COMPLYING WITH MARYLAND’S OPEN MEETINGS ACT

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With thanks to
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OBJECTIVES

• What is the Open Meetings Act?
  ➢ why should a public body comply?

• What does it require of public bodies?
  ➢ what activities does it govern? (or not)
  ➢ what actions does it require before a meeting?
  ➢ what actions does it require during a meeting?
  ➢ what actions does it require after a meeting?

• How is the Act enforced?

• How can virtual or online meetings and conference calls comply with the Open Meetings Act?
OPEN MEETINGS ACT

General Provisions Article

Title 3

Annotated Code of Maryland
THE LEGISLATURE’S POLICY STATEMENT FOR THE OPEN MEETINGS ACT:

It is essential to the maintenance of a democratic society that, except in special and appropriate circumstances:

(1) public business be performed in an open and public manner; and

(2) citizens be allowed to observe:

(i) the performance of public officials; and

(ii) the deliberations and decisions that the making of public policy involves.

GP § 3-102
DO THESE 3 THINGS AND YOUR MEETINGS WILL COMPLY WITH THE OPEN MEETINGS ACT:

1. Before: provide advance public notice and an agenda
2. During: hold meeting open to public
3. After: prepare minutes
4. Make sure your public body designates a trainee
IN PERSON MEETINGS ARE NOT ALWAYS REQUIRED FOR AN OPEN MEETING

• Deliberation or consideration on items of public business among a quorum requires public access to observe (or listen)

• The Board has held that conference calls can satisfy the Open Meeting Act requirements for public access

• Court of Special Appeals did so as well in Tuzeer v. Kim, 201 Md. App. 443, 471 (2011), specifying the conference call:
  • MUST BE ACCESSIBLE TO THE PUBLIC and
  • THE PUBLIC MUST BE ABLE TO HEAR ALL COMMENTS AND DISCUSSION
VIRTUAL MEETINGS

• The Board has held the Act allows conference calls

• A virtual or online meeting satisfying the same requirements can also comply with the Open Meetings Act
  • Electronic online – Zoom, Skype, Google Hangouts, etc.
  • In person but only live-feed for remote public observation
  • We recommend including the conference call option for persons without computer or tablet access

• Virtual meetings have been needed during the COVID-19 crisis, but use is likely to continue to allow broader access in the future
ACTIVITIES GOVERNED (2): WHAT IS A MEETING?
§§3-101(G), (K), 3-103

- Defined as: any *deliberation, consideration or transaction* of public business among a *quorum*
  - Quorum counts anyone present – can’t cycle through a room to evade the Act

- Conference calls or any other method of *simultaneous or contemporaneous* interaction
  - Electronic communications allowing continued and interactive group deliberation on public business
  - Virtual meetings on Zoom, Google Hangouts, or others

- Social gatherings and retreats when public business is discussed
  - But not social gatherings when no public business is discussed
ELECTRONIC (E-MAIL) EXCHANGE OF INFORMATION WITHOUT DELIBERATION

• Transmitting information by email, text, etc., without discussion or deliberation, is generally acceptable
  • But the public has the right to observe deliberations on public business covered by the Act

• Public business includes any consideration of a public matter, including decisions, recommendations, requests and opinions
  • This includes proclamations, awards and officers of the public body (such as chair, vice-chair and secretary)

• Email (outside of a public meeting) can be used to:
  • Approve minutes
  • Approve agenda items
  • Identify meeting locations, times, and the agenda
  • Provide information without deliberation by the public body
ELECTRONIC (E-MAIL) DELIBERATIONS ON PUBLIC BUSINESS

• **Emails (or texts)** used by a quorum to *deliberate and decide* matters of public business **may violate the Act.**

• Try to avoid the following “red flags”:
  
  • “Reply-all” and group/circulated email exchanges, *especially when there is discussion and deliberation*
  
  • Continuous deliberation on a matter leading to a decision
  
  • Effectively constant messages even if not simultaneous
OPTIONS FOR URGENT MATTERS OF PUBLIC BUSINESS

• Options for urgent matters may include:
  • A public meeting by conference call, allowing the public to dial in, after public notice
  • Individual emails to each member of the public body
    • Without interactive deliberation
  • Scheduling an online public meeting, allowing public to observe;
  • Delegating the decision to staff and/or one member of the public body (or the Mayor or equivalent role)

• Note: The Open Meetings Act prohibits “evasive devices” to avoid compliance
ACTIVITIES GOVERNED (3):
TOPICS OF DISCUSSION
(“FUNCTIONS”) DEFINED BY THE
ACT - §§ 3-101 DEFINITIONS;
3-103 SCOPE.

- Covered: Advisory, legislative, quasi-legislative functions, all as specially defined by the Act.

- Excluded: administrative (formerly executive), judicial, quasi-judicial functions

- Expressly included: discussions concerning
  » Granting a license or permit
  » Many types of land-use matters
ACTIVITIES GOVERNED (4): THE ADMINISTRATIVE (FORMERLY EXECUTIVE) FUNCTION EXCLUSION - §§ 3-101(B), 3-104

- Topic must not fall within any other defined function
- Public body must be applying existing law or policy --not creating law or policy
- Meeting might be subject to reporting requirement
- Exclusion is not related to confidentiality issues
VIRTUAL MEETING PREPARATION

Advance meeting preparation may be an “administrative function” not subject to Open Meetings Act requirements –

BUT ONLY IF:

• *Discussions are limited to practical and technical matters* as to how to access and operate the meeting, such as
  • Details of the virtual meeting process
  • Protocols during the meeting
  • Setting the agenda

• If so limited, the meeting for advance preparation does not require notice, motion to close or minutes *unless* the meeting occurs in the midst of an otherwise open meeting or at the end of such a meeting

THE ADMINISTRATIVE FUNCTION EXEMPTION DOES NOT ALLOW DISCUSSION ON THE CREATION OF PUBLIC POLICY, PER GP §§ 3-101 AND 103
RUNNING A VIRTUAL PUBLIC MEETING

- The COVID-19 crisis required all of us to learn new ways of proceeding
- Now more of a habit, but still remember to **proceed with clear steps**
  - Start with a **roll call** to identify public body members who are present
  - **Speakers should identify themselves** before speaking
  - Chair should be careful to **recognize speakers by name**
  - If virtual (visual), raising hands can be helpful before speaking
- Motions should be deliberate
  - If visual, raise hands to make the motion and second
  - **Voting** should be **member-by-member** to avoid confusion
  - **Chair should announce** motion, second, and voting
- Chair needs to deliberately announce each new agenda item
ACTIONS BEFORE A MEETING: PUBLIC NOTICE OF MEETINGS – § 3-302

- Timing
- Reasonably in advance
- Last-minute meetings – special efforts
- Content
- Date, time, place, open/then closed status (vote to close is public)
- Agenda: Make agenda “available” in advance, with topics and items of business
- Method
- Consistency
ADVANCE NOTICE FOR VIRTUAL MEETINGS

• When not using customary and usual practices for a meeting, make extra efforts to provide notice

• Notice must tell the public how to access the meeting for observation

• We recommend making a conference call option available to ensure public access and as a backup

• Advance notice is critical, and to the extent possible, using the same notice process is recommended
ACTIONS DURING A MEETING (1):
LOGISTICS - § 3-303

• Location

• Public participation – **not required by Act**

• Cameras/tape recorders – model rules recommended

• Documents and communications referred to during meeting - access?

• Audible discussion (no quiet discussions among public body members which cannot be heard)
PROVIDING PUBLIC ACCESS FOR A VIRTUAL MEETING

THE MEETING MUST BE REASONABLY ACCESSIBLE TO THE PUBLIC

• *Reasonable* means accessible to the *community being served*
  • This requires consideration of how the community can access the meeting
  • And whether they have the means to do so

FOR EXAMPLE, A “ZOOM” MEETING WITHOUT A CONFERENCE CALL OPTION **MAY NOT BE CONSIDERED ACCESSIBLE** FOR A COMMUNITY WHERE FEW PERSONS HAVE COMPUTER ACCESS

• *Note that providing a conference call option even as a backup*
  • May help to ensure accessibility even for those without online access
  • May allow a practical backup even if online access becomes interrupted
  • And overall, may help to ensure Open Meetings compliance if there is a future challenge
MUST PROVIDE ACCESS OPTIONS FOR CONFERENCE CALLS OR VIRTUAL MEETINGS

• For a conference call – a telephone number to call, along with any access codes

• For electronic online – an access code to allow live participation, with a telephone number to allow listening (as an option OR upon software failure)
  • Additional registration or sign-in can be required to provide public comment, but not for public access simply to observe

• To ensure maximum public access, an electronic online meeting can at the same time also be shown live via internet, cable access, You-Tube, etc.
ACTIONS DURING A MEETING (3):
15 EXCEPTIONS (ALL TO BE CONSTRUED NARROWLY) - GP § 3-305(B)

- Personnel matters regarding individual employees
- Receipt of legal advice
- Litigation
- Real property acquisition (not sale)
- Collective bargaining
- Certain business development proposals
- Certain public security matters
- Cyber security: If identified risk to information resources or network management
- Other law requiring confidentiality ... and 6 others
ACTIONS DURING A MEETING (2): CLOSING A MEETING – §§ 3-305, -306(C), -104

- Identifying a **specific exception** allowing closure
- Chair completes a meaningful written “closing statement” – citation, topic, reasons for excluding public; Chair’s duty to prepare/sign it
- Holding a public vote to close, after proper notice of the open session
- Staying within the exception on the statement
- Deciding on post-meeting disclosures (what members will say)
- 2 model closing statements on Attorney General’s website
- Complying with training requirements; completing Compliance Checklist if member designated for training can’t attend.
- **BUT:** closed session **impermissible** if public body hasn’t designated a member for training. § 3-213.
OPEN MEETINGS ACT DOES NOT REQUIRE PUBLIC PARTICIPATION

• But public participation MAY be otherwise required
  • For public hearings
  • For a period of open public comment (if provided)
  • Where other specific requirements apply

• Use consistent processes to allow equal access for public comment
  • For a virtual meeting, registration or sign-in is permitted to establish an order for public comment
  • Scheduling allows comment “in the order received”
  • Can allow email comment prior to the meeting or leave record open

• Focus should be on maximizing opportunity for public comment, such as by scheduled oral comment and an email option as well

• Right of cross-examination and contentions hearings will be special challenges in a virtual setting
ACTIONS AFTER A MEETING (1):
MEANINGFUL MINUTES – § 3-306

- Required timeliness; content
- Open-session minutes: available on request, without redaction
  - Post online if “practicable,” per §3-306(e)(2)
- Closed session minutes are sealed, with the public summary included in the minutes of next open session
  - Note this requirement also extends to certain administrative function sessions not open to public
  - Summary of closed session with 4 required items of information (date-time-place, purpose; vote record to close; citation allowing closure; topics discussed, persons present, any action taken) and compliance checklist, if required per §3-213
- Tape recording ≠ minutes, but use of live and streaming audio or video can be allowed for open-session minutes
ACTIONS AFTER A MEETING (2): MEANINGFUL MINUTES – § 3-104 AND § 306

• Minutes of the next open meeting must include:
  • Purpose for the closed meeting
  • Citation authorizing closed meeting
  • Votes to close
  • The topics and subject matter actually discussed
  • Actions taken (if any)
  • Date, time, place
  • Persons present

• For a template, go to open meetings page on Attorney General’s website

• Only exception -- §3-104; closing an open meeting for the administrative function. Minutes must include (1) the subject matter discussed, (2) date/time/place and (3) persons present
ACTIONS AFTER A MEETING (3): RECORD RETENTION – §§ 3-302, 3-306

- Notice (screenshot of online notice should be printed out with date of posting) (1 year)
- Minutes and tape recordings (5 years)
- Sealed minutes (1 year)
- Closing statements (likely 1 year)
- Archiving requirements - other laws might apply
- Access: open to inspection at the office on request. Minutes to be posted online to the extent “practicable”
REMEDIES - 2 ROUTES

• (1) Open Meetings Compliance Board: Advisory opinions – §§ 3-204 through 3-212

  When OMCB finds violation, public body must summarize the opinion at the next public meeting, sign it, and return it to the Compliance Board

• (2) Circuit Court: Orders – §§ 3-401 and 3-402

  Court may overturn public body’s action in some cases, assess penalty, and award attorney’s fees
TRAINING REQUIREMENT (1) – § 3-213

• Designation by “each public body” of a member, officer, or employee to “receive training”

• Designee must take training within 90 days of the designation (Training received before October 1, 2013 does not qualify)

• If the designee no longer serves on or works for the public body, the public body needs to designate a new one
ADDITIONAL TRAINING REQUIREMENT (2) – § 3-213

• Public body may not meet in closed session unless a member has been designated to take the training

• Designated member must attend open session at which public body votes to hold closed session or

• If designated member cannot attend, public body must complete Compliance Checklist and attach it to open-session minutes

• Public bodies should retain their own proof that the training was received and not send it to the Compliance Board
ISSUES, EXAMPLES, AND QUESTIONS

• Common causes of violations (unplanned meetings, lack of staff, staff turnover, member turnover, member desire to control information, lack of knowledge about the Act’s requirements, lack of agenda planning)

• Steps to avoid complaints (follow the 4 steps; identify the person responsible for various compliance tasks; include tasks in job descriptions; adopt schedule for training; plan meeting topics; orient new members and staff)

• Avoidance of electronic or other non-public communications which include deliberation and/or decision on public matters by a quorum

• Responses to complaints (see the procedures posted online); addressing constituents’ concerns early

• Questions, examples
MORE INFORMATION

- Compliance checklist, model closing forms and summary, FAQs, Compliance Board opinions, and topical index: http://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx

- For virtual meetings, the above Attorney General “Open Meetings” page has an FAQ and the Maryland Municipal League has a 1-page summary www.mdmunicipal.org

- Online class: Institute for Governmental Service and Research website: www.igsr.umd.edu

- Open Meetings Act Manual (10th ed. 2021), also accessible through the Attorney General’s “Open Meetings” page