COMPLYING WITH MARYLAND’S OPEN MEETINGS ACT

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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
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 (1): THOSE OF A “PUBLIC BODY” - §3-101(H)

- Multi-member
- Formal creation (law, charter, bylaw, rule, resolution)
- Or by executive appointment, if including 2 or more members of the public
- Committees and subcommittees, depending on creation
- Informally created public bodies, sometimes
- Nominally private corporations, sometimes
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 should attend open session at which public body votes to hold closed session,
  - But if not, 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](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](http://www.mdmunicipal.org)

- Online class: Institute for Governmental Service and Research website: [www.igsr.umd.edu](http://www.igsr.umd.edu)

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