

COMPLYING WITH MARYLAND'S OPEN MEETINGS ACT



April Ishak
AC Ishak Law LLC; City Attorney, City of Havre de Grace
Former Chair, Open Meetings Compliance Board

Frank M. Johnson
Deputy City Attorney
City of Gaithersburg

With thanks to
Ann MacNeille
Assistant Attorney General
Maryland Attorney General's Office
Counsel, Open Meetings Compliance Board

November 9, 2020, Virtual Presentation
Maryland Planning Commissioners Association

OBJECTIVES

- What is the Open Meetings Act?
 - why should a public body comply?
- What does it require of public bodies?
 - what activities does it govern? (or not)
 - what actions does it require before a meeting?
 - what actions does it require during a meeting?
 - what actions does it require after a meeting?
- How is the Act enforced?
- And during the COVID-19 crisis, when the public cannot attend meetings in person, how can virtual or online meetings and conference calls comply with the Open Meetings Act?

OPEN MEETINGS ACT

General Provisions Article

Title 3

Annotated Code of Maryland

THE LEGISLATURE'S POLICY STATEMENT:

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

- (1) public business be performed in an **open and public manner**; and
- (2) citizens be allowed to **observe**:
 - (i) the **performance** of public officials; and
 - (ii) the **deliberations and decisions** that the making of public policy involves.

DO THESE 3 THINGS AND YOUR MEETINGS WILL COMPLY WITH THE OPEN MEETINGS ACT:

1. Before: provide advance public notice and an agenda
2. During: hold meeting open to public
3. After: prepare minutes
- [4. Make sure your public body designates a trainee]

IN PERSON MEETINGS ARE NOT ALWAYS REQUIRED

- Deliberation or consideration on items of public business among a quorum *requires public access to observe (or listen)*
- The Board has held that conference calls are permitted
- Court of Special Appeals did so as well in *Tuzeer v. Kim*, 201 Md. App. 443, 471 (2011), specifying the conference call:
 - **MUST BE ACCESSIBLE TO THE PUBLIC and**
 - **THE PUBLIC MUST BE ABLE TO HEAR ALL COMMENTS AND DISCUSSION**

VIRTUAL MEETINGS

- The Board has held the Act allows conference calls
- We believe a virtual or online meeting satisfying the same requirements can also comply with the Open Meetings Act
 - Electronic online – Zoom, Skype, Google Hangouts, etc.
 - In person but only live-feed for remote public observation
 - We recommend including the conference call option for persons without computer or tablet access
- An important issue during the COVID-19 crisis, but it is possible we will use elements of virtual meetings to allow broader access in the future as well

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

- Multi-member
- Formal creation (law, charter, bylaw, rule, resolution)
- Or by executive appointment, if including 2 or more members of the public
- Committees and subcommittees, depending on creation
- Informally created public bodies, sometimes
- Nominally private corporations, sometimes

ACTIVITIES GOVERNED (2): THE PUBLIC BODY'S "MEETINGS" - §§3-101(G), (K), 3-103

- Any **deliberation, consideration or transaction** of public business among a quorum
- **Quorum** convened – or cycled through a room to evade the Act
- Conference calls or other methods of **simultaneous** interaction
- **Electronic communications** allowing continued and interactive group deliberation on public business
- Virtual meetings on Zoom, Google Hangouts, or others
- **Social gatherings** and retreats when public business is discussed,
- But **not** social gatherings when **no** public business is discussed

ELECTRONIC DELIBERATIONS ON PUBLIC BUSINESS

- **Transmitting information** by email, text, etc. , without discussion, is generally acceptable
- *But the public has the right to observe when communications become **deliberations on public business covered by the Act***
- Thus, **emails (or texts)** used by a quorum to deliberate and decide matters of public business **may violate the Act. Avoid:**
 - “Reply-all” and group/circulated emails
 - Continuous deliberation on a matter leading to a decision
 - Effectively constant messages even if not simultaneous
- Options for urgent matters may include: conference call after public notice; individual emails without interactive deliberation; potential online public meeting allowing public to observe; ¹⁰ delegation to staff. *Note: The Act prohibits “evasive devices.”*

ACTIVITIES GOVERNED (3):
TOPICS OF DISCUSSION
(“FUNCTIONS”) DEFINED BY THE
ACT - §§ 3-101 DEFINITIONS;
3-103 SCOPE.

- Covered: Advisory, legislative, quasi-legislative functions, all as specially defined by the Act.
- Excluded: administrative (formerly executive), judicial, quasi-judicial functions
- Expressly *included*: discussions concerning
 - » Granting a license or permit
 - » Many types of land-use matters

ACTIVITIES GOVERNED (4):
THE ADMINISTRATIVE (FORMERLY
EXECUTIVE) FUNCTION EXCLUSION -
§§ 3-101(B), 3-104

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

VIRTUAL MEETING PREPARATION

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

- *Limited to discussions on practical and technical matters* as to how to access and operate the meeting, such as
 - Details of the virtual meeting process
 - Protocols during the meeting
 - Setting the agenda
- If so limited, the meeting for advance preparation does not require notice, motion to close or minutes *unless* the meeting occurs in the midst of an otherwise open meeting or at the end of such a meeting

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

RUNNING A VIRTUAL PUBLIC MEETING DURING COVID-19

- The COVID-19 crisis has required all of us to learn new ways of proceeding
- Proceed deliberately and carefully
 - Start with a roll call to identify public body members who are present
 - Speakers should identify themselves before speaking
 - Chair should be careful to recognize speakers by name
 - If virtual (visual), raising hands can be helpful before speaking
- Motions should be deliberate
 - Raise hands to make the motion and second
 - Voting should be member-by-member to avoid confusion
 - Chair should announce motion, second, and voting
- Chair needs to very deliberately announce each new agenda item

ACTIONS BEFORE A MEETING: PUBLIC NOTICE OF MEETINGS – § 3-302

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

ADVANCE NOTICE FOR VIRTUAL MEETINGS

- When not using customary and usual practices for a meeting, make extra efforts to provide notice
- Notice must tell the public how to access the meeting for observation
- We recommend making a conference call option available to ensure public access and as a backup
- Advance notice is critical, and to the extent possible, using the same notice process is recommended

ACTIONS DURING A MEETING (1): LOGISTICS - § 3-303

- Location
- Public participation – **not required by Act**
- Cameras/tape recorders – model rules recommended
- Documents and communications referred to during meeting- access?
- Audible discussion (no quiet discussions among public body members which cannot be heard)

PROVIDING PUBLIC ACCESS FOR A VIRTUAL MEETING

THE MEETING MUST BE REASONABLY ACCESSIBLE TO THE PUBLIC

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

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

- *Note that providing a conference call option even as a backup*
 - May help to ensure accessibility even for those without online access
 - May allow a practical backup even if online access becomes interrupted
 - And overall, may help to ensure Open Meetings compliance if there is a future challenge

MUST PROVIDE ACCESS OPTIONS FOR CONFERENCE CALLS OR VIRTUAL MEETINGS

- For a conference call – a *telephone number* to call, along with any *access codes*
- For electronic online – an *access code* to allow live participation, with a *telephone number* to allow *listening* (as an option OR upon software failure)
- To ensure public access, an electronic online meeting can at the same time also be *shown live* via cable access, u-tube

ACTIONS DURING A MEETING (2): CLOSING A MEETING – §§ 3-305, - 306(C), -104

- Identifying a specific exception
- Completing a meaningful written “closing statement” – citation, topic, reasons for excluding; Chair’s duty to prepare/sign it
- Holding a public vote to close, after proper notice of the open session
- Staying within the exception on the statement
- Deciding on post-meeting disclosures
- 2 model closing statements on Attorney General’s website
- Complying with new training requirements; completing Compliance Checklist if member designated for training can’t attend.
- Closed session **impermissible** if public body hasn’t designated a member for training. § 3-213.

ACTIONS DURING A MEETING (3):
15 EXCEPTIONS (ALL TO BE CONSTRUED
NARROWLY) - GP § 3-305(B)

- Personnel matters regarding individual employees
- Receipt of legal advice
- Litigation
- Real property acquisition (not sale)
- Collective bargaining
- Certain business development proposals
- Certain public security matters
- Cyber security: If identified risk to information resources or network management
- Other law requiring confidentiality ... and 6 others

OPEN MEETINGS ACT DOES NOT REQUIRE PUBLIC PARTICIPATION

- But public participation MAY be otherwise required for
 - Public hearings
 - Open public comment (if provided)
 - Where other specific requirements apply
- Consistent processes should be used allowing equal access to public comment
- Focus should be on maximizing opportunity for public comment, such as by scheduled oral comment and an email option as well
- Right of cross-examination and contentions hearings will be special challenges in a virtual setting

PUBLIC PARTICIPATION IS NOT AN OPEN MEETINGS ACT REQUIREMENT

*BUT PUBLIC PARTICIPATION MAY OTHERWISE BE REQUIRED, SUCH AS
FOR PUBLIC HEARINGS OR BY OTHER APPLICABLE LAW*

- If so, *in person* public comment is not usually required (unless a local ordinance or applicable law specifically requires that)
- To handle public comment virtually, provide prior notice and access details
- Scheduling allows the speaker to comment “in the order received”
- Adding option for email comment can expand public participation
 - Either prior to the meeting for consideration
 - Or allowing an open record after the meeting

ACTIONS AFTER A MEETING (1): MEANINGFUL MINUTES – § 3-306

- Required timeliness; content
- Open-session minutes: available on request, without redaction
- Post online if “practicable” (new requirement, GP §3-306(e)(2))
- Tape recording ≠ minutes
- Closed-session minutes: Sealed, with publicly available summary in minutes of next open session (requirement extends to certain administrative function sessions not open to public)
- Use of live and streaming audio or video for open-session minutes
- Summary of closed session with 4 required items of information; Compliance Checklist, when required. § 3-213.

ACTIONS AFTER A MEETING (2): MEANINGFUL MINUTES – § 3-104 AND § 306

- Minutes of the next open meeting must include:
 - Purpose for the closed meeting
 - Citation authorizing closed meeting
 - Votes to close
 - The topics and subject matter actually discussed
 - Actions taken (if any)
 - Date, time, place
 - Persons present
- For a template, go to open meetings page on Attorney General's website
- Only exception -- §3-104; *closing an open meeting* for the **administrative function**. Minutes must include (1) the subject²⁵ matter discussed, (2) date/time/place and (3) persons present

ACTIONS AFTER A MEETING (3): **RECORD RETENTION – §§ 3-302,** **3-306**

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

REMEDIES- 2 ROUTES

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

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

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

Court may overturn public body's action in some cases, assess penalty, and award attorney's fees

TRAINING REQUIREMENT (1) – § 3-213

- Designation by “each public body” of a member, officer, or employee to “receive training”
- Designee must take training within 90 days of the designation (Training received before October 1, 2013 does not qualify)
- If the designee no longer serves on or works for the public body, the public body needs to designate a new one

ADDITIONAL TRAINING REQUIREMENT (2) – § 3-213

- Public body may not meet in closed session unless a member has been designated to take the training
 - Designated member must attend open session at which public body votes to hold closed session or
 - If designated member cannot attend, public body must complete Compliance Checklist and attach it to open-session minutes
- Public bodies should retain their own proof that the training was received and not send it to the Compliance Board

ISSUES, EXAMPLES, AND QUESTIONS

- Common causes of violations (unplanned meetings, lack of staff, staff turnover, member turnover, member desire to control information, lack of knowledge about the Act's requirements, lack of agenda planning)
- Steps to avoid complaints (follow the 4 steps; identify the person responsible for various compliance tasks; include tasks in job descriptions; adopt schedule for training; plan meeting topics; orient new members and staff)
- Avoidance of electronic or other non-public communications which include deliberation and/or decision on public matters by a quorum
- Responses to complaints (see the procedures posted online); addressing constituents' concerns early
- Questions, examples

MORE INFORMATION

- Compliance checklist, model closing forms and summary, FAQs, Compliance Board opinions, and topical index:
<http://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx>
- For virtual meetings, the above Attorney General “Open Meetings” page has an FAQ and the Maryland Municipal League has a 1-page summary www.mdmunicipal.org
- Online class: Institute for Governmental Service and Research website: www.igsr.umd.edu
- Open Meetings Act Manual (9th ed. December 2016 with June 2017 Updates), also accessible through the Attorney General’s “Open Meetings” page