meeting or when another member exchanged messages with a member of the public. *Id.* at 31. However, the Compliance Board limited that guidance to the particular facts before it, and advised public bodies to “to recognize that the public’s trust in government can be diminished by their members’ receipt of electronic communications, particularly from people who are not the public body’s staff, during a meeting and on the business at hand.” *Id.* The Compliance Board also “encourage[d] public bodies that encounter the problem to consider addressing it through meeting rules, advisories to the public, or other means as appropriate to the particular public body.” *Id.*

⁶ *C.L.U.B.* and *Grant* implicitly qualify the Court’s earlier dicta in *City of College Park v. Cotter*, 309 Md. 573 (1987). In *Cotter*, the Court of Appeals applied a municipal open meeting ordinance which was stricter than the Act in that it did not permit the council to close a session to confer with its attorney. *Id.* at

discussed in footnote 4, above, *Armstrong v. Mayor & City Council of Baltimore*, 409 Md. 648 (2009), the circuit court found that a public body had intentionally avoided holding a meeting, and had violated the Act, by circulating drafts of an bill among the members, but that finding was not at issue on appeal. In *Grant*, the Court, referring to an earlier version of this Manual, made clear that “[w]e do not condone the use of a “walking quorum” or other device if used to evade the requirements of the Open Meetings Act and shield the actual deliberations of a public body from public view.” 465 Md. at 533. There, the Court addressed a land use appeal in which the administrative record contained no facts concerning how the board had reached conclusions that it had stated in a lengthy opinion that it issued on the day after its hearing on the matter and without deliberating publicly. Noting a lack of “direct and culpable facts” establishing that the board had met in some fashion or used an evasive device, the burden that the Act places on the plaintiff to prove violations, and the Act’s statutory presumption that public bodies comply with it, the Court held that a violation of the Act had not been proven. *Id.* at 527.

For its part, the Compliance Board has often addressed complaints that a public body improperly reached a decision through e-mails, separately-held telephone calls, or other modes of communication in such a way as to avoid the presence of a quorum. In addressing these matters, the Compliance Board has acknowledged its inability, as an advisory body with limited information before it, to determine whether the members used separate communications to circumvent the Act. For example, in 8 *OMCB Opinions* 56, the Compliance Board, noting that it was not an investigatory body and “not in a position to infer that a public body has acted with the intent to evade the Act,” concluded that a county board’s conduct did not amount to a meeting. Although that county board had evidently decided the matter at hand out of the public eye before it took a vote in public, its counsel stated that he had prepared a written decision and had taken it to each member separately and that the members had not discussed the issue as a group before they adopted the decision. While the Compliance Board did not assess evasive intent, it reiterated an earlier caution against ““this way of proceeding,”” *id.* at 59 (quoting 7 *OMCB Opinions* 193 (2011)), and it noted out-of-state cases in which courts had found that a public body’s use of an intermediary to conduct discussions seemingly in the absence of a quorum—a “walking quorum”—violated those states’ open meetings laws.⁷ Citing those cases and

592-94. Applying the similarly-worded definition of the term “meeting” in that ordinance, the Court stated in a footnote that “nothing prevents the City Attorney from meeting in closed session with less than a quorum of the Council members.” *Id.* at 595 n. 32. However, under *C.L.U.B.* and *Grant*, 465 Md. at 533, sequential sub-quorum gatherings, if designed to circumvent the Act, could be subject to challenge. *See also* fn. 4.

⁷ The Compliance Board further explained that courts in other states have given the term “walking quorum” to a public body’s use of the quorum requirement to avoid deliberating in public. *See, e.g., Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 706-707 (W.D. Tex. 2011) (walking quorums “occur when members of a governmental body gather in numbers that do not physically constitute a quorum at any one

C.L.U.B., 377 Md. 183, the Compliance Board then stated its “reluctan[ce] . . . to give the impression that the quorum requirement provides public bodies with an absolute defense to an alleged Open Meetings Act violation.” 8 *OMCB Opinions* at 59. See also 7 *OMCB Opinions* at 194 (finding that the commission had not “met” when it reached a consensus “through sequential and one-on-one communications” with the board president, “conducted in person, by e-mail, and by telephone”; disapproving “this way of proceeding”).

2. **The gathering is convened for the “consideration or transaction” of public business; or,**
3. **If the quorum instead came together by chance or for social purposes, the quorum used the occasion to discuss public business**

These two related elements are met when a quorum comes together to consider *or* transact public business, and they are *not* met when the members are together for some other reason and do not discuss public business.

Some clear guidelines have emerged. First, the location of the meeting is irrelevant. If a quorum of the public body’s members comes together at a restaurant by chance and discusses public business, all of the elements of a “meeting” are met. 7 *OMCB Opinions* 269 (2011). The same is true of a “retreat.” See, e.g., 3 *OMCB Opinions* 122, 124 (2001).

Also irrelevant is the fact that the quorum does not make a decision or take an action. The Court of Appeals has repeatedly stated that a public body’s “consideration” of public business includes all phases of its deliberation—“every step of the process”—not just the decision. See, e.g., *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980).⁸ Accordingly,

time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body”) (citations and some internal punctuation omitted); *Mabry v. Union Parish Sch. Bd.*, 974 So. 2d 787, 789 (La. App. 2 Cir. 2008) (a “walking quorum” is “a meeting of a public body where different members leave the meeting and different members enter the meeting so that while an actual quorum is never physically present an actual quorum during the course of the meeting participates in the discussion”); *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 471-478 (W.D. Tex. 2001) (reviewing cases on public bodies’ use of a quorum requirement to avoid public deliberations). See also *State ex. rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St. 3d 540, 668 N.E.2d 903 (Ohio 1996) (in addressing meetings held on three different days, stating, “The Ohio Sunshine Law cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of a public body.”). See also *Grant*, 465 Md. at 533 (citing out-of-state “walking quorum” cases; describing the practice).

⁸ There the Court stated: “It is . . . the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business.” *Id.*

the Compliance Board has explained that receiving a briefing on public business is part of the process of considering it, *see* 7 *OMCB Opinions* 85, 87 (2011), and, in any event, the “advisory function” is not exempted from the Act. *See* §§ 3-101(c)(4), 3-103. Relevant instead are the facts about what the members discussed. If a quorum of members attends the same social event, the members are not “meeting” unless they gather and start discussing the public body’s business. *See, e.g.,* 5 *OMCB Opinions* 93 (2007). Likewise, for example, if two members of a three-member board find themselves in the same restaurant or store, they are not “meeting” unless they start discussing the public body’s business. 7 *OMCB Opinions* 269.

Less clear is whether a public body is meeting to transact “public business” when a quorum is present at an event that another entity has convened to conduct that entity’s business. The Maryland courts have addressed that question in two contexts. *See City of New Carrollton v. Rogers*, 287 Md. 56 (1980); *Ajamian v. Montgomery County*, 99 Md. App. 665 (1994). In *Rogers*, the Court held, without lengthy discussion, that a city council had not conducted a “meeting” when a quorum of its members attended a civic association’s meeting to address questions about a possible annexation of property. 287 Md. at 81. In *Ajamian*, a quorum of a county council attended a closed meeting of the county Democratic Central Committee, and the council president responded to a request for a briefing on various councilmanic redistricting plans. 99 Md. App. at 671-72. A discussion about the plans ensued, and the central committee voted to support the plan proposed by the redistricting commission. The council members neither joined the discussion nor voted. *Id.* The trial court found that there was “no vote,” no “deliberation by councilmembers,” no “meeting to deliberate and decide,” no intention to “evade the law,” “no evidence that the law was in fact evaded,” and “no factual basis for a finding of violation of [the Act].” *Id.* at 680 (internal punctuation omitted). The Court of Special Appeals upheld those findings of fact, and affirmed the trial court’s judgment.

Applying *Ajamian*, the Compliance Board has advised:

[M]embers of a public body do not violate the Act merely by attending a meeting of an entity that is not itself subject to the [Act], even if the topic of discussion relates directly to a matter before the public body. . . . The crucial point [of *Ajamian*] was that the Act applies only if the public body itself separately conducts public business, as distinct from the proceedings of the larger group. If interaction among the members of the public body does not occur, and the larger group is not a mere subterfuge to evade the law, no violation occurs.

1 *OMCB Opinions* 120, 121 (1995); *see also* 7 *OMCB Opinions* 105, 110 (2009). For example, the Compliance Board concluded that various election boards had not violated

the statute when a quorum of each had attended a closed meeting of a private association of election personnel, because there was no evidence that any individual board had conducted public business there. 1 *OMCB Opinions* at 121. By contrast, a public body “met” when a quorum of its members attended an event that the public body itself had organized for presentations on a matter that was then pending before the public body. 8 *OMCB Opinions* 19 (2012).

In short, “[w]hen a quorum of a public body convenes and discusses public business within one of the functions covered by the Act, that gathering is deemed a meeting of the public body, even when the quorum was created accidentally or the discussions occurred in a meeting not called by the public body itself.” 8 *OMCB Opinions* 76, 79 (2012). See also, e.g., 3 *OMCB Opinions* 30, 33-34 (2000) (concluding that the Act applied to an informal briefing when a quorum was created by the unexpected arrival of an additional member); 6 *OMCB Opinions* 155, 158 (2009) (concluding that a public body “met” under the Act when a quorum of its members attended a subcommittee meeting).

Practice notes on the presence of a quorum:

- Members of public bodies should know how many members it takes to create a quorum so that they know when the Act applies to their discussions.
- To avoid the accidental creation of a quorum, electronic communications should be avoided or confined to the one-way transmission of information. They should not be used as a means to interact on public business within the Act’s scope.
- It is advisable for the members of a public body to avoid communicating with each other on the side about an item while the public body is discussing it in open session.
- The Act does not require public bodies to “meet,” but a public body that reaches decisions by other means might create a perception that it operates in the dark.
- The quorum requirement might not provide a defense to a public body that has called a brief recess in the middle of its deliberations when a quorum departs together and comes back with a decision.
- The quorum requirement would probably not provide a defense to a public body that has intentionally evaded the Act, as might occur if a public body held a discussion through an intermediary so as to avoid creating a quorum.

C. Is the meeting subject to the Act because the public body is performing a “function” subject to the Act, or instead exempt from the Act because the public body is performing one of the three “functions” expressly excluded from the Act? (Index topics 1C through K)

Even when a “public body” is “meeting,” the Act might not apply, because the Act applies to some “functions” that a public body might perform, but not others. The Act defines six “functions.” Meetings that fall within the definitions of the legislative, quasi-legislative, and advisory functions are subject to the Act. Generally, meetings that fall within the definitions of the administrative, judicial, and quasi-judicial functions are not subject to the Act. § 3-103. However, the Act does apply when a public body meets to consider granting a license or permit or to consider various land use matters. § 3-103(b). And, when a public body recesses an open meeting to carry out an administrative function in a closed session, it must make the disclosures specified by the Act. § 3-104.

The Compliance Board has interpreted the Act to apply to discussions that do not fall into any of the functions. That conclusion is supported by § 3-301, which requires a public body to meet in open session “[e]xcept as otherwise expressly provided” by the Act. Thus, if a meeting does not fall within one of the express exclusions, the Act applies. *See* 78 Op. Att’y Gen. 275, 278 n.3 (1993) (stating, in effect, that the Act applies “if a public body is carrying out a function that cannot be categorized under any one of the six defined functions”); 4 *OMCB Opinions* 12, 18 (2004) (concluding that a town council’s discussion about its position on legislation pending in the General Assembly was subject to the Act because it did not fall within a defined function).

To figure out what “function” the public body performed at a meeting, a person needs to gather the facts on what the members addressed there. Often, it is also helpful to know what functions that the particular public body is authorized to perform. That information is usually found in the laws, resolutions, or orders that created or govern the public body. The topic index provides useful examples of how the Compliance Board has characterized various discussions.

1. The functions subject to the Act: advisory, legislative, quasi-legislative functions, and licensing, permitting, and land use deliberations

a. Advisory function (Index topic 1D)

Public bodies perform “advisory” functions when they “stud[y] . . . a matter of public concern” or “mak[e] recommendations on the matter” and are doing so under a “delegation of responsibility” by any of four authorities:

- “law”
- the Governor or someone subject to the Governor’s “policy direction”
- the chief executive officer of a political subdivision or someone subject to that officer’s policy direction
- “formal action by or for a public body that exercises an administrative, judicial, legislative, quasi-judicial, or quasi-legislative function.”

§ 3-101(c)(4).

The advisory function is usually performed by task forces and commissions that have been appointed to study an issue and report back. Thus, a standing committee created by a public body’s bylaws to recommend changes to the public body’s organizational structure performed an “advisory function” when it met to discuss that topic, 9 *OMCB Opinions* 1, 8 (2013), as did a committee created to recommend candidates for appointment to a school board when performing that task. 12 *OMCB Opinions* 98, 100 (2018).

b. “Legislative function” (Index topic 1F)

The “legislative function” includes more than just acting on proposed legislation. Section 3-101(f) provides:

“Legislative function” means the process or act of:

- (1) approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy;
- (2) approving or disapproving an appointment;
- (3) proposing or ratifying a constitution or constitutional amendment; or
- (4) proposing or ratifying a charter or charter amendment.

§ 3-101(f). The definition includes both the “process” and the “act” of amending a law. Accordingly, the Compliance Board has concluded that a city council was performing a legislative function, subject to the Act, when the city administrator briefed it about a proposed ordinance. 1 *OMCB Opinions* 35, 36 (1993).

c. Quasi-legislative function (Index topic 1J)

This function includes far more topics than its name might suggest. Section 3-101(j) provides:

“Quasi-legislative function” means the process or act of:

- (1) adopting, disapproving, amending, or repealing a rule, regulation, or bylaw that has the force of law, including a rule of a court;
- (2) approving, disapproving, or amending a budget; or
- (3) approving, disapproving, or amending a contract.

For example, a public body that approves a budget performs a quasi-legislative function (and a legislative function, if adoption is by ordinance), while a public body that is statutorily charged with recommending a budget for approval by another entity is performing an advisory function. Either way, the discussion is subject to the Act.

In some circumstances, the “process or act” of “approving, disapproving, or amending a contract” may extend to a board’s performance evaluation of an employee whose contract is up for renewal or amendment. *See* 13 *OMCB Opinions* 71, 72 (2019) and matters cited therein (addressing discussions about school superintendent’s performance and contract terms).

d. Licensing, permitting, and land use matters (Index topic 1G)

Section 3-103(b) provides that the Act applies when a public body “is meeting to consider: (1) granting a license or permit; or (2) a special exception, variance, conditional use, or zoning classification, the enforcement of any zoning law or regulation, or any other zoning matter.” Until 1991, when the provision was added, proceedings on many licensing, permitting, and land use matters had been considered quasi-judicial or administrative in nature and, hence, not subject to the Act, which expressly excludes meetings held to perform those functions. Now, licensing, permitting, and various land use matters fall within the scope of the Act no matter what “function” the public body is performing.

The Court of Appeals has interpreted the catch-all phrase “any other zoning matter” to include development plan applications, usually considered to be a “planning” matter. *Wesley Chapel Bluemont Ass’n v. Baltimore County*, 347 Md. 125, 137-50 (1997). After extensively reviewing the legislative history of the provision, the Court found “no evidence” that the General Assembly had incorporated into the Act the “technical distinctions that the courts had drawn between land use planning, zoning, and development control.” *Id.* at 144. The Court accordingly held that the Act applied to the hearings held

by the county board of appeals on the development plan. *Id.* at 148. *See also* 100 Op. Att’y Gen. 55, 68-70 (2015) (discussing the history of the provision). Other land use cases in which open meetings issues were raised include *Grant v. Cty. Council of Prince George’s Cty.*, 465 Md. 496 (2019), *WSG Holdings, LLC v. Bowie*, 429 Md. 598 (2012), *Tuzeer v. Yim, LLC*, 201 Md. App. 443 (2011) (use permit) and *Handley v. Ocean Downs, LLC*, 151 Md. App. 615 (2003) (special exception).

2. The functions exempt from the Act: judicial, quasi-judicial, administrative - unless the public body is considering granting a license or permit or taking certain land-use actions

a. “Judicial Function” (Index topic 1E)

The judicial function is defined to mean “the exercise of any power of the Judicial Branch of the State government,” except for “the exercise of rulemaking power by a court.” § 3-101(e). The definition also includes the exercise of the powers delegated to juries and two courts-related commissions.

b. “Quasi-judicial function” (Index topic 1I)

As defined by the Act, the “quasi-judicial” function means the “determination” of a “contested case,” as defined by Title 10, Subtitle 2 of the State Government Article, or of a matter before an administrative agency for which judicial review would be governed by Title 7, Chapter 200 of the Maryland Rules. The “quasi-judicial function” also includes the Compliance Board’s determination of an open meetings complaint under the Act. § 3-101(i). For example, a school board that hears an employee’s appeal of a personnel action under the Education Article is performing a quasi-judicial function because those appeals are contested cases. 90 Md. Op. Att’y Gen. 17, 20 (2005).

Many licensing and land use matters that fall within this definition are nonetheless expressly subject to the Act under § 3-103(b). It provides that the Act applies when a public body “is meeting to consider: (1) granting a license or permit; or (2) a special exception, variance, conditional use, or zoning classification, the enforcement of any zoning law or regulation, or any other zoning matter.” *See* 1(d), above.

c. “Administrative function” - the two-step analysis, plus the licensing/permitting inquiry (Index Topic 1C)

The Act defines “administrative function” in both the negative—what an administrative function is *not*—and the affirmative—what it *is*. In an opinion approved by the Court of Special Appeals, this Office explained the two-step analysis that the

Compliance Board has used to determine whether a particular activity is an administrative function:

The first step is to evaluate whether the meeting falls within any other function defined in the statute. If it does, the analysis ends because, by definition, the meeting does not involve an administrative function. [§ 3-101(b)(2)]. If the session does not involve one of the other defined functions, the second step is to evaluate whether the public body is involved in the administration of an existing law, rule, or regulation (as opposed to the development of new policy). If it is, the meeting likely involves an administrative function and the [Act] does not apply; if not, the discussion is not an administrative function and the [Act] does apply.

95 Op. Att’y Gen. 152, 155-56 (2010); *see also Dyer v. Board of Educ.*, 216 Md. App. 530, 537-38 (2014) (quoting the opinion and applying the Compliance Board’s two-step test).

A third inquiry, as with the quasi-judicial exclusion explained above, is to determine whether the meeting, even though “administrative” in nature, is subject to the Act anyway as a licensing, permitting, or land use matter under § 3-103(b).

1. The first step: A topic that falls within the advisory, legislative, quasi-legislative, judicial, and quasi-judicial functions does *not* fall within the administrative function.

If the topic of discussion falls into the definition of any other function, then it is not “administrative.” § 3-101(b)(2). For example, a public body’s consideration of a “measure to set public policy” would fall within the definition of “legislative function” in § 3-101(f)(1) and so would not be an administrative function.

Practice notes on the first step:

- Task forces that have been created to make recommendations seldom perform “administrative” functions other than choosing a presiding officer and meeting place and discussing logistical matters associated with the performance of their duties.
- A legislative body that is approving an appointment is performing a quasi-legislative function and therefore not an administrative function.

- The judicial and quasi-judicial functions are exempt from the Act anyway, so if the meeting in question involves a judicial or administrative body’s consideration of a particular case, it is usually easier to apply those definitions before analyzing the meeting under the administrative function exclusion.
 - A public body that prepares a budget to recommend to another public body performs an advisory function and thus not an administrative function.
 - A public body engaged in the act or process of approving, disapproving, or amending a contract performs an advisory function and thus not an administrative function.
2. The second step: The “administration” of a law, rule, regulation, or bylaw *is* within the administrative function.

The second step is to apply the Act’s definition of what an administrative function *is*. See § 3-101(b)(1). The definition is circular—“administrative” is defined only by reference to “administration”—and it can be hard to apply confidently. Section 3-101(b)(1) provides:

“Administrative function” means the administration of:

- (i) a law of the State;
- (ii) a law of a political subdivision of the State; or
- (iii) a rule, regulation, or bylaw of a public body.

The Compliance Board has construed § 3-101(b)(1) this way: “[T]here [must be] an identifiable prior law to be administered, and the public body holding the meeting must be vested with legal responsibility for its administration.” 7 *OMCB Opinions* 131, 136 (2011) (quoting 5 *OMCB Opinions* 42, 44 (2006)). Thus, when the implementation of a town policy concerning the use of a town facility lay within the town administrator’s purview, the town council was not performing an administrative function when it gave the town administrator its views about a particular organization’s use of the facility. 13 *OMCB Opinions* 5, 7 (2019).

One generalization that has emerged is that “administering” a law can include applying an existing provision to a set of facts, as when an ethics commission applies existing ethics regulations to a particular set of facts in order to resolve a complaint, *Dyer v. Board of Education*, 216 Md. App. 530, 538 (2014), a medical review panel applies

regulations to the facts of the cases before it, 7 *OMCB Opinions* 250, 254 (2011), or a municipal elections board conducts an election in accordance with existing procedures, 10 *OMCB Opinions* 22, 26 (2016) (finding that the exclusion applied to the implementation of pre-set procedures but not to its formulation of new procedures). See also 14 *OMCB Opinions* 60, 62 (2020) (citing matters in which the Compliance Board found that “a public body is performing an administrative function when it meets solely to address complaints that fall within its legal purview”). Likewise, a public body that allegedly exchanged communications about how to conduct a particular meeting “in accordance with the Health Officer’s advice, the Governor’s order referring local jurisdictions to the State’s social distancing recommendations, and the Open Meetings Act,” and not about its meetings policies generally, was performing an administrative function. 14 *OMCB Opinions* 83, 87 (2020). See also 10 *OMCB Opinions* 31, 34 (2016) (citing opinions concerning the management of property).

Another generalization is that the development of new policy does not qualify as “administrative.” See 10 *OMCB Opinions* at 26; see also 9 *OMCB Opinions* 1, 8 (2013) (“discussions about prospective policies and recommendations of future actions on subjects of public concern very seldom, if ever, qualify for the administrative function exclusion”); 7 *OMCB Opinions* at 254 (medical review panel’s discussion of “what the standards should be” would not be “administrative”).⁹ The line can be difficult to draw when the respective roles of staff and a supervising board are unclear as to a decision that, if made by the board, would fall within the Act. See 14 *OMCB Opinions* 108 (2020) (concluding that a school board was not “merely implementing already-made decisions” when it approved the superintendent’s recommended plan for layoffs).

⁹ The Compliance Board has given these examples of how it has applied the administrative exclusion:

When a public body met to dismiss an employee, 1 *OMCB Opinions* 166 (1996), evaluate an employee’s performance, 3 *OMCB Opinions* 218, 221 (2002), fill a vacancy, 1 *OMCB Opinions* 252 (1997), or make an appointment, 6 *OMCB Opinions* at 61, we have found those discussions to be administrative in nature. And, we have found that the wording of press releases and the procedures for issuing them are topics that fall within the exclusion. 1 *OMCB Opinions* 133 (1995) (discussion of press release by board of aldermen was not subject to the Act); 8 *OMCB Opinions* 89, 91 (2012) (county commissioners’ discussion of current press release procedures “fall easily into the administrative function exclusion as we have applied it”).

9 *OMCB Opinions* 110, 112-13 (2014). For examples of administrative, and non-administrative, functions performed by a board of county commissioners, see 7 *OMCB Opinions* 225 (2011).

The Compliance Board has repeatedly commented on the difficulty of applying the administrative function exclusion with confidence.¹⁰ If in doubt, the public body should proceed on the assumption that the Act applies. If the public body wants to treat the matter as “administrative” because the topic is confidential, the public body should instead analyze whether the meeting may be closed under the “exceptions” in the Act that permit closed-door discussions of certain topics. *See* Chapter 4.

Practice notes on the second step:

- A policy cannot be “administered” before the public body has adopted it. For example, a county council that had not yet adopted its position on legislation in the General Assembly could not claim that it was merely implementing that position when, before voting on the position, it held closed sessions to hire a lobbyist to advocate it. *See 7 OMCB Opinions* at 137.
- A public body is “administering” its bylaws when it elects its own officers under a bylaw requiring it to do so. *See 9 OMCB Opinions* at 9, 10 (“[T]his part of the test is met when a public body elects its own officers.”).
- A discussion that begins as “administrative” in nature can easily stray into policy matters that may only be discussed in an open meeting. For that reason, many public bodies perform administrative functions in open meetings that satisfy the requirements for meetings subject to the Act. Otherwise, the discussion must be postponed until proper notice can be given.

¹⁰ For example, in 9 *OMCB Opinions* 110 (2014), the Compliance Board commented on “the regrettable difficulty, for public bodies, the public, and representatives of the press alike, of applying the administrative function exclusion.” *Id.* at 113. As noted there, the Compliance Board had studied the issue in 2005. *Id.*, citing *Use of the Executive Function Exclusion under the Maryland Open Meetings Act - Study and Recommendations by the Open Meetings Compliance Board* (December, 2005). One confusing aspect of the administrative function exclusion noted in the study was that the exclusion might also apply to discussions that fall within the “personnel matters” exception that permits a public body to close a meeting that is subject to the Act. *Id.*, citing Study p. 6. *See also* fn. 8, above, and Chapter 4, part A, below, of this Manual.

Chapter 2: Notice and Agendas

Chapter 2: For meetings subject to the Act, did the public body give “reasonable advance notice” and make an agenda available?

(Index Topic 2)

Chapter Summary: The Act states the “public policy of the State that the public be provided with adequate notice of the time and location of meetings of public bodies, which shall be held in places reasonably accessible to individuals who would like to attend these meetings.” § 3-102(c). That policy is implemented by § 3-302, which requires public bodies to “give reasonable advance notice” before meeting in an open or closed session and addresses the form, content, and method of giving notice. The Compliance Board has observed that a “deficiency in one regard may sometimes be ameliorated by the public body’s extra efforts in another, as when a public body takes extra measures to publish a last-minute notice of an urgently-called meeting.” 8 *OMCB Opinions* 76, 80 (2012). Consistency is key: “[T]he public body must provide the public with a reliable and predictable way of getting accurate information, reasonably in advance, about when and where the public body will meet.” 12 *OMCB Opinions* 108, 110 (2018).

The Compliance Board has emphasized that “[t]he notice provisions of the Act are not merely technical; a meeting held without notice to the public is a secret meeting.” 8 *OMCB Opinions* at 79. The failure to give notice thus also means that the public body has violated the Act’s default requirement that public bodies “shall meet in open session.” *See* § 3-301.

Section 3-302 requires public bodies to retain a copy of their meeting notices. That requirement is discussed in Chapter 6 of this manual.

To figure out whether a public body gave proper notice, a person needs a copy of any notice that was posted online or published by other means, the date of the posting, and the date of the meeting. Also relevant might be the circumstances behind the scheduling of a meeting on short notice. Usually, the public body or its website, if it uses that means of giving notice, is the best source of this information.

The Act also requires public bodies to make an agenda available when they post notice, or, if the agenda has not been determined at the time of notice, to make the agenda

available as soon as practicable, but, for most bodies, at least 24 hours before the meeting. *See* § 3-302.1. A public body subject to § 3-307, which applies only to seventeen enumerated entities, must post an agenda to its website at least 48 hours before a meeting.

A. *Timing – Did the public body post the notice “reasonably in advance” of the meeting?*

The Act states the policy that notice be “adequate,” § 3-102(c), and requires that “reasonable advance notice” be given. § 3-302(a). The Act does not specify how far in advance notice must be given; there is no requirement that notice be given “at least *X* days in advance.” The Compliance Board has explained:

As for timeliness, we have stated that “the touchstone of ‘reasonableness’ is whether a public body gives notice of a future meeting as soon as is practicable after it has fixed the date, time, and place of the meeting.” 5 *OMCB Opinions* 83, 84 (2006). A public body has not provided “reasonable advance notice” if it knew the deadline by which it needed to meet on a certain matter and delayed setting the date. 5 *OMCB Opinions* 139, 143 (2007). Put another way, when “a meeting is scheduled on short notice, as sometimes will be required by unexpected developments, the person responsible for scheduling [it] must provide the best public notice under the circumstances.” 1 *OMCB Opinions* 38, 39 (1993). For example, notice of a meeting one day in advance is insufficient when a public body could have anticipated the need for the meeting earlier. *See* 5 *OMCB Opinions* at 143.

8 *OMCB Opinions* at 80. Most of the Compliance Board’s timeliness opinions address allegations that a public body waited until the last minute to give notice. One complaint, however, alleged that the public body’s notice, posted in the Maryland Register four weeks in advance, was too early. *See* 8 *OMCB Opinions* 125, 125 (2013) (finding no violation).

The Compliance Board has approved standing website notices of regularly scheduled meetings (“The Council meets on the third Wednesday of every month, at 3 p.m., in Room 12 at City Hall”), so long as they remain accurate. 9 *OMCB Opinions* 256, 257-58 (2015). Public bodies must also notify the public if the posted meeting has been canceled, 1 *OMCB Opinions* 183, 189-90 (1996), and if “some material element about the meeting – that is, its date, time, place, and closed or open status – changes.” 3 *OMCB Opinions* 85, 86 (2001).

The Board has found that last-minute notices given on a website alone and without any alert to the public to watch for short-notice meetings in certain circumstances do not

constitute “reasonable advance notice” because that method is effective only for members of the public who happened to check the website shortly before the meeting. 9 *OMCB Opinions* 110, 115 (2014). For meetings held to address truly urgent matters, the Compliance Board has suggested the use of “save-the-date” type notices when the meeting details will not be known until shortly beforehand. In 9 *OMCB Opinions* 125 (2014), the Board addressed the meetings of an entity that had to address urgent matters on short notice. Noting that “it can be hard for a public body’s staff to publish timely notice when the members have not yet decided on the date, time, and place of the meeting,” the Compliance Board advised:

Two methods, when used together, will often suffice. First, as soon as a public body knows that it will need to meet urgently, it might post that expectation on its website and alert the public to watch the website for details. At the same time, the public body might send that message by e-mail or through social media to the representatives of the press who follow its activities. Public bodies that often must meet on short notice might also develop a list of members of the public who want to receive such notices.

Id. at 126; *see also* 13 *OMCB Opinions* 39, 44-45 (2019) (suggesting that a county council use its website to alert the public to watch for notices of meetings called during the General Assembly’s session, when short notice is sometimes necessary, to consider the council’s positions on pending legislation). The Compliance Board itself has posted a notice on its webpage that it occasionally must meet on short notice during the General Assembly’s session to address questions about its position on pending legislation and that the public should check the website frequently during the General Assembly’s session.

A meeting should not be held on short notice if the matters are not urgent. The Compliance Board has advised that a public body has two options when it discovers, shortly before a meeting, that it has not given notice: “(1) if there is no emergency that must be addressed that day, it may postpone the meeting and give proper notice for a meeting at a later time; or, (2), if the meeting must be held that day, the public body may make good-faith efforts to reach its interested public by whatever method is likely to work.” 9 *OMCB Opinions* 199, 200 (2014). If the public body discovers at the meeting that notice was not given, it must adjourn the meeting and re-convene only after it has given adequate notice. 8 *OMCB Opinions* 188, 190 (2013). These principles apply whether or not a meeting is a “continuance” of an earlier one; the Compliance Board has advised that a public body that “continues” a meeting to a different date must give notice of that date. *See, e.g.*, 5 *OMCB Opinions* 184, 186 (2007). Notice of a continuance is not adequate if only given orally at the meeting. *See* 8 *OMCB Opinions* 76, 82 (2012).

B. *Format and contents – Was the notice written, and did it contain the required information?*

Section 3-302(b) provides that notice must, “whenever reasonable,” be “in writing” and specify the “date, time, and place” of the meeting. As discussed in Chapter 6, the Act requires public bodies to retain a copy of each meeting notice for three years, so notice given electronically should be retrievable for at least that period. *See, e.g.*, 8 *OMCB Opinions* 188, 189-90 (2013) (recommending that a public body’s staff print out a screenshot of the written notice and of any e-mailed notice given, record the date of the print-out, and retain it). When notice is given on a website or by social media, the public body should print out or save a screenshot. To establish the timeliness of notice given on a website, public bodies may also wish to document the posting date, whether by including it on the notice when space allows or by keeping a record in some other form.

Additionally, under § 3-302(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.” Read in a vacuum, the provision seems to contemplate that a public body may post notice of an entirely closed session. However, if a meeting is subject to the Act, the public body may only close it after the members have voted in public to do so. *See* § 3-305(d) (spelling out the steps to be taken before a public body closes a meeting). Therefore, the Compliance Board has advised that the public body’s notice of a closed session must invite the public to an open meeting right before the anticipated closed session. *See, e.g.*, 8 *OMCB Opinions* 150, 158 (2013) (suggesting that a public body convey in its notice for such a meeting 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.”). A notice of an entirely closed session, when the session is subject to the Act, thus violates the Act. For an example of such a violation, see *Frazier v. McCarron*, 466 Md. 436, 448 (2019), *reconsideration denied* (Jan. 23, 2020). *See also* *WSG Holdings, LLC v. Bowie*, 429 Md. 598, 625, n. 29 (2012) (“Clearly, notice of a public meeting cannot be effective where the notice itself closes the meeting.”) (citing *Cassidy v. Baltimore County Board of Appeals*, 218 Md. 418, 424 (1958)). For more information on the procedures for conducting a closed meeting, see Chapter 5.

The Act also does not address the question of whether public notices may include a request that people interested in attending contact the public body in advance. The Compliance Board has approved such requests as a way to ensure that the meeting place can accommodate the attendees. *See* 9 *OMCB Opinions* 206, 211 (2015).

The Compliance Board has addressed a few complaints that a public body’s website was difficult to navigate. Usually, the Compliance Board has declined to second-guess

website design. *See, e.g.*, 13 *OMCB Opinions* 27, 28 (2019) (stating that the Act does not require public bodies to publish notice on a website and also “does not micromanage the way in which a public body organizes its website when it does use it for posting notice”). However, problems can arise when a public body posts notice in multiple places on its website—for example, by an entry on a monthly calendar, by a standing notice on the public body’s general information page, and on a page dedicated to meeting notices and agendas—and then changes a meeting date in one place but not the others or does not provide complete information in any one place. *See, e.g.*, 10 *OMCB Opinions* 22, 29 (2016) (“encourag[ing]” the public body “to include in its ‘Meetings’ information clear instructions on where the public can find meetings notices that contain all of the required information”); 14 *OMCB Opinions* 42, 44 (2020) (in addressing a school board’s website in detail, noting that “[s]ometimes, . . . a public body’s effort to give notice in a few places on its website results in confusion or inconsistency and, in the end, deficient notice”); 14 *OMCB Opinions* 19, 21 (2020) (advising the public body that its notices, as well as its agendas, must make clear that the public is invited to observe the public body’s vote to close the meeting).

As discussed in D, below, the Act now requires public bodies to have an agenda for each meeting and to make it available. A public body that posts its agendas and notices in one combined document must be sure to include the items required by both § 3-302 and § 3-302.1.

C. Methods of posting notice - Does the public body use methods that are reasonably likely to reach people who would be interested in attending its meetings?

The Act gives public bodies considerable discretion on how to provide “reasonable advance notice.” Section 3-302(c) provides:

A public body may give the notice under this section as follows:

- (1) if the public body is a unit of State government, by publication in the Maryland Register;
- (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.

The Compliance Board has suggested that public bodies periodically revisit their choice of methods, because methods that once seemed adequate for a particular constituency might have become ineffective. *See* 9 *OMCB Opinions* 206, 209 (2015) (encouraging public bodies to “review their notice methods, to reasonably adapt them to the changing ways in which their interested public gets information, and, if possible, to use several methods”). The Compliance Board has also recognized that a method that might reach one public body’s interested public might not work for another public body. *See, e.g.,* 13 *OMCB Opinions* 9 (2019) (noting that website notices “are not always the most effective way (or even *an* effective way) for every public body to reach its own interested public”).

Consistency is also important. Thus, a change in method should be posted the usual way before that way is abandoned. In 11 *OMCB Opinions* 78, 82 (2017), the Compliance Board explained that “[a] hallmark of ‘reasonable’ notice under the Act is reasonable consistency as to the method used; notice is hardly effective if it does not appear in the place where the public expects to find it.” There, the Compliance Board found that the public body’s “apparent deviation from its usual method—its online calendar—violated the § 3-302 requirement of ‘reasonable advance notice,’ whether or not the [public body] had posted notice on its actual bulletin board.” Also, a public body may not simply exclude some meetings from the notices that it posts on its website. *See, e.g., id.*; *see also* 12 *OMCB Opinions* 1 (2018) (stating that “when a public body uses a calendar function for some meetings, it must post them all there”; finding that a school board violated the Act by omitting its “work sessions” from its online meeting calendar). Likewise, a public body that uses its website to post meetings of its committees should use that method for all of its committees. *See* 8 *OMCB Opinions* 76, 83 (2012) (remarking on the appearance created by the “public body’s failure to employ its usual method of giving notice, particularly when that method is seemingly easy and efficient”).

Practice notes on notice:

- Members of public bodies can avoid unintentional violations of the Act by asking, at the outset of each meeting, how and when notice

was provided to the public and by getting a clear understanding of which staff member has lead responsibility for doing that.

- Public bodies that create citizen task forces should, at the same time, assign lead administrative staff.
- Public bodies that might have to meet on an emergency basis should consider developing procedures and email notification lists to use in those emergencies.
- Copies of meeting notices must be retained, as discussed also in Chapter 6, so notices given online or through social media should be saved or printed out, with a notation of the posting date.

D. Agenda Requirement – Has the public body made an agenda available within the applicable deadlines?

The Act now requires public bodies to make agendas available before their meetings.¹ With an exception for emergency meetings, § 3-302.1 requires: “Before meeting in an open session, a public body shall make available to the public an agenda” that (1) contains “known items of business or topics to be discussed at the portion of the meeting that is open” and (2) indicates “whether the public body expects to close any portion of the meeting” under § 3-305. A public body subject to § 3-307 must also, “[t]o the extent practicable,” include “the expected time at which the public body intends to adjourn the open session to a closed session. Public bodies are not required to make available any information in the agenda regarding the subject matter of the closed portion of the meeting. 3-302.1(a), (c).

The Act provides public bodies some leeway to add items to an agenda after the agenda has been made available to the public. *See* § 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.”); § 3-307(j) (same); *see also* 11 *OMCB Opinions* 18 (2017) (applying § 3-302.1(e)). However, because “it is a violation of the Act to make available an agenda that omits a known item of business,” 14 *OMCB Opinions* 102 (2020), the Act does not permit a public body to add an item to an agenda at the last minute when the item was known to the public body when it first made the agenda available. For example, in 12 *OMCB Opinions* 21 (2018), the Compliance Board found that a town council had violated the Act by omitting a known item of business from its

¹ Public bodies subject to § 3-307 must also make available “a summary of any finalized documents, written testimony from the public, and other materials that the public body will vote on at the open meeting.” § 3-307(b)(1). The subject bodies need not disclose information that is protected by the Public Information Act. 2022 Md. Laws, ch. 346, § 2.

agenda when some council members, but not the staff who prepared the agenda, knew that the item would be discussed. The Compliance Board suggested: “Such violations can be avoided by establishing a routine by which the presiding officer or other officer reviews agendas before they are posted, as each public body, not its staff, is answerable for compliance with the Act.” *Id.* at 22.

The Compliance Board has also addressed what the term “item[] of business” encompasses. *See* 15 *OMCB Opinions* 1 (2021) There, the Compliance Board concluded that the question of whether to adopt a bill on an “emergency basis,” such that the bill would become effective upon its first reading, was a separate item from the item that the agenda had described as the first reading of the bill, and that the public body had violated § 3-302.1 by failing to include the issue on the agenda. The Compliance Board noted that the bill that had been posted before the meeting did not contain any reference to an effective date, immediate or otherwise, that the town clerk had recommended in materials posted at the time the agenda was posted that the bill could be adopted on an emergency basis, and that, under the town’s charter, the adoption of a bill on an emergency basis required a separate motion, vote, and approval process. After citing the legislative history of § 3-302.1 and referring to its “goal that members of the public be provided information that will help them decide whether to attend a particular meeting,” the Compliance Board further noted that a member of the public who was interested in the bill would have wanted to know that the council would consider not only the bill itself but also whether to make it effective that day, without the usual second reading and meeting. *Id.* The Compliance Board further decided that the items to be addressed must be listed in the agenda itself. 15 *OMCB Opinions* 1.

The deadline for making an agenda available depends on when the agenda items or topics have been determined. If they have been determined at the time notice is given, the public body is to make the agenda available then. Otherwise, the public body must make the agenda available as soon as practicable, but, for most bodies, at least 24 hours before the meeting. § 3-302.1(a)(2), (3). A public body subject to § 3-307, which applies only to seventeen enumerated entities, must post an agenda on its website 48 hours before a meeting. Section 1-302(c) governs the calculation of time for purposes of the Act. *See* 15 *OMCB Opinions* 1 (2021) (providing guidance on calculating the 24-hour period).

Section 3-302.1 gives public bodies flexibility as to the methods for making the agenda available. A public body may make the agenda available by any of the methods authorized for giving notice under § 3-302(c). Also, the “method that a public body uses for making available an agenda may be different from the method a public body uses for giving notice.” § 3-302.1(d). Public bodies subject to § 3-307, however, must post agendas on their websites. *See* § 3-307(b).

There is one exception to the requirement that an agenda be provided before a meeting. If a public body cannot meet the deadlines because it scheduled the meeting “in response to an emergency, a natural disaster, or any other unanticipated situation,” the public body must make the agenda available, on request, within a reasonable time after the meeting occurs. § 3-302.1(b). Public bodies subject to § 3-307, however, must still make an agenda available “as far in advance of the meeting as practicable” in the case of a meeting “being held due to an emergency, a natural disaster, or any other unanticipated situation”). § 3-307(b)(1)(ii).

Chapter 3: Open Meeting Requirement

Chapter 3: Will the meeting in fact be open to the public?

(Index Topic 3)

Chapter summary: Section 3-102(c) states the policy that public bodies' meetings must be held "in places reasonably accessible to individuals who would like to attend these meetings." Section 3-102(b) states that the ability of the public, its representatives, and the media to attend, report on, and broadcast . . . ensures the accountability of government to the citizens of the State."

The Act does not define what the right to "attend" a meeting entails. Two sections touch on the subject: § 3-303 requires public bodies to adopt rules of conduct and addresses the role of the presiding officer, and § 3-304, applicable only to State public bodies, addresses the provision of interpreters. For meetings held in a physical meeting space, the Compliance Board has elaborated on logistical matters such as access to the meeting room and the handling of videotaping. The Compliance Board has also addressed logistical matters arising from public bodies' efforts to enable the public to observe meetings held virtually or by teleconference. The circumstances under which a public body may meet in closed session are discussed in Chapters 4 and 5.

While this Manual does not address a public body's duties under the Americans with Disabilities Act and analogous State and local laws, those duties should be considered when the public body is choosing a meeting place. Also, some State agencies are subject to laws that require them to stream their meetings live.

To figure out whether a particular meeting met this requirement, a person needs facts on the public body's arrangements for the meeting and what occurred there.

A. The right to "observe" a meeting

Section 3-303(a) provides: "Whenever a public body meets in open session, the general public is entitled to attend." That means that members of the public may attend a meeting and observe it. With one exception pertaining to the closing of a meeting (see Chapter 5), it does not mean that they are entitled to speak. *See City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) ("While the Act does not afford the public any right to participate in the meetings, it does assure the public right to observe the deliberative

process and the making of decisions by the public body at open meetings.”). So, unless the public body is governed by laws that require the particular public body to receive public comment, the decision of whether to allow members of the public to speak is up to the public body.

Ordinarily, the management of any public comment period is up to the presiding officer. *See, e.g., 9 OMCB Opinions 232, 233 (2015)* (stating that the Act does not regulate the presiding officers’ decisions on whether to allow a member of the public to speak); *12 OMCB Opinions 77, 79 (2018)*. Complaints about the manner in which a presiding officer conducts a public comment period thus do not state Open Meetings Act violations. *See, e.g., 14 OMCB Opinions 83, 84 (2020)* (“A public body . . . does not violate the Act by failing to provide members of the public with the ability to offer oral comments during a meeting.”); *8 OMCB Opinions 84, 85 (2012)*.

The Compliance Board has addressed the ability to “observe” in a number of contexts. *See 14 OMCB Opinions 29 (2020)* (discussing appellate and Compliance Board opinions on the right to observe). In the context of complaints that the public body did not provide members of the public with copies of documents concerning an item under discussion, the Compliance Board has explained that the ability to “observe” does not mean that the public body must provide to the audience copies of the documents being reviewed by the members. *See, e.g., 9 OMCB Opinions 206, 212-13 (2015)*. However, the public must be given a grasp of what is being discussed and acted on. The Compliance Board has advised that an oral summary or general description of the documents in question will ordinarily serve this purpose. *Id.* Requests for records fall under the Public Information Act, not the Open Meetings Act, with the exception of the meeting documents discussed in Chapter 6.

In the context of text messages exchanged during a public meeting, the Compliance Board has advised: “Just as a public body should disclose, during a meeting, the subject matter of documents that it is addressing and not making available to the public at that time, . . . the gist of substantive electronic communications, among members on the dais or attending by other means, on the business at hand, should be disclosed to the public at the time.” *14 OMCB Opinions 29, 31-32 (2020)*. There, the Compliance Board found that a public body violated the Act when two members of a public body, during a public meeting of a quorum of at least 4 members, exchanged text messages about the item of business that the quorum was then discussing. *See id.* at 31 (“The transmission of substantive side messages among a few members, on the topic being discussed at that time, including suggestions of actions to be taken, deprives the public (as well as the other members) of the opportunity to observe the deliberations fully.”). The Compliance Board further explained that “each member, as part of the collective whole, shares in the public body’s

duty to avoid interfering with the ability of the public to observe the members' conduct of public business during a public meeting." *Id.*

In the same opinion, the Compliance Board addressed electronic communications that a member had received from a member of the public during the meeting. *Id.* at 31. The Compliance Board noted that "'observing' a meeting could be construed to mean that the public is entitled to know when a nonmember is lobbying a member of the public body to vote a certain way on an item at the very moment when the public body is considering the item." However, the Compliance Board stated, "the Act only regulates public bodies, and so the unilateral conduct of a lobbyist (or, as here, any other member of the public) is not attributable to the public body unless a quorum of its members somehow participates in it." *Id.* Noting that the facts before it did not show that the nonmember's communications had influenced the member, the Compliance Board cautioned that "if the facts about another public body were to show such influence, or that a quorum of the members of a public body had been contacted during the meeting about the matter they were considering, we would be concerned that the public had been deprived of the opportunity to observe that, in effect, private access had been permitted during a meeting and out of the public eye." The Compliance Board encouraged public bodies to address the practice through meeting rules and advisories to the public.

In the context of recesses called during an open meeting, the Compliance Board has advised that a public body may not use such recesses as a means to "crystallize" the members' thinking by conferring in groups less than a quorum. *See 9 OMCB Opinions* 283, 288 (2015) ("Public bodies may not use behind-the-scenes recesses as a means of shortcutting further public discussion of a matter that they have just been considering in open session."); *14 OMCB Opinions* 16, 17 (2020) (explaining that although Robert's Rules of Order recommends the use of recesses as an "aid[] to the crystallization of opinion," the Act does not allow it); *see also* Chapter 1, Part B(2)(d) (discussing the application of the Act to communications among fewer than a quorum of a public body's members).

B. Access to a physical meeting space

As a general rule, when public bodies meet in a physical space, they must ordinarily admit members of the public to that space. However, when safety considerations beyond the public body's control or unanticipated emergency circumstances have prevented the public body from providing access to the meeting space, the Compliance Board has found the requirement to have been met so long as the public body provided an adequate alternative method of observing the meeting while it is in progress. The guidance on access to the meeting space falls into two categories: whether the space is open to the public, and whether it can accommodate the public.

Ordinarily, a public body that meets in a physical space must do so in a facility that admits the public. For example, a public body may not meet in a juvenile detention center that does not permit the general public to enter, *see* 78 Op. Att’y Gen. 240 (1993), or at a private business that likewise is closed to the public. *See* 8 *OMCB Opinions* 188 (2013); *cf. WSG Holdings, LLC v. Bowie*, 429 Md. 598 (2012) (in applying open meetings provisions of a land-use law, holding that members of the public were improperly excluded from site visit to private property). A meeting may be held at a restaurant so long as the public is provided with places to sit and the members’ discussion is audible. *See* 8 *OMCB Opinions* 111, 114 (2012) (“the Act does not prohibit a public body from having a meal during a meeting; does not prohibit a public body from meeting in a private meeting space to which there is access to members of the public at no cost to them; and does not regulate the members’ choices of food and drink”). Members of the public who attend public meetings may be required to cooperate with the security procedures for the building in which the meeting is held. 9 *OMCB Opinions* 296 (2015).¹

Also, as a general rule, the ability to gain access to the meeting space must be provided to all who wish to attend. Thus, “a public body may not deny, through its choice of meeting site, the right of a person with a disability to observe an open meeting,” 1 *OMCB Opinions* 237, 239 (1997), may not restrict attendance to people who pay an admission fee, 8 *OMCB Opinions* 18, 25 (2012), may not restrict attendance to people on an invitation list, 7 *OMCB Opinions* 49 (2010), and may not exclude the press. 2 *OMCB Opinions* 67 (1999); *see also* 9 *OMCB Opinions* 290, 291 (2015) (meetings to be open to press and public “on equal terms”). The Court of Appeals has explained that “any action taken by the public body which discourages public attendance at the meeting to any substantial degree would likely violate the Act’s provisions.” *City of New Carrollton v. Rogers*, 287 Md. 56, 69 (1980).

Part of providing a “place reasonably accessible” to people who would like to attend the meeting is holding the meeting in a room large enough to hold them. 3 *OMCB Opinions* 118, 120 (2001). The Compliance Board has stated that “a public body would violate the Act if it had reason to expect a large crowd but nevertheless deliberately chose to meet in too small a space when a suitable, larger space was available.” *Id.* Public bodies may include in their meeting notices a request that members of the public inform staff of their intention to attend the meeting, and the Compliance Board has recommended that practice

¹ Nonetheless, the inquiry is fact-sensitive. In addressing Texas’s open meetings law, which, like Maryland’s, is silent on whether a public body may meet in buildings where members of the public must show identification in order to be admitted, the Texas Attorney General opined that a court was unlikely to generally prohibit such a requirement but that the question was “ultimately a question of fact.” Tex. Att’y Gen. Op. KP-0020 (2015).

for public bodies without regular access to large meeting rooms. 9 *OMCB Opinions* 206, 211 (2015).

In a few cases, the Compliance Board has recognized that a public body's ability to provide access to a physical meeting space was constrained by public health measures (usually the legal capacity of the room for fire safety purposes), emergency circumstances, or the size of a meeting room that the public body had reasonably expected to be adequate, and that, under the particular circumstances, the public body's substitute arrangements for observing the meeting were adequate. For the Compliance Board's explanation of the principles applicable to room size and the use of overflow space and of its prior opinions on that topic, see 13 *OMCB Opinions* 58 (2019).

In one matter that arose during the COVID-19 pandemic, for example, the Compliance Board found that a county council did not violate the Act when it excluded the public from the meeting room. There, the county health officer had advised against admitting the public to the room, and the council provided live access to the meeting by live streaming video, cable television, and a call-in number for people without a computer or cable subscription. 14 *OMCB Opinions* 85,86 (2019). The Compliance Board cited the informal guidance posted on the Attorney General's website as "Open Meetings Act FAQs for meetings held during the COVID19 Emergency" for the proposition that, "during this pandemic, '[t]he overriding principle is that when a public body encounters circumstances that challenge its ability to admit the public to an open meeting in the usual location, the public body must provide the public with the best possible opportunity to observe the conduct of public business, given those circumstances.'" *Id.*

C. Access to a teleconference or to a virtual meeting space

A public body that meets remotely, whether by telephone, videoconference, or other electronic means, must provide the public with the opportunity to observe the meeting while it is in progress. The requirement is not met by merely posting a recording afterwards. 14 *OMCB Opinion* 66, 71 (2020). For most of the seventeen public bodies subject to § 3-307, providing a livestream of a meeting is required, even if the body invites the public to attend the meeting in person. See § 3-307(b)(3) (requiring, with few exceptions, that public bodies subject to § 3-307 make available on their websites "live video streaming of each portion of a meeting that is held in open session").

When the meeting "place" is a conference call, the public may be provided access either via a call-in number or by access to a meeting room with a speakerphone. 8 *OMCB Opinions* 111, 113 (2012). Some states limit public bodies' use of conference call meetings; for example, California law requires at least one member to be present in a meeting room. See Cal Gov't Code § 11123(b)(1)(F). Maryland does not limit the use of conference-call

meetings. Still, the members of public bodies that meet by teleconference should identify themselves and speak audibly so as to assure that the meeting, is in fact “open” to the public. It may also be advisable for each member to tell the group whether anyone is with the member at the time.²

The only Maryland case relevant to teleconferences is *Tuzeer v. Yim, LLC*, 201 Md. App. 443, 468 (2011). There, the court held that the presence of one member by telephone counted towards a quorum and that the meeting met the Act’s “accessibility” requirement because “there was no indication that anyone was unable to hear her comments.” *Id.* at 471.

The appellate courts have not yet addressed the use of virtual meeting platforms. The Compliance Board first gave guidance on virtually-held meetings in 2020, when public bodies’ use of the technology proliferated in response to the COVID-19 pandemic. The issues addressed by the Compliance Board fall into several categories.

First, the Compliance Board has addressed complaints about the quality of the audio. As with complaints about a public body’s arrangements for loudspeakers in an overflow room, the Compliance Board has assessed whether the technological difficulties substantially impaired the public’s ability to observe the meeting. *See, e.g.*, 14 *OMCB Opinions* 85,86 (2020) (finding that the technical difficulties with the sound, experienced by members of the public body and the public alike, were not “so extensive as to violate the Act”); 14 *OMCB Opinions* 111 (2020) (“[O]ur sampling of the video does not suggest that the occasional glitches in the audio, often caused when members did not unmute their microphone before speaking, substantially interfered with the public’s opportunity to observe the meeting. In fact, it appears that the board members perceived the same pauses that the public did.”). There, the measures that the public body had taken to enable the public to observe the meeting included the presiding officer’s introductory request to the members that they identify themselves when speaking, her efforts to call on each by name, her use of roll-call votes for all votes, and the identification of each member on the screen by the member’s initials, and, occasionally, by their name. The Compliance Board stated:

² The California open meetings statute sets several ground rules to ensure that members of the public can truly “attend” teleconference meetings. Votes must be by roll call, agendas must be provided in the room provided to the public, and the discussion must be “audible” to members of the public who listen in on the meeting. Cal Gov’t Code § 11123(b)(1). The Texas open meetings law requires that minimum standards be set for the audio signal and requires that it be of “sufficient quality” that the public can “hear the voice of each participant.” Tex. Gov’t Code Ann. § 551.127. Under that law, “[a] meeting may be held by videoconference call only if a quorum of the governmental body is physically present at one location of the meeting,” except that “a state governmental body or a governmental body that extends into three or more counties” may meet by videoconference call so long as the presiding officer is physically present at one location of the meeting that is open to the public during the open portions of the meeting.”

Often, watching a remotely-held meeting that the public body's members are separately attending through various methods might not seem to be a perfect substitute for observing a meeting that the members actually attend in a meeting room to which the public is admitted. Under the current circumstances, however, we find that the County Board's method provided the public with adequate access to the meeting, that the County Board took reasonable efforts to address the shortcomings inherent in virtual meetings, and that the glitches and lapses that occurred from time to time did not materially interfere with that access.

Id.

Second, the Compliance Board has given logistical guidance on how a public body that is closing a virtual meeting can enable the public to assert an objection to the public body's decision to meet in closed session. *See* 14 *OMCB Opinions* 92, 97 (2020) (suggesting that the public be given a way to contact staff during the meeting). However, the Open Meetings Act does not require a public body to enable members of the public to log into a meeting as participants. 14 *OMCB Opinions* 111 (2020).

Finally, in 14 *OMCB Opinions* 83, 86 (2020), the Compliance Board stated that "an important question about whether it is reasonable for a public body to rely on the internet to provide access to a meeting when a substantial number of people served by the public body lack access to the internet" was "not before us because the Council also provided access by telephone and cable television."

D. Regulation of videotaping and recording; meeting rules

Section 3-303 requires public bodies to "adopt and enforce reasonable rules regulating the conduct of persons attending its meetings and the videotaping, televising, photographing, broadcasting, or recording of its meetings." The Compliance Board has found that a prohibition on videotaping is not a "reasonable rule" and that public bodies violate the Act when they refuse to permit videotaping. 3 *OMCB Opinions* 356 (2003). The Compliance Board has also found that public bodies may not prohibit the videotaping of members of the public who are at the meeting. *See* 1 *OMCB Opinions* 137, 140 (1995) ("There is no right to be protected against the gaze of an observer in a public forum, or against the lens of the observer's camera.").

The Compliance Board deems a rule on the use of video recording equipment "reasonable" if the rule "(1) is needed to protect the legitimate rights of others at the meeting; and (2) does so by means that are consistent with the goals of the Act." 5 *OMCB Opinions* 22, 24-25 (2006). An example of a rule found "reasonable," if adequately posted

beforehand, is a requirement that people wishing to videotape a meeting check in with staff before the meeting so that staff may tell them where they may stand. *Id.* Ordinarily, public bodies must afford members of the public and reporters access to an open meeting on equal terms. *Id.* (citing 2 *OMCB Opinions* 67 (1999)). However, where a county council, in order to comply with the county health officer's advice about meeting safely during the pandemic, admitted only the press to the meeting room, the Compliance Board found that, "under the circumstances with which the Council was faced, . . . the Council did not violate the Act by excluding all observers but the press from the meeting room." 14 *OMCB Opinions* 83, 86 (2020)

For the Compliance Board's summary of the principles applicable to videotaping, along with citations to its opinions on the subject, see 8 *OMCB Opinions* 128, 131-33 (2013).

Model rules are posted under "Sample Forms and Checklists" at www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx. Public bodies that allow public comment may wish to include additional rules about such matters as time limits, advance registration if required, and the presiding officer's conduct of the session. The Open Meetings Act, however, does not require public comment periods and does not regulate them.

E. Role of the presiding officer; disruptions

Under § 3-303(c)(1), the public body may "have [an] individual removed" if the "presiding officer determines that the behavior of [the] individual is disrupting an open session." *Id.* The Compliance Board has also noted that the presiding officer has the discretion to ask that videotaping be done from an unobtrusive location. See 8 *OMCB Opinions* 128,133 (2013) ("A presiding officer thus has the authority to determine that a person's conduct is disruptive and, by implication, to address that problem by asking her to move."). A person making a presentation to the public body does not have the authority to order photographers to move. *Id.*

As above, the presiding officer ordinarily manages the meeting and any public comment period. See also Robert's Rules of Order (10th ed.), p. 434 (describing presiding officer's duties).

Chapter 4: Permissibility of Closed Sessions – The Exceptions

Chapter 4: Will the discussion fall within one of the 15 “exceptions” that permit the public body to exclude the public?

(Index Topic 4)

Chapter summary: When a public body holds a meeting subject to the Act, the meeting must be open to the public unless the topic of discussion falls within one of the fifteen exceptions that allow a public body to exclude the public. *See* §§ 3-301, 3-305. Before closing an open meeting under one of the statutory exceptions, the public body must disclose the particular exception that permits the closed session. Then, in the closed session, the attendees may discuss only matters within the scope of that exception. § 3-305(b), (d); *see also* 7 *OMCB Opinions* 125, 127 (2011) (explaining that “discussions at closed meetings must fall within the scope of the exception claimed by the public body in advance”). This chapter explains the fifteen exceptions. For an explanation of *how* to invoke an exception, see Chapter 5.

For the most part, the decision to invoke an exception to close a meeting is discretionary. Although other laws, such as medical privacy laws, might require a public body to discuss a topic in a closed session, the Act itself does not mandate closed sessions; instead, it provides that the public body “may” meet in closed session to discuss an excepted topic. § 3-305(b). Given the discretionary nature of the decision, the public body must articulate a reason for excluding the public. For that requirement, see Chapter 5.

Public bodies must construe the fifteen exceptions “strictly . . . in favor of open meetings.” § 3-305(a). Public bodies should apply the exceptions in light of the Act’s stated policy that public bodies’ meetings are to be open “except in special and appropriate circumstances.” *See* § 3-102(c). As noted below, three exceptions—the procurement, public security, and cybersecurity exceptions—may only be invoked after the public body finds that a public discussion of the matter would cause certain types of harm.

The Act does *not* authorize public bodies to close meetings for discussions that fall outside of the exceptions. *See* § 3-305(b) (providing that a public body may close a meeting

“only” to discuss one of the fifteen topics). Formerly, the Act broadly permitted public bodies to close a meeting for “an exceptional reason” that was “so compelling” as to override the public interest in open meetings. That exception was repealed in 1991. *See* 1991 Md. Laws, ch. 655. The exceptions now reflect the General Assembly’s efforts to balance the public’s need to know with public bodies’ need to address certain specific topics in private. A local government with home rule powers may enact an open meetings ordinance with fewer exceptions—that is, a law that more stringently requires openness—but it may not add exceptions. *See* § 3-105 (“Whenever [the Act] and another law that relates to meetings of public bodies conflict, [the Act] applies unless the other law is more stringent.”).

It is important to note that no exception authorizes a closed session unless the public body has disclosed its reliance on the exception *before* the closed session. *See* § 3-305(c) (“A public body that meets in closed session under this section may not discuss or act on any matter not authorized under subsection (b)); § 3-305 (b) (providing exceptions “[s]ubject to” § 3-305(d)); § 3-305(d) (requiring the adoption of a written statement and motion before the closed session). Put another way, if the public body has not cited the exception before it excludes the public, the exception does not apply. That condition and the multiple other conditions that the Act places on closing a session, including two new ones added in 2017, are discussed in Chapter 5, as are the disclosures that must be made after a closed session and the members’ duty to confine the discussion to the matters disclosed on the closing statement.

To figure out whether a closed-session discussion fell within an exception, a person should gather the public body’s written disclosures about the session, as well as any other facts that have emerged about it. The Compliance Board’s opinions on each exception can be found under Topic 4 in the Index, in the order in which they appear here and in the Act.

A. The “personnel matters” exception: § 3-305(b)(1)

This exception allows a public body to close a meeting to discuss various personnel actions with regard to, or the evaluation of, “an appointee, employee, or official over whom it has jurisdiction” or “any other personnel matter that affects one or more specific individuals.” The discussion must involve individual employees. *See, e.g.,* 13 *OMCB Opinions* 14, 15 (2019) (exception applied to school board’s discussion about the performance of its counsel, a school board employee). Discussions about an entire class of employees, even when the class is small, do not fall within the exception. *See, e.g.,* 7 *OMCB Opinions* 131, 134 (2011); *see also* 11 *OMCB Opinions* 38 (2017).

To the same effect, the Compliance Board has explained that a discussion about the “‘elimination of a position,’ while it is vacant, likely involves the setting of policy, rather than the discussion of information specific to a particular individual.” 7 *OMCB Opinions* 216, 220 (2011). The discussion about the elimination of a position or department must be open “[e]ven where the discussion involves a position held by so few employees that everyone knows whose positions are being discussed, . . . unless it involves the performance or other attributes of those individual employees.” 3 *OMCB Opinions* 335, 337 (2003). This exception thus “does not apply where anyone in the position would be affected by the action being considered.” *Id.* It also does not extend to policy issues such as the method of making the appointment. *See, e.g., 3 OMCB Opinions* 67, 69 (2000).

A discussion of another entity’s employee, appointee, or official would not fall within the exception unless the public body was considering appointing or employing that individual. *Compare, e.g., 9 OMCB Opinions* 132, 136 (2014) (“[A] discussion that involves a vendor’s performance of its contract to supply people to provide services would likely exceed the exception.”) with 3 *OMCB Opinions* 340, 343 (2003) (concluding that the exception extended to a session closed to discuss renewing the town attorney’s contract).

The Compliance Board has found that discussions about particular employees or appointees sometimes fall also within the administrative exclusion. *See* notes 7 and 8 in Chapter 1; *see also 12 OMCB Opinions* 46, 48 (2018) (“[P]erformance evaluations often fall within the administrative function exclusion.”). In that case, the Act would not apply, with the exception of the disclosure requirements that apply when a public body closes an open meeting to address administrative matters. *See* § 3-104. If in doubt, the public body should proceed on the assumption that the Act applies to these discussions, for multiple practical reasons: the courts have not addressed this point, so the law is not settled; a public body that convenes behind closed doors to address administrative matters invites suspicion that its members are secretly conducting more substantive business; the disclosure requirements that attach to meetings closed under the Act give the public some assurance that the closed session is legal and some information about it; and, though the Act’s requirement that public bodies prepare minutes is regarded by some as a nuisance and a reason to treat a discussion as “administrative,” memorializing the events of a meeting is one of the basics of efficient meetings practices.

B. The “privacy or reputation” exception: § 3-305(b)(2)

This exception allows a public body to close a meeting to “protect the privacy or reputation of an individual with respect to a matter that is not related to public business.” The Compliance Board has seldom addressed it, probably because most discussions about

a person's private matters would not likely relate to public business, and many others would fall instead into the personnel exception. In 9 *OMCB Opinions* 71 (2013), a university board cited the exception as a basis for closing a meeting to discuss possible honorees. The Compliance Board found that the exception applied to the discussion of "the personal and non-University related reputations of [the] potential honorees." *Id.* at 77. A discussion of public information about an individual would not fall within the exception, as the closed session would not be necessary to "protect" that information. The Compliance Board has suggested that a discussion about honorees' personal attributes might also fall within the exception for the discussion of personnel and appointees. 8 *OMCB Opinions* 166, 167-68 (2013).

C. The "real property acquisition" exception: § 3-305(b)(3)

This exception allows a public body to close a meeting to "consider the acquisition of real property for a public purpose and matters directly related to the acquisition." Within the exception are discussions about acquiring interests in real property, whether by purchase, lease, or easement. *See, e.g.,* 7 *OMCB Opinions* 225, 233 (2011) (easement). The purpose of the exception is to protect the public body's bargaining power.

The exception does not extend to discussions about selling or renting out the public body's own property. *See, e.g.,* 9 *OMCB Opinions* 29, 34 (2013) ("Th[e] exception does not apply to discussions about real property the public body already owns."); 12 *OMCB Opinions* 10, 12 (2018) (stating that "the Act does not authorize the members of a public body to dispose of the public body's real property entirely in the dark," but instead "effectively gives public bodies the choice between conducting a competitive bidding process or addressing the matter in a public meeting."). The exception also does not apply to acquisitions of personal property. *See* 1 *OMCB Opinions* 73, 77 (1994) (council's discussion about selling the city's junk-grade cars did not fall within the exception, because it involved neither an acquisition nor real property).

In the one reported case on the application of the exception, the Court of Appeals held that the exception applied to a closed meeting at which a board of town aldermen voted to condemn some land for a town parking garage. The Court emphasized the evidence that the aldermen had held multiple public hearings on the matter and had included the garage in the budget. After reviewing Open Meetings Act cases in which public bodies had clearly intended to evade the Act, the Court noted that "no such evasive devices have been exploited by the Aldermen in a very public campaign to construct a new

parking deck.” *J.P. Delphey Ltd. P'ship v. Mayor & City of Frederick*, 396 Md. 180, 201 (2006).¹

D. The “business location” exception: § 3-305(b)(4)

This exception allows a public body to close a meeting to “consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State.” The Compliance Board has noted that the General Assembly added the exception on the basis of its “understanding that some businesses might be deterred from making proposals about relocation, expansion, or retention of an existing facility if all such discussions were open to public view.” 7 *OMCB Opinions* 148, 159-63 (2011) (summarizing the prior Compliance Board opinions on the exception). The Compliance Board therefore has interpreted the exception “to address the business’s interest in protecting its own identity and information,” *id.* at 163, and not to apply to discussions of information that does not belong to the business or plans that the business itself has disclosed in earlier public meetings. *See* 9 *OMCB Opinions* 15, 25 (2013).

Noting that the Act requires that the exceptions be construed strictly, the Compliance Board has stated that it does “not construe [§ 3-305(b)(4)] broadly to apply every time a property owner, its developer, or a coordinating agency seeks legislation to enable a land use or financing that might in turn generate proposals from new businesses.” *Id.* at 27. The Compliance Board thus does not construe the exception to extend to “steps in the legislative process.” *Id.*; *see also, e.g.,* 7 *OMCB Opinions* at 163 (declining to extend the exception to “closed-session discussions on generally applicable land-use legislation”).

¹ The *Delphey* opinion adds uncertainty to the application of § 3-105, which requires that, when the Act and “another law that relates to meetings of public bodies conflict, [the Act] applies unless the other law is more stringent.” The Court found that the real property exception, which the Court construed to permit the aldermen to vote on the real estate matter in closed session, conflicted with Article 23A, § 8 (now § 4-104 of the Land Use Article), which prohibits municipal legislative bodies from adopting ordinances and resolutions in closed sessions. 396 Md. at 198-99. Under § 3-305, it would seem that Article 23A, § 5, as the more stringent provision, would have taken precedence. However, without mentioning § 3-105 (then § 10-504 of the State Government Article), the Court applied the common-law canon of statutory construction that resolves conflicts between statutes by preferring the more specific provision. The Court then decided that the real property acquisition exception, as the more specific provision on the topic under discussion, prevailed. *Id.* Nonetheless, the opinion contains no indication that the Court intended to modify *City of College Park v. Cotter*, 309 Md. 573 (1987), *see* fn. 3 in Chapter 1, and so the Court’s application of § 3-105 in *Cotter* is probably still good law, *see* 94 Op. Att’y Gen. 161, 172, n. 20 (2009) (noting that neither party in *Delphey* had “focus[ed] on” the provision in their briefs).

E. The “investment of public funds” exception: § 3-305(b)(5)

This exception pertains to the use of public funds for investment purposes and not to the expenditure of public funds. The Compliance Board has instructed, generally, that the discussion must be “sufficiently related to a concrete investment possibility as to justify invoking the exception.” 4 *OMCB Opinions* 114, 117 (2005). The Compliance Board has declined to extend the exception to a public body’s discussions about whether to donate funds to a charity. 7 *OMCB Opinions* 195, 203-05 (2011). Also not within the exception was the public body’s meeting to approve a governing document of a corporation owned by the public body. *Id.* at 204-05. And, § 3-305(b)(5) does not shield reports on the status of funding for a building project. *See* 11 *OMCB Opinions* 59, 62 (2017). After the funds have been invested, the public body must unseal the minutes of the closed meeting. § 3-306(c)(5).

F. The “marketing of public securities” exception: § 3-305(b)(6)

This exception shields a public body’s discussions about the terms on which to issue bonds. After the bonds have been issued, the public body must unseal the minutes of the closed meeting. § 3-306(c)(4).

The Compliance Board has construed this exception in a matter that involved the issuance of tax increment financing (“TIF”) bonds for which the sole buyer was to be the developer of the project that was to be financed through the bonds. *See* 9 *OMCB Opinions* at 27-28. The Compliance Board questioned whether that “market” of one would be adversely affected by public disclosure of the discussion and found that, in any event, discussions about the developer’s site plans and whether to approve legislation for the TIF did not fall within the exception. *Id.* In another matter involving proposed tax increment financing, the Compliance Board concluded that the exception did not apply to a development corporation’s discussion, at an early concept stage, about whether to recommend to a city council the adoption of ordinances that would then lead to steps that would result in the city’s marketing of TIF bonds. 10 *OMCB Opinions* 46 (2016). The Compliance Board found that the connection between the particular discussion and the actual marketing of securities was “too attenuated for the exception to apply.” *Id.* at 49.

G. The “legal advice” exception: § 3-305(b)(7)

The original version of this exception was known as the “legal matters” exception and broadly permitted public bodies to “consult with counsel on a legal matter.” The General Assembly narrowed the exception in 1991 to apply only when the public body

wishes to “consult with counsel to obtain legal advice.” *See* 1991 Md. Laws, ch. 655. Thus, as explained by the Compliance Board, the exception “is to be narrowly construed to cover only the interchange between the client public body and its lawyer in which the client seeks advice and the lawyer provides it.” 1 *OMCB Opinions* 1, 5 (1992). The exception “does not allow for closed discussion among members of the public body merely because an issue has legal ramifications.” 1 *OMCB Opinions* 53, 54 (1993); 11 *OMCB Opinions* 38 (2017). In short, the Compliance Board has instructed, “[o]nce the advice has been sought and provided, the body must return to open session to discuss the policy implications of the advice it received or anything else about proposed legislation.” 1 *OMCB Opinions* 145, 149 (1995).

Accordingly, the Compliance Board has concluded that a city council exceeded the “legal advice” exception when it discussed the need to have an ordinance drafted, “however brief and devoid of substantive discussion,” 1 *OMCB Opinions* at 149; that a town council’s receipt of its attorney’s advice on the legality of a new charter amendment fell within § 3-305(b)(7), but that the council’s discussion about asking counsel to review the charter did not, 12 *OMCB Opinions* 69, 73 (2018); that a town council’s receipt of advice on actions the council could take regarding the town’s police department employees fell within the exception but that its decision to ask counsel and law enforcement personnel to review the department’s policies did not, 13 *OMCB Opinions* 27, 30-31 (2019); that a town council’s discussions about whether to renew a franchise went beyond the receipt of legal advice, 14 *OMCB Opinions* 49, 56 (2020); and that although a planning commission had properly received counsel’s advice in a meeting closed under § 3-305(b)(7), it then violated the Act by “remain[ing] in closed session to decide on its course of action,” 13 *OMCB Opinions* 68, 69 (2019). Likewise, two public bodies violated the Act when, in a joint closed session, the conversation “strayed away from advice from [counsel] and instead became a government-to-government discussion.” 1 *OMCB Opinions* at 55.

Section 3-305(b)(7) does not apply to a discussion between the public body and anyone other than its lawyer. *See* 1 *OMCB Opinions* at 3. However, as discussed below, § 3-305(b)(8)—the “pending or potential litigation” exception—might apply to discussions about some legal matters. *See* 12 *OMCB Opinions* 46, 47 (2018) (advising that the public body should have cited § 3-305(b)(8), not 3-305(b)(7), to discuss potential litigation without its attorney present). Also, if the public body is communicating to the attorney information that would be protected by the attorney-client privilege, the “other law” exception, § 3-305(b)(13), discussed in Part M below, might apply to the communication.

H. The “pending or potential litigation” exception: § 3-305(b)(8)

This exception authorizes a public body to “consult with staff, consultants, or other individuals about pending or potential litigation.” § 3-305(b)(8). Counsel need not be present; this exception contemplates, for example, that staff may brief the public body on the progress of settling a particular claim before suit is filed. *See, e.g., 1 OMCB Opinions 38, 41 (1993).*

The Compliance Board has explained that “potential” litigation means more than a theoretical possibility: “Strict construction of the ‘litigation’ exception means that the exception may be invoked regarding ‘potential litigation’ only when suit has been threatened or a realistic possibility of a suit is otherwise obvious.” *1 OMCB Opinions 38, 41 (1993).* For example, a public body “may not discuss budgetary or related matters in a closed session merely because someone speculates that a lawsuit is possible if funds are not spent for some purpose.” *Id.* By contrast, the exception does permit a public body to close a meeting to discuss options for settling a particular claim before suit is filed. *Id.*

As with the “legal advice” exception, the pending or potential litigation exception “may not be used as a pretext for engaging in closed discussions concerning an underlying policy issue that, though related to the litigation, can reasonably be discussed separately.” *7 OMCB Opinions 148, 152 (2011); see also 1 OMCB Opinions 56, 60-61 (1994)* (while city council could discuss in closed session possible ways to avert a lawsuit related to alleged zoning violation by a day care center, its discussion of alternative locations for the day care center exceeded the scope of the exception). In *7 OMCB Opinions 36 (2010)*, the Compliance Board found that the exception extended to a town council’s discussion about whether to settle a case and to its decision to authorize the acting mayor to sign a consent decree on the town’s behalf. *See also 1 OMCB Opinions 56 (1994)* (finding that a town council’s “discussion resulting in a decision to pay \$3,500” fell within § 3-305(b)(8) because it was “a consideration of settlement options to avert potential litigation,” but that the council’s general discussion about future measures relating to the claimant’s business did not).

The exception does not apply after the “pending litigation” has been settled or otherwise concluded. *See 8 OMCB Opinions 42, 44 (2012).*

I. The “collective bargaining” exception: § 3-305(b)(9)

Under this exception, a public body may close a meeting to “conduct collective bargaining negotiations or consider matters that relate to the negotiations.” The

Compliance Board has concluded that this exception applies to a public body's discussions about whether to approve collective bargaining agreements that are not deemed final without that approval. 9 *OMCB Opinions* 71, 76 (2013).

For other applications of this exception, see 7 *OMCB Opinions* 58, 61-62 (2009) and 12 *OMCB Opinions* 13, 14 (2018).

J. The “public security” exception: § 3-305(b)(10)

Added to the Act after 9/11, this conditional exception permits public bodies to close a meeting to discuss “public security, including (i) the deployment of fire and police services and staff; and (ii) the development and implementation of emergency plans.” Before closing a meeting under this exception, the public body must first “determine that public discussion would constitute a risk to the public or to public security.” The public body should document its “public risk” finding in the minutes of the public body's proceedings on a motion to close a meeting under § 3-305(b)(10), in the presiding officer's written statement of the reasons for closing the session, or both.

For an application of this exception, see 7 *OMCB Opinions* 225, 229 (2011). For the cybersecurity exception, see Part O, below.

K. The “scholastic, licensing, and qualifying examination” exception: § 3-305(b)(11)

Boards that “prepare, administer, or grade a scholastic, licensing, or qualifying examination” may perform those duties in closed session.

The Compliance Board has applied this exception once, in a matter involving a county board of electrical examiners. See 1 *OMCB Opinions* 13 (1992).

L. The “investigative proceeding regarding criminal conduct” exception: § 3-305(b)(12)

A public body may close a session to “conduct or discuss an investigative proceeding on actual or possible criminal conduct.”

The Compliance Board found that this exception permitted a town council to close a session to discuss efforts to prompt the State prosecutor to conduct a criminal investigation of the mayor's conduct. 1 *OMCB Opinions* 50 (2000). The town council in 5

OMCB Opinions 42 (2006) failed to properly invoke the exception before holding a closed-door session with the State’s Attorney to discuss an investigation into the misappropriation of town funds. Had the town cited the exception as a basis for closing the meeting, the exception would have applied to the session. *Id.* at 45.

When a “criminal conduct” discussion involves the public body’s own employee, the discussion might also fall within the personnel exception discussed in Part A, above.

M. The “other law” exception: § 3-305(b)(13)

The Act contains a catch-all exception that permits a public body to close a meeting to “comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosure about a particular proceeding or matter.” Examples of laws that might prevent public disclosure are the State procurement laws, which govern the disclosure of offers and offerors’ names before bids or proposals are opened, *see* St. Fin. & Proc. § 13-210; federal laws that prevent the disclosure of various types of personal information, *see, e.g.*, Health Insurance Portability and Accountability Act (“HIPAA”), 42 U.S.C. § 1320d *et seq.*; Federal Educational Rights and Privacy Act, 20 U.S.C. § 1232g; and provisions of the Public Information Act (“PIA”) that require a governmental unit to deny requests for certain records or types of information. *See* §§ 4-304 through 326 (specifying records that may not be inspected); §§ 4-328 through 340 (specifying the types of information that may not be inspected).

For example, as explained by the Compliance Board, a provision of the PIA, § 4-335,

prevents public disclosure of confidential commercial or financial information contained in documents possessed by a State agency. Therefore, under exception 13 of the Act, a public body is permitted to close a meeting when public discussion of that information would compromise its confidentiality.

8 *OMCB Opinions* 137, 142, n. 4 (2013). The Act itself prevents a public body from disclosing closed-session minutes until they are unsealed, so a public body may invoke this exception to meet in closed session to discuss those minutes. *See* 9 *OMCB Opinions* 160, 164 (2014) (“Public bodies must adopt minutes of their closed sessions, and those minutes, by law, ‘shall be sealed and may not be open to public inspection.’”).

N. The “procurement” exception: § 3-305(b)(14)

The procurement exception is conditional. It allows a public body to close a meeting 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”—but only “if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.” *See* 14 *OMCB Opinions* 49, 54 (2020) (explaining that the public body may not invoke the exception until it has determined that public discussion would have an adverse impact) The Compliance Board has explained that “a public body may close a meeting to hear competing offerors’ presentations of their proposals, because that information, if made public, would give an advantage to the offerors who have not yet presented their proposals and would thereby compromise the process.” *See* 7 *OMCB Opinions* 1, 3 (2010).

Several criteria for the procurement exception have emerged from the Compliance Board’s opinions. First, the discussion must involve “a pending procurement or an impending procurement that is actually in the works.” 9 *OMCB Opinions* 132, 137 (2014). This criterion is not met by “the possibility that a public body might decide to initiate a competitive procurement process in the future.” *Id.* A general discussion about procurement procedures thus exceeds the scope of the exception. *Id.*

Second, § 3-305(b)(14) protects the competitive procurement process and does not shield discussions about other contract matters. Thus, discussions about sole-source contracts and modifications of a contract that has already been awarded seldom fall within the exception. *See, e.g.*, 14 *OMCB Opinions* 49, 54 (finding that the exception did not apply when the matter discussed was whether to extend a pier franchise on a sole-source basis and on what terms). The Compliance Board has posited that the discussion might apply when a public body is awarding a sole-source “gap” contract for services needed while a competitive procurement for those services is pending, but only “if the public body can establish that the disclosure of the discussion about the gap contracts would affect the public body’s leverage in the competitive procurement.” 8 *OMCB Opinions* 8, 15 (2012).

Third, the public body must find that public discussion of the matter would “adversely impact the ability of the public body to participate in the competitive bidding or proposal process.” § 3-305(b)(14). The public body should document that finding in the minutes of the public body’s proceedings on a motion to close a meeting under § 3-305(b)(14), in the presiding officer’s written statement of the reasons for closing the session, or both. *See, e.g.*, 8 *OMCB Opinions* 63, 66 (2012); 12 *OMCB Opinions* 60 (2018).

O. The “cybersecurity” exception: § 3-305(b)(15)

The cybersecurity exception is conditional. It allows a public body to close a meeting to discuss cybersecurity “if the public body determines that public discussion would constitute a risk to” the following:

- (i) security assessments or deployments relating to information resources technology;
- (ii) network security information, including information that is:
 - 1. related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a governmental entity;
 - 2. collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
 - 3. related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity; or
- (iii) deployments or implementation of security personnel, critical infrastructure, or security devices.

§ 3-305(b)(15).

The Public Information Act might also pertain to discussions about the security of an information system. Section § 4-338 of the General Provisions Article requires records custodians to “deny inspection of the part of a public record that contains information about the security of an information system.” A discussion that would disclose that information thus might fall under the “other law” exception provided by § 3-305(b)(13), discussed in Part M, above.

As with the “public security” exception, the public body should document its “risk” determination in the minutes of the public body’s proceedings on a motion to close a meeting under § 3-305(b)(15); in the presiding officer’s written statement of the reasons for closing the session; or both.

Practice notes on the exceptions:

- None of the exceptions applies to a meeting that was closed without a public vote to close and a closing statement that cites the applicable exception or exceptions. *See* Chapter 5.
- Discussions in a closed session may not stray beyond the scope of the exception claimed on the closing statement. If the discussion begins to stray, the presiding officer must curtail the discussion. The public body may then return to open session, if the public has been told of

that possibility, or schedule the topic for a properly-noticed open meeting at a later date.

- Ideally, the need for a closed session will be identified before the meeting, so that counsel (or, if counsel is not available, an officer, member, or employee who has taken training on the Act), can assess whether the discussion will fall within an exception and make sure that the presiding officer cites the applicable provisions on the closing statement.
- The exceptions are to be construed narrowly. If a public body (or its counsel) is uncertain about whether the public body can rely on a particular exception as its basis for closing a meeting, the balance should tip in favor of keeping the meeting open.
- If, during the meeting, a member of the public body unexpectedly requests a closed session, the member must disclose enough information for the presiding officer to complete the closing statement and the other members to hold an informed vote on whether to exclude the public. *See* Chapter 5, Part A.
- If a public body expects to close part of a meeting, it must include that expectation on its meeting notice. *See* Chapter 2, Part B.
- If in doubt about whether an exception applies to a particular discussion that the public body expects to hold, the presiding officer may recess the meeting briefly in order to consult separately with counsel. Or, the presiding officer may call for a vote to close the meeting and disclose on a written closing statement that counsel's advice will be sought on whether the exception would apply to the proposed topic of discussion. *See* Chapter 5, Part A. The public body would then return to open session for a vote on any motion to discuss the topic in closed session.

Chapter 5: Conditions for Closing a Meeting

Chapter 5: Did the public body take the necessary steps before, during, and after the closed session?

(Index Topic 5)

Chapter summary: A public body may not meet in closed session unless it has designated at least one member to take training in the requirements of the Act. § 3-213(d). The Act imposes five additional conditions on a public body's exercise of its discretion to close a meeting to discuss one of the topics listed in § 3-305. The first three conditions must be met in the properly-noticed open session that must be held just before the meeting is closed; the fourth applies during the closed session, and the fifth applies afterwards. (For notice and agenda provisions relevant to closed sessions, see Chapter 2). The five conditions are:

First, the members must convene in a properly-noticed open session, and it must be attended by a member designated to take the training. § 3-213(d)(3)(i). If a designated member cannot attend, the public body must complete the "Compliance Checklist" posted on the open meetings page of the Attorney General's website, and include the completed checklist in the minutes of the open session. § 3-213(d)(3)(ii).

Second, in the open session, the presiding officer must "make a written statement of the reason for closing the meeting." § 3-305(d). In that statement, often called a "closing statement," the presiding officer must additionally disclose the "topics to be discussed" and the statutory exception relied upon as authority for closing the meeting.

Third, the presiding officer must conduct a recorded vote—a vote for which each member's vote is specified—on a motion to close the meeting to the public. § 3-305(d)(1). A member of the public may note an objection to the closing. § 3-305(d)(3).

Fourth, during the closed session, the members of the public body must confine their discussion to the topics and the scope of the exception disclosed on the closing statement. See § 3-305(b), (c); see also Chapter 4, Chapter Summary. In effect, the

presiding officer's closing statement sets the agenda for the closed session, such that, during the closed session, members of the public body may not bring up "new business." *See, e.g., 9 OMCB Opinions* 46, 50 (2013) (rejecting the public body's argument that it was not required to specify the topics to be discussed on its closing statement because, at the time of the vote, the members did not yet know what topics might come up in the closed session).

Fifth, after the closed session, the public body must disclose, in the minutes of the next open session, information that discloses what topics were actually discussed, who attended the closed session, and what actions the public body took. *See* § 3-306(c)(2). Disclosure requirements also apply to sessions closed for the performance of an administrative function. § 3-104. If a member designated for training could not attend the initial open meeting, the public body must also include in the minutes the compliance checklist that it completed before closing the meeting. § 3-213(d)(3)(ii).

To figure out whether a public body complied with the disclosure requirements, a person should inspect the open-session minutes for the session that was closed and for the next open session, as well as the closing statement.

A. Before the closed session: closing statement and recorded vote

The closing statement must contain three items of information: the "topics to be discussed" in the closed session, a citation to the exception applicable to each topic, and "the reason for closing the meeting." § 3-305(d). Once adopted by the members' recorded vote, the closing statement is the public body's representation to the public that the closed session will comport with the Act. In fact, members of the public are entitled to a copy of the closing statement when the meeting is closed. *See 7 OMCB Opinions* 5, 6 (2010) ("[T]he statement is a matter of public record that must be available at the time a public body concludes its public session immediately before the start of the closed meeting."). Further, if a member of the public objects to the closing, the public body must send a copy of the closing statement to the Compliance Board. § 3-305(d)(3).

The Compliance Board has explained the purposes to be served by closing statements:

As might be inferred from the fact that the General Assembly assigned to the presiding officer the duty to make the written statement, the performance of that duty is not a mere formality. A properly-completed written statement serves to prompt each member of the public body, before voting, to consider whether the reason is sufficient to depart from the Act's norm of openness.

It helps members of the public who will be barred from the closed session to understand that this exception to the principle of openness is well-grounded. It serves as an accountability tool, because it enables the public to compare the pre-meeting disclosures with the minutes summarizing the actual conduct of the meeting and thereby to assess whether the discussion stayed within the exceptions that the public body had claimed. And, in the event that a complaint is filed, it tells us that the members of the public body considered the legality of closing the meeting and gives us their reason at the time for doing so. An after-the-fact justification for closing a meeting is not a good substitute for that information.

9 *OMCB Opinions* 15, 22-23 (2013) (citing and quoting 4 *OMCB Opinions* 46, 48 (2004) (quotation marks omitted)). See also 8 *OMCB Opinions* 166, 168 (2013) (“[T]he public body’s objective should be to treat each decision to exclude the public as a substantive decision for which each member of the public body is accountable and to demonstrate that fact to the public in the ways required by the Act.”).

Closing statements that merely parrot the words of the statutory exception rarely convey enough detail about the topics to be discussed and the reason for excluding the public. Particularly, the text of the claimed exception does not tell the public why the closed session was necessary; after all, the exceptions allow, but do not require a public body to close a meeting.¹ For example, a closing statement that merely states the words of the business relocation exception, which allows the public body to exclude the public from its discussion of a proposal for a business to locate in the public body’s jurisdiction, does not tell the public anything about why the discussion has to be secret, especially if the identity of the business has already been made public. See, e.g., 9 *OMCB Opinions* 46, 50 (2013).

In most cases, a description of the topic alone also does not convey why the public body needs to exclude the public. Occasionally, though, the Compliance Board has found that a description of the topic to be discussed adequately conveyed the public body’s reason for closing a meeting, as when the public body has described the topic as discipline matters respecting individual employees. See, e.g., 4 *OMCB Opinions* 188, 196 (2005). The better practice is to state the citation, topic, and reason for closing as separate pieces of information; that way, the public is not left to speculate on why it has been excluded.

¹ For a list of the opinions in which the Compliance Board has found that a public body violated the Act by adopting a closing statement that contained only “uninformative boilerplate,” see Topic 5(C)(3) in the index under the “Compliance Board” heading at https://www.marylandattorneygeneral.gov/OpenGov%20Documents/Openmeetings/OMCB_Topical_Index.pdf.

The recorded vote serves to reflect each member’s decision as to the public body’s exercise of its discretion to close the meeting on the basis stated in the closing statement. *Cf.* 14 *OMCB Opinions* 49, 58 (2020) (noting that the “members themselves were accountable for the action they took to exclude the public from those discussions”). The presiding officer should therefore conduct the vote after the closing statement has been read aloud to the members, or at least summarized well enough to convey to them what they are voting on. *See* 9 *OMCB Opinions* 46, 49 (2013) (“[T]he written statement of the topics to be discussed and reasons for closing allows the members to cast an informed vote on whether the claimed reason is sufficient to depart from the Act’s norm of openness—that is whether it ‘really is necessary’ to exclude the public.”).

Practice notes on avoiding closing statement violations:

- A closing statement must be prepared, and a recorded vote to close must be conducted, *before* the public body closes the meeting. That means that the public must be given notice of an open meeting. Thus, even when the only public portion of a meeting will be the motion and vote to close, the meeting notice must invite the public to that portion of the meeting. § 3-202(b)(3); *see also* 8 *OMCB Opinions* 150, 158 (2013) (suggesting wording for notices of such meetings).
- Model closing statement forms, one with instructions for the presiding officer and one without, as well as a sample form, can be found at <https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx>, under “Sample Forms and Checklists.” Public bodies are not required to use the forms, but they prompt the presiding officer to provide all of the required information. 8 *OMCB Opinions* 166, 168 (2013).
- Public bodies may use a closing statement pre-prepared by staff, so long as it remains accurate when the members vote to close the meeting. 9 *OMCB Opinions* 1, 6 (2013). To ensure accuracy—for example, that the “reason for closing” is the members’ own reason for closing—it is a good practice for the presiding officer to read the closing statement out loud, entertain a motion to adopt it, and then conduct the recorded vote, or to include the pre-prepared form in the members’ meeting packet, or both.

- When someone other than the presiding officer has prepared the closing statement, it is a good idea for the presiding officer to sign or initial it to show compliance with the Act's requirement that the presiding officer "make" the statement. *See* 8 *OMCB Opinions* 166, 168 (2013) (stating that although a "public body may record the presiding officer's acknowledgment of the written statement in its minutes if it prefers," the "better practice is to include it in the written statement, which is immediately available to the public").
- The presiding officer should take a copy of the closing statement into the closed session as a reminder of the permissible scope of the discussion. The original, as adopted before the closed session, should be left outside with staff in case a member of the public requests a copy and also as a record of the disclosures made before the closed session. 8 *OMCB Opinions* 182 (2013).
- Topics should be described as fully as possible without compromising the confidentiality of the discussion. *See, e.g.,* 9 *OMCB Opinions* 71, 75 (2013) (finding the description of the topics as "institutional strategic, budgetary and administrative matters" to be "so vague as to be insufficient").
- A "public body may close a meeting to discuss several topics—if each topic falls within an exception and if each is clearly traceable to the relevant statutory exception and reason for closing." 9 *OMCB Opinions* 1, 3 (2013).
- Ideally, the need for a closed session will be anticipated beforehand so that the presiding officer, staff, and counsel, as appropriate, can evaluate whether the Act authorizes excluding the public from the particular discussion.
- When a member calls for a closed session during the open session, and the presiding officer does not know what the discussion will entail or whether an exception applies, the presiding officer must gather the information necessary to prepare a proper closing statement and to ensure that the other members know why they are voting to close the meeting. One way to achieve those goals is to briefly recess the meeting to confer separately with the member who wants to close the

meeting and counsel, if counsel can be reached. If counsel is present, another way is to entertain a motion to close the meeting to receive legal advice under § 3-305(b)(7), consult with counsel on whether the session may be closed, and then reconvene in open session to present a written statement and conduct a vote on whether to close. *See* 9 *OMCB Opinions* 46, 51 (2013) (“The Act neither requires nor permits members of a public body to vote to exclude the public from a meeting without information on the merits of that action.”).

B. During the closed session, the duty to discuss only the disclosed topics, only within the scope of the claimed exception

As discussed in Chapter 4, the public body’s discussion in a meeting closed under § 3-305 must stay within the confines of the exception or exceptions that the presiding officer disclosed on the closing statement. For example, the discussions about an individual employee in a meeting properly closed under the personnel exception may not stray into discussions of more general employment matters. *See, e.g.,* 6 *OMCB Opinions* 180, 185 (2009). In that example, the topic identified, such as “retirement benefits of specific employee,” might seem to include policy matters on the provision of retirement benefits generally, but a discussion of those matters would not fall within the personnel exception.

When the discussion begins to stray beyond the topics and exceptions claimed beforehand, the presiding officer must stop the discussion so that it may be conducted in the open. *See, e.g.,* 9 *OMCB Opinions* 195, 196 (2014) (“Whether or not a topic falls within one of the . . . exceptions, it may not be discussed in a closed session if it has not been disclosed beforehand on the written statement.”). If the closed session was the last item on the agenda of the public body’s meeting, the public body may not immediately return to an open session; the public would have had no notice of that open session.

C. After the closed session, the disclosure of the events of the session

After meeting in a closed session under § 3-305, the public body must disclose what actually transpired in the closed session in as much detail as it can without disclosing the information that the claimed exception permitted the public body to keep confidential. The requirements for post-session disclosures are discussed in Chapter 6, Part B.4.

If a member designated for training could not attend the initial open meeting, the public body must also include in the minutes the compliance checklist that it completed before closing the meeting. § 3-213(d)(3)(ii). The checklist and a template for the other

requisite post-session disclosures are posted under “Sample Forms and Checklists” at <https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx> .

Chapter 6: Meeting Documents

Chapter 6: Did the public body prepare and retain the required documents and post its minutes online?

(Index Topic 6)

Chapter summary: The Act generally requires that public bodies prepare minutes “as soon as practicable” after they meet unless “live and archived video or audio streaming of the open session is available” or “the public body votes on legislation and the [members’] individual votes” are “posted promptly on the Internet.” § 3-306(b).¹ Public bodies must retain meeting minutes and recordings for five years and, “to the extent practicable,” must “post online the minutes or recordings” that they are required to retain. § 3-306(e). Meeting notices and closing statements for closed sessions must be retained for three years. *See* §§ 3-302, 3-305. Additionally, public bodies must make an agenda available before they meet. For that requirement, see Chapter 2, Part D.

Ordinarily, open-session minutes and closing statements should be produced for inspection, at no cost, when a member of the public comes to the public body’s office and asks to see them, though the Compliance Board has recognized that a public body might not be able to grant immediate access to documents more than a year old. The Act does not require public bodies to send copies of minutes to members of the public at no charge.

A draft set of minutes does not constitute “minutes” until “the public body itself has had an opportunity to review and correct the work of whoever prepared the draft minutes.” 7 *OMCB Opinions* 83, 84 (2011); *see also, e.g.,* 14 *OMCB Opinions* 49, 55 (2020, (“[I]t is the public body’s members who vote to adopt minutes, including closed-session summaries, as complete and accurate.”). Minutes are the public body’s own representation of the events of a meeting, and so the public body’s members, not staff, are accountable for omissions and other inaccuracies. *See, e.g., id.* at 58 (in finding that the public body violated § 3-306, noting that there was “no indication that the Council members hesitated to adopt minutes that omitted the substantive actions they took, whether by consensus or otherwise, in closed session.”).

¹ Section 3-307, which applies only to seventeen entities, sets forth its own rules for video recording meetings and preparing minutes. *See* § 3-307(b), (d), (e) (requiring, with limited exceptions, that bodies subject to 3-307 prepare minutes in “a timely manner” and post minutes and videos of meetings online).

The Act's documents requirements can pose challenges for unfunded task forces that have not been assigned administrative staff and do not have any members employed by the parent public body. *See, e.g., 8 OMCB Opinions* 188, 189 (2013). The Compliance Board has "urge[d] officials and government bodies that create task forces to provide a level of staffing that will enable the members to do their work without violating the Act." *Id.*; *see also 7 OMCB Opinions* 121, 122-23 (2011) ("Where, as here, a local government structures an unfunded advisory committee of citizens as a public body subject to the Open Meetings Act, we suggest that measures be taken to provide that body with a repository for minutes and with a means of providing citizens with access to them.").

A. *Written meeting notice*

The Act requires public bodies to issue their meeting notices "in writing" "[w]henever reasonable," § 3-302(b), and then to "keep a copy" for at least one year after the date of the meeting. § 3-302(d). Only rarely will a meeting occur on such an emergency basis that the only feasible way of giving notice is to call members of the press on the telephone, and, even then, it is likely that the message could be conveyed "in writing" by social media or e-mail. So, the public body will almost always have a written notice to copy or print out and keep for a year.

Public bodies that post (and cancel) their meeting notices online have sometimes had trouble establishing later that they gave proper notice of a meeting. In one matter, for example, a city task force was only able to prove that it had posted notice online by locating the work orders that its staff sent to the city's website staff. *See 8 OMCB Opinions* 188, 189 (2013). The Compliance Board found that the task force had violated the one-year retention requirement and advised the task force to "ensure that staff print out a screenshot of the written notice and of any e-mailed notice given to the media, record the date of the print-out, and retain it." *Id.* at 190. In another matter, the Compliance Board found that a county committee had complied with the retention requirement after the county's information technology staff was able to recover a notice that the committee had posted online. *9 OMCB Opinions* 175, 176 (2014).

Although public bodies must keep a copy of their meeting notices, they are not required to continue to post them on their websites after the meeting date. *9 OMCB Opinions* 151, 154 (2014). They are also not required to include on the notice the date on which they posted it, but providing that information to the public might guard against suspicion that the public body posted the notice after the fact. If a public body posts a meeting date on an events calendar that links to a page with the rest of the required information, the public body must keep copies of both pages.

For a discussion of the required content of meeting notices and the agenda requirement, see Chapter 2.

B. Meeting minutes – open and closed sessions

The Act provides generally that, “as soon as practicable after a public body meets, it shall have minutes of its session prepared.” § 3-306(b)(1). There are two exceptions to that rule. First, a public body need not prepare minutes for an open session if “live and archived video or audio streaming of the open session is available,” and, second, “the public body votes on legislation and the individual votes taken by each member of the public body who participates in the voting are posted promptly on the Internet.” § 3-306(b)(2).²

Closed-session minutes are ordinarily sealed and thus not available for public inspection. They are available to the public body itself and, when there has been a complaint that the public body violated the Act by holding a closed session, to the Compliance Board. §§ 3-306(c)(3), 3-206(b)(2), (3). Generally, a public body that has not closed a session to discuss a confidential topic may not later redact the confidential material from its open-session minutes. 7 *OMCB Opinions* 64 (2010) (“If a matter was discussed in an open session governed by [the Act] – even if the meeting could have been closed under [§ 3-305], but the public body did not elect to do so – the minutes of that meeting are available to the public.”). So, although it might not occur to a public body to vote to close a meeting when no members of the public are present, the minutes of the discussion will not be sealed unless the meeting has been closed.

Public bodies must keep a copy of the minutes and any tape recording of the session for at least five years, must post them online “to the extent practicable,” and must make them “open to public inspection during ordinary business hours.” § 3-306(e), (d). Problems sometimes arise when someone asks for old minutes that are no longer retained in the public body’s main office. The Compliance Board has “generally recognized that public bodies do not necessarily keep older records handy for inspection upon demand.” 9 *OMCB Opinions* 218, 224 (2015). It has “encouraged members of the public to recognize that reality, and public bodies to agree to retrieve [minutes] within a ‘reasonable period.’” *Id.*

As discussed further below, complaints to the Compliance Board about open-session minutes usually fall into four categories: insufficient content generally; insufficient disclosures about closed sessions; belated adoption; and problems with providing members

² Some public bodies keep written minutes as well as audio or video minutes. Written minutes provide a more compact summary of each meeting, serve as a backup in case of technology failures, and, in any case, are required by some public bodies’ bylaws. Written minutes may be handwritten, so long as they are legible. See 7 *OMCB Opinions* 121, 123 (2011); 1 *OMCB Opinions* 63, 64 (1994).

of the public with access. For closed-session minutes, questions sometimes arise as to a public body's duties to unseal them. These issues usually do not arise for live and archived video or audio streaming, though questions are sometimes raised about the quality of the audio and the public's ability to identify the speakers. When a public body relies on audio streaming for its minutes, the presiding officer should take special care to recognize the speakers by name.

C. Content of minutes, generally

Under the Act, minutes must “reflect” three types of information: “each item that the public body considered,” “the action that the public body took on each item,” and “each vote that was recorded.” § 3-306(c). As to minutes for an open session, the Compliance Board has explained that “[e]ach item must be described in sufficient detail so that a member of the public who examines the minutes can understand the issue under consideration.” 3 *OMCB Opinions* 164, 166 (2001) (citing the 4th edition of this Manual); *see also Floyd v. Mayor and City Council*, 241 Md. App. 199, 218-19 (2019) (applying § 3-306(c)). Also, a public body that conducts a vote to close a meeting, in the absence of a member designated to take training on the Act, must complete the Compliance Checklist that is posted on the Attorney General's website and include that document in the minutes. § 3-213(d).

Closed-session minutes, which are initially sealed, must also meet the § 3-306(c) standards. The minutes of meetings closed under two of the fifteen exceptions must be unsealed at certain times.³ The minutes of meetings closed under the other exceptions will be unsealed only if a majority of the members of the public body votes to do so, whether on its own initiative or in response to a person's request. § 3-306(c)(4)(iii). Additionally, closed minutes must be provided to the Compliance Board upon its request, and implicit in that requirement is the assumption that closed-session minutes will enable the Compliance Board to determine whether the discussion exceeded the bounds of the disclosures on the closing statement. *See* § 3-206(b)(2).

As below, the Act addresses various aspects of the content and format of minutes

1. Audio or Video Streaming

“Audio or video streaming” may only be substituted for minutes if it is live and archived. § 3-306(b)(2)(i). If a public body designates either of these two substitute

³ Under § 3-306(c)(4), the minutes of meetings closed to discuss the marketing of public securities and the investment of public funds, § 3-305(b)(5) and (6), “shall be unsealed” when the securities have been marketed or the funds invested.

methods as the format of its official minutes, it should take steps to ensure that the video or audio has captured at least the content that would be available had written minutes been prepared. For example, streaming should be designed in such a way as to capture the identities of speakers and of those voting to close a meeting. *See, e.g.*, 14 *OMCB Opinions* 111 (2020) (citing measures that the presiding officer took to ensure that observers of a virtual meeting could identify the speakers). And, in cases of technological difficulty, the public body will need to prepare written minutes in order to comply with § 3-306. *See* 9 *OMCB Opinions* 256 (2015).

Many public bodies that stream audio or video of their meetings also keep written minutes, both because written minutes serve many functions in addition to those required by the Act (for example, the public body's actions on a matter are often found more quickly in minutes than by listening to the meeting) and because a public body's own governing laws might require the adoption of written minutes. When a public body uses multiple formats, it should decide which method to use for its official minutes and make sure to include all of the required information in that version.

2. Internet Posting of Votes on Legislation

When a public body has met to vote on legislation, it may, instead of preparing written minutes recording that vote, “promptly” post each member's individual vote on the internet. § 3-306(b)(2)(ii). As a practical matter, few public bodies other than the General Assembly meet exclusively to hold a vote on legislation.

3. Disclosure, in open-session minutes, of events of prior session closed under § 3-305

After a public body has met in a session closed under § 3-305, it must include a summary of the session in the minutes of its next public meeting. *See* § 3-306(c)(2). Public bodies may instead include the summary in the minutes of the public meeting held that day—that way, the public will see the summary sooner—but should follow a consistent practice or include a cross-reference in the later set of minutes so that the public knows where to look.

The summary must include: (1) the time, place, and purpose of the closed session; (2) each member's vote on the motion to close the session; (3) the statutory exception claimed as a basis for excluding the public; and (4) a list of the topics discussed, persons present, and actions taken in the closed session. *Id.* The closed-session summary “serves as the members' representation of what occurred out of the public's view.” 9 *OMCB Opinions* 160, 162 (2014). A template for use in preparing a closed-session summary can be found on the Attorney General's website.

As with closing statements, the public body is only required to disclose as much information as it can without compromising the confidentiality of the session. For example, if a public body closes a meeting under the personnel exception to discuss with an employee a disciplinary matter involving that employee, the list of “persons present” may refer to the employee generically. The “persons present” disclosure may also pose a challenge for closed meetings held by teleconference. For those closed meetings, each member should disclose whether there is anyone else in earshot and take the call out of the presence of any member of the public who would not have been admitted to an actual meeting room.

The closing statement does not serve as a substitute for the post-session disclosures, even when the closed session has gone as predicted on the closing statement. As explained by the Compliance Board, “a statement prepared before the meeting cannot report on the actions taken during the meeting, and a prediction as to the topics to be discussed during the closed session will not reflect the actual event” 9 *OMCB Opinions* at 161. As discussed in Part C of this Chapter and in Chapter 5, the second section of the model closing statement, labeled “for use in the minutes of the next regular meeting,” is there to prompt the person keeping the minutes of the closed session to gather the information that the public body must include in the minutes of the next open meeting. That section is not part of the closing statement, and the notes made on it do not constitute the public body’s summary of the session until the public body adopts them as part of the minutes of its next open session. *Id.* A template for the requisite closed-session summary is posted at <https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx>.

4. Disclosure, in open-session minutes, of events of prior closed session, when held during a recess, to perform an administrative function

When a public body has recessed an open session to perform an administrative function in closed session, it must include in the minutes of its next meeting a “statement of the date, time, place, and persons present at the administrative function meeting” and “a phrase or sentence identifying the subject matter discussed” there. § 3-104. Otherwise, as discussed in Chapter 1, a meeting at which a public body solely performs an administrative function is not subject to the Act.

5. Timing and adoption of minutes

The Act requires public bodies to “have minutes prepared” “as soon as practicable” after their meetings. § 3-306(b); *see also* § 3-307(d)(1) (providing that the seventeen public bodies subject to § 3-307 “shall approve meeting minutes in a timely manner”). As explained by the Compliance Board, a draft summary of a meeting does not become a set of “minutes” until the public body has adopted it as minutes. *See* 6 *OMCB Opinions* 187,

190 (2009) (“To qualify as minutes of the public body, the public body must approve them.”); *see also* 14 *OMCB Opinions* 3 (2020) (concluding that computer-generated “notes” of a meeting did not constitute minutes because they had not been reviewed and adopted by the members of the public body). Section 3-306(b)’s timeliness requirement does not pertain to the posting of minutes online; that separate requirement is set by § 3-306(e). *See* item 6, below; *see also* 13 *OMCB Opinions* 18 (2019) (discussing the two separate requirements).

The Compliance Board has stated that the “[a]s soon as practicable” requirement for adopting minutes “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.” 8 *OMCB Opinions* 150, 159 (2013). Given that the General Assembly chose not to quantify what is “practicable” for the wide variety of entities subject to the Act, the Compliance Board has seldom pronounced generally how long is too long. *See, e.g.*, 3 *OMCB Opinions* 85, 89 (2001) (“The Act allows practical circumstances to be considered and does not impose a rigid time limit”) (citation and quotation marks omitted).⁴ The Compliance Board instead has stated that, as “a general rule,” “minutes are to be available on a cycle paralleling a public body’s meetings” and has recognized that “special circumstances might justify a delay.” 6 *OMCB Opinions* 164, 169 (2009) (citations to other opinions omitted). And, for the seventeen entities subject to § 3-307, the Act expressly contemplates approval of minutes at the next meeting (except in cases of emergency meetings). *See* § 3-307(d)(2), (3) (“Each open meeting agenda shall include consideration of the meeting minutes from the most recent meeting,” except when the agenda is for an emergency meeting). Not included in the general rule that minutes should be approved on a cycle paralleling a public body’s meetings are bodies that meet

⁴ The circumstances addressed by the Compliance Board in 8 *OMCB Opinions* 173 (2014) illustrate the difficulty of setting a “rigid time limit” to be met by all of the public bodies subject to the Act. The advisory council there, comprised of 34 members, had a 3% share (less than 2 hours per week) of an administrative staffer’s time. The staffer prepared detailed draft minutes within two to three weeks for review by the officers and then adoption at the next meeting, about eight weeks later. The council’s policy was to provide the draft to people who asked for it. Although a copy of the draft was provided promptly to complainant, she complained to the Compliance Board that the council had not adopted minutes in a timely manner. The Compliance Board found that, given the circumstances, the council did not violate the “as soon as practicable” standard. The Compliance Board observed:

Of course, in an ideal world, every public body would be sufficiently funded and staffed and thus able either to stream its meetings online or to produce and adopt written minutes quickly. When the ideal fails to materialize through no fault of the public body, we suggest accommodations.

only a few times a year. In 6 *OMCB Opinions* 85, 88 (2009), for example, the Compliance Board advised that “routine delays of several months would be unlawful,” and it found that a “nearly four-month delay” violated the Act. 8 *OMCB Opinions* 173 (2013).⁵ For public bodies that meet rarely, the Compliance Board has approved, albeit with a caution, the practice of adopting minutes by circulating copies among the members.⁶ The Compliance Board has also encouraged public bodies to make draft information available, when possible, and members of the public to accept it, pending the adoption of the final set. *See, e.g.,* 8 *OMCB Opinions* 173, 174-75 (2013). There, for example, staff had sent detailed draft minutes to the complainant three days after she requested them. Noting that it was “not at all clear” that the complainant had been denied timely access to meeting information, the Compliance Board advised that members of the public who want to “know quickly what happened at a meeting might attend the meeting, or accept draft minutes, or ask a participant for details.”

6. Inspection of minutes by the public

The Act requires public bodies to retain a copy of their minutes and any tape recordings of the meeting for five years. Minutes and tape recordings of open sessions “are public records and shall be open to public inspection during ordinary business hours.” § 3-306(c), (d). The Compliance Board has opined that written closing statements are also to be available for inspection by the public, not only at the meeting that was closed, but also “as a matter of course to any requester for at least the . . . period during which the statement

⁵ *See also* 8 *OMCB Opinions* 176, 177 (2013) (“Public bodies that routinely only meet quarterly, we have stated, should find an alternative way of adopting minutes so that people who could not attend the meeting do not have to wait three months to find out what the public body did. That is the only objective standard we have set in our interpretation of the minutes requirement.”)

⁶ In 8 *OMCB Opinions* 125 (2013), for example, the Compliance Board stated:

[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.

Id. at 126-27; *see also* 8 *OMCB Opinions* 150, 159 (2013) (same); 8 *OMCB Opinions* 176, 177 (2013) (“[W]e have very expressly stated that the adoption of minutes [other than in an open meeting] is the rare exception to the principle that public business should be conducted in the open.”).

must be kept.” 5 *OMCB Opinions* 184, 187 (2007); *see also* § 3-305(d)(5) (requiring that closing statements be retained for three years).

As noted above, most public bodies must post minutes or recordings of meetings online only “to the extent practicable.” § 3-306(e). The seventeen entities subject to § 3-307, however, are *required* to post minutes and recordings online. *See* § 3-307(b)(2) (requiring a subject body’s minutes of open session to be posted online, “not more than 2 business days after the minutes are approved); § 3-307(e)(2) (requiring most bodies subject to § 3-307 to post to their websites “complete and unedited archived video recording[s] of each open meeting . . . for a minimum of 1 year after the date of the meeting”).

The Act does not require public bodies either to mail hard copies of minutes to members of the public or to scan minutes and send them electronically. A request for scanned or copied minutes is instead a request for records under the Public Information Act (“PIA”), which states the deadlines applicable to responses to such requests and permits government bodies to recoup copying costs. The Compliance Board has explained:

[A] person who wants to see meeting documents has two separate options: either go to the public body’s place of business and inspect them for free, as the Open Meetings Act provides, or, instead, ask the public body to send copies in accordance with the Public Information Act, wait for the public body’s response under the timetable provided by that law, and pay such costs as the public body may charge, again under that law.

9 *OMCB Opinions* 218, 220 (2015). Thus, the Compliance Board explained, “the fact that a request for copies includes a request for meeting documents does not mean that the requester may jump in front of the line of other [PIA] requesters whose requests the public body might be processing.” *Id.*

The expectation set by the Act for public access—i.e., that public bodies should be able to produce minutes for inspection by anyone who comes to the public body’s office and asks for them—is workable for the public bodies, such as many municipalities, that maintain them in binders in an office staffed for in-person inquiries from members of the public. *See, e.g.,* 8 *OMCB Opinions* 122, 123 (2012). That expectation is harder to achieve for the many task forces and commissions without a central place of business, without dedicated staff, without any other function requiring in-person availability to the public, or with competing deadlines that staff must meet when the requester appears. Problems have arisen, sometimes resulting in violations, when the public body is a task force that has no assigned office space, *see* 7 *OMCB Opinions* 121 (2011) (minutes retained by chair of citizen task force without staff); when a member of the public asks for years’ worth of minutes and the public body maintains minutes in the file for each meeting, *see* 8 *OMCB*

Opinions 1 (2012) (member of the public came to office and requested minutes for the prior six years); when the public body's sole employee cannot leave the requester alone while she goes into the file room where the minutes are kept, *see id.*, or when the minutes that the person wants to see are with staff in another office at the time, as might happen if someone has requested copies of them under the Public Information Act and staff are preparing them for production that way, or the requester arrives on a day when staff have other pressing demands, or the minutes are those of a task force with which staff are unfamiliar. *See, e.g., 9 OMCB Opinions* 218 (2015).

The Compliance Board has explained that the "to the extent practicable" standard that § 3-306(e) sets for most public bodies to post minutes online is not as stringent as the "as soon as practicable" standard that § 3-306(b) sets for the public body's adoption of minutes. 13 *OMCB Opinions* 18, 19 (2019). Section 3-306(b), the Compliance Board explained, "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." *Id.* (internal quotation omitted). However, for the online posting requirement, § 3-306(e),

the balance is different [because] the public has access to the minutes by other methods. Therefore, the balance that we strike here is between, on the one hand, the goal of providing seamless access to those members of the public who have access to the internet and, on the other, the practical constraints on the particular public body's ability to do so.

Id. The inquiry is "fact-dependent." *Id.*

The Compliance Board has set a general rule of reasonableness and good faith for both the members of the public who seek the minutes of a public body and the public body's staff. *See, e.g., 8 OMCB Opinions* 1; 14 *OMCB Opinions* 3 (2020).

D. For sessions closed under § 3-305, the closing statement

For an explanation of the written disclosures ("closing statement") that a public body must make before closing a session under the Act, see Chapter 5, Part A. Closing statements must be kept for three years; are a matter of public record; must, "[t]o the extent practicable," be posted online; and, as the Compliance Board has stated, must be available for inspection, at the time of closing, by members of the public who so request. *See* § 3-305(d); 5 *OMCB Opinions* 184, 187 (2007). If a member of the public objects to the closing

of a session, the public body must send a copy of the closing statement to the Compliance Board. *See* § 3-305(d)(3).

Of the two parts to the closing statement form posted on the Attorney General's website, only the first part, when completed, is the closing statement itself. The second part, with spaces for the information that must be disclosed in subsequent open-session minutes, is a worksheet for the use of the person who is recording the events of the closed session and is not a public record unless that part of the document is incorporated into the open-session minutes.

The closing statement itself does not serve as a substitute for the post-session disclosures that must be made in the minutes of the next open session. See Part B.4 of this chapter and 9 *OMCB Opinions* 160, 161 (2014). A template for the closed-session summary can be found on the Attorney General's website.

Chapter 7: Guidance, Judicial Enforcement, and Training

Chapter 7: What roles does the Act assign to the Compliance Board, the courts, and the Office of the Attorney General?

(Index Topic 7)

Chapter summary: The Act assigns separate roles to the Compliance Board, the courts, and the Office of the Attorney General. The Compliance Board is an independent State agency and is not a division of either the Office of the Attorney General or any other unit of State government. The Act spells out the Compliance Board's duties. Broadly described, those duties are to issue advisory opinions in response to complaints that the Act has been violated, to recommend legislation to improve the Act, to receive certain documents, and to develop and conduct educational programs in conjunction with the Office of the Attorney General for public bodies' attorneys and staff. Although the Compliance Board may request certain documents from public bodies, it does not have the power to compel compliance with the Act, to subpoena documents, to administer oaths, or to issue orders. In short, the Compliance Board does not have the authority to investigate facts, to issue orders, or to address alleged violations of laws other than the Open Meetings Act.

Only courts may enforce the provisions of the Open Meetings Act. To seek judicial enforcement of the Act, a person must file a lawsuit in the circuit court for the county in which the public body is located. During that process and to the extent permitted by the applicable Maryland Rules of Civil Procedure and other laws, representatives of the public body may be required to give sworn testimony and produce documents. The Compliance Board and its staff from the Attorney General's Office have no role in judicial enforcement of the Act.

The Office of the Attorney General shares the Compliance Board's educational duties and provides staff and counsel for the Compliance Board. However, the Compliance Board is an entity that is independent of the Office of the Attorney General, so the opinions that the Compliance Board issues in the matters that come before it are its own, not the Attorney General's. The Attorney General is the legal advisor of the State, charged with performing the legal work for State officers and State government units. The lawyers in

the Attorney General's Office are not authorized to either advise or represent individual members of the public on open meetings matters.

A. The Compliance Board

The Act creates the Compliance Board as a three-member public body comprised of members who are appointed by the Governor. They serve as volunteers. The Compliance Board has no budget of its own. Its duties include: issuing advisory opinions in response to complaints that a public body has violated the Act; recommending legislation; submitting an annual report to the Governor and the General Assembly; receiving copies of certain documents; and developing and conducting training, in conjunction with the Office of the Attorney General and others, for the "staffs and attorneys" of public bodies, the Maryland Municipal League, the Maryland Association of Counties, and the Maryland Association of Boards of Education. §§ 3-204 through 213. The Compliance Board may also attempt to resolve a prospective complaint that a meeting that the Act requires to be open will be closed. § 3-212. The Office of the Attorney General provides the Compliance Board with counsel and administrative assistance.

1. The complaint process

The Compliance Board complaint process provides the public with a way to raise concerns about a possible violation regarding a particular meeting without hiring a lawyer and without waiting for the matter to make its way through the courts. The process also provides public bodies with relatively quick guidance on how to comply with the Act. The process is streamlined by design. When the Act was amended to create the Compliance Board, the Act had been in effect for 14 years, and it had become apparent both that public bodies needed educational programs and guidance on compliance and that members of the public needed a way to submit complaints without having to sue.

The trade-off for the State's provision of a free and straightforward complaint mechanism is that the Compliance Board's opinions are "advisory only." § 3-209. Although the Act authorizes the Compliance Board to request certain documents and requires public bodies to comply with those requests, the Act does not empower the Compliance Board to issue orders enforceable by a court. § 3-210. Also, the Compliance Board does not have investigatory powers; it cannot subpoena documents, summon witnesses, or administer oaths, and it is not set up to take testimony. *See* § 3-210; *see also* 8 *OMCB Opinions* 170, 171 (2013) (explaining that the Board is "an advisory board, not a fact-finding tribunal"). And, the Compliance Board's advisory authority is limited to Open Meetings Act issues, not issues that might arise under other laws or a public body's bylaws or procedures. For example, Public Information Act issues do not fall within the Compliance Board's functions. *See, e.g.,* 9 *OMCB Opinions* 218, 220 (2015).

The Open Meetings Act complaint process is simple and much more informal than litigation. As described in the “Complaint Procedures” posted on the Open Meetings page of the Attorney General’s website, anyone may submit to the Compliance Board a written complaint that a public body has violated the Act on a particular occasion. *See* § 3-205. Complainants must “identify the public body,” and “describe the action of the public body” and the date and circumstances of the action. § 3-205(b)(1), (2). Complaints must also be signed and therefore may not be submitted anonymously. *See* § 3-205(b)(3).

The Compliance Board has not expected complainants to recite all the facts that would prove a violation. “After all,” the Compliance Board has explained, “it normally is the public body, not the complainant, that has the information, including the actual date a specific action might have taken place, that is necessary to allow us to fully evaluate whether or not a violation occurred.” 6 *OMCB Opinions* 69, 72 (2009). And in contrast to a plaintiff who files suit in court, a complainant in the Compliance Board process “need not satisfy any particular burden of proof.” *Id.* Nonetheless, the Compliance Board expects complaints to be founded on a “good-faith belief that the Act was indeed violated, based on a reasonable inquiry into the available facts.” 8 *OMCB Opinions* 99, 101 (2012). In that opinion, the Compliance Board dismissed a “speculative allegation” and “mere surmise” that the public body “probably discussed public business during the lunch recess disclosed in its minutes.” Noting that there was no evidence that the members of the public body were even together during the recess, the Compliance Board stated that it did not “construe the Act to require us to address complaints that mention no indicia of the alleged violation – indicia such as errors in documents required to be kept under the Act, comments or actions by members of the public body or staff evidencing improper conduct, or an apparently rubber-stamped decision suggesting an improper closed meeting, to name a few.” *Id.*

The Compliance Board also encourages complainants to contact the public body with questions before filing a complaint. In 8 *OMCB Opinions* 170, 172 (2013), for example, the complainant alleged, apparently without looking into the matter, that a county council had not given any notice of a meeting. The response showed that notice had been given by several methods. The Compliance Board, finding that the “allegations had no basis in fact,” stated: “A ‘reasonable inquiry’ often yields the citizen a faster answer than we can provide, sometimes serves to avoid an unnecessary complaint and unnecessary expenditure of the public body’s resources, and, otherwise, enables the complainant to provide us with more information.” *Id.*

The Act requires the Compliance Board to send the complaint to the public body, which then must respond within 30 days of its receipt of the complaint. § 3-206.¹ Just as there is no set format for a complaint, a response may take the form of a simple letter to the Compliance Board. The response should include the relevant meeting documents and explain any relevant circumstances. The Act does not require public bodies to submit sworn testimony, but they may. When the matter involves a complaint that a meeting was improperly closed, the Compliance Board may ask the public body to include the sealed minutes of the closed session. § 3-206(b)(2). The Compliance Board keeps the contents of those minutes confidential. § 3-206(b)(3).² A public body's failure to respond to the Compliance Board's request for documents "is itself a violation" of the Act. 5 *OMCB Opinions* 14, 21 (2006).

The Act gives complainants no role in the Compliance Board's process beyond the filing of the complaint. *See* § 3-207. However, the Compliance Board permits the complainant to reply to the public body's response when the reply would add factual information. The public body may then have the last word. Replies that merely reiterate the complaint are discouraged, because they delay the Compliance Board's issuance of guidance on whether the public body has violated the Act and what it should do to comply. *See* Complaint Procedures.

Usually, the submissions and the meeting documents—written notice, agenda, closing statement, minutes or archived audio or video recording, sealed minutes—provide the Compliance Board with the information it needs to resolve the complaint quickly so that the public body can correct any practices that violate the Act. Sometimes, however, the written submissions of a complainant and a public body reflect factual disputes that are not resolved by the meeting documents, such as a dispute over whether the public body unreasonably delayed giving notice of a meeting or adopting minutes. The Act accounts for this possibility in two ways: first, the Compliance Board may state its inability to resolve an issue, § 3-207(c)(2); and second, the Compliance Board may conduct an "informal conference" with the public body or anyone else if more information is needed. § 3-207(b)(1). In the interest of providing prompt advice, the Compliance Board has usually found it most useful to give guidance on the most likely scenarios. In 9 *OMCB*

¹ When the Compliance Board receives a complaint that clearly does not lie within its authority, as when a person has only alleged violations of other laws, the complainant is usually informed by letter that the Compliance Board will not address it. In case of doubt, the complaint is forwarded to the public body for response.

² In addressing allegations that a public body's discussion strayed beyond the scope of the claimed exception, the Compliance Board preserves the confidentiality of the closed-session minutes by referring to the events of the session only generically and then only as needed to resolve the complaint. *See, e.g.*, 9 *OMCB Opinions* 44 (2013).

Opinions 171, 173 (2014), for example, where the meeting in question had occurred over two years earlier and the available information led to differing inferences about a closed-meeting discussion, the Compliance Board addressed “some possibilities in the alternative.”

After considering the submissions, the Compliance Board issues a written advisory opinion within 30 days, or, if it has stated its inability to meet that target, within 90 days. § 3-207(a), (c). Copies of the opinion are then sent to the public body and the complainant and posted online with headnotes keyed to the online index to the Compliance Board’s opinions. From July 1, 2017 on, the list of opinions for each volume identifies the opinions in which the Compliance Board found a violation.

2. Announcement and acknowledgment of violations

If the Compliance Board has found a violation, a member of the public body must summarize the opinion at the public body’s next open meeting, and a majority of the members of the public body must sign a copy of the complaint and submit it to the Compliance Board. § 3-211(a), (b). The members’ signatures signify their acknowledgment that they have received the opinion, not an admission that they have violated the Act. § 3-211(c). Compliance Board opinions are potentially admissible in court; in 2013, the General Assembly repealed the Act’s prohibition on the admission of Compliance Board opinions in cases brought under the Act. *See* 2013 Md. Laws ch. 612. However, the evidentiary rules applicable to actions in circuit court do not apply to submissions to the Compliance Board, and a Compliance Board opinion would not necessarily be admissible in circuit court as proof that a violation did or did not occur.

3. The Compliance Board’s annual reports and meetings

The Act requires the Compliance Board to report annually to the Governor and General Assembly on its activities, its opinions, the violations it found, and the complaints it received that a public body failed to give reasonable notice of a meeting. The annual report must also “recommend any improvements” to the Act. § 3-204(e). The report is due by October 1 of each year. The Compliance Board usually meets in late summer to discuss the activities of the year and to hear and consider comments from the public, representatives of the media, public bodies, and representatives from the Maryland Association of Counties, the Maryland Municipal League, and other organizations. When the Compliance Board decides at an annual meeting to propose legislative changes, it includes its proposals in the annual report.

The Compliance Board sometimes meets during the General Assembly’s session to consider commenting on pending Open Meetings Act legislation. The Compliance Board

members also gather as needed to deliberate on complaints. Section 3-101(i) of the Act defines those deliberations as a quasi-judicial function that is exempt from the Act under § 3-103(a).

4. The Board’s receipt of documents; the training requirement

In addition to responding to complaints, public bodies must submit two types of documents to the Compliance Board: closing statements, when a member of the public has objected to the closing of a session (*see* Chapters 5, Part A and 6, Part C), and a signed copy of the Compliance Board’s opinion, if the Compliance Board has found that the public body violated the Act (*see* Part 2 of this Chapter). §§ 3-305(d)(3), 3-211.

Regarding training, generally, each public body must designate an employee, officer, or member to “receive training on the requirements of the meeting law.” § 3-213. However, public bodies that wish to conduct closed sessions must designate at least one *member* to take the training. *See* Chapter 5, Part A. Public bodies are not required to submit to the Compliance Board the names of the individuals whom they have designated to take training on the Act; those records remain with the particular public body. *See* 2017 Laws of Md., ch. 525 (repealing former § 3-213(a)(2)). Details on complying with the requirement are posted on the Open Meetings page of the Attorney General’s website.

The training must be taken in one of three ways: the online class “offered by the Office of the Attorney General and the University of Maryland’s Institute for Governmental Service and Research”; an open meetings class “offered by the Maryland Association of Boards of Education through the Boardsmanship Academy Program”; or an open meetings class “offered by the Maryland Association of Counties or the Maryland Municipal League through the Academy for Excellence in Local Governance.” *Id.* The online class is free and available to the general public. The associations generally offer their classes at their conferences, so the designees of most State public bodies take the online class. The Compliance Board does not have the authority to approve other forms of training. Training received before October 1, 2013, does not satisfy the requirement. Newly-created public bodies need not designate a trainee before their first meeting, 9 *OMCB Opinions* 268 (2015), so long as that meeting will not include a closed session.

The Compliance Board does not monitor compliance with the requirement, which applies to every entity in the State that meets the Act’s definition of a public body. The Act applies, for example, to temporary task forces appointed by local and State government executives and by people “subject to the control” of those officials. § 3-101(h)(2). The Compliance Board, a body of three volunteers with no budget of its own, has noted that it would not be able to monitor compliance and that identifying every public body in

existence at any given time would be difficult. *See, e.g.*, Minutes of January 29, 2013 meeting of Compliance Board.

5. Members of the Compliance Board

The Compliance Board members are appointed by the Governor to three-year terms on a staggered basis. Although they may not serve more than two consecutive terms, their service continues until a successor has been appointed. As of the date of this Manual, the Compliance Board has had six chairs: Walter Sondheim, who served from 1992 until his death in 2007; Elizabeth L. Nilson, Esq., who served from February 2007 to June 2014; Monica J. Johnson, Esq., who served as a recess appointee from June 1, 2014 to April 13, 2015; Jonathan A. Hodgson, Esq., who served from August 2015 to July 2019; April C. Ishak, Esq., who served as chair from July 2019 to July 2020 after serving as a member for four years, and the current chair, Lynn M. Marshall, Esq., who was appointed in July 2020.

Other members of the public appointed to take on this volunteer work include past members Courtney McKeldin, Tyler G. Webb, Esq., Julio Morales, Esq., Wanda Martinez, Esq., Mamata Poch, Esq., Rachel Grasmick Shapiro, Esq., Patrick S. Meighan, Esq., and Nancy McCutchan Duden, Esq. and current member Jacob A. Altshuler, Esq.

B. The courts - judicial enforcement of the Act

The enforcement provisions of the Act are set forth in §§ 3-401 and 3-402. They do not apply to the actions of “appropriating public funds,” imposing a tax, “or providing for the issuance of bonds, notes, or other evidences of public obligation.” Otherwise, they apply when a public body has failed to comply with five provisions of the Act: § 3-301, which requires generally that public bodies meet in the open unless the Act expressly permits otherwise; § 3-302, which requires public bodies to give notice of their meetings; § 3-303, which states the public’s right to attend open meetings; § 3-305, which regulates closed sessions; and § 3-306(c), which addresses the contents of minutes. *See* § 3-401(b).

For those types of violations, any person may file in the appropriate circuit court a petition that asks the court to determine whether those provisions apply to the circumstances, to require the public body to comply with them, or, subject to § 3-401(d)(4), to “void the action of the public body.” The 45-day limitation period is triggered by various events, depending on the type of violation alleged, and is extended by the filing of a complaint with the Compliance Board. § 3-401(b). The petitioner need not file a complaint with the Compliance Board before filing suit. § 3-401(e). That a violation was merely “technical” or “harmless” is not a defense to the action. *See Frazier v. McCarron*, 466 Md. 436, 449 (2019) (“A violation may not cause specific demonstrable injury to individual members of the public, but it does necessarily clash with and detract from the public policy

that the Legislature declared . . . is essential to the maintenance of a democratic society[.]” (quotation marks omitted). However, a public body’s argument that a violation was harmless or technical “does not mean that an axe must fall upon every, or any particular, violation. The Legislature wisely provided a range of remedial and punitive options . . . and, subject to those conditions, left the choice largely to the discretion of the court.” *Id.*

Section 3-401 provides that the Act’s judicial enforcement provisions do “not affect or prevent the use of any other available remedies.” In applying that section, the Court of Special Appeals has held that Act’s judicial remedy is not exclusive and that the statute of limitations for actions under the Act does not apply to an open meetings claim in an action for judicial review brought under other laws. *Handley v. Ocean Downs, LLC*, 151 Md. App. 615, 636-39 (2003).

The enforcement provisions set a presumption “that the public body did not violate any provision of [the Act],” and they assign the burden of proof to the petitioner. § 3-401(c); *Grant v. County Council of Prince George’s County*, 465 Md. 496, 524 (2019). A court may only declare void a final action of the public body “if the court finds that the public body willfully failed to comply with § 3-301, § 3-302, § 3-303, or § 3-306(c) [of the Act] and that no other remedy is adequate.” § 3-401(d)(4). The remedy thus is not available for violations of § 3-305 alone. The Court of Appeals has explained “willfulness,” for purposes of the Act, this way:

[W]e think that willfulness, for OMA purposes, means a violation that is knowing and intentional. By “intentional,” we mean deliberate – other than inadvertent – and by “knowing” we mean knowledge that the act or omission violates a mandatory provision of OMA. . . . This standard does not require that the violation be for any nefarious or corrupt purpose.

Frazier v. McCarron, 466 Md. 436, 453 (2019), *reconsideration denied* (Jan. 23, 2020); *see also Floyd v. Baltimore City Council*, 241 Md. App. 199, 226 (2019). Noting the Act’s training requirements, the *Frazier* Court observed that “[c]ompliance with those provisions should limit both inadvertent or negligent violations and, with knowledge of the possible consequences of a violation, knowing and intentional ones as well.” *Frazier*, 466 Md. at 453.

Courts may order other forms of relief, such as an injunction and counsel fees, without finding willfulness. *See* § 3-40(d)(1), (2), (3), and (5); *Frazier*, 466 Md. at 449-50 (explaining that “only two [of the remedies] are conditioned on the violation being willful”); *see also Armstrong v. Mayor & City Council*, 409 Md. 648, 694 (2009); *Floyd*, 241 Md. App. at 228. The court may impose a civil penalty on a “public body that willfully meets with knowledge that the meeting is being held in violation of [the Act].” § 3-402.

After considering the public body's financial resources and ability to pay the fine, the court may impose a fine of up to \$250 for the first violation and \$1,000 for each subsequent violation within three years. *Id.*

C. The Office of the Attorney General

The Office of the Attorney General is required to provide staff for the Compliance Board and to work “in conjunction” with the Compliance Board on training for the staffs and attorneys of public bodies and the two local government associations. §§ 3-203, 3-204(d). The Act does not confer any other authority on the Office of the Attorney General.

The duties of the Office of the Attorney General are set forth in the Maryland Constitution and the Maryland Code. As described on the Attorney General's website, “[t]he Attorney General's Office has general charge, supervision and direction of the legal business of the State, acting as legal advisors and representatives of the major agencies, various boards, commissions, officials and institutions of State Government.”³

The Office of the Attorney General provides the Compliance Board with administrative staff and counsel. Counsel, and the drafters of this Manual, have traditionally been lawyers in the Opinions and Advice Division, including former Chief Counsel Jack Schwartz, former Assistant Attorneys General William Varga, and Ann MacNeille, and Assistant Attorney General Rachel Simmons. The Office also hosts an open meetings webpage on its website. The open meetings resources posted there⁴ include this Manual with revision dates for each chapter, FAQs, a compliance checklist, various forms, instructions for the training requirement, and a link to the online course hosted by the Institute for Governmental Service and Research at the University of Maryland. Also posted there are the Compliance Board's meeting notices and documents, its complaint and response procedures, its opinions, and a topical index and search box for the opinions.

³ <https://www.marylandattorneygeneral.gov/>

⁴ <https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx>