COMPLYING WITH MARYLAND’S OPEN MEETINGS ACT

April Ishak
AC Ishak Law LLC; City Attorney, City of Havre de Grace
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

June 30, 2020, Virtual Summer Convention
Maryland Municipal League
Part One of a Two-Part Presentation
TWO PARTS

• This is the First Part
  • Introduction
  • Three Easy Steps
  • Covered Activities
  • Administrative Function
  • Virtual Meetings
  • Notice and Agenda

• Second Part
  • Quick Review
  • Logistics & Public Access
  • Closed Meetings
  • Public participation in virtual meetings
  • Minutes, Record Retention and Enforcement
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.

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

1. Before: provide advance public notice and an agenda
2. During: hold meeting open to public
3. After: prepare minutes

[4. Make sure your public body designates a trainee]
IN PERSON MEETINGS ARE NOT ALWAYS REQUIRED

- 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 as well in Tuzeer v. Kim, 201 Md. App. 443, 471 (2011)
  - MUST BE ACCESSIBLE TO THE PUBLIC
  - THE PUBLIC MUST BE ABLE TO HEAR ALL COMMENTS AND DISCUSSION
ARE VIRTUAL MEETINGS PERMITTED?

• 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 recommending 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 in the future as well
QUESTION FOR THE AUDIENCE

*It is a reality that almost every public body has had to use conference calls or some form of virtual meetings.*

**QUESTION 1:** Necessity aside, do you consider that a positive option?

**QUESTION 2:** Do you expect we will use virtual meetings as a more routine option once we are past this crisis?
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; 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 operate the meeting, such as
  • Details of the virtual meeting process
  • Protocols during the meeting
  • Setting the agenda

• Does not require notice, motion to close or minutes *unless* meeting is closed in the midst of an otherwise open meeting or at the end of such a meeting

**ADMINISTRATIVE FUNCTION EXEMPTION DOES NOT ALLOW DISCUSSION ON ANY MATTERS OF PUBLIC BUSINESS OR PUBLIC POLICY, PER GP §3-103**
RUNNING A VIRTUAL PUBLIC MEETING DURING COVID-19

• The COVID-19 crisis is requiring all of us to take new steps, in new ways, and thus to learn new ways of proceeding

• Start with a roll call to identify public body members

• Proceed carefully: speakers should identify themselves before speaking

• Chair should 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
TIME FOR QUESTIONS

We will continue with Part Two of the presentation this afternoon.
COMPLYING WITH MARYLAND’S OPEN MEETINGS ACT

April Ishak
AC Ishak Law LLC; City Attorney, City of Havre de Grace
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

June 30, 2020, Virtual Summer Convention
Maryland Municipal League
Part Two of a Two-Part Presentation
TWO PARTS

• First Part
  • Introduction
  • Three Easy Steps
  • Covered Activities
  • Administrative Function
  • Virtual Meetings
  • Notice and Agenda

• This is the Second Part
  • Quick Review
  • Logistics & Public Access
  • Closed Meetings
  • Public participation in virtual meetings
  • Minutes, Record Retention and Enforcement
ACTIONS DURING A MEETING (1): LOGISTICS - § 3-303

• Location

• Public participation – not required by Act

• Cameras/tape recorders – model rules

• Documents and communications referred to during meeting- access?

• Audible discussion
HOW TO PROVIDE 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 may help to ensure Open Meetings compliance in the event of 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 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
QUESTION FOR THE AUDIENCE

From time to time, a decision-making public body may desire or have the need to meet in a closed session.

QUESTION 1: From your own experience, do you think closed meetings are used too frequently or too easily relied on to address an issue?

QUESTION 2: Are there reasons for a closed meeting that may be legitimate but not fit within one of the 15 exceptions?
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
WHEN PUBLIC PARTICIPATION IS REQUIRED IN A VIRTUAL MEETING, PRACTICAL STEPS MAY INCLUDE

• *In person* public comment is not necessarily required (unless a local ordinance or applicable law otherwise requires that)

• May require prior notice and scheduling allow the speaker to comment “in the order received”

• May require allowance of email comment
  • Either prior to the meeting for consideration
  • Or allowing an open record after the meeting

• AGAIN, PUBLIC PARTICIPATION IS *NOT* AN OPEN MEETINGS ACT REQUIREMENT
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 subject matter discussed, (2) date/time/place and (3) persons present
ACTIONS AFTER A MEETING (3): RECORD RETENTION – §§ 3-302, 3-306

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

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

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

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

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

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

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

• If the designee no longer serves on or works for the public body, the public body needs to designate a new one
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
QUESTIONS