

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

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.

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 present²⁶

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>
- 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