Open Meetings Act Manual

Office of the

Maryland Attorney General

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PREFACE

When the bill that later evolved into Maryland's 1977 "Sunshine Law" was endorsed by the House and Senate committees, they wrote of the need to find the "proper balance between ... two imperatives": "securing the public's right to know public business," and yet preserving the "confidentiality [that] is indispensable to the efficient, effective and fair conduct of government." The 1977 Open Meetings Act tried to find that necessary balance. It represented a major advance over prior law, which essentially left the matter up to the agencies and therefore encouraged closed-door government. Then, in 1991, the Legislature returned to the issue and shifted the balance more clearly in favor of the public's right to know, including an advisory process, through the Open Meetings Compliance Board, as an alternative to litigation. As recently as 2004, the Legislature has refined the Compliance Board process.

This manual, which may be freely copied, is meant to help members of public bodies, their lawyers, and members of the press and public understand the Act and especially its practical application. It reflects the substantial body of guidance provided by the opinions of the Compliance Board, which are available on the Attorney General's website (www.oag.state.md.us; click on "Open Government," then on "About the Maryland Open Meetings Act") and in printed form (ordering information on the website). This manual will be maintained and updated on the website.

I am grateful to the members of my staff who serve as co-counsel to the Compliance Board, Assistant Attorneys General Jack Schwartz and William R. Varga. I also want to acknowledge the research assistance of Melissa Archie-Burton, who joined us in a summer externship while a student at the University of Maryland School of Law. Finally, I thank the members of the Open Meetings Compliance Board – Chairman Walter Sondheim, Courtney McKeldin, and Tyler Webb – for their support for this project. They have played a vital role in making the promise of the law a reality.

J. Joseph Curran, Jr.
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Chapter One
Policy and Interpretive Principles

The Open Meetings Act is based on the General Assembly's policy determination in favor of open decision-making by governmental bodies:

> It is essential to the maintenance of a democratic society that, except in special and appropriate circumstances:
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> (1) public business be performed in an open and public manner; and
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> (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.

§10-501(a) of the State Government Article[1]. The General Assembly came to this policy judgment because public and news media access to the meetings of public bodies "ensures the accountability of government to the citizens of this State." §10-501(b)(1). Furthermore, "[t]he conduct of public business in open meetings increases the faith of

[1] The Open Meetings Act is codified as Subtitle 5 of Title 10 of the State Government Article, Maryland Code. All statutory references in this manual are to this subtitle, unless otherwise indicated.

the public in government and enhances the effectiveness of the public in fulfilling its role in a democratic society." §10-501(b)(2).[2]

Thus, the general rule is that if a public body is meeting and the subject matter is covered by the Open Meetings Act (matters that are discussed in the next chapter of this manual), the body must meet in open session. §10-505. While the Act sets out exceptions to this general rule, the exceptions themselves are to be "strictly construed in favor of open meetings of public bodies." §10-508(c).

Although the Open Meetings Act is the primary State law on this topic, it is not the only potentially applicable law. If another State law applies to a meeting – for example, Article 23A, §8, on municipal legislative bodies – compliance with both laws is required to the extent possible. In addition, a local government might be subject to its own "sunshine" law. In the event of a conflict between the Open Meetings Act and another law on the same subject, the Open Meetings Act applies "unless the other law is more stringent." §10-504. So, for instance, if a municipal charter requires *all* meetings of a town council to be open, the council may not invoke an exception in the Open Meetings Act to close a meeting.[3]

St. Mary's County has its own separate Open Meetings Act, codified in Article 24, Title 4, Subtitle 2 of the Maryland Code. Although the St. Mary's County Act in general is the more stringent of the two laws, a public body of the St. Mary's County government should comply with a provision of the State Open Meetings Act if the latter leads to greater public access.[4]

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[2] The federal government and nearly every state have made the same policy judgment. When it enacted the Government in the Sunshine Act, 5 U.S.C. §552b, Congress declared that "the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government." Pub. L. No. 94-409, 90 Stat. 1241 (1976). For a comprehensive review of state "sunshine" laws, *see* Ann Taylor Schwing, *Open Meeting Laws* (1994), and Peter G. Guthrie, Annotation, *Validity, Construction, and Application of Statutes Making Public Proceedings Open to the Public,* 38 A.L.R. 3d 1070 (1971, 2004 supp.).

[3] *See City of College Park v. Cotter*, 309 Md. 573, 525 A.2d 1059 (1987).

[4] The relationship between the two laws is the subject of an advice letter from Assistant Attorney General Robert A. Zarnoch and Staff Attorney Kurt Wolfgang to Delegate J. Ernest Bell, II (November 22, 1991). The St. Mary's County Act has been discussed and applied in 80 *Opinions of the Attorney General* 241 (1995) and 89 *Opinions of the Attorney General* 22 (2004).

Chapter Two
Scope of the Open Meetings Act

A. "PUBLIC BODIES"

The Open Meetings Act applies only to entities that consist of at least two people. §10-502(h)(1)(i). Thus, the Act is inapplicable to a meeting held by the chief executive of a jurisdiction, a department head, or another official acting as "a single member entity." §10-502(h)(3)(i).[1] If a statute requires a single official to hold a public hearing, for example, the Open Meetings Act does not govern notice or other requirements concerning the hearing; the other statute would.

From the initial passage of the Act, it has applied to multi-member bodies created by the following formal legal instruments: the Maryland Constitution; a State statute; a county charter; an ordinance; a rule, resolution, or bylaw; an executive order of the Governor; or an executive order of the chief executive of a political subdivision. §10-502(h)(1)(ii). Therefore, the first and often determinative step in analyzing whether the Act applies to an entity is to review the basis for the entity's existence. For example, the "public body" status of a county delegation to the General Assembly depends on the formal legal authority for its existence, namely the pertinent rule of the House of Delegates or the Senate.[2]

Sometimes a subgroup of a public body is itself a public body, separately subject to the Open Meetings Act when it meets. In one case, for example, the Court of Appeals held that a group of members of a school board, numbering less than a quorum of the board, itself constituted a "public body" when authorized by statute and board

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[1] *See* 1 *Official Opinions of the Open Meetings Compliance Board* 175 (1996) (Opinion 96-8). For brevity's sake, we shall henceforth refer to the volumes of Compliance Board opinions as "*OMCB Opinions*."

[2] 80 *Opinions of the Attorney General* 53 (1995); letter of advice from Assistant Attorney General Richard E. Israel to Senator Timothy R. Ferguson (August 1, 2000).

resolution to negotiate a labor agreement.[3] Conversely, if the authority for the existence or the functions of a subgroup of a public body is not set out in a statute, bylaw, resolution, or other formal instrument identified in §10-501(h)(1)(ii), the subgroup itself would not be a "public body." Thus, the Compliance Board ruled, "[a] subcommittee that is simply designated by the presiding official ... is not a public body."[4]

Except as discussed below, the Act does not apply to bodies that exist simply as a result of long-standing practice, informal arrangements, or other means apart from any of these formal governmental enactments. For example, the Court of Special Appeals held that the Act does not apply to a political gathering or party caucus.[5] Similarly, a political party central committee is not a public body, because it is created by the party's constitution and bylaws, not a State statute.[6] A group of employees, not chosen by a public official nor created by constitution, statute, ordinance, rule, or executive order, is not a "public body"; therefore, the group is not required to meet in open session.[7]

One portion of the definition of "public body" extends the term – and accordingly, the Act itself – to certain entities created less formally. That is, the Act applies to "any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least 2 individuals not employed by the State or a political subdivision." §10-

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[3] *Carroll County Educ. Ass'n v. Board of Educ.*, 294 Md. 144, 155, 448 A.2d 345 (1982). *See also Avara v. Baltimore News American*, 292 Md. 543, 550-51, 440 A.2d 368 (1982) (legislative conference committee "authorized" by rule is a "public body").

[4] 2 *OMCB Opinions* 70, 72 (1999) (Opinion 99-12). *See also* 1 *OMCB* 69 (1994) (Opinion 94-4).

[5] *See Ajamian v. Montgomery County*, 99 Md. App. 665, 639 A.2d 157, *cert. denied*, 334 Md. 631, 640 A.2d 1132 (1994).

[6] 3 *OMCB Opinions* 278 (2003) (Opinion 03-6).

[7] 80 *Opinions of the Attorney General* 90 (1995). *See also* 4 *OMCB Opinions* 43 (2004).

502(h)(2)(i).[8] For example, if the Governor uses a letter instead of an executive order to designate a group of people, including at least two private citizens, to study a matter of public concern, the entity will be covered by the Act.

Some officials have expressed concern that this aspect of the definition of "public body" would extend the Act to informal citizen groups – for example, if the mayor of a town appoints a committee of citizens to make recommendations about the siting of a new playground. The definition is indeed broad, and such a committee would be a "public body." And if, as in this example, the committee is carrying out an "advisory function," the Act would apply.

In an era of privatization and entrepreneurial government, the status of private corporations can be controversial. In general, private corporate boards are not "public bodies." Moreover, the receipt of public funds does not itself subject a private corporation to the Open Meetings Act.[9] Under a test adopted by the Court of Special Appeals, however, the origin and functions of some nominally private corporations would cause them to be considered "public bodies":

> A private corporate form alone does not insure 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.[10]

According to the Court of Special Appeals, a private corporation that "was organized and has functioned as an extension or sub-agency of the ... government" is a "public

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[8] The language about "an official subject to ... policy direction" was added by Chapter 440 (Senate Bill 111) of 2004. An account of the legislative history and an application of Chapter 440 is set out in 4 *OMCB Opinions* 132 (2005).

[9] 1 *OMCB Opinions* 212, 216 n. 4 (1997) (Opinion 97-3). *See also* Opinion of the Attorney General 96-011 (February 29, 1996) (unpublished).

[10] *Andy's Ice Cream v. City of Salisbury*, 125 Md. App. 125, 154-55, 724 A.2d 717, *cert. denied*, 353 Md. 473, 727 A 2d 382 (1999).

body" under the Act.[11] Moreover, the Compliance Board has opined that if a corporation's existence is authorized by a direct legislative act, and the legislative body intended the corporation to be governmental in character, the corporate board is a "public body."[12]

The Act lists entities that are excluded from the definition of "public body" and therefore are excluded from the Act's coverage. Among these specific exclusions are 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. §10-502(h)(3).[13] The Act does not apply, for example, to a meeting between a board of county commissioners that is the executive as well as legislative head of county government and the heads of the departments of county government, because that group of administrative advisers to the executive would be the "local counterpart" to the Governor's Cabinet in that county.[14] The actual nature of the body, rather than its label, determines whether the entity is subject to the Act.[15]

B. "MEETINGS"

The Open Meetings Act applies only if a public body is holding a "meeting." The Act, however, does not specify the circumstances under which a meeting is required; it merely governs the meetings that do occur. Furthermore, as the Compliance Board put it, the Act does not "control a public body's decision whether to discuss a

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[11] 125 Md. App. at 157.

[12] *See* 1 *OMCB Opinions* 212 (1997) (Opinion 97-3). In addition, the Maryland School for the Blind is specifically covered by the Act. §10-502(h)(2)(ii).

[13] Other exclusions are the Appalachian States Low Level Radioactive Waste Commission, the governing bodies of hospitals, and certain self-insurance pools.

[14] *See* 1 *OMCB Opinions* 50 (19993) (Opinion 93-10); letter of advice from Assistant Attorney General Jack Schwartz, Chief Counsel for Opinions and Advice, to Delegate Stephen J. Braun (September 19, 1991). On the other hand, the "local counterpart" exclusion does not extend to a meeting of town council members in their capacity as heads of municipal departments. 3 *OMCB Opinions* 26 (2000) (Opinion 00-7).

[15] *See* 1 *OMCB Opinions* 104 (1994) (Opinions 94-9); 1 *OMCB Opinions* 50 (1993) (Opinion 93-10).

matter [at a meeting]."[16] Perhaps other law limits a public body's decision-making process to a convened meeting; the Open Meetings Act does not.

The term "meet" is defined as follows: "to convene a quorum of a public body for the consideration or transaction of public business." §10-502(g). A quorum is a majority of the membership unless some other provision of law specifies a different number. §10-502(k). Hence, the Act does not apply to conversations between, for instance, any two members of a public body having a membership greater than three. As the Compliance Board put it, the Act "does not preclude politicking and lobbying, individually, outside the meeting."[17] If a public body announced an open meeting but a quorum of members does not attend, the Act would not govern discussions among the members who did attend. It would be prudent, nonetheless, for those members to maintain the open session that otherwise would have occurred, given their and the public's expectation that the matters would be discussed openly.

Although the presence of a quorum in the same room would ordinarily characterize a "meeting," joint physical presence is not a prerequisite to the convening of a meeting. For example, a telephone conference call in which a quorum of members is conducting business simultaneously is a "meeting" that must comply with the Act.[18] If a public body meets in open session via telephone or video conference, it must afford the public access to the discussion. A telephone conference is open to the public if a speaker-phone is available at an announced location; a video conference, if a monitor is similarly available.

A meeting can also occur in unconventional venues. For example, if a quorum of a public body rides together in a vehicle and conducts public business while doing so, they are holding a meeting. If the meeting is one that the public is entitled to

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[16] 2 *OMCB Opinions* 70, 71-72 (1999) (Opinion 99-12).

[17] 1 *OMCB Opinions* 101, at 103 (1994) (Opinion 94-8) (internal quotation omitted). *See also* 4 *OMCB Opinions* 51 (2004) (one-to-one serial conversations); *Jochum v. Tuscola County*, 239 F.Supp. 2d 714 (E.D. Mich. 2003) (canvassing of votes individually); *Telegraph -Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 533 (Iowa 1980) (series of individual discussions); *Moberg v. Independent School Dist.*, 336 N.W. 2d 510, 518 (Minn. 1983) (series of telephone calls). Other states have prohibited serial communications. *See* Ann Taylor Schwing, *Open Meeting Laws* §6.40c.

[18] 4 *OMCB Opinions* 58, 61 (2004). *See also* H. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S. Code Cong. & Adm. News 2247 (explaining scope of term "meeting" in federal Government in the Sunshine Act).

observe, the public body has violated the Act, for obviously the public cannot gain access to the meeting site.

Although the common physical presence of members of a public body is not a prerequisite for a "meeting" to occur, the possibility of immediate interaction is.[19] Therefore, the Act does not apply to an exchange of correspondence among members of a public body: "A piece of paper that moves from person to person does not 'convene a quorum of a public body,' even if the paper reflects 'the consideration or transaction of public business.' Because an exchange of paper is not a 'meeting,' the Act does not apply."[20] Likewise, the Act does not apply to conventional e-mail messages.[21] Other law might address whether a public body is allowed to make decisions by these means, but the Act does not.

The General Assembly's statement of legislative policy speaks of the public's entitlement "to witness the phases of the deliberation, policy formation, and decision making of public bodies ...." §10-501(b)(1). "In this regard," the Court of Appeals has stated, "it is clear that the Act applies, not only to final decisions made by the public body exercising legislative functions at a public meeting, but as well as to all deliberations which precede the actual legislative act or decision, unless authorized by [the Act] to be closed to the public."[22] This reasoning also applies to briefings or other information-gathering. This often critical phase of the decision-making process must be open to public view.[23]

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[19] *See* 2 *OMCB Opinions* 206, 208-09 (1997) (Opinion 97-2).

[20] Letter of advice from Jack Schwartz, Chief Counsel for Opinions and Advice, to Jeffery S. Getty, Esquire, City Attorney of Frostburg (July 11, 1995) (citing *City of College Park v. Cotter*, 309 Md. 573, 595 n. 32, 525 A.2d 1059 (1987)). *See also* 1 *OMCB Opinions* 218 (1997) (Opinion 97-4).

[21] 81 *Opinions of the Attorney General* 140 (1996); 2 *OMCB Opinions* 78 (1999) (Opinion 99-15). The Virginia Supreme Court reached the same conclusion about a comparable provision in Virginia's "sunshine" law. *Beck v. Shelton*, 953 S.E.2d 195 (Va. 2004). The result might be different if a quorum were participating in a simultaneous medium like a pre-arranged "chat room."

[22] *City of New Carrolton v. Rogers*, 287 Md. 56, 72, 410 A.2d 1070 (1980).

[23] 71 *Opinions of the Attorney General* 26, 29 (1986); 3 *OMCB Opinions* 30 (2000) (Opinion 00-8); 1 *OMCB Opinions* 35 (1993) (Opinion 93-6).

A public body cannot avoid its obligations under the Act by labeling its meeting a "work session" or "pre-meeting," or by gathering together at some location other than the customary meeting room. As the Court of Appeals put it, "the 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.'"[24] The Court of Appeals quoted with approval the following passage from a Florida case:

> One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic premeeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute ....[25]

As the Court of Appeals observed, "every step of the process ... constitutes the consideration or transaction of public business."[26]

The fact that a quorum of a body might be together at the same time, however, does not necessarily make that gathering a "meeting" subject to the Act. Rather, both the context for the gathering of the quorum and the content of the discussion must be considered, because the Act does not apply to "a chance encounter, social gathering, or other occasion that is not intended to circumvent this subtitle." §10-503(a)(2).

If a majority of members of a public body attends a gathering convened by an entity to which the Act does not apply, the Act does not become applicable merely because a quorum is present. In one case, the Court of Special Appeals held that the presence of five members of the Montgomery County Council at a meeting of the local

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[24] *Rogers,* 287 Md. at 72.

[25] *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (1974).

[26] *Rogers*, 287 Md. at 72.

Democratic Central Committee ("DCC") did not violate the Open Meetings Act.[27] Although the members attending would constitute a quorum if convened as such, and the discussion concerned issues before the Council, they did not act in that capacity during the meeting. That is, the Court based its decision on the *activity* of the Council members at the DCC meeting, rejecting the argument that the mere presence of the Council members necessarily implicated the Act. Likewise, the Compliance Board had opined, even before the court decision, that a public body is not subject to the Act simply because a quorum is present at another organization's meeting.[28] At the same time, a public body cannot escape its obligations under the Act if, in the course of another group's meeting, the public body itself convenes and engages in business that is subject to the Act.[29]

The Act also does not apply to meetings with civic or neighborhood groups that are intended merely to allow citizens to question members of the public body. In the *City of New Carrolton* case, the Court of Appeals considered the Act's applicability to a meeting at which the city's mayor and members of its council went to a forum, at the invitation of a neighborhood group, "for the purpose of answering questions that their residents might have about [the city]." The Court held that "[p]ublic notice of this event was not required by the Act to be given to the citizens of the [city] since, as we view it, it was not a 'meeting' of the public body but rather, within the contemplation of §[10-503(a)(2)], was an [occasion that is not intended to circumvent this subtitle]."[30]

The content of a quorum's discussion can also determine whether the Act applies. For example, a discussion of a member's personal circumstances (illness, for example), although it might be indirectly related to the carrying out of the member's

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[27] *Ajamian v. Montgomery County*, 99 Md. App. 665, 639 A.2d 157 (1994), *cert. denied*, 334 Md. 631, 640 A.2d 1132 (1994). *See also Jochum v. Tuscola County*, 239 F. Supp. 2d 714 (E.D. Mich. 2003).

[28] 1 *OMCB Opinions* 6 (1992) (Opinion 92-2).

[29] 1 *OMCB Opinions* at 7 (1992) (Opinion 92-2). *See also, e.g.*, 1 *OMCB Opinions* 142 (1995) (Opinion 95-10); 1 *OMCB Opinions* 120 (1995) (Opinion 95-4); and 1 *OMCB Opinions* 104 (1994) (Opinion 94-9).

[30] 287 Md. at 71.

duties, is not "the consideration or transaction of public business."[31] Moreover, the Act is not violated merely because a majority of a public body might gather together informally before a meeting or during a break. So long as the members simply engage in social conversation and avoid any phase of the public body's own decision-making process, the Act would not apply.[32] Similarly, the Act would not apply to a training session aimed at improving leadership or team-building skills.[33] Likewise, a public body does not engage in the conduct of public business merely by listening to a general informational presentation not linked to specific items of pending business. At a library board reception, for example, the Act was not violated when board members heard "a summary of improvements to the libraries as well as problems the libraries face in the future."[34] In a social setting, the Compliance Board has recognized, public officials can be expected to "make stray comments relating to public business." This inevitable occurrence is not a legal problem so long as the conversation is confined merely to "passing references to the work of the [public] body."[35]

Whether a "retreat" is a meeting depends not on how it is labeled but rather on its purpose. If, for example, the purpose of the retreat is simply to improve interpersonal relations, the Act would not apply.[36] A retreat or similar informal gathering would be a meeting, however, if it were a device to set the public body's agenda or discuss specific matters that are to be dealt with by the body.[37]

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[31] *See* 1 *OMCB Opinions* 129 (1995) (Opinion 95-7).

[32] *See, e.g.,* 3 *OMCB Opinions* 257 (2003) (Opinion 03-2); 1 *OMCB Opinions* 227 (1997) (Opinion 97-7); 1 *OMCB Opinions* 157 (1996) (Opinion 96-3); and 1 *OMCB Opinions* 92 (1994) (Opinion 94-6).

[33] 80 *Opinions of the Attorney General* 241 (1995).

[34] 1 *OMCB Opinions* 227, 231-32 (1997) (Opinion 97-7).

[35] 2 *OMCB Opinions* 5, 7 (1998) (Opinion 98-2).

[36] *See* 3 *OMCB Opinions* 274 (2003) (Opinion 03-5).

[37] 3 *OMCB Opinions* 122 (2001) (Opinion 01-10).

C. SUBJECT MATTER: FUNCTIONS INCLUDED AND EXCLUDED

1. Functions included.

The scope of the Act is determined in part by the "function" carried out by the public body. If, at a meeting, a public body is engaged in an "advisory function," "legislative function," or "quasi-legislative function," the Act applies.

An *advisory function* is "the study of a matter of public concern or the making of recommendations on the matter, under a delegation of responsibility" by law, gubernatorial or other chief executive designation, or formal action by a public body. §10-502(c). A *legislative function* is "the process or act of ... approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy."[38] It also includes "approving or disapproving an appointment," §10-502(f); this language refers to the public body's consideration of an appointment proposed by an executive official or a subordinate of the public body rather than to the public body's making an appointment.[39] A *quasi-legislative function* includes the process of rulemaking, "approving, disapproving, or amending a budget,"[40] and "approving, disapproving, or amending a contract." §10-502(j). A contract can include an employment contract.[41]

The Act also applies to functions not defined in the Act at all. In the Compliance Board's simile, "just as the universe of subatomic particles probably contains particles as yet undetected, so the universe of activities subject to the Open Meetings Act

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[38] *See, e.g.*, 64 *Opinions of the Attorney General* 208, 210 (1979) (action of Lottery Commission to increase prize payout is the exercise of a legislative function). The Compliance Board has considered how this definition applies to the role of local government in the State legislative process. 4 *OMCB Opinions* 12 (2004).

[39] 1 *OMCB Opinions* 252 (1997) (Opinion 97-14); and 1 *OMCB Opinions* 123 (1995) (Opinion 95-5).

[40] *See* 4 *OMCB Opinions* 104 (2004).

[41] 1 *OMCB Opinions* 125 (1995) (Opinion 95-5).

contains functions that are undefined by the Act .... If a discussion fits within none of the functional definitions of the Act, then the discussion is subject to the Act."[42]

2. Functions excluded.

The Open Meetings Act does not apply, however, to every possible item of public business. With an important exception to be discussed below, it does not apply when a public body is carrying out an "administrative function," a "judicial function," or a "quasi-judicial function." §10-503(a)(1).[43] If the Act does not apply, a public body is free, but is not required, to comply with the Act's provisions on notice, openness, and the like.

Of the activities that are outside the scope of the Open Meetings Act, the definitions of *judicial function* and *quasi-judicial function* are straightforward. A judicial function is "the exercise of any power of the judicial branch of the State government," except rulemaking. §10-502(e). A quasi-judicial function is "a determination of ... a contested case" under the Maryland Administrative Procedure Act or any other administrative proceeding subject to judicial review under Title 7, Chapter 200 of the Maryland Rules. §10-502(i).[44]

The term "*administrative function*," defined in §10-502(b), is new, but the underlying concept is not. In legislation enacted in 2006, the General Assembly changed the former term "executive function" to "administrative function" but kept the definition

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[42] 1 *OMCB Opinions* 96, 98 (1994) (Opinion 94-7). *See also* 4 *OMCB Opinions* 12 (2004).

[43] For many years, an executive order required agencies in the Executive Branch to hold open meetings (with certain exceptions) even when carrying out what is now called an administrative function. *See* Executive Order 01.01.1976.09 (issued May 25, 1976). This executive order was rescinded on January 12, 1987. *See* Executive Order 01.01.1987.01 (rescinding 52 executive orders said to have become "obsolete").

[44] 3 *OMCB Opinions* 260 (2003) (Opinion 03-3); 2 *OMCB Opinions* 1, 2-3 (1998) (Opinion 98-1).

the same.[45] This change in terminology, recommended by the Compliance Board,[46] is aimed at avoiding the confusion that arose between "executive function," the term previously used in the Act, and "executive session," commonly used to refer to any closed meeting. The change, however, does not affect the interpretation of the exclusion. In other words, all prior judicial and Compliance Board interpretations of the executive function exclusion are preserved and may be used in applying the "administrative function" exclusion.

The Compliance Board has described the executive function – now termed the administrative function – exclusion as "the most bedeviling aspect of Open Meetings Act compliance ...."[47] Applying this exclusion requires two distinct steps. First, the public body must consider whether the matter to be discussed falls within the definition of any of the other defined functions. If so, then the administrative function exclusion is ruled out. §10-502(b)(2). If not, the public body must consider whether the matter to be discussed involves the development of new policy, or merely the implementation of an already-established law or policy. The administrative function exclusion covers only the latter.[48] Public bodies should be particularly careful about aspects of the contracting process, which might seem administrative in character but are a quasi-legislative, not an administrative, function.[49] The Compliance Board has issued numerous opinions examining this exclusion in various contexts. References to these are included in Appendix H to this manual.

In counties that have not adopted a form of home rule, in home rule counties without a county executive, and in many municipalities, the legislative body exercises

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[45] Chapter 584 (House Bill 698) of the Laws of Maryland 2006 (effective October 1, 2006).

[46] Open Meetings Compliance Board, *Use of the Executive Function Exclusion Under the State Open Meetings Act* 19-20 (December 2005).

[47] 3 *OMCB Opinions* 105, 106 (2001) (Opinion 01-7).

[48] *See* 78 *Opinions of the Attorney General* 275 (1993). For example, this office has concluded that the issuance of advisory opinions by the State Ethics Commission is an administrative (formerly executive) function, not an advisory function. *See* 64 *Opinions of the Attorney General* 162, 167 n.3 (1979); Opinion No. 78-079 (June 7, 1978) (unpublished).

[49] *See* 4 *OMCB Opinions* 127 (2005).

administrative functions as well. The applicability of the Act will depend on which role the body is playing.[50] In a commissioner county, for example, the early phases of the budget preparation process correspond to activities of the county executive in a charter home rule county; these budget preparation activities are, therefore, part of the administrative function, rather than the quasi-legislative function of budget review.[51]

Similarly, a county board of education carries out some activities within the administrative function exclusion and some that are not excluded. The Compliance Board has given extensive guidance on this matter in an opinion involving the Board of Education for Howard County.[52]

Although administrative and quasi-judicial functions are generally outside the scope of the Act, these exclusions do not extend to certain licensing and all zoning matters. Under §10-503(b), the Act applies to a public body when it is meeting to consider:

> (1) granting a license or permit; or
>
> (2) a special exception, variance, conditional use, zoning classification, enforcement of any zoning law or regulation, or any other zoning matter.

Thus, it does not matter whether a particular license application or zoning matter would fit within the definition of the administrative or quasi-judicial functions. If the item deals

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[50] *See Board of County Commissioners v. Landmark Community Newspapers*, 293 Md. 595, 602-05, 446 A.2d 63 (1982); Compliance Board Opinion 92-2 (October 23, 1993), *reprinted in* 1 *OMCB Opinions* 6. The Compliance Board has held that the distinction drawn in *Landmark*, between the executive and the quasi-legislative phases of the budget process, "is limited to a situation in which preexisting law clearly delineates the distinct phases of the process in question." 3 *OMCB Opinions* 105, 110-11 (2001) (Opinion 01-7).

[51] *Landmark Community Newspapers*, 293 Md. at 605. *See generally* 1 *OMCB Opinions* 227 at 229-30 (1997) (Opinion 97-7).

[52] 3 *OMCB Opinions* 39 (2001) (Opinion 01-10).

with "granting a license or permit" or with zoning, the Open Meetings Act applies to the meeting at which the matter is considered.[53]

This provision has resulted in a significant change in practice for some public bodies. Zoning appeals boards, for example, which once were outside the Act when carrying out their quasi-judicial role, are required to conduct their deliberations in open session unless one of the Act's exceptions applies, and often none will. The General Assembly unquestionably meant to legislate this result; not only is the statutory language unambiguous, but the General Assembly also rejected amendments that would have permitted these deliberations to be nonpublic.[54]

But the reach of §10-503(b) might not have been considered by the General Assembly in another area: occupational licensing applications.[55] When a person applies for a license under the Health Occupations or Business Occupations and Professions Articles, the licensing board's meeting to consider the application would fall within the terms of §10-503(b)(1) and therefore is subject to the Open Meeting Act. Of course, exceptions in the Act might permit the meeting to be closed – especially §10-508(a)(2), regarding the protection of personal privacy, and §10-508(a)(13), permitting invocation of confidentiality requirements in other law. These and other exceptions are discussed in Chapter 4 below.

The Act applies even if the licensing board has before it a recommendation that a license application be denied; the item to be considered remains whether to grant the license. The Act would not apply, however, to suspension or revocation proceedings, which do not concern the "granting" of a license.

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[53] 3 *OMCB Opinions* 182 (2002) (Opinion 02-3).

[54] *See generally Wesley Chapel Bluemount Ass'n v. Baltimore County*, 347 Md. 125 (1997). This case decided that development or subdivision plans are, for purposes of §10-503(b)(2), a "zoning matter."

[55] The only example that we could locate in the legislative history of a proceeding to be covered by §10-503(b)(1) is liquor licensing.

D. WRITTEN MATERIAL

With the exception of certain provisions dealing with minutes, discussed in Chapter 3, the Open Meetings Act does not regulate access to documents. Instead, the Maryland Public Information Act governs public access to State and local records.[56] Thus, even if members of a public body refer to certain documents at a public meeting, the Open Meetings Act does not require that the documents themselves be made public; the status of the documents would be determined by the Public Information Act or other law.[57]

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[56] *See* Title 10, Subtitle 6, Part III of the State Government Article. A manual and other material about the Public Information Act may be found on the Attorney General's website, http://www.oag.state.md.us/Opengov/pia.htm.

[57] 2 *OMCB Opinions* 78 (1999) (Opinion 99-15).

Chapter Three
Procedural Requirements

A. NOTICE

1. Applicability

If a meeting is subject to the Act, the public body must give "reasonable advance notice of the session." §10-506(a). In the case of an open meeting, the Court of Appeals has written, "[o]bservation by citizens is possible only when they have notice [of a planned meeting]."[1] Notice of the meeting is required, however, even if the session may be closed under one of the Act's exceptions. Moreover, notice of a scheduled meeting is required despite the presiding officer's anticipation that a quorum will not attend.[2]

2. Content

Unless some unusual circumstance makes it impracticable to do so, the public body should give a written notice that includes the date, time, and place of its meeting. If the body intends to conduct all or a part of its meeting in closed session, the notice should say so. §10-506(b). Although many public bodies have adopted the commendable practice of including an anticipated agenda in their meeting notice, this practice is not required by the Act. Hence, a variation from a previously announced

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[1] *Community and Labor United For Baltimore Charter Committee (CLUB) v. Baltimore City Board of Elections*, 377 Md. 183, 194, 832 A.2d 804 (2003).

[2] *CLUB v. Board of Elections*, 377 Md. at 195. *See also* 3 *OMCB Opinions* 314 (1993) (Opinion 03-13); 3 *OMCB Opinions* 92 (2001) (Opinion 01-4).

agenda (for example, by adding an item) is not a violation.[3] A meeting notice must be retained for at least one year after the date of the meeting. §10-506(d).

3. Method

The Act allows a range of methods for giving notice. If the public body is a unit of State government, it may publish its meeting notice in the Maryland Register. §10-506(c)(1). Any public body may give the required notice "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." §10-506(c)(2).[4] "Delivery" implies an affirmative act; the public body may not rely on the happenstance that a reporter will learn of a meeting from some independent source.[5] In addition, "if the public body previously has given public notice that this method will be used," it may give notice "by posting or depositing the notice at a convenient public location at or near the place of the session" – typically, on a bulletin board outside the town hall or similar building. §10-506(c)(3).[6] Finally, a public body may give notice "by any other reasonable method." §10-506(c)(4).[7]

A public body has a duty to ensure that staff members do not mistakenly omit giving notice.[8] A public body also has a responsibility to notify the public if a previously scheduled meeting is canceled.[9]

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[3] *See* 3 *OMCB Opinions* 264 (2003) (Opinion 03-4); *2 OMCB Opinions* 52 (1999) (Opinion 99-7); 2 *OMCB Opinions* 31 (1998) (Opinion 98-9); *1 OMCB Opinions* 110 (1995) (Opinion 95-1); and 1 *OMCB Opinions* 16 (1992) (Opinion 92-5).

[4] *See, e.g.,* 3 *OMCB Opinions* 188 (2002) (Opinion 02-4).

[5] 4 *OMCB Opinions* 88 (2004).

[6] The place used for a posting might be consistent with what the public was previously told. 4 *OMCB Opinions* 88 (2004).

[7] Cable television might, under some circumstances, be a "reasonable method" of notice. 1 *OMCB Opinions* 166 (1996) (Opinion 96-5). A written version of the notice, however, should also be available to the public.

[8] 1 *OMCB Opinions* 44 (1993) (Opinion 93-8).

[9] 1 *OMCB Opinions* 186 (1996) (Opinion 96-11).

4. Timing

The Act does not mandate any particular period of advance notice. Undoubtedly, the General Assembly recognized that sometimes meetings have to be held on short notice, and the Compliance Board has ruled that, "absent evidence that a public body scheduled a meeting primarily to foil the public's right to attend and observe, the Compliance Board ordinarily will accept the determination ... that a meeting is needed at a particular time."[10] The rule of thumb, given the policies of the Act, is that notice of a future meeting should be given as soon as is practicable after the body has fixed the date, time, and place of its next meeting. If events require the prompt convening of a previously unscheduled meeting, the public body is to provide the best public notice feasible under the circumstances.[11] For example, the public body would be well-advised to provide immediate oral notice to reporters who are reasonably thought to be interested, and a written notice should be posted in the customary public place as quickly as possible.[12] Impromptu meeting or not, the Act's "procedures *must* be followed ... [for] any session of a public body that is within the scope of the Open Meetings Act."[13]

B. CHOICE OF MEETING SITE

The Act's statement of legislative policy calls on public bodies to hold meetings "in places reasonably accessible to individuals who would like to attend these meetings." §10-501(c). A public body may not meet in a room posted as off-limits to the public, even if a determined member of the public might be admitted despite the sign.[14] When a public body is considering where to meet, it should choose a room large enough to accommodate those members of the public and the press who are expected to attend. "That is, a public body would violate the Act if it had reason to expect a large

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[10] 4 *OMCB Opinions* 51, 56 (2004).

[11] *See* 1 *OMCB Opinions* 56 (1994) (Opinion 94-1).

[12] *4 OMCB Opinions* 6, 9 (2004); 1 *OMCB Opinions* 186 (1996) (Opinion 96-11); and 1 *OMCB Opinions* 183 (1996) (Opinion 96-10).

[13] 1 *OMCB Opinions* 20 (1993) (Opinion 93-1).

[14] 4 *OMCB Opinions* 147 (2005).

crowd but deliberately chose to meet in too small a space when a suitable, larger space was available."[15]

The location should be as convenient as possible for public attendance. "[T]he law would almost certainly be interpreted to preclude selection of a meeting location so distant and inconvenient as to prevent public attendance. Selection of such a site would subvert the policy of open meetings ...."[16] Further, the room should be accessible to members of the public with disabilities.[17] Individuals who are deaf may request that an interpreter be available at a public hearing; if feasible, the unit holding the hearing should provide the interpreter. §10-507.1.[18]

Should a larger crowd than expected attend, the body may move to a larger facility if one is readily available or may postpone the meeting until a larger space can be found. As the Compliance Board wrote:

> In our opinion, a public body, although not legally required to do so, *should* move a meeting to a larger room if the current meeting site cannot accommodate all who have arrived, a larger room is readily available, a request is made that the meeting be moved there, and moving the meeting would not interfere with the public body's ability to conduct its business. To move a meeting under these circumstance would advance the underlying goals of the Open Meetings Act without unduly burdening the public

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[15] 3 *OMCB Opinions* 118, 120 (2001) (Opinion 01-9).

[16] Ann Taylor Schwing, *Open Meeting Laws* §5.72, at 213.

[17] The Compliance Board has ruled that the Act is not violated if individuals with mobility impairments are provided assistance to attend a meeting in a facility that is not barrier-free. 1 *OMCB Opinions* 245 (1997) (Opinion 97-11). *See also* 3 *OMCB Opinions* 233, 235 (2002) (Opinion 02-13); 1 *OMCB Opinions* 237, 239 (1997) (Opinion 97-9). The Compliance Board did not address the impact of the Americans with Disabilities Act, the interpretation of which is outside the Compliance Board's jurisdiction.

[18] This provision, enacted by Chapter 31 of the Laws of Maryland 1997 as a recodification of former Article 30, §2, applies to all "units" within the Executive and Legislative Branches. The term "unit," although undefined, is broader than "public body." Although this provision does not itself apply to local units of government, compliance with it will avoid potential liability issues under the Americans with Disabilities Act.

> body. If a public body moves the meeting site, it should post a notice to that effect at the original location, so that latecomers will be directed to the proper place.[19]

C. VOTING REQUIREMENTS

In general, the Open Meetings Act does not lay out rules of parliamentary procedure.[20] It is not intended to supplant or substitute for a public body's own rules or guidelines, such as Robert's Rules of Order, for the conduct of meetings. In particular, the Act does not dictate how a public body organizes its consideration of issues that are permitted in closed session; it may meet for a closed session unconnected with an open session, or it may hold a closed session before or after an open session.[21] The notice of the closed meeting, however, should "make clear to members of the public that a meeting scheduled to begin at, for example, 9:00 a.m. will commence with a closed session, the open session to commence at 10:00 a.m."[22] Of course, a notice of this kind merely states an expectation; if the Act applies, the actual closing of the session requires compliance with the procedures discussed below.

The Act requires certain formal steps before a public body may meet in closed session.[23] First, the presiding officer must "conduct a recorded vote on the closing of the session." §10-508(d)(2)(i). In accordance with customary parliamentary procedures, this vote would occur on a motion, properly seconded, to close the meeting. The motion should state the legal basis for the proposed closing. The body may hold the closed session only if the motion is supported by a majority of the members present and voting. §10-508(d)(1). This vote must take place in an open session immediately

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[19] 3 *OMCB Opinions* 118, 121 (2001) (Opinion 01-9).

[20] 3 *OMCB Opinions* 264, 268 (2003) (Opinion 03-4).

[21] 3 *OMCB Opinions* 26 4, 268 (2003) (Opinion 03-4).

[22] 1 *OMCB Opinions* 23 (1993) (Opinion 93-2).

[23] If the public body is engaged in an administrative, judicial, or quasi-judicial function, it need not vote to close a meeting, because the Act ordinarily is inapplicable. *See* Chapter 2, Part C.

preceding the closed session.[24] "[T]hose who participate in a closed session are accountable for the decision to close."[25] Hence, a public body may not close a meeting based on a vote that occurred at a prior session.[26]

The presiding officer must ensure that a written statement is prepared setting out the reason for closing the meeting, the specific provision of the Open Meetings Act that allows the meeting to be closed, and the topics to be discussed at the closed session. §10-508(d)(2)(ii).[27] All justification for closing a meeting must be presented at this time. After-the-fact justifications, not presented contemporaneously with closing, are ineffective.[28]

While this written statement need not disclose sensitive information that the Act permits to be discussed in closed session, the statement ought to be more than "uninformative boilerplate."[29] This statement is a matter of public record and is to be sent to the Open Meeting Compliance Board if anyone objects to the closing of a meeting. §10-508(d)(3) and (4). An objection, however, is not itself a complaint to the Board, the procedures for which are summarized in Chapter 5. The written statement must be retained by the public body for at least one year after the date of the session. §10-508(d)(5).

D. MINUTES

The Open Meetings Act requires that public bodies keep written minutes of all of their meetings, open and closed, and retain them for at least one year. §10-509(b)

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[24] 3 *OMCB Opinions* 4 (2000) (Opinion 00-2);1 *OMCB Opinions* 191 (1996) (Opinion 96-12).

[25] 3 *OMCB Opinions* 4, 6 (2000) (Opinion 00-2).

[26] *Id*.

[27] A sample form for the required statement is set out in Appendix C.

[28] *See* 1 *OMCB Opinions* 117 (1995) (Opinion 95-03); 1 *OMCB Opinions* 96 (1994) (Opinion (4-7); 1 *OMCB Opinions* 73 (1994) (Opinion 94-5); and 1 *OMCB Opinions* 53 (1993) (Opinion 93-11).

[29] *See, e.g.,* 1 *OMCB Opinions* 23, 26 (1993) (Opinion 93-2).

and (e). The maintenance of untranscribed audiotapes does not suffice.[30] Minutes are to be prepared as soon as "practicable." §10-509(b). This requirement, the Compliance Board has opined, means that "[t]he cycle of minutes preparation should parallel the cycle of a public body's meetings, with only the lag time needed to draft and review minutes."[31] The Compliance Board found unlawful "routine delays of several months or longer in preparing minutes."[32] By contrast, the Compliance Board found that an interval of about five weeks between a meeting and the disclosure of minutes reflected "a reasonable preparation time."[33] The approved minutes of open meetings are publicly available. §10-509(d). Draft minutes, however, need not be disclosed.[34]

The Act requires that the following information be set out in the minutes, whether the meeting is open or closed: "each item" considered, the action taken on each item, and each recorded vote. §10-509(c)(1).[35] Although the Act does not specify the level of detail in the description of an "item," the description should be sufficient so that a member of the public who examines the minutes of an open meeting (or of a closed meeting, if the minutes are later released) can understand what the issue was.

A public body may, but is not required to, tape record a session. §10-509(c)(3)(i).[36] The minutes and any tape recording of a closed session are generally not open to public inspection, unless the majority of the public body votes in favor of disclosing them. §10-509(c)(4)(iii). When a public body has closed a meeting to discuss the investment of public funds or the marketing of public securities, however, the minutes and any tape recording of that portion of a closed session must be made available to the public after the transactions have occurred. §10-509(c)(4)(i) and (ii). The Act does not require that the minutes of a closed session be released after the

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[30] 2 *OMCB Opinions* 87, 90 (1999) (Opinion 99-18).

[31] 2 *OMCB Opinions* 87, 89 (1999) (Opinion 99-18). *See also* 4 *OMCB Opinions* 1 (2004); 4 *OMCB Opinions* 24 (2004); 3 *OMCB Opinions* 233 (2002) (Opinion 02-13).

[32] *Id. See also* 2 *OMCB Opinions* 11, 12 (1998) (Opinion 98-3).

[33] 3 *OMCB Opinions* 340, 342 (2003) (Opinion 03-18).

[34] 2 *OMCB Opinions* 13 (1998) (Opinion 98-3).

[35] *See* 1 *OMCB Opinions* 155 (1996) (Opinion 96-2).

[36] 4 *OMCB Opinions* 74 (2004).

completion of other transactions – for example, the purchase of real estate – but the public body might choose to make the minutes public at that time unless doing so would cause some harm (as, for example, if negotiations for a similar tract of land were still in progress). Minutes and any tape recordings are required to be maintained for at least one year after the meeting. §10-509(e).

Finally, the public body has a duty to disclose certain information about a closed meeting. The minutes of the next open meeting must include "a statement of the time, place, and purpose of the [previous] closed session," a record of how the members voted on the motion to close the session, a citation of the provision of the Act that allowed the meeting to be closed, and "a listing of the topics of discussion, persons present, and each action taken during the session." §10-509(c)(2).

The degree of detail in the minutes need not negate the confidentiality that the closed session was meant to preserve. For example, if disclosing the fact that a particular property was under consideration for acquisition might affect the price, the minutes need not disclose that information.[37] Another example relates to settlement proposals. Suppose that a public body closed a meeting to seek advice from its counsel about a settlement proposal in pending litigation. The statement in the minutes of the next open meeting need not disclose details like the nature of the proposal or the exact response of the public body.[38] At the same time, a public body must avoid the use of evasive boilerplate, a practice that does not meet the objective of §10-508(d)(2). A description that the topic of a closed meeting was, simply, a "personnel matter" would be impermissibly uninformative, because that description merely repeats the pertinent statutory text.[39] In the Compliance Board's example, a public body "might say (assuming this were the situation), 'Consideration of disciplinary action for alleged violations of municipal policy.' As this example indicates, there is a middle ground between identifying the individual whose personnel matter is involved, which is not

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[37] *See* 1 *OMCB Opinions* 110 (1995) (Opinion 95-1); 1 *OMCB Opinions* 73 (1994) (Opinion 94-5); and 1 *OMCB Opinions* 16 (1992) (Opinion 92-5).

[38] *See* 1 *OMCB Opinions* 73, 74 (1994) (Opinion 94-5).

[39] *See, e.g.,* 1 *OMCB Opinions* 110 (1995) (Opinion 95-1); and 1 *OMCB Opinions* 73 (1994) (Opinion 94-5).

required, and saying nothing more than the formulaic 'personnel matter,' which is impermissible."[40]

The preceding discussion is predicated on the assumption that the Act applied to the meeting in question. If a topic of discussion is excluded from the Act (*see* Chapter 2C), ordinarily no minutes at all need be kept.

Recent legislation, however, requires certain disclosures "if a public body recesses an open session to carry out an administrative function" in closed session. §10-503(c).[41] In that circumstance, the public body's next open meeting minutes are to contain "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 at ... meeting."

[40] 4 *OMCB Opinions* 76, 78 (2004).

[41] Chapter 584 (House Bill 698) of the Laws of Maryland 2006.

Chapter Four
Open and Closed Meetings

A. General Openness Requirement

A public body must hold an open meeting unless the matter under discussion is entirely outside the scope of the Open Meetings Act – for example, if it concerns an administrative, judicial, or quasi-judicial function other than licensing or zoning – or, if the Act applies, one of the specific exceptions set out in §10-508 is applicable. "When the ... Act requires a meeting to be open, it must be open to all. The Act does not contain an intermediate category of 'partially open' meetings, to which some members of the public are admitted and others excluded .... Accordingly, a public body may not bar reporters from an open meeting."[1]

B. Observing and Taping

The Act entitles members of the public to observe open sessions of public bodies; it does not afford the public any right to participate in the discussion.[2] Indeed, disruptive attempts at participation can result in removal from the meeting. §10-507(c)(1).[3] Conversely, the Act does not affect the application of any other law or policy that *does* grant members of the public the opportunity to be heard at a meeting.

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[1] 2 *OMCB Opinions* 67, 69 (1999) (Opinion 99-11).

[2] 1 *OMCB Opinions* 227 (1993) (Opinion 97-7).

[3] Under §10-507(c)(2), "[u]nless the public body or its members or agents acted maliciously, the public body, members, and agents are not liable for having an individual removed ...."

Every public body has a duty to "adopt and enforce reasonable rules regarding the conduct of persons attending its meetings and the videotaping, televising, photographing, broadcasting, or recording of its meetings." §10-507(b). The Open Meetings Compliance Board has prepared model rules to assist public bodies in carrying out this obligation; these are included in this manual as Appendix D. As introduced, the 1991 legislation (Senate Bill 170) would have expressly allowed public meetings to be videotaped, televised, photographed, broadcast, or recorded. That provision was deleted by amendment. Nevertheless, the Act's statement of public policy refers to "[t]he ability of the public, its representatives, and the media to attend, report on, and *broadcast* meetings of public bodies ...." §10-501(b)(1).

Accordingly, a public body may not bar the use of recording and transmitting devices, for a flat prohibition is not "reasonable": "[A] rule restricting videotaping or other similar activities is 'reasonable' only if it satisfies two criteria: (i) that the rule is needed to protect the legitimate rights of others at the meeting and (ii) that the rule does so by means that are consistent with the goals of the Act."[4] The "legitimate rights" of attendees at an open meeting does not include a right to avoid photography: "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."[5] If a public body is concerned about the disruptive effect of bright lights or camera operators moving around the room, it can impose appropriate restrictions.

C. EXCEPTIONS ALLOWING CLOSED MEETING

If a meeting is within the scope of the Open Meetings Act, it *must* be open unless one of the specific reasons for closing it can legitimately be identified. A public body may not avoid an open meeting merely because a topic is controversial or potentially embarrassing.[6]

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[4] 1 *OMCB Opinions* 137, 140 (1995) (Opinion 95-9).

[5] *Id*. at 141.

[6] The 1977 Open Meetings Act contained a provision, former §10-508(a)(14), under which a public body could close a meeting to "satisfy an exceptional reason that, by two-thirds vote of the members of the public body who are present at the session, the public body finds to be so compelling that the reason overrides the general public policy in favor of open sessions." This provision was deleted when the Act was revamped in 1991.

Fourteen circumstances exist under which a public body may close a meeting in its entirety or may close a portion of a meeting that is otherwise required to be open. All fourteen exceptions are to be "strictly construed in favor of open meetings ...." §10-508(c). Nothing in the Open Meetings Act itself *requires* a public body to invoke an exception; unless some other confidentiality law applies, it may meet in open session even if, under the Act, it could legally meet in closed session.[7] When a public body does invoke one of these exceptions, it must limit its discussion to that topic only. If the public body wishes to discuss other matters, it must return to open session, either to discuss the additional matter in public or vote to close the session based on another applicable exception.[8]

One provision, §10-508(a)(13), recognizes that other law might require a meeting to be closed. Thus, it permits a public body to close a meeting in order to "comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter." Examples of other law that might require a meeting to be closed include federal law,[9] a State constitutional privilege,[10] a State statute,[11] and a common law privilege.[12]

Two of the exceptions in §10-508 are designed to protect the privacy of individuals. One generally permits a meeting to be closed to "protect the privacy or reputation of individuals with respect to a matter that is not related to public business." §10-508(a)(2). The other permits a meeting to be closed when the discussion deals with a "personnel matter" affecting one or more specific individuals. §10-508(a)(1). This exception includes discussion of possible personnel actions, compensation issues, and "performance evaluation of appointees, employees, or officials over whom [the public

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[7] *See* 65 *Opinions of the Attorney General* 347, 348 (1980).

[8] 3 *OMCB Opinions* 16, 21 (2000) (Opinion 00-5).

[9] *Potomac Group Home v. Montgomery County,* 823 F. Supp 1285, 1299 (D. Md. 1993).

[10] Bill review letter (Senate Bill 170) from Attorney General J. Joseph Curran, Jr. to Governor William Donald Schaefer (May 6, 1991).

[11] Letter of advice from Assistant Attorney General Jack Schwartz, Chief Counsel for Opinions and Advice, to Barbara R. Trader, Esquire (October 7, 1996) (discussing provision of Public Information Act that bars disclosure of personnel records).

[12] 1 *OMCB Opinions* 96 (1994) (Opinion 94-7). *See also* 65 *Opinions of the Attorney General* 341, 343-44 (1980).

body] has jurisdiction." §10-508(a)(1)(i).[13] Like the other exceptions, this one is to be construed narrowly. It is inapplicable to discussions of issues affecting classes of public employees, as distinct from specific individuals.[14]

All of the other exceptions are intended to protect the public interest by allowing a body to discuss genuinely sensitive issues in closed session. Four of these exceptions relate to business or financial transactions: the acquisition of real property, §10-508(a)(3); proposals for a business or industrial organization to locate, expand, or remain in the State, §10-508(a)(4);[15] the investment of public funds, §10-508(a)(5); and the marketing of public securities, §10-508(a)(6).

The Act also allows a public body to close a meeting in order to "consult with counsel to obtain legal advice." §10-508(a)(7). This exception is more narrowly worded than its predecessor in the original Act. Prior to the 1991 amendments, this exception authorized the closing of a meeting to "consult with counsel on a legal matter." The Legislature tightened the wording to avoid the situation in which a lawyer sat in on a meeting to give a colorable basis for invoking this exception but was not a genuine participant in the discussion (lawyer as potted plant). As reworded by the 1991 amendments, §10-508(a)(7) requires that the issue be one on which the body seeks and obtains the advice of the lawyer. As the Compliance Board put it, "the exception is a relatively narrow one, limited to the give-and-take between lawyer and client in the context of the bona fide rendering of advice."[16] Furthermore, "once the legal advice is obtained, the public body may not remain in closed session to discuss policy issues or other matters. The exception for consultation with counsel "may *never* be invoked unless the lawyer is present at the meeting."[17]

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[13] The exception applies, however, to a discussion of any specific personnel matter, even if the public body does not have jurisdiction. §10-508(a)(1)(ii); 4 *OMCB Opinions* 188 (2005).

[14] The fullest discussion of this exception appears in 1 *OMCB Opinions* 73 (1994) (Opinion 94-5). *See also, e.g.,* 3 *OMCB Opinions* 335 (2003) (Opinion 03-17); 1 *OMCB Opinions* 233, 236 (1997) (Opinion 97-8).

[15] This exception applies to a discussion about a company's plans to relocate within the State. 1 *OMCB Opinions* 73 (1994) (Opinion 94-5).

[16] 3 *OMCB Opinions* 16, 20 (2000) (Opinion 00-5).

[17] 1 *OMCB Opinions* 35 (1993) (Opinion 93-6). *See also* 3 *OMCB Opinions* 16 (2000) (Opinion 00-5).

Another exception, §10-508(a)(8), permits a public body to close a meeting in order to consult with any individual "about pending or potential litigation." The exception can be invoked "only when the discussion *directly relates* to the pending or potential litigation; it may not [be invoked to] close a portion of the discussion that deals separately with the underlying [policy] issue.[18] The exception applies only if the potential for litigation is concrete, rather than speculative.[19]

Two other exceptions allow a public body to close a meeting in order to deal effectively with labor negotiations and procurement matters. Under §10-508(a)(9), a public body may "conduct collective bargaining negotiations or consider matters that relate to the negotiations" in closed session. With respect to procurement, "before a contract is awarded or bids are opened," a public body may meet in closed session to "discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive or bidding proposal process." §10-508(a)(14). This exception is evidently intended to protect against premature disclosure of sensitive information like the public body's negotiating strategy. Conversely, the exception was not intended to permit secret discussion by a public body of open bids submitted by various bidders. More generally, as the Compliance Board put it, "there is no exception in the Act for 'negotiation issues' as such."[20] Only negotiations of the types specified in the exceptions are covered.

Finally, three other exceptions deal with sensitive issues warranting closed meetings: the discussion of "public security," if "public discussion would constitute a risk to the public or public security," §10-508(a)(10);[21] the preparation, administration, or grading of "a scholastic, licensing, or qualifying examination," §10-508(a)(11);[22] and the conduct or discussion of "an investigative proceeding on actual or possible criminal conduct," §10-508(a)(12).

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[18] 1 *OMCB Opinions* 56, 60 (1994) (Opinion 94-1).

[19] 3 *OMCB Opinions* 233, 239 (2002) (Opinion 02-13); 1 *OMCB Opinions* 237, 240 (1997) (Opinion 97-9).

[20] 1 OMCB Opinions 233, 234 (1997) (Opinion 97-8) (exception does not apply to negotiations among government jurisdictions over cost-sharing arrangement). *See also* 3 *OMCB Opinions* 233, 237 (2002) (Opinion 02-13).

[21] *See* 1 *OMCB Opinions* 73 (1994) (Opinion 94-5).

[22] *See* 1 *OMCB Opinions* 13 (1992) (Opinion 92-4).

The Open Meetings Act does not prohibit a public body from taking final action at a session that is properly closed to the public under one of the exceptions. So, for example, a public body may vote to make a particular kind of investment of public funds in closed session. Other law, however, may bar final action in a closed session.[23]

[23] *See* Article 23A, §8 and Article 25, §5 of the Maryland Code (municipal and county legislative bodies may not finally adopt an "ordinance, resolution, rule or regulation" in an executive session).

Chapter Five
Enforcement

A. OPEN MEETINGS COMPLIANCE BOARD

The Open Meetings Compliance Board, which began its activities in 1992, has responsibility to educate public bodies about their duties under the Act, to provide a nonjudicial forum for resolving disputes about the Act's application, and to offer recommendations to the General Assembly about amending the Act. The Board consists of three members, appointed by the Governor, serving three-year terms. §10-502.2. The Attorney General's Office provides the staff for the Board.

The Compliance Board's primary duty is to "receive, review, and resolve complaints from any person alleging a violation of the provisions of this [Act] and issue a written opinion as to whether a violation has occurred." §10-502.4(a). The Board's procedures, as outlined in the Act, call for a written complaint stating the nature of the alleged violation; a written response by the public body within 30 days, including certain documentary material if requested by the Board, §10-502.5(c)(2)(ii); an "informal conference," if the Board wants more information or believes that oral presentations would be helpful;[1] and the issuance of a written opinion by the Board. §10-502.5. One commentator has praised the Compliance Board's "important role in promoting the public policy under the Open Meetings Act.... It is a public service in the best sense of the term."[2]

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[1] Interestingly, the Act does not apply to these informal conferences conducted by the Board. "[A] determination of ... a complaint by the Board" is defined as "quasi-judicial" and is therefore outside the scope of the Act. §§10-502(i)(3) and 10-503(a)(1)(iii).

[2] Robert H. Drummer, *May I Watch? Complying with the Open Meetings Act*, 39 Md. Bar J. no 1, at 27 (January/February 2006).

The Board is not set up to resolve disputed issues of fact. If key facts about a complaint are disputed, the Board will invoke its express authority to "state that the Board is unable to resolve the complaint." §10-502.5(f)(2).[3] The Board has prepared a summary of its complaint procedures, which are posted on our website and reprinted in Appendix F.[4]

The Board's opinions are "advisory only." §10-502.5(i)(1). The Board is prohibited from "requir[ing] or compel[ling] any specific actions by a public body." §10-502.5(i)(2).[5] Indeed, if a complainant brings a lawsuit about a public body's alleged violation of the Act after the Board has issued its opinion, the opinion may not even be introduced into evidence in court. §10-502.5(j).

In addition to receiving complaints of alleged prior violations of the Act, the Board on occasion seeks to resolve disputes prospectively. Anyone who believes that a public body is about to hold a closed meeting when the Act requires the meeting to be open may complain, orally or in writing, to a member of the Board (or, under authorization by the Board, to its counsel in the Attorney General's Office). The person who receives the complaint is to look into the situation and advise the Board, following up later with a written report. If the Board concludes that a violation of the Act would occur if the meeting were not open, the Board's representative is to counsel the public body in an effort to achieve compliance with the Act. §10-502.6.

Finally, the Board is responsible for studying "ongoing compliance" with the Act by public bodies and is to "make recommendations to the General Assembly for improvements in [the Act]." §10-502.4(c). The vehicle for any recommendations is an

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[3] *See, e.g.,*1 *OMCB Opinions* 56 (1994) (Opinion 94-1); and 1 *OMCB Opinions* 38 (1993) (93-7).

[4] The current procedures were developed and posted as part of a settlement in a declaratory judgment action brought against the Compliance Board in the Circuit Court for Howard County.

[5] *See, e.g.,* 3 *OMCB Opinions* 182, 187 (2002) (Opinion 02-3).

annual report to the Governor and the General Assembly, which is to contain any recommended amendments as well as a discussion of the Board's activities.[6]

B. JUDICIAL ENFORCEMENT

Any person who believes that a public body has failed to comply with the Open Meetings Act may file suit against the public body in circuit court. §10-510(b)(1).[7] The suit is to be filed within 45 days of the alleged violation. §10-510(b)(2) and (3). If the person has chosen to file a complaint with the Open Meetings Compliance Board, the 45-day statute of limitations is tolled while the Board considers the matter. §10-510(b)(4).[8]

If a person files suit, he or she must overcome a presumption that the public body did not violate the Act. §10-510(c).[9] But if the person succeeds in carrying that burden, the court has broad authority to issue injunctive or declaratory relief. In particular, "if the court finds that a public body willfully failed to comply with §§10-505, 10-506, 10-507 or 10-509(c) of this [Act] and that no other remedy is adequate, [the court may] declare void the final action of the public body." §10-510(d)(4).[10] In a decision later vacated, the Court of Special Appeals held that the term "willfully," as

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[6] The Board's most recent annual report is available on our website. Visit www.oag.state.md.us, then click on "Open Government," then on "About the Maryland Open Meetings Act."

[7] This provision previously required a plaintiff to have been "adversely affected." This limiting language was removed from the Act when the General Assembly overrode the Governor's veto of House Bill 73 and Senate Bill 87 of 2004.

[8] The 45-day limitations period does not apply to a claim about an Open Meetings Act violation that is included in a petition for judicial review of a government agency's action. *Handley v. Ocean Downs, LLC*, 151 Md. App. 615, 827 A.2d 961 (2003).

[9] This provision is not applicable to complaints to the Compliance Board. *See, e.g.,* 1 *OMCB Opinions* 180-81 (1996) (Opinion 96-9).

[10] Although Article 8 of the Maryland Declaration of Rights bars legislation that would vest in the courts power to void governmental actions on broad public policy grounds, the standards in §10-510(d)(4) are constitutionally sufficient. *See Sugarloaf Citizens Ass'n v. Gudis*, 319 Md. 558, 569, 573 A.2d 1325 (1990).

used in §10-510(d)(4), "does not require knowledge that the meeting actually violates the Open Meetings Act but instead refers to intentional conduct."[11]

In addition, the court may award attorneys fees and other litigation expenses to the prevailing party. §10-510(d)(5)(i). The award of fees is not automatic,[12] and there is no presumption that a party who prevails on the merits is entitled to attorneys fees.[13] Fees may be awarded, however, even if the public body acted in good faith.[14]

Three types of actions are excluded from judicial review: appropriating public funds, levying a tax, or issuing bonds or other debt obligations. §10-510(a)(1). The exclusion regarding appropriations encompasses "[t]he entire budgetary process."[15]

C. CIVIL PENALTY

The 1991 amendments to the Open Meetings Act added a civil (not criminal) penalty provision for knowing and willful violations of the Act. Specifically: "A member of a public body who willfully participates in a meeting of the body with knowledge that the meeting is being held in violation of the [Act] is subject to a civil penalty not to exceed $100." §10-511. Only a court may impose a civil penalty; the Compliance Board may not.[16] The civil penalty provision would not be applicable if the violation of the Act were the result of mere carelessness, a good-faith mistake, or reliance on incorrect legal advice.

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[11] *Suburban Hospital, Inc. v. Maryland Health Resources Planning Comm'n,* 125 Md. App. 579, 596, 726 A.2d 807 (1999), *vacated as moot*, 364 Md. 353 (2001).

[12] *Wesley Chapel Bluemount Ass'n v. Baltimore County*, 347 Md. 125, 699 A.2d 434 (1997) (identifying factors for courts to consider).

[13] *Baltimore County v. Wesley Chapel Bluemount Ass'n*, 128 Md. App. 180, 736 A.2d 1177 (1999). *See also Malamis v. Stein*, 69 Md. App. 221, 516 A.2d 1039 (1986) (award of fees within trial court's discretion).

[14] *Baltimore County*, 128 Md. App. at 189.

[15] *Board of County Commissioners v. Landmark Community Newspapers*, 293 Md. 595, 607, 446 A.2d 63 (1982).

[16] 1 *OMCB Opinions* 201, 205 (1997) (Opinion 97-1).

ARTICLE – STATE GOVERNMENT

TITLE 10. GOVERNMENTAL PROCEDURES

SUBTITLE 5. MEETINGS

10-501. Public policy.

(a) 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.

(b) (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.

(c) Except in special and appropriate circumstances when meetings of public bodies may be closed under this subtitle, 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.

10-502. Definitions.

(a) In this subtitle the following words have the meanings indicated.

(b) (1) "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.

(2) "Administrative function" does not include:

(i) an advisory function;

(ii) a judicial function;

(iii) a legislative function;

(iv) a quasi-judicial function; or

(v) a quasi-legislative function.

(c) "Advisory function" means the study of a matter of public concern or the making of recommendations on the matter, under a delegation of responsibility by:

(1) law;

(2) the Governor or an official who is subject to the policy direction of the Governor;

(3) the chief executive officer of a political subdivision of the State or an official who is subject to the policy director of the chief executive officer; or

(4) formal action by or for a public body that exercises an executive, judicial, legislative, quasi-judicial, or quasi-legislative function.

(d) "Board" means the State Open Meetings Law Compliance Board.

(e) (1) "Judicial function" means the exercise of any power of the Judicial Branch of the State government.

(2) "Judicial function" includes the exercise of:

(i) a power for which Article IV, § 1 of the Maryland Constitution provides;

(ii) a function of a grand jury;

(iii) a function of a petit jury;

(iv) a function of the Commission on Judicial Disabilities; and

(v) a function of a judicial nominating commission.

(3) "Judicial function" does not include the exercise of rulemaking power by a court.

(f) "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.

(g) "Meet" means to convene a quorum of a public body for the consideration or transaction of public business.

(h) (1) "Public body" means an entity that:

(i) consists of at least 2 individuals; and

(ii) is created by:

1. the Maryland Constitution;
2. a State statute;
3. a county charter;
4. an ordinance;
5. a rule, resolution, or bylaw;
6. an executive order of the Governor; or
7. an executive order of the chief executive authority of a political subdivision of the State.

(2) "Public body" includes:

(i) any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least 2 individuals not employed by the State or the political subdivision; and

(ii) The Maryland School for the Blind.

(3) "Public body" does not include:

(i) any single member entity;

(ii) any judicial nominating commission;

(iii) any grand jury;

(iv) any petit jury;

(v) the Appalachian States Low Level Radioactive Waste Commission established in § 7-302 of the Environment Article;

(vi) except when a court is exercising rulemaking power, any court established in accordance with Article IV of the Maryland Constitution;

(vii) the Governor's cabinet, the Governor's Executive Council as provided in Title 8, Subtitle 1 of this article, or any committee of the Executive Council;

(viii) a local government's counterpart to the Governor's cabinet, Executive Council, or any committee of the counterpart of the Executive Council;

(ix) except as provided in paragraph (1) of this subsection, a subcommittee of a public body as defined under paragraph (2)(i) of this subsection;

(x) the governing body of a hospital as defined in § 19-301(g) of the Health - General Article; and

(xi) a self-insurance pool that is established in accordance with Title 19, Subtitle 6 of the Insurance Article or § 9-404 of the Labor and Employment Article by:

1. a public entity, as defined in § 19-602 of the Insurance Article; or

2. a county or municipal corporation, as defined in § 9-404 of the Labor and Employment Article.

(i) "Quasi-judicial function" means a determination of:

(1) a contested case to which Subtitle 2 of this title applies;

(2) a proceeding before an administrative agency for which Title 7, Chapter 200 of the Maryland Rules would govern judicial review; or

(3) a complaint by the Board in accordance with this subtitle.

(j) "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.

(k) "Quorum" means:

(1) a majority of the members of a public body; or

(2) any different number that law requires.

10-502.1. Open Meeting, Compliance Board.

There is a State Open Meetings Law Compliance Board.

10-502.2. Same – Membership.

(a) (1) The Board consists of 3 members, at least one of whom shall be an attorney admitted to the Maryland Bar, appointed by the Governor with the advice and consent of the Senate.

(2) From among the members of the Board, the Governor shall appoint a chairman.

(b) (1) The term of a member is 3 years.

(2) The terms of members are staggered as required by the terms provided for members of the Board on July 1, 1991.

(3) At the end of a term, a member continues to serve until a successor is appointed.

(4) A member who is appointed after a term has begun serves only for the rest of the term and until a successor is appointed.

(5) A member may not serve for more than 2 consecutive 3-year terms.

10-502.3. Same – Quorum; meetings; compensation.

(a) A majority of the full authorized membership of the Board is a quorum.

(b) The Board shall meet at a time and place to be determined by the Board.

(c) Each member of the Board:

(1) may not receive compensation; and

(2) is entitled to reimbursement for expenses under the Standard State Travel Regulations, as provided in the State budget.

(d) The Office of the Attorney General shall provide staff for the Board.

10-502.4. Same – Duties.

(a) The Board shall receive, review, and resolve complaints from any person alleging a violation of the provisions of this subtitle and issue a written opinion as to whether a violation has occurred.

(b) The Board shall receive and review any complaint alleging a prospective violation of the provisions of this subtitle as provided under § 10-502.6 of this subtitle.

(c) The Board shall study ongoing compliance with the provisions of this subtitle by public bodies and make recommendations to the General Assembly for improvements in this subtitle.

(d) The Board, in conjunction with the Office of the Attorney General and other interested organizations or persons, shall develop and conduct educational programs on the requirements of the open meetings law for the staffs and attorneys of:

(1) public bodies;

(2) the Maryland Municipal League; and
(3) the Maryland Association of Counties.

(e) (1) On or before October 1 of each year, the Board shall submit an annual report to the Governor and the General Assembly, in accordance with §2-1246 of this article.

(2) The report shall include a description of:

(i) the activities of the Board;

(ii) the opinions of the Board in any cases brought before it;

(iii) the number and nature of complaints filed with the Board, including a discussion of complaints concerning the reasonableness of the notice provided for meetings; and

(iv) any recommendations for improvements to the provisions of this subtitle.

10-502.5. Same – Complaint process.

(a) Any person may file a written complaint with the Board seeking a written opinion from the Board on the application of the provisions of this subtitle to the action of a public body covered by this subtitle.

(b) The complaint shall:

(1) be signed by the person making the complaint; and

(2) identify the public body, specify the action of the public body, the date of the action, and the circumstances of the action.

(c) (1) On receipt of the written complaint, and except as provided in paragraph (3) of this subsection, the Board shall promptly send the complaint to the public body identified in the complaint and request that a response to the complaint be sent to the Board.

(2)(i) The public body shall file a written response to the complaint within 30 days of its receipt of the complaint.

(ii) On request of the Board, the public body shall include with its written response to the complaint a copy of:

1. a notice provided under §10-506 of this subtitle;

2. a written statement made under §10-508(d)(2)(ii) of this subtitle; and

3. minutes and any tape recording made by the public body under §10-509 of this subtitle.

(iii) The Board shall maintain the confidentiality of minutes and any tape recording submitted by a public body that are sealed in accordance with §10-509(c)(3)(ii) of this subtitle.

(3) (i) If the public body identified in the complaint no longer exists, the Board shall promptly send the complaint to the official or entity that appointed the public body.

(ii) The official or entity that appointed the public body shall, to the extent feasible, comply with the requirements of paragraph (2) of this subsection.

(4) If after 45 days, a written response is not received, the Board shall decide the case on the facts before it.

(d) The Board shall:

(1) review the complaint and any response; and

(2) if the information in the complaint and response is sufficient to permit a determination, issue a written opinion as to whether a violation of the provisions of this subtitle has occurred or will occur not later than 30 days after receiving the response.

(e) (1) If the Board is unable to reach a determination based on the written submissions before it, the Board may schedule an informal conference to hear from the complainant, the public body, or any other person with relevant information about the subject of the complaint.

(2) An informal conference scheduled by the Board is not a "contested case" within the meaning of § 10-202(d) of this title.

(3) The Board shall issue a written opinion not later than 30 days following the informal conference.

(f) (1) If the Board is unable to render an opinion on a complaint within the time periods specified in subsection (d) or (e) of this section, the Board shall:

(i) state in writing the reason for its inability; and

(ii) issue an opinion as soon as possible but not later than 90 days after the filing of the complaint.

(2) An opinion of the Board may state that the Board is unable to resolve the complaint.

(g) The Board shall send a copy of the written opinion to the complainant and to the affected public body.

(h) (1) On a periodic basis, the Board may send to any public body in the State any written opinion that will provide the public body with guidance on compliance with the provisions of this subtitle.

(2) On request, a copy of a written opinion shall be provided to any person.

(i) (1) The opinions of the Board are advisory only.

(2) The Board may not require or compel any specific actions by a public body.

(j) A written opinion issued by the Board may not be introduced as evidence in a proceeding conducted in accordance with § 10-510 of this subtitle.

10-502.6. Same – Prospective violations.

(a) On receipt of an oral or written complaint by any person that a meeting required to be open under the provisions of this subtitle will be closed in violation of this subtitle, the Board acting

through its chairman, a designated Board member, or any authorized staff person available to the Board may contact the public body to determine the nature of the meeting that will be held and the reason for the expected closure of the meeting.

(b) When at least 2 members of the Board conclude that a violation of this subtitle may occur if the closed meeting is held, the person acting for the Board under subsection (a) of this section immediately shall inform the public body of the potential violation and any lawful means that are available for conducting its meeting to achieve the purposes of the public body.

(c) The person acting for the Board shall inform the person who filed the complaint under subsection (a) of this section of the result of any effort to achieve compliance with this subtitle under subsection (b) of this section.

(d) The person acting for the Board shall file a written report with the Board describing the complaint, the effort to achieve compliance, and the results of the effort.

(e) The filing of a complaint under subsection (a) of this section and action by a person acting for the Board under subsections (b), (c), and (d) of this section may not prevent or bar the Board from considering and acting on a written complaint filed in accordance with § 10-502.5 of this subtitle.

10-503. Scope of subtitle.

(a) Except as provided in subsections (b) and (c) of this section, this subtitle does not apply to:

(1) a public body when it is carrying out:

(i) an administrative function;

(ii) a judicial function; or

(iii) a quasi-judicial function; or

(2) a chance encounter, social gathering, or other occasion that is not intended to circumvent this subtitle.

(b) The provisions of this subtitle apply to a public body when it is meeting to consider:

(1) granting a license or permit; or

(2) a special exception, variance, conditional use, zoning classification, the enforcement of any zoning law or regulation, or any other zoning matter.

(c) If a public body recesses an open session to carry out an administrative function in a meeting that is not open to the public, the minutes for the public body's next meeting shall include:

(1) a statement of the date, time, place, and persons present at the administrative function meeting; and

(2) a phrase or sentence identifying the subject matter discussed at the administrative function meeting.

10-504. Conflict of Laws.

Whenever this subtitle and another law that relates to meetings of public bodies conflict, this subtitle applies unless the other law is more stringent.

10-505. Open meetings generally required.

Except as otherwise expressly provided in this subtitle, a public body shall meet in open session.

10-506. Notice of meetings.

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

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

(c) A public body may give the notice under this section as follows:
(1) if the public body is a unit of the State government, by publication in the Maryland Register;
(2) by delivery to representatives of the news media who regularly report on sessions of the public body or the activities of the government of which the public body is a part;
(3) if the public body previously has given public notice that this method will be used:
(i) by posting or depositing the notice at a convenient public location at or near the place of the session; or
(ii) by posting the notice on an Internet website ordinarily used by the public body to provide information to the public; or
(4) by any other reasonable method.

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

10-507. Public Attendance.

(a) Whenever a public body meets in open session, the general public is entitled to attend.

(b) A public body shall adopt and enforce reasonable rules regarding the conduct of persons attending its meetings and the videotaping, televising, photographing, broadcasting, or recording of its meetings.

(c) (1) If the presiding officer determines that the behavior of an individual is disrupting an open session, the public body may have the individual removed.

(2) Unless the public body or its members or agents acted maliciously, the public body, members, and agents are not liable for having an individual removed under this subsection.

10-507.1. Interpreters for hearing impaired.

(a) This section applies only to the Executive and Legislative Branches of State government.

(b) (1) On request and to the extent feasible, a unit that holds a public hearing shall provide a qualified interpreter to assist deaf persons to understand the proceeding.

(2) The request must be submitted in writing or by telecommunication at least 5 days before the proceeding begins.

(3) Whether providing an interpreter is feasible shall be determined, in each instance, by the unit involved.

10-508. Closed meetings.

(a) Subject to the provisions of subsection (d) of this section, a public body may meet in closed session or adjourn an open session to a closed session only to:

(1) discuss:

(i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials over whom it has jurisdiction; or

(ii) any other personnel matter that affects 1 or more specific individuals;

(2) protect the privacy or reputation of individuals with respect to a matter that is not related to public business;

(3) consider the acquisition of real property for a public purpose and matters directly related thereto;

(4) consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State;

(5) consider the investment of public funds;

(6) consider the marketing of public securities;

(7) consult with counsel to obtain legal advice;

(8) consult with staff, consultants, or other individuals about pending or potential litigation;

(9) conduct collective bargaining negotiations or consider matters that relate to the negotiations;

(10) discuss public security, if the public body determines that public discussion would constitute a risk to the public or to public security, including:

(i) the deployment of fire and police services and staff; and

(ii) the development and implementation of emergency plans;

(11) prepare, administer, or grade a scholastic, licensing, or qualifying examination;

(12) conduct or discuss an investigative proceeding on actual or possible criminal conduct;

(13) comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter; or

(14) before a contract is awarded or bids are opened, discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.

(b) A public body that meets in closed session under this section may not discuss or act on any matter not permitted under subsection (a) of this section.

(c) The exceptions in subsection (a) of this section shall be strictly construed in favor of open meetings of public bodies.

(d) (1) Unless a majority of the members of a public body present and voting vote in favor of closing the session, the public body may not meet in closed session.

(2) Before a public body meets in closed session, the presiding officer shall:

(i) conduct a recorded vote on the closing of the session; and

(ii) make a written statement of the reason for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed.

(3) If a person objects to the closing of a session, the public body shall send a copy of the written statement required under paragraph (2) of this subsection to the Board.

(4) The written statement shall be a matter of public record.

(5) A public body shall keep a copy of the written statement made under paragraph (2)(ii) of this subsection for at least 1 year after the date of the session.

10-509. Minutes.

(a) This section does not:

(1) require any change in the form or content of the Journal of the Senate of Maryland or Journal of the House of Delegates of Maryland; or

(2) limit the matters that a public body may include in its minutes.

(b) As soon as practicable after a public body meets, it shall have written minutes of its session prepared.

(c) (1) The minutes shall reflect:

(i) each item that the public body considered;

(ii) the action that the public body took on each item; and

(iii) each vote that was recorded.

(2) If a public body meets in closed session, the minutes for its next open session shall include:

(i) a statement of the time, place, and purpose of the closed session;

(ii) a record of the vote of each member as to closing the session;

(iii) a citation of the authority under this subtitle for closing the session; and

(iv) a listing of the topics of discussion, persons present, and each action taken during the session.

(3) (i) A session may be tape recorded by a public body.

(ii) A public body shall provide for the preservation for 1 year of its minutes and any tape recording of its closed meetings.

(iii) Except as otherwise provided in paragraph (4) of this subsection, the minutes and any tape recording of a closed session shall be sealed and may not be open to public inspection.

(4) The minutes and any tape recording shall be unsealed and open to inspection as follows:

(i) for a meeting closed under § 10-508(a)(5), when the public body invests the funds;

(ii) for a meeting closed under § 10-508(a)(6), when the public securities being discussed have been marketed; or

(iii) on request of a person or on the public body's own initiative, if a majority of the members of the public body present and voting vote in favor of unsealing the minutes and any tape recording.

(d) Except as provided in subsection (c) of this section, minutes of a public body are public records and shall be open to public inspection during ordinary business hours.

(e) A public body shall keep a copy of the minutes of each session and any tape recording made under subsection (c)(3)(i) of this section for at least 1 year after the date of the session.

10-510. Judicial Enforcement.

(a) (1) This section does not apply to the action of:

(i) appropriating public funds;

(ii) levying a tax; or

(iii) providing for the issuance of bonds, notes, or other evidences of public obligation.

(2) This section does not authorize a court to void an action of a public body because of any violation of this subtitle by another public body.

(3) This section does not affect or prevent the use of any other available remedies.

(b) (1) If a public body fails to comply with § 10-505, § 10-506, § 10-507, § 10-508, or § 10-509(c) of this subtitle any person may file with a circuit court that has venue a petition that asks the court to:

(i) determine the applicability of those sections;

(ii) require the public body to comply with those sections; or

(iii) void the action of the public body.

(2) If a violation of § 10-506, § 10-508, or § 10-509(c) of this subtitle is alleged, the person shall file the petition within 45 days after the date of the alleged violation.

(3) If a violation of § 10-505 or § 10-507 of this subtitle is alleged, the person shall file the petition within 45 days after the public body includes in the minutes of an open session the information specified in § 10-509(c)(2) of this subtitle.

(4) If a written complaint is filed with the Board in accordance with § 10-502.5 of this subtitle, the time between the filing of the complaint and the mailing of the written opinion to the complainant and the affected public body under § 10-502.5(g) of this subtitle may not be included in determining if a claim against a public body is barred by the statute of limitations set forth in paragraphs (2) and (3) of this subsection.

(c) In an action under this section, it is presumed that the public body did not violate any provision of this subtitle, and the complainant has the burden of proving the violation.

(d) A court may:

(1) consolidate a proceeding under this section with another proceeding under this section or an appeal from the action of the public body;

(2) issue an injunction;

(3) determine the applicability of this subtitle to the discussions or decisions of public bodies;

(4) if the court finds that a public body willfully failed to comply with § 10-505, § 10-506, § 10-507, or § 10-509(c) of this subtitle and that no other remedy is adequate, declare void the final action of the public body;

(5) as part of its judgment:

(i) assess against any party reasonable counsel fees and other litigation expenses that the party who prevails in the action incurred; and

(ii) require a reasonable bond to ensure the payment of the assessment; and

(6) grant any other appropriate relief.

(e) (1) A person may file a petition under this section without seeking an opinion from the State Open Meetings Law Compliance Board.

(2) The failure of a person to file a complaint with the Board is not a ground for the court to either stay or dismiss a petition.

10-511. Penalty.

A member of a public body who willfully participates in a meeting of the body with knowledge that the meeting is being held in violation of the provisions of this subtitle is subject to a civil penalty not to exceed $100.

10-512. Short title.

This subtitle may be cited as the "Open Meetings Act".

COMPLIANCE CHECKLIST

For *all meetings* covered by the Act, did you:

A. Provide proper advance notice?

B. Arrange for minutes to be taken?

For *closed* meetings covered by the Act, did you also:

A. Identify one or more of the following grounds for closing the meeting?*

1. a specific personnel matter;

2. protection of personal privacy on a matter unrelated to public business;

3. acquisition of real property;

4. a proposed business relocation or expansion;

5. the investment of public funds;

6. the marketing of public securities;

7. obtaining legal advice;

8. consulting about litigation;

9. collective bargaining;

10. public security;

11. scholastic, licensing, or qualifying examinations;

* These items are merely synopses of the exceptions. The actual text of an exception should be considered carefully before a meeting is closed on that basis.

12. criminal investigations;

13. other legal requirement; or

14. preliminary discussion of procurement issues.

B. Record a majority vote in favor of closing the meeting?

C. Prepare, at the time of the vote, a written statement of the reasons and legal basis for closing the meeting and the topics to be discussed?

D. Keep the closed-session discussion within the scope of the exception that you cited?

E. Include in the minutes of the next open meeting a statement of the time, place, and purpose of the closed meeting; a record of the vote to close the meeting and the authority to do so; and a listing of the topics discussed, the persons present, and the actions taken?

For a meeting *recessed into closed session to conduct an administrative function,* did you include in the minutes of the next open meeting a statement of the date, time, place, and persons present and a phrase or sentence identifying the subject matter discussed at the closed session?

After a meeting, did you file and maintain records in accordance with the record retention requirements of the Act?

Revised October 2006

FORM OF STATEMENT FOR CLOSING A MEETING

Location: _____ Date: _____
Time: _____

Motion By: _____ Seconded By: _____

Vote to Close Session:

	AYE	NAY	ABSTAIN	ABSENT
Name	[ ]	[ ]	[ ]	[ ]
Name	[ ]	[ ]	[ ]	[ ]
Name	[ ]	[ ]	[ ]	[ ]
Name	[ ]	[ ]	[ ]	[ ]

STATUTORY AUTHORITY TO CLOSE SESSION

State Government Article §10-508(a):

(1) [ ] To discuss:

(i) The appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials over whom it has jurisdiction; or

[ ] (ii) Any other personnel matter that affects one or more specific individuals.

(2) [ ] To protect the privacy or reputation of individuals with respect to a matter that is not related to public business.

(3) [ ] To consider the acquisition of real property for a public purpose and matters directly related thereto.

(4) [ ] To consider a preliminary matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State.

(5) [ ] To consider the investment of public funds.

(6) [ ] To consider the marketing of public securities.

(7) [ ] To consult with counsel to obtain legal advice on a legal matter.

(8) [ ] To consult with staff, consultants, or other individuals about pending or potential litigation.

(9) [ ] To conduct collective bargaining negotiations or consider matters that relate to the negotiations.

(10) [ ] To discuss public security, if the public body determines that public discussions would constitute a risk to the public or public security, including:

(i) the deployment of fire and police services and staff; and

(ii) the development and implementation of emergency plans.

(11) [ ] To prepare, administer or grade a scholastic, licensing, or qualifying examination.

(12) [ ] To conduct or discuss an investigative proceeding on actual or possible criminal conduct.

(13) [ ] To comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter.

(14) [ ] Before a contract is awarded or bids are opened, discuss a matter directly related to a negotiation strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.

TOPICS TO BE DISCUSSED:

_____

_____

_____

REASON FOR CLOSING:

_____

_____

_____

_____

Signature of Presiding Officer

MODEL REGULATIONS FOR OPEN MEETINGS

1.01. Public Attendance.

(a) At any open session of the [name of public body], the general public is invited to attend and observe.

(b) Except in instances when the [public body] expressly invites public testimony, questions, comments, or other forms of public participation, or when public participation is otherwise authorized by law, no member of the public attending an open session may participate in the session.

1.02. Disruptive Conduct.

(a) A person attending an open session of the [public body] may not engage in any conduct, including visual demonstrations such as the waving of placards, signs, or banners, that disrupts the session or that interferes with the right of members of the public to attend and observe the session.

(b)(1) The presiding officer may order any person who persists in conduct prohibited by subsection (a) of this section or who violates any other regulation concerning the conduct of the open session to be removed from the session and may request police assistance to restore order.

(2) The presiding officer may recess the session while order is restored.

1.03. Recording, Photographing, and Broadcasting of Open Session

(a) A member of the public, including any representative of the news media, may record discussions of the [public body] at an open session by means of a tape recorder or any other recording device if the device does not create an excessive noise that disturbs members of the [public body] or other persons attending the session.

(b) A member of the public, including any representative of the news media, may photograph or videotape the proceedings of the [public body] at an open session by means of any type of camera if the camera:

(1) Is operated without excessively bright artificial light that disturbs members of the [public body] or other persons attending the session; and

(2) Does not create an excessive noise that disturbs members of the [public body] or other persons attending the session.

(c) A representative of the news media may broadcast or televise the proceedings of the [public body] at an open session if the equipment used:

(1) Is operated without excessively bright artificial light that disturbs members of the [public body] or other persons attending the session; and

(2) Does not create an excessive noise that disturbs members of the [public body] or other persons attending the session.

(d) The presiding officer may restrict the movement of a person who is using a recording device, camera, or broadcasting or television equipment if such restriction is necessary to maintain the orderly conduct of the session.

1.04. Recording Not Part of Record.

A recording of an open session made by a member of the public, or any transcript derived from such a recording, may not be deemed a part of the record of any proceeding of the [public body].

LEGISLATIVE CHRONOLOGY

1. Chapter 13 (Senate Bill 31) of the Laws of Maryland 1954: requiring meetings of Executive Branch boards and commissions to be open to the public, but allowing these bodies to hold "executive session[s] from which the public is excluded" for any purpose other than final adoption of a regulation or resolution.

2. Senate Bill 289 (1976 Session) (vetoed): embodying recommendations of the Legislative Council for a "sunshine" law. *See* Legislative Council, *Report to the General Assembly of 1976* at 207, 215-16, 322, and 337.

3. Veto of Senate Bill 289: objections by Governor Mandel, primarily to "voidability" provision and inclusion of advisory bodies. *See* 2 Laws of Maryland 1976 at 2747 (veto message of May 25, 1976).

4. Chapter 863 (Senate Bill 493) of the Laws of Maryland 1977: enacting the original Open Meetings Act as former Article 76A, §§7 through 15.

5. Chapter 284 (Senate Bill 50) of the Laws of Maryland 1984: recodifying open meetings provisions as part of the State Government Article.

6. Senate Bill 620 (1990 Session) (failed): proposed comprehensive revision of the Open Meetings Act.

7. Chapter 655 (Senate Bill 170) of the Laws of Maryland 1991: amending the Act significantly and creating the Open Meetings Compliance Board.

8. Chapter 473 (Senate Bill 269) of the Laws of Maryland 1994: deleting a "sunset" provision tied to the expanded definition of "public body."

9. Chapter 56 (House Bill 270) of the Laws of Maryland 2002: amending, in minor ways, the annual reporting obligation of the Open Meetings Compliance Board.

10. Chapter 440 (Senate Bill 111) of the Laws of Maryland 2004: expanding the definition of "public body" and requiring public bodies to retain, and make available to the Compliance Board, certain records.

11. Chapter 1 (Senate Bill 87) and Chapter 6 (House Bill 73) of the Laws of Maryland 2004 Special Session: modification of standing requirement in connection with judicial enforcement. Became law following override of Governor Ehrlich's veto. *See* 4 Laws of Maryland 2004 at 2684 and 2912 (veto messages of May 25, 2004).

12. Chapter 584 (House Bill 698) of the Laws of Maryland 2006: renaming the former "executive function" as "administrative function" and requiring certain information to be made public after a public recesses an open session to carry out an administrative function in closed session.

Open Meetings Compliance Board Complaint Procedures

Filing a Complaint

The Open Meetings Act lets you file a complaint if you think that the Act might have been violated. Here's how to file:

- Send a letter to this address: Open Meetings Compliance Board, c/o Attorney General's Office, 200 St. Paul Place, Baltimore, MD 21202. The complaint must be signed and include a return address.

- Tell the Compliance Board what public body is involved, what happened, what the date was, and what possible violation you're concerned about. You can include more than one meeting or other issue in a single complaint. You may find it helpful, before you file a complaint, to look over the *Open Meetings Act Manual*, available at this link: http://www.oag.state.md.us/Opengov/Openmeetings/support.htm.

- Please be as detailed as you can. Usually, the Compliance Board issues an opinion based solely on the information in the complaint and in the response from the public body. The more information it has, the more focused its opinion can be.

- Identify any document that the public body might possess that you feel would assist the Compliance Board in the review.

- The Compliance Board only has jurisdiction over complaints about possible violations of the Open Meetings Act by public bodies. For example, if you only allege a violation of a local ordinance, or object to a closed meeting held by a single official rather than a public body, the Compliance Board can't address the matter and will return your letter.

- If your complaint seems to fall within the Compliance Board's authority, it will be sent to the public body involved for its response. If the Compliance Board spots issues based on the information in a complaint, even if you don't talk about them, the Compliance Board might ask the public body to respond to those issues too.

- If the Compliance Board concludes that your complaint doesn't provide enough information to process it, you'll be asked for additional information. Make sure you provide the information within 30 days, or else the Compliance Board will dismiss the complaint.

Responding to a Complaint

- The presiding officer of, or the attorney for, the public body should respond by letter on its behalf. Send the response to this address: Open Meetings Compliance Board, c/o Attorney General's Office, 200 St. Paul Place, Baltimore, MD 21202.

- Respond within 30 days of your receipt of the complaint from the Compliance Board. Please send the complainant a copy of your response.

- Address all allegations in the complaint and any other issues raised by the Compliance Board. If you deny that the Act was violated, explain how the public body complied. If you acknowledge that the Act was violated, explain how the public body has or will change its procedures so as to comply.

- If the Compliance Board asks you for documents like meeting notices or minutes, provide them with your response.

The Compliance Board's Opinion

- Usually, within a month after receiving the public body's response, the Compliance Board issues an opinion. Occasionally, the Compliance Board asks all interested persons to attend an informal conference, so it can get more information before issuing an opinion.

- An opinion of the Compliance Board is strictly advisory. In it, the Compliance Board will say whether it thinks the Open Meetings Act was violated and explain the basis for its opinion. The Compliance Board doesn't have authority to issue orders or impose penalties.

- The Compliance Board opinion is posted on the Web shortly after issuance. You can access any opinion via the following address: http://www.oag.state.md.us/Opengov/openmeetings/board.htm

October 2006

OPEN MEETING COMPLIANCE BOARD OPINIONS

TOPICAL INDEX

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