Chapter 1:
Applicability of the Act

Chapter One: When does the Act apply?

(Index Topic 1)

Chapter Summary: Determining whether the Act applies to a particular gathering is a three-step process. First, to be subject to the Act, an entity must fall within the Act's definition of a "public body." Second, for a gathering of the public body's members to be subject to the Act, the members must be "meeting," as defined by the Act. Third, the public body must be performing one of the "functions" subject to the Act.[7] In turn, each step has multiple elements, some with multiple sub-elements. The Act's threshold provisions are more complicated than the rest of the Act.

A. Is the entity a "public body" subject to the Act? (Index topic 1-A)

The Act only applies to "public bodies." An entity is a "public body" if it meets any of the three tests set by the definition of that term in § 3-101(h). An additional consideration is whether the entity is one of those expressly excluded from the definition. And the courts have sometimes deemed seemingly private entities to be "public bodies" by virtue of considerations such as the government's control over the particular entity's existence, governance, and functions. The General Assembly has added specific entities and types of entities to the statutory definition over the years, so the Compliance Board's opinions on the subject should be checked against the current law.

To figure out whether an entity meets the definition, a person first needs to gather the facts on how the entity was created (for example, by a statute, or by a person?), by whom its members are appointed, and what functions it serves. Only then can one apply the five sets of principles discussed below. If an entity does not meet the Act's definition of a "public body," the Act does not apply to that entity's gatherings.

---

[7] For an illustration of the Compliance Board's application of the three-step process, see 7 *OMCB Opinions* 21 (2010).

1. The first test - more than one member; created by a law, bylaw, resolution, or other legal instrument (the "created by law" test)

The "created by law" test, which is set forth in § 3-101(h)(1), is usually easy to apply. First, the entity must consist of "at least two individuals." *Id*. Therefore, a single person, while perhaps an official or government employee, does not constitute a "public body." For example, one hearing officer is not a "public body," 1 *OMCB Opinions* 175, 176 (1996), nor is a county executive, 9 *OMCB Opinions* 234, 237 (2015). Also, an agency run by a secretary or department head is not an entity that "consists" of the government employees who work for it; the Act, read as a whole, contemplates an entity that consists of members whose presence can create a quorum. *See* 4 *OMCB Opinions* 132, 137 (2005) (noting that "agency staff meetings are not generally subject to the Open Meetings Act, because staff members are not a 'public body'"); 7 *OMCB Opinions* 284, 285 n.2 (2011) (the Maryland Department of the Environment is "not a body either of 'individuals,' for purposes of [§ 3-101(h)(1)] or of 'members appointed by the Governor'"); 9 *OMCB Opinions* 53, 54 (2013) (State procurement personnel who were invited to attend periodic updates on developments in the field were not "conducting public business as 'members' of a 'public body,'" but rather were "simply agency employees attending agency information sessions"); 9 *OMCB Opinions* 302, 302-03 (2015) (mediation session held by Department of Natural Resources employees for lease applicant and protestants was not a gathering of a "public body"); 14 *OMCB Opinions* 1, 1-2 (2020) ("public body" was not created by attendance of county employees at community meetings hosted by their departments); 17 *OMCB Opinions* 61, 63 (2023) (individual employees of county revenue authority did not constitute "public body").

Next, the entity must have been created by one of the eight types of legal instruments listed in the definition. Among other things, the list includes State and local laws and executive orders, the State constitution, local governments' charters, and a "rule, resolution, or bylaw." § 3-101(h)(1). The State's Board of Public Works meets this test; it was created by Article XII, § 1 of the Maryland Constitution. *See* 6 *OMCB Opinions* 69, 72 (2009). By contrast, a gathering of government employees by their own volition does not meet the test. 80 *Opinions of the Attorney General* 90, 92 (1995).

The list of instruments includes master agreements and memoranda of understanding ("MOUs") between the Department of Education and a majority of the county boards of education. § 3-101(h)(ii)(4). The list does not include other MOUs. However, the Compliance Board has stated that when a public body, by resolution, enters into an MOU with another entity to create a new board, commission, or other body, the new entity might well meet this first test. *See* 9 *OMCB Opinions* 94, 97 n.2 (2013) ("[T]he Act should not be interpreted to allow a parent public body to sidestep the Act by creating committees through MOUs with private entities."). The determination of whether a purely intergovernmental MOU that creates a multimember board has created a "public body" under the "created by law" test has also depended on how the signatories adopted the MOU.

See 14 *OMCB Opinions* 14, 14-15 (2020) (concluding that an entity created by an MOU was not a "public body" because, of the three parties to the MOU, only one was itself a public body and there was "no indication that a formal resolution" called for that public body's vote to approve the MOU creating the entity).

Another factor to consider when applying the "created by law" test is whether a legal instrument enumerated in § 3-101(h)(1) has impliedly created a public body. The opinion of the Supreme Court of Maryland in *Avara v. The Baltimore News American*, 292 Md. 543 (1982), provides one example of the circumstances under which public body status should be implied from an instrument that does not expressly create the entity, and the Compliance Board's opinions provide others.

In *Avara*, the Court of Appeals addressed the status of the House-Senate Conference Committee appointed in 1981 under the rules of each house of the General Assembly. Those rules, as described by the Court, "authorize[d] the appointment of conference committees where the two Houses 'are unable to concur on the final form of a Bill.'" *Id.* at 546. The committee had been appointed to "resolve differences between the two Houses in the budget." *Id.* at 547. The Court noted that such a committee had been appointed every year since 1976 and that it was "likely" that a similar committee would be appointed in 1982. *Id.* Rejecting the State's argument that the committee was not a "public body" because it was not created by the rules themselves, the Court stated that "Conference Committees are established and exist only in pursuance of House and Senate Rules and in the sense contemplated by [the definition] are plainly the creation of a rule." *Id*. at 550. To conclude otherwise, the Court stated, "would be to ascribe an intention to the legislature to exclude from the Act's coverage all those entities which, although lawfully transacting public business and exercising legislative or advisory functions, were nevertheless merely authorized but not required to exist." *Id*. at 551. The Court further stated that such a result "would seriously undercut the Act's effectiveness and would be wholly at odds with the broad public policy underlying its passage." *Id*. Later that year, the Court concluded that a school board had created a public body when, as authorized by statute, the school board designated representatives to engage in collective bargaining negotiations, "because they are an entity of two or more persons created or authorized by statute or resolution." *Carroll County Educ. Ass'n, Inc. v. Board of Educ. of Carroll County*, 294 Md. 144, 155 (1982).

Relying on *Avara*, the Compliance Board has more than once found the implicit creation of a new public body when a parent public body adopted a resolution "recommending" the creation of the new entity. In 10 *OMCB Opinions* 117 (2016), the Compliance Board described how a city council enacted a resolution approving a "Strategic Economic Development Plan" that "recommend[ed] the City establish a 501(c)(3) entity under which all economic development functions [would] be administered." *Id.* at 118-19. Thereafter, a non-Maryland resident filed articles of incorporation with the State Department of Assessments and Taxation to form a tax-exempt non-stock corporation, under Maryland laws. *Id.* at 119. The City Council then executed a memorandum of

understanding with the corporation authorizing it to implement the city's Strategic Economic Development Plan. *Id.* The Compliance Board concluded that the corporation was a public body because it "was created by the Council's formal adoption of the [Strategic Economic Development] Plan, including the Plan's recommendation that a private non-profit entity be created to implement the economic development strategy set forth there." *Id.* at 123. Although the corporation was technically created with the filing of articles of incorporation, the Compliance Board found that it was "created 'in pursuance' of the [City] Council's action and [was] 'plainly the creation' of that action." *Id.* (quoting *Avara*, 292 Md. at 550). Similarly, in 16 *OMCB Opinions* 90 (2022), the Compliance Board found that the National Capital Park and Planning Commission impliedly established the Olney Town Center Advisory Committee as a new public body by adopting a resolution that recommended the committee's creation. *Id.* at 90-95; *see also* 11 *OMCB Opinions* 3, 8 (2017) (recognizing that some public bodies "are established by a law that does not itself create the entity but instead authorizes the creation of an entity for a particular purpose"); *cf.* 7 *OMCB Opinions* 21, 26-27 (2010) (concluding that a local school boundary study committee was a "public body," even though it was appointed by an area assistant superintendent rather than the local board of education or superintendent, because the committee was established pursuant to a school board policy that called for the committee's creation).

The "created by law" test also raises questions about how detailed a legal instrument must be to establish that a public body's committee or sub-entity is itself a public body subject to the Act. A committee is clearly a public body when its parent public body expressly creates it by name in the parent's bylaws, resolutions, or rules, as when a bylaw provision states, "There shall be a Finance Committee." *See, e.g.*, 14 *OMCB Opinions* 98, 99-101 (2020); 9 *OMCB Opinions* 151, 153-54 (2014). By contrast, bylaws that merely authorize a public body to create "such standing committees as the [body] may desire," or allow the public body's president to appoint special committees, do not, standing alone, confer "public body" status upon a committee. 7 *OMCB Opinions* 105, 106-07 (2011) (finding that such language in the bylaws of a library board did not establish a specific finance committee and, thus, that the committee was not a "public body" under the "created by law" test). But an instrument need not identify a committee by name to satisfy the "created by law" test; the Compliance Board has also recognized that a legal instrument may impliedly create a public body by mandating that certain functions be performed by a committee. *See* 7 *OMCB Opinions* 176, 184 (2011) (finding a committee of the Maryland Transportation Authority to be a public body where an MTA resolution mandated the performance of functions carried out by the committee, even though the resolution did not specifically create the committee); 13 *OMCB Opinions* 21, 23 (2019) (explaining that the complained-of committee would be a "public body" if a resolution had "mandated [its] performance of certain functions"); 5 *OMCB Opinions* 189, 191-92 (2007) (concluding that a subgroup, established in accordance with a statute that required the Critical Area Commission to appoint a panel of five of its members to conduct a public hearing on a proposal to amend a local critical area program, was a "public body"); 7 *OMCB Opinions*

21, 27 (2010) (finding that a boundary study committee was a "public body" because it was appointed by an assistant superintendent in accordance with a Board of Education policy requiring the appointment of such committees to advise on school districting). It appears, then, that the outcome in a given situation will vary with the degree to which the formal instrument identifies the function of the committee—that is, the more precisely the instrument identifies or mandates the committee's tasks or role, the more likely it is that the committee will be deemed a public body.

Of course, if a committee was not created by any of the enumerated legal instruments, the entity will not satisfy the "created by law" test. *See, e.g.*, 4 *OMCB Opinions* 132, 137 (2005) ("We have long distinguished between entities established by formal action of a public body versus entities established less formally, at the prerogative of a presiding officer or consensus of the body. While the former are subject to the Open Meetings Act, the latter are not."); 14 *OMCB Opinions* 60, 61 (2020) (distinguishing between a mere motion and a formal resolution or bylaw).[8]

That said, a committee's status when first created "does not matter" if the public body later takes formal actions that create it. 10 *OMCB Opinion* 12, 15 (2016). In 10 *OMCB Opinions* 12 (2016), for example, the Compliance Board found that a committee that was not originally a public body became one when the parent body "adopted a resolution that set its membership, mandated its performance of various compliance functions, and assigned it a role in making policy recommendations to [the parent]." *Id*. at 15. Similarly, in 14 *OMCB Opinions* 98 (2020), the Compliance Board found that a committee became a public body when its parent adopted resolutions that "acknowledged it as a committee of the [parent body] itself, detailed the precise advisory functions it [was] to perform, and delegated to it the receipt of reports on the [parent public body's] behalf." *Id.* at 100.

[8] An informally created subcommittee may also fall into an exclusion that applies to subcommittees of public bodies that satisfy the "executive appointment" test, which is discussed below. *See* § 3-101(h)(3)(ix) (excluding from the definition of "public body" a subcommittee of a public body that satisfies the test set forth in § 3-101(h)(2)(i); *see also* 13 *OMCB Opinions* 51, 52 (2019) (applying the exclusion); 14 *OMCB Opinions* 60, 62 (2020) (same).

2. The second test (the "executive appointment" test):

For State entities – members appointed by the Governor or someone subject to the Governor's policy direction, with at least two individuals who are not employed by the State government.

For local entities – members appointed by the chief executive authority or someone subject to the executive's policy direction, with at least two individuals who are not employed by the local government.

The "executive appointment test," which is set forth in § 3-101(h)(2)(i), is not always easy to apply. A multi-member entity is a "public body" if it was appointed by "an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision," *and* if it includes at least two people not employed by the State or political subdivision—unless the group is a "subcommittee" of such a body. § 3-101(h)(2)(i); § 3-101(h)(3)(ix). For example, the Compliance Board found that a task force created by the Secretary of the Environment was a public body because the secretary was an "official subject to the policy direction of the Governor." 5 *OMCB Opinions* 182, 182 (2007).

The Act does not provide guidance on who is "subject to the policy direction" of the executive. The Compliance Board addressed that question in the case of a committee appointed by a county police captain. 9 *OMCB Opinions* 279 (2015). The police captain, a merit system employee, was supervised by the deputy to the police chief, who had been appointed by the county executive. *Id.* at 280-81. Relying on the legislative history of the provision, the Compliance Board found that the police captain was too far removed from the county executive to be deemed subject to the executive's policy direction. *Id.* at 281.

Applying the "executive appointment test" to a local government's board or commission may also require looking at laws other than the Act in order to identify both the "chief executive authority" and the scope of that authority's "policy direction." For example, the "chief executive authority" might be a board of commissioners in some jurisdictions and a mayor or county executive in others, depending on the jurisdiction's form of government and any applicable charter provisions.

Section 3-101(h)(3)(ix) expressly excludes subcommittees of this type of public body from the definition of a "public body." For the scope of that exclusion, see part 4, below.

3. The third test (for State entities only) – appointed either by (a) an Executive Branch public body whose members were appointed by the Governor *or* (b) someone subject to that entity's policy direction, *and* includes in its membership at least two individuals who are not employed by the State (the "executive entity appointment" test)

The "executive entity appointment" test, which is set forth in § 3-101(h)(2)(ii), is best explained through an example. When a gubernatorially appointed board or its director creates a committee that includes at least two people who are neither members of the board nor employees of the State, that committee will be a "public body." The test thus brings under the Act committees that are made by the State agencies that are headed by boards. *See, e.g.*, 12 *OMCB Opinions* 53, 54 (2018) (applying the test and finding that subcommittees of the Maryland Medical Cannabis Commission were not themselves public bodies because the committees' members were all members of the Commission). This definition of "public body" was added in 2009 with the enactment of House Bill 1194.

4. Entities that are specifically excluded from, or included in, the definition

Section 3-101(h)(2)(iii) expressly identifies the Maryland School for the Blind as a public body that is subject to the Act.

By contrast, the General Assembly has provided that some entities are not subject to the Act, even though those entities would meet one of the Act's three tests for defining a "public body." *See* § 3-101(h)(3). Among the specific exclusions are judicial nominating commissions, grand juries, petit juries, courts (except when they are engaged in rulemaking), the Governor's Cabinet, a local counterpart to the Governor's Cabinet, and certain subcommittees. § 3-101(h)(3). The subcommittee exclusion, § 3-101(h)(3)(ix), applies only to subcommittees of public bodies that meet the executive appointment test. In 7 *OMCB Opinions* 284 (2011), for example, the Compliance Board concluded that the exclusion applied to a subcommittee of a task force that had been appointed by the Secretary of the Environment. *Id.* at 284-85; *see also* 12 *OMCB Opinions* 53, 54 (2018) (reaching the same conclusion for subcommittees created by the director of the Maryland Medical Cannabis Commission); 13 *OMCB Opinions* 51, 52 (2019) (applying the exception); 14 *OMCB Opinions* 60, 62 (2020) (same).

Practice notes on the subcommittee exception:

- A subcommittee meeting will be deemed to be a meeting of the parent public body if a quorum of the members of the parent body attends.

- "Subcommittees," in the usual sense, are comprised only of members of the parent public body.

- Subcommittees should not be used as a way to perform the parent body's functions behind closed doors. The courts construe the Act so as to prohibit "evasive devices," and a subcommittee that conducts the parent body's own business risks being deemed a public body.

5. The final set of considerations – the courts' "constructive public body" factors

Maryland's appellate courts have sometimes deemed a privately incorporated entity to be a "public body" subject to the Act. When doing so, they have looked to various factors, including the degree to which the entity's board is controlled by the government (as when the board members are appointed and subject to termination by a government official), whether the entity performs a purely public function, and whether the entity has few private functions. The inquiry is fact specific. *See, e.g.*, *City of Baltimore Development Corp. v. Carmel Realty Associates*, 395 Md. 299, 329-31 (2006). The fact that a private entity receives or administers government funds is not enough by itself. In 9 *OMCB Opinions* 203 (2015), for example, the Compliance Board found that the facts that the private entity had applied to provide services to a government agency and that the agency selected it and regulated the provision of the services did not make it a "public body." *Id*. at 204.

In addressing an entity incorporated by a city attorney, at the mayor's direction, to operate the city's zoo, the Appellate Court of Maryland[9] explained:

> 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.

Andy's Ice Cream, Inc. v. City of Salisbury, 125 Md. App. 125, 154-55 (1999). The Compliance Board discussed these principles in 7 *OMCB Opinions* 195 (2011) and 9 *OMCB Opinions* 246 (2015). A key consideration is whether the privately incorporated entity is structured in such a way that a governmental entity controls its governance, as when a governmental entity has the power to dissolve it or appoint its board. *See* 7 *OMCB Opinions* 195, 199-201 (2011) (discussing cases). Applying these principles, the

[9] The same constitutional amendment that changed the name of Maryland's highest court, *see* footnote 2 on page ii above, amended the name of the court formerly known as the Court of Special Appeals. We use that court's new name—Appellate Court of Maryland—throughout the manual.

Compliance Board has found that a privately incorporated and controlled volunteer fire company is not a "public body." 12 *OMCB Opinions* 65, 65-66 (2018).

B. Is the public body holding a "meeting," or did the members instead gather merely by chance, for social reasons, or for some other occasion not intended to evade the Act? (Index topic 1B)

The next threshold question is whether the members of the public body are holding a "meeting," because the Act applies only when a public body "meets." The Act does not govern whether a particular public body must conduct public business in a meeting; the Act simply sets the rules that apply when a public body *does* meet. *See* 94 *Opinions of the Attorney General* 161, 173 (2009) ("[O]ur longstanding advice has been that the Open Meetings Act does not specify when a public body must hold a meeting[.]").

Under the Act, "meet" "means to convene a quorum of a public body to consider or transact public business." § 3-101(g). The Act does not apply to a "chance encounter, social gathering, or other occasion that is not intended to circumvent" the Act. § 3-103(a)(2). As explained by the Supreme Court of Maryland, the Act does not apply unless there is "evidence of an[] actual meeting or an[] exchange of emails or other communications between members of the [public body] which might rise to the level of a 'meeting' or an[] evasive device purposefully designed to avoid the requirements of the Act." *Grant v. County Council of Prince George's C*ounty, 465 Md. 496, 533 (2019). So, the "meeting" requirement is met when the public body considers public business in any of the following circumstances: (1) a quorum of the public body's members is present at an "actual meeting"; (2) a quorum is deemed present by virtue of communications that would "rise to the level of a 'meeting,'"; (3) if the quorum came together only by chance or social reasons, it nevertheless used the occasion to discuss public business; or (4) the members considered public business by "a device purposefully designed to avoid the requirements of the Act." *Id.* at 533; §§ 3-101(g), 3-103(a)(2).

To figure out whether a public body has "met," a person needs to gather the facts on how many members of the particular body it takes to create a quorum (subpart 1 below), how many members were "present," (whether actually, virtually, or through the exchange of communications which might "rise to the level of a 'meeting'" or constitute an evasive device) (subpart 2), and whether the group was discussing the public body's business (subpart 3).

1. The number of members required to create a quorum

A "quorum" is "a majority of the members of a public body" or "the number of members that the law requires." § 3-101(k). For example, if eight members of a fifteen-member board gather, their presence will usually create a quorum. Their presence will not create a quorum, however, if the statute that creates the board requires the presence of nine

members for a quorum. A particular public body's quorum might also be defined in regulations and executive orders. However, the Compliance Board has concluded that a bylaw, by itself, is not an "other law" that would override the Act's definition of a quorum as the majority. *See* 9 *OMCB Opinions* 307, 310 (2015); *cf.* 73 *Opinions of the Attorney General* 6, 10 (1988) (explaining that administrative agencies lack the authority to alter by rule or bylaw the definition of a "quorum" set by a statute or, if none, the common law).

2. The presence of a quorum, whether physically or by other means

As explained above, a quorum may be deemed "present" in several ways: through the quorum's presence together at one time (an "actual meeting"), through an exchange of communications that "rise[s] to the level of a 'meeting,'" or through the use of an evasive device to avoid meeting openly. *See Grant*, 465 Md. at 533 (describing the requirement). Public bodies have been found to have "met" in the following sets of circumstances:

a. Quorum created by physical presence, in one place at one time

A quorum of members in one place at one time can be created regardless of the group's location or intent of the group to gather. For example, three members of a five-member public body formed a quorum when they encountered each other at a coffee shop by happenstance and then sat together. 7 *OMCB Opinions* 269, 270-71 (2011) (finding no violation of the Act because the quorum did not discuss business subject to the Act); *see also* 7 *OMCB Opinions* 92, 93 (2011) (noting that the presence of a majority of a town council's members at a county council's meeting created an "accidental quorum" of the town council); 3 *OMCB Opinions* 30, 31, 33-34 (2000) (noting that a quorum occurred by accident—and the public body violated the Act—when a council member "poked her head into the room" where others were hearing a budget presentation and then stayed). As explained by the Supreme Court of Maryland, "[t]he 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.'" *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) (quoting what is now § 3-101(g)). The fact that a presiding officer did not expect a small-group discussion of public business to evolve into a gathering of a quorum thus did not provide a defense to an action brought for violation of the Act. *Community and Labor United For Baltimore Charter Comm. v. Baltimore City Bd. of Elections*, 377 Md. 183, 195 (2003) ("*C.L.U.B.*").

b. Quorum created by "presence" at one time, not in one place

A quorum may also be formed when a quorum of the members is not physically present together. *Grant*, 465 Md. at 533 ("There may be instances where the Court may find a violation of the Open Meetings Act in the absence of a physical meeting consisting of a quorum of a public body."). For example, a member who participates in a meeting by

telephone will be deemed present for purposes of the Act. 9 *OMCB Opinions* 40, 41 & n.1 (2013); *cf. Tuzeer v. Yim*, LLC, 201 Md. App. 443, 471 (2011) (stating that the Act does not "prohibit[] a meeting with one or more members participating by telephone conference as long as the conference call is broadcast over a speakerphone so it can be heard by members of the public"); *see also*, *e.g.*, 14 *OMCB Opinions* 72 (2020) (addressing a meeting held entirely by telephone). A discussion conducted by teleconference or videoconference is thus a "meeting" when a quorum is on the call or in the virtual meeting.

c. Exchanges of electronic communications among a quorum, not during a scheduled meeting

Depending on the circumstances, the exchange of electronic communications among a quorum can be deemed a "meeting." *See Grant,* 465 Md. 496, 533 (noting that the record did not reflect "any exchange of emails or other communications between members . . . which might rise to the level of a 'meeting'"); *see also* 14 *OMCB Opinions* 33, 37 (2020) (concluding that a series of emails on one topic, exchanged among a public body's members over about fourteen hours, "was so tightly grouped as to amount to a meeting of a quorum"); 13 *OMCB Opinions* 39, 40-41, 44 (2019) (finding that a public body's exchange of fifteen emails and text messages, including four "demonstrably among a quorum," over two days, rose to the level of a meeting); 9 *OMCB Opinions* 259, 263 (2015) (explaining that the exchange of electronic communications can constitute a meeting); 81 *Opinions of the Attorney General* 140, 143-44 (1996) (opining that, at the time, sequential e-mail communications were analogous to the exchange of information through regular mail and thus did not constitute a "meeting" but that the "result would be different" if the members were able to "use e-mail for 'real time' simultaneous interchange").

In addressing whether an exchange of emails or texts rises to the level of a meeting, the Compliance Board has referred to the Wisconsin Attorney General's prediction of the factors that courts would likely consider in addressing whether an email exchange was a meeting: "(1) the number of participants involved in the communication; (2) the number of communications regarding the subject; (3) a time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications." 9 *OMCB Opinions* at 265.

The lack of "actual interaction" was key in 9 *OMCB Opinions* 259 (2015), 10 *OMCB Opinions* 18 (2016), and 13 *OMCB Opinions* 47 (2019), where the Compliance Board found that the communications did not amount to a "meeting." By contrast, in 13 *OMCB Opinions* 39 (2019), the Compliance Board applied the factors and found, from the "totality of the circumstances," that a board's continuous deliberations and vote by texts and emails exchanged over two days reflected "conversation-like interactions" and therefore rose to the level of a "meeting." The Compliance Board reached a similar result in 14 *OMCB Opinions* 33, 37 (2020), where it "conclude[d] with little difficulty" that a

series of emails on one topic, exchanged among a school board's members over about fourteen hours, "was so tightly grouped as to amount to a meeting of a quorum."

As for practical guidance, the Compliance Board advised in 9 *OMCB Opinions* 259 (2015) that the use of electronic communications for substantive business is risky at best. There, the Compliance Board suggested that members either "simply forebear from conducting business electronically" or avoid using the "reply all" and "forward" functions. *Id*. at 264. The Compliance Board then conveyed the following "practical advice" from Wisconsin's Attorney General:

> Inadvertent violations of the open meetings law through the use of electronic communications can be reduced if electronic mail is used principally to transmit information one way to a body's membership; if the originator of the message reminds recipients to reply only to the originator, if at all; and if message recipients are scrupulous about minimizing the content and distribution of their replies.

Id. at 265 (quoting 2005 Wisc. AG LEXIS 29, 2-4 (Wisc. AG 2005) (internal quotation marks and citation omitted)).[10]

---

[10] Some states' open meetings laws expressly include "electronic communications" in the definition of "meeting." *See, e.g*., Iowa Code Ann. § 21.2 (West) ("'Meeting' means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties."). Others prohibit the use of electronic communications to avoid open meetings. For example, the Alabama Open Meetings Act provides that "[s]erial meetings or electronic communications shall not be utilized to circumvent any of the provisions of" the Act. Ala. Code § 36-25A-1. In other states, courts have interpreted open meetings laws to extend to email communications when the circumstances show deliberations among a quorum. The Arkansas Supreme Court, in construing a statute that, like Maryland's, does not mention electronic communications, stated its reasoning for interpreting the Arkansas Freedom of Information Act ("FOIA") to apply to them in some circumstances:

> We . . . have no difficulty in concluding that FOIA's open-meeting provisions apply to email and other forms of electronic communication between governmental officials just as surely as they apply to in-person or telephonic conversations. It is unrealistic to believe that public business that may be accomplished via telephone could not also be performed via email or any other modern means of electronic communication. Neither this court nor the [Arkansas] General Assembly can be expected to list all such communication methods or anticipate others yet to emerge. Exempting electronic communication would allow governmental officials who are so inclined to make decisions in secret, leave the public in the dark, and subvert the purpose of FOIA's open-meeting provisions.

City of Fort Smith v. Wade, 578 S.W.3d 276, 280 (Ark. 2019), *reh'g denied* (Aug. 1, 2019). In considering whether Maryland's Open Meetings Act should be amended to address electronic communications, the Open Meetings Compliance Board has similarly stated that the Act can already be interpreted to extend to them in certain circumstances. *See* Annual Meeting Minutes, September 8, 2016, available at https://www.marylandattorneygeneral.gov/OpenGov%20Documents/Openmeetings/min090816.pdf

d. Exchanges of communications among fewer than a quorum, in the course of a public meeting of a quorum

The Supreme Court of Maryland, and, more recently, the Compliance Board, have sometimes applied the Act, and found violations of it, in instances in which fewer than a quorum of members exchanged communications out of the public eye during an open meeting of the public body, whether while a quorum was briefly absent, during a brief recess, or by electronic communications among themselves during the meeting.

In the first such instance, the Court applied the Act to discussions from which a city council excluded the public when fewer than a quorum were in the meeting room. *See C.L.U.B.*, 377 Md. 183. There, the Court held that the council violated the Act when the city council president instructed staff to keep track of the number of council members in the room and then excluded the public whenever the number fell below a quorum. *Id.* at 190-91. Implicitly rejecting the council's argument that the Act did not apply to a gathering of fewer than a quorum of members, the Court noted the council president's testimony that she had not wanted the meeting to be public because the discussion would be "heated." *Id.* at 194. The Court then held that the council had willfully violated the Act. *Id*. at 188, 196-97. The Court did not specify whether it deemed that carefully-managed gathering to be an "evasive device," that could be subject to the Act regardless of the number of members actually present, *see Grant*, 465 Md. at 533, or whether the gathering instead "[rose] to the level of a 'meeting,'" *id*., given that the requisite number of members seemingly cycled in and out of the room in such a way to enable collective deliberation among a quorum.[11]

In the second instance of a finding of a violation without proof that a quorum was together at the same time, the Compliance Board held that a county board of appeals violated the Act when the board abruptly called a ten-minute recess in the middle of

---

(reporting that "the Board concurred that the Act gave it the flexibility to address the issue on a case-by-case basis and that legislation was not needed at this time").

A survey of states' laws on this topic and others can be found in the online Open Government Guide published by the Reporters Committee for Freedom of the Press: https://www.rcfp.org/open-government-guide/. The Reporters Committee has also published a guide to the federal open meetings law: www.rcfp.org/federal-open-government-guide.

[11] Either way, the *C.L.U.B.* Court seemingly deemed a quorum to be sufficiently available to vote in some fashion; the Court faulted the presiding officer for "simply decid[ing] to close the meeting," when the number of members in the room dropped below a quorum, without having conducted the vote to close required by § 3-305. *See* 377 Md. at 195. Although the facts stated in the opinion show that the public was asked to leave whenever a quorum was not in the room, staff was asked to keep track of the quorum, and the presiding officer did not want the public to observe the discussion, the opinion does not specify that the presiding officer either asked members to leave or otherwise knew in advance when a member would leave and break the quorum. The point at which the presiding officer should have required the quorum to vote on a motion to close is thus unclear from the facts stated in the opinion, even had the Act permitted the particular topic to be discussed in closed session.

detailed deliberations on a special exception application and then returned to open session with a complete resolution of the matter. 9 *OMCB Opinions* 283 (2015). The board had recessed after its counsel suggested a break to "let your thoughts settle down," and all of the members left the meeting room together. *Id.* at 285. Immediately upon their return, the chair stated: "We've had a little bit more discussion . . . OK, would someone like to make a motion at this point?" *Id.* Noting that the public body had not closed the meeting for reasons permitted by the Act, and that a consensus was reached during the recess whether or not the discussion was held in the presence of a simultaneous quorum, the Compliance Board stated that it did not "construe the Act to permit the use of recesses as a setting in which to consider public business behind closed doors." *Id*. at 284. The Compliance Board further advised: "Public bodies may not use behind-the-scenes recesses as a means of shortcutting further public discussion of a matter that they have just been considering in open session." *Id*. at 288. Citing the result in *C.L.U.B*., 377 Md. 183, the Compliance Board cautioned that "the Act does not automatically switch off during a discussion when the number of members present falls briefly below the number required for a quorum." *Id.* "Of more significance" for such recesses, the Compliance Board went on, "will be the totality of the circumstances, including whether the deliberations have continued during the break." *Id*.[12]

In the third such instance, the Compliance Board found that a school board violated the Act when, during a meeting, two members—fewer than a quorum of the board's members—exchanged text messages about the public business under discussion at that moment. 14 *OMCB Opinions* 29 (2020). The Compliance Board reasoned that the members were conducting the public business that the public body was conducting and that the public was entitled to observe the members' deliberations. *Id.* at 31-32.[13]

---

[12] For another example of a "totality of the circumstances" approach to the quorum requirement, see *Armstrong v. Mayor & City Council of Baltimore*, 409 Md. 648 (2009). There, the Supreme Court of Maryland quoted at length, but did not explicitly review, the circuit court's finding that a council committee had violated the Act by circulating a draft zoning bill among its members for their approval at separate times. *Id.* at 661-65. Noting that "it is true that a quorum is technically necessary to trigger the Act," the circuit court had nonetheless examined whether, from the "totality of the circumstances," the committee had violated the Act. *Id.* at 662. The circuit court found that the committee had "intentionally avoid[ed] holding a meeting" of a quorum. *Id.* The circuit court then concluded that it was "not consistent with the goal of the [Act]" to meet publicly on a bill without discussing it and then to circulate it later "from member to member without the public being permitted to observe any of the deliberative process." *Id*. at 662-63. The extent to which the Court adopted the circuit court's reasoning is unclear. *See* 94 *Opinions of the Attorney General* 161, 174-75 n.22 (2009).

[13] In the same matter, the Compliance Board found, "with some reluctance," that the board did not violate the Act either when one member passively received text messages from a member of the public during the meeting or when another member exchanged messages with a member of the public. *Id*. at 31. However, the Compliance Board limited that guidance to the particular facts before it, and advised public bodies "to recognize that the public's trust in government can be diminished by their members' receipt of electronic communications, particularly from people who are not the public body's staff, during a meeting and on the business at hand." *Id*. The Compliance Board also "encourage[d] public bodies that encounter the problem

e. Communications among individual members whose presence would not create a quorum and who are not in a public meeting at the time - the question of "evasive devices"

Maryland courts have repeatedly instructed that open meetings laws "should be construed so as to frustrate all evasive devices." *E.g.*, *WSG Holdings, LLC v. Bowie*, 429 Md. 598, 619 (2012); *cf.* § 3-103(a)(2) (providing that the Act does not apply to a "chance encounter, social gathering, or other occasion that is not intended to circumvent" the Act). Accordingly, when the members of a public body have not demonstrably deliberated as a group, whether in each other's presence or through communications that rise to the level of a meeting, but nonetheless reached a consensus somehow, the courts will look to whether there is "evidence of . . . any evasive device purposefully designed to avoid the requirements of the Act." *Grant*, 465 Md. at 533.

As already noted, the Supreme Court of Maryland found in *C.L.U.B.*, that a public body violated the Act by structuring a meeting in such a way as to avoid deliberating on a matter in the presence of a quorum. 377 Md. at 190-91, 194. There, the city council president "had indicated that she did not want the media to be present at the August 8 meeting 'because of her fear of how the media might portray the Council when it was having heated discussions.'" *Id.* at 189.[14] Similarly, in *Armstrong v. Mayor & City Council of Baltimore*, 409 Md. 648 (2009), discussed above in footnote 12, a circuit court found that a public body had intentionally avoided holding a meeting, and had violated the Act, by circulating drafts of an ordinance among the members. And in *Grant*, the Supreme Court of Maryland, referring to an earlier version of this Manual, made clear that the Court does "not condone the use of a 'walking quorum' or other device if used to evade the requirements of the Open Meetings Act and shield the actual deliberations of a public body from public view." 465 Md. at 533. There, the Court addressed a land use appeal in which the administrative record contained no facts concerning how the board had reached conclusions that it had stated in a lengthy opinion that it issued the day after its hearing and without deliberating publicly. Noting a lack of "direct and culpable facts" establishing that the board had met in some fashion or used an evasive device, the burden that the Act places on the plaintiff to prove violations, and the Act's statutory presumption that public bodies

---

to consider addressing it through meeting rules, advisories to the public, or other means as appropriate to the particular public body." *Id.*

[14] *C.L.U.B.* and *Grant* implicitly qualify the Court's earlier dicta in *City of College Park v. Cotter*, 309 Md. 573 (1987). In *Cotter*, the Supreme Court of Maryland applied a municipal open meeting ordinance which was stricter than the Act in that it did not permit the council to close a session to confer with its attorney. *Id.* at 591-94. Applying the similarly worded definition of the term "meeting" in that ordinance, the Court stated in a footnote that "nothing prevents the City Attorney from meeting in closed session with less than a quorum of the Council members." *Id.* at 595 n.32. However, under *C.L.U.B.* and *Grant*, sequential sub-quorum gatherings, if designed to circumvent the Act, could be subject to challenge.

comply with it,[15] the Court held that a violation of the Act had not been proven. *Id*. at 527-34.

For its part, the Compliance Board has often addressed complaints that a public body improperly reached a decision through e-mails, telephone calls, or other modes of communication in such a way as to avoid the presence of a quorum. In addressing these matters, the Compliance Board has acknowledged its inability, as an advisory body with limited information before it, to determine whether the members used such communications for the purpose of circumventing the Act. For example, in 8 *OMCB Opinions* 56 (2012), the Compliance Board, noting that it was not an investigatory body and "not in a position to infer that a public body has acted with the intent to evade the Act," concluded that a county board's conduct did not amount to a meeting. *Id.* at 60. Although that county board had evidently decided the matter at hand out of the public eye before it took a vote in public, its counsel stated that he had prepared a written decision and had taken it to each member separately and that the members had not discussed the issue as a group before they adopted the decision. *Id.* at 57. While the Compliance Board did not assess evasive intent, it reiterated an earlier caution against "'this way of proceeding,'" *id*. at 59 (quoting 7 *OMCB Opinions* 193, 194 (2011)), and noted out-of-state cases in which courts had found that a public body's use of an intermediary to conduct discussions seemingly in the absence of a quorum violated those states' open meetings laws, *id.*[16] Citing those cases and *C.L.U.B*., the Compliance Board then stated its "reluctan[ce] . . . to give the impression that the quorum requirement provides public bodies with an absolute defense to an alleged Open Meetings Act violation." *Id.*; *see also* 7 *OMCB Opinions* at 194 (finding that the commission had not "met" when it reached a consensus "through sequential and one-on-one communications" with the board president, "conducted in person, by e-mail, and by telephone," but cautioning against "this way of proceeding").

---

[15] As noted in Chapter 7, this presumption applies only in civil actions filed in circuit courts. No such presumption applies when the Open Meetings Compliance Board resolves a complaint. Moreover, a complainant to the Compliance Board need not satisfy any burden of proof, although a plaintiff in a civil action does.

[16] Courts in other states have applied the term "walking quorum" to a public body's practice of deliberately avoiding the presence of a quorum to evade openness requirements. *See, e.g.*, *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 706-07 (W.D. Tex. 2011) (walking quorums "occur when members of a governmental body gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body") (cleaned up); *Mabry v. Union Parish Sch. Bd*., 974 So. 2d 787, 789 (La. App. 2 Cir. 2008) (a "walking quorum" is "a meeting of a public body where different members leave the meeting and different members enter the meeting so that while an actual quorum is never physically present an actual quorum during the course of the meeting participates in the discussion"); *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 474-76 (W.D. Tex. 2001) (reviewing cases on "walking quorums"); *see also State ex. rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St. 3d 540, 544 (1996) (in addressing meetings held on three different days, stating, "The Ohio Sunshine Law cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of a public body."); *Grant*, 465 Md. at 533 (citing out-of-state "walking quorum" cases and describing the practice).

3. The gathering is convened for the "consideration or transaction" of public business; or,

if the quorum instead came together by chance or for social purposes, the quorum used the occasion to discuss public business

These two related elements are met when a quorum comes together to consider *or* transact public business, and they are *not* met when the members are together for some other reason and do not discuss public business.

Some clear guidelines have emerged. First, it does not matter whether the quorum makes a decision or takes an action. The Supreme Court of Maryland has repeatedly stated that a public body's "consideration" of public business includes all phases of its deliberation—"every step of the process"—not just the decision. *E.g.*, *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980).[17] Thus, the consideration of public business might be receiving an informational briefing. *E.g.*, 7 *OMCB Opinions* 85, 87 (2011); 1 *OMCB Opinions* 35, 36 (1993).

Second, the location of the meeting is irrelevant. If a quorum of the public body's members comes together at a restaurant by chance and discusses public business, all of the elements of a "meeting" are met. 7 *OMCB Opinions* 269, 270 (2011). The same is true of a "retreat." *See* 3 *OMCB Opinions* 122, 124 (2001). Relevant instead are the facts about what the members discussed. If a quorum of members attends the same social event, the members are not "meeting" unless they gather and start discussing the public body's business. *See, e.g.*, 5 *OMCB Opinions* 93, 96 (2007). Likewise, if two members of a three-member board find themselves in the same restaurant or store, they are not "meeting" unless they start discussing the public body's business. 7 *OMCB Opinions* at 271.

Less clear is whether a public body is meeting to transact "public business" when a quorum is present at an event that another entity has convened. The Maryland courts have addressed that question in two contexts. *See City of New Carrollton v. Rogers*, 287 Md. 56 (1980); *Ajamian v. Montgomery County*, 99 Md. App. 665 (1994). In *Roger*s, the Supreme Court of Maryland held, without lengthy discussion, that a city council had not conducted a "meeting" when a quorum of its members attended a civic association's meeting to address questions about a possible annexation of property. 287 Md. at 71. In *Ajamian*, a quorum of a county council attended a closed meeting of the county Democratic Central Committee, and the council president responded to a request for a briefing on various councilmanic redistricting plans. 99 Md. App. at 671-72. A discussion about the plans ensued, and the central committee voted to support the plan proposed by the redistricting commission. *Id.* The council members neither joined the discussion nor

[17] There the Court stated: "It is . . . the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business." *Id*.

voted. *Id*. The trial court found that there was "no vote," no "deliberation by councilmembers," no "meeting to deliberate and decide," no intention to "evade the law," "no evidence that the law was in fact evaded," and "no factual basis for a finding of violation of [the Act]." *Id*. at 680 (internal punctuation omitted). The Appellate Court of Maryland upheld those findings of fact, and affirmed the trial court's judgment.

Applying *Ajamian*, the Compliance Board has advised:

> [M]embers of a public body do not violate the Act merely by attending a meeting of an entity that is not itself subject to the [Act], even if the topic of discussion relates directly to a matter before the public body. . . . The crucial point [of *Ajamian*] was that the Act applies only if the public body itself separately conducts public business, as distinct from the proceedings of the larger group. If interaction among the members of the public body does not occur, and the larger group is not a mere subterfuge to evade the law, no violation occurs.

1 *OMCB Opinions* 120, 121 (1995); *accord* 7 *OMCB Opinions* 105, 110 (2009). For example, the Compliance Board concluded that various election boards had not violated the statute when a quorum of each had attended a closed meeting of a private association of election personnel, because there was no evidence that any individual board had conducted public business there. 1 *OMCB Opinions* at 121. By contrast, a public body "met" when a quorum of its members attended an event that the public body itself had organized for presentations on a matter that was then pending before the public body. 8 *OMCB Opinions* 19, 23-25 (2012).

More recently, the Compliance Board has said that "whether the presence of a quorum of members of a public body at another entity's gathering constitutes a 'meeting' of the public body" depends on "the totality of circumstances." 16 *OMCB Opinions* 185, 188 (2022). Relevant factors include:

> whether the host entity is a private body or a public body subject to the Act, the nature of the gathering and the topic of discussion, whether the meeting is a step in the public body's decision-making process, whether the topic of discussion involves a matter that is certain to come before the public body, and what the members of the public body do at the gathering.

Id. Thus, "members of a public body do not violate the Act merely by attending a meeting of an entity that is not itself subject to the Open Meetings Act, even if the topic of discussion relates directly to a matter before the public body." 1 *OMCB Opinions* 120, 121 (1994). But the result may be different if the members of the public body constitute a quorum and interact with one another on a matter of the public body's business. *See, e.g.*, 9 *OMCB Opinions* 40, 42-43 (2013) (concluding that three members of a five-member

public body convened a "meeting" of the public body when they appeared on a radio program and discussed a matter that the public body would be acting on ten days later). And if a quorum of one public body attends the meeting of a second public body to receive information about a matter that will soon come before the first public body, the quorum's presence may establish a meeting of the first public body, even if the members are merely listening to a presentation and not communicating with one another. *See* 16 *OMCB* at 188-89 (concluding that, when a quorum of a city council attended a meeting of the city's planning commission, which was receiving and discussing information on a proposed zoning amendment that would come before the council for a vote, the gathering constituted a "meeting" of both the planning commission and the city council).

In short, "[w]hen a quorum of a public body convenes and discusses public business within one of the functions covered by the Act, that gathering is deemed a meeting of the public body, even when the quorum was created accidentally or the discussions occurred in a meeting not called by the public body itself." 8 *OMCB Opinions* 76, 79 (2012). *See also, e.g.*, 3 *OMCB Opinions* 30, 33-34 (2000) (concluding that the Act applied to an informal briefing when a quorum was created by the unexpected arrival of an additional member); 6 *OMCB Opinions* 155, 158 (2009) (concluding that a public body "met" under the Act when a quorum of its members attended a subcommittee meeting).

Practice notes on the presence of a quorum:

- Members of public bodies should know how many members it takes to create a quorum so that they know when the Act applies to their discussions.

- To avoid the accidental creation of a quorum, electronic communications should be avoided or confined to the one-way transmission of information. They should not be used as a means to interact on public business within the Act's scope.

- It is advisable for the members of a public body to avoid communicating with each other on the side about an item while the public body is discussing it in open session.

- The Act does not require public bodies to "meet," but a public body that reaches decisions by other means might create a perception that it operates in the dark.

- The quorum requirement might not provide a defense to a public body that has called a brief recess in the middle of its deliberations when a quorum departs together and comes back with a decision.

- The quorum requirement would probably not provide a defense to a public body that has intentionally evaded the Act, as might occur if a public body held a discussion through an intermediary so as to avoid creating a quorum.

C. Is the meeting subject to the Act because the public body is performing a "function" subject to the Act, or instead exempt from the Act because the public body is performing one of the three "functions" expressly excluded from the Act? (*Index topics 1C through K)*

Even when a "public body" is "meeting," the Act might not apply, because the Act applies to some "functions" that a public body might perform, but not others. The Act defines six "functions." Meetings that fall within the definitions of the legislative, quasi-legislative, and advisory functions are subject to the Act. Generally, meetings that fall within the definitions of the administrative, judicial, and quasi-judicial functions are not subject to the Act. § 3-103. However, the Act does apply when a public body meets to consider granting a license or permit or to consider various land use matters. § 3-103(b). And, when a public body recesses an open meeting to carry out an administrative function in a closed session, it must make the disclosures specified by the Act. § 3-104.

The Compliance Board has interpreted the Act to apply to discussions that do not fall into any of the six defined functions. That conclusion is supported by § 3-301, which requires a public body to meet in open session "[e]xcept as otherwise expressly provided" by the Act. Thus, if a meeting does not fall within one of the express exclusions, the Act applies. *See* 78 *Opinions of the Attorney General* 275, 278 n.3 (1993) (stating that the Act applies "if a public body is carrying out a function that cannot be categorized under any one of the six defined functions"); 4 *OMCB Opinions* 12, 18 (2004) (concluding that a town council's discussion about its position on legislation pending in the General Assembly was subject to the Act because it did not fall within any defined function).

To figure out what "function" the public body performed at a meeting, a person needs to gather the facts on what the members addressed there. Often, it is also helpful to know what functions that the particular public body is authorized to perform. That information is usually found in the laws, resolutions, or orders that created or govern the public body. The topic index provides useful examples of how the Compliance Board has characterized various discussions.

1. The functions subject to the Act: advisory, legislative, quasi-legislative functions, and licensing, permitting, and land use deliberations

a. Advisory function (Index topic 1D)

Public bodies perform "advisory" functions when they "stud[y] . . . a matter of public concern" or "mak[e] recommendations on the matter" and are doing so under a "delegation of responsibility" by any of four authorities:

- "law"
- the Governor or someone subject to the Governor's "policy direction"
- the chief executive officer of a political subdivision or someone subject to that officer's policy direction
- "formal action by or for a public body that exercises an administrative, judicial, legislative, quasi-judicial, or quasi-legislative function."

§ 3-101(c).

The advisory function is usually performed by task forces and commissions that have been appointed to study an issue and report back. Thus, a standing committee created by a public body's bylaws to recommend changes to the public body's organizational structure performed an "advisory function" when it met to discuss that topic, 9 *OMCB Opinions* 1, 8 (2013), as did a committee created to recommend candidates for appointment to a school board when performing that task, 12 *OMCB Opinions* 98, 100 (2018).

b. "Legislative function" (Index topic 1F)

The "legislative function" includes more than just acting on proposed legislation. Section 3-101(f) provides:

> "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.

§ 3-101(f). The definition includes both the "process" and the "act" of amending a law. Accordingly, the Compliance Board has concluded that a city council was performing a legislative function, subject to the Act, when the city administrator briefed it about a proposed ordinance. 1 *OMCB Opinions* 35, 36 (1993).

c. Quasi-legislative function (Index topic 1J)

This function includes far more topics than its name might suggest. Section 3-101(j) provides:

> "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.

For example, a public body that approves a budget performs a quasi-legislative function (and a legislative function, if adoption is by ordinance), while a public body that is statutorily charged with recommending a budget for approval by another entity is performing an advisory function. Either way, the discussion is subject to the Act.

In some circumstances, the "process or act" of "approving, disapproving, or amending a contract" may extend to a board's performance evaluation of an employee whose contract is up for renewal or amendment. *See* 13 *OMCB Opinions* 71, 71-72 (2019) (addressing discussions about a school superintendent's performance and contract terms); 10 *OMCB Opinions* 57, 58-59 (2016) (same).

d. Licensing, permitting, and land use matters (Index topic 1G)

Section 3-103(b) provides that the Act applies when a public body "is meeting to consider: (1) granting a license or permit; or (2) a special exception, variance, conditional use, or zoning classification, the enforcement of any zoning law or regulation, or any other zoning matter." Until 1991, when the provision was added, proceedings on many licensing, permitting, and land use matters had been considered quasi-judicial or administrative in nature and, hence, not subject to the Act, which expressly excludes meetings held to perform those functions. Now, licensing, permitting, and various land use matters fall within the scope of the Act no matter what "function" the public body is performing.

The Supreme Court of Maryland has interpreted the catch-all phrase "any other zoning matter" to include development plan applications, usually considered to be a "planning" matter. *Wesley Chapel Bluemont Ass'n v. Baltimore County*, 347 Md. 125, 137-50 (1997). After extensively reviewing the legislative history of the provision, the Court found "no evidence" that the General Assembly had incorporated into the Act the "technical distinctions the courts had drawn between land use planning, zoning, and development control." *Id*. at 144. The Court accordingly held that the Act applied to the hearings held by the county board of appeals on the development plan. *Id.* at 148; *see also* 100 *Opinions of the Attorney General* 55, 68-70 (2015) (discussing the history of the provision). Other land use cases in which open meetings issues were raised include *Grant*

v. County Council of Prince George's County, 465 Md. 496 (2019), *WSG Holdings, LLC v. Bowie*, 429 Md. 598 (2012), *Tuzeer v. Yim*, *LLC*, 201 Md. App. 443 (2011) (use permit) and *Handley v. Ocean Downs, LLC*, 151 Md. App. 615 (2003) (special exception).

2. The functions exempt from the Act: judicial, quasi-judicial, administrative - unless the public body is considering granting a license or permit or taking certain land-use actions

a. "Judicial Function" (Index topic 1E)

The judicial function is defined to mean "the exercise of any power of the Judicial Branch of the State government," except for "the exercise of rulemaking power by a court." § 3-101(e). The definition also includes the exercise of the powers delegated to juries and two courts-related commissions.

b. "Quasi–judicial function" (Index topic 1I)

As defined by the Act, the "quasi-judicial" function means the "determination" of a "contested case," as defined by Title 10, Subtitle 2 of the State Government Article, or of a matter before an administrative agency for which judicial review would be governed by Title 7, Chapter 200 of the Maryland Rules. § 3-101(i). The "quasi-judicial function" also includes the Compliance Board's determination of an open meetings complaint under the Act. *Id.* For example, a school board that hears an employee's appeal of a personnel action under the Education Article is performing a quasi-judicial function because those appeals are contested cases. 90 *Opinions of the Attorney General* 17, 20 (2005).

Many licensing and land use matters that fall within this definition are nonetheless expressly subject to the Act under § 3-103(b). It provides that the Act applies when a public body "is meeting to consider: (1) granting a license or permit; or (2) a special exception, variance, conditional use, or zoning classification, the enforcement of any zoning law or regulation, or any other zoning matter." *See* 1(d), above.

c. "Administrative function" - the two-step analysis, plus the licensing/permitting inquiry (Index Topic 1C)

The Act defines "administrative function" in both the negative—what an administrative function is *not* —and the affirmative—what it *is*. In an opinion approved by the Appellate Court of Maryland, this Office explained the two-step analysis that the Compliance Board has used to determine whether a particular activity is an administrative function:

> The first step is to evaluate whether the meeting falls within any other function defined in the statute. If it does, the analysis ends because, by

> definition, the meeting does not involve an administrative function. [§ 3-101(b)(2)]. If the session does not involve one of the other defined functions, the second step is to evaluate whether the public body is involved in the administration of an existing law, rule, or regulation (as opposed to the development of new policy). If it is, the meeting likely involves an administrative function and the [Act] does not apply; if not, the discussion is not an administrative function and the [Act] does apply.

95 *Opinions of the Attorney General* 152, 155-56 (2010); *see also Dyer v. Board of Educ.*, 216 Md. App. 530, 537-38 (2014) (quoting the opinion and applying the Compliance Board's two-step test).

A third inquiry, as with the quasi-judicial exclusion explained above, is to determine whether the meeting, even though "administrative" in nature, is subject to the Act anyway as a licensing, permitting, or land use matter under § 3-103(b).

1. The first step: A topic that falls within the advisory, legislative, quasi-legislative, judicial, and quasi-judicial functions does *not* fall within the administrative function.

If the topic of discussion falls into the definition of any other function, then it is not "administrative." § 3-101(b)(2). For example, a public body's consideration of a "measure to set public policy" would fall within the definition of "legislative function" in § 3-101(f)(1) and so would not be an administrative function.

Practice notes on the first step:

- Task forces that have been created to make recommendations seldom perform "administrative" functions other than choosing a presiding officer and meeting place and discussing logistical matters associated with the performance of their duties.

- A legislative body that is approving an appointment is performing a quasi-legislative function and therefore not an administrative function.

- The judicial and quasi-judicial functions are exempt from the Act anyway, so if the meeting in question involves a judicial or administrative body's consideration of a particular case, it is usually easier to apply those definitions before analyzing the meeting under the administrative function exclusion.

- A public body that prepares a budget to recommend to another public body performs an advisory function and thus not an administrative function.

- A public body engaged in the act or process of approving, disapproving, or amending a contract performs an advisory function and thus not an administrative function.

2. The second step: The "administration" of a law, rule, regulation, or bylaw *is* within the administrative function.

The second step is to apply the Act's definition of what an administrative function *is*. *See* § 3-101(b)(1). The definition is circular—"administrative" is defined only by reference to "administration"—and it can be hard to apply confidently. Section 3-101(b)(1) provides:

> "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.

The Compliance Board has construed § 3-101(b)(1) this way: "'[T]here [must be] an identifiable prior law to be administered, and the public body holding the meeting must be vested with legal responsibility for its administration.'" 7 *OMCB Opinions* 131, 135 (2011) (quoting 5 *OMCB Opinions* 42, 44 (2006)). Thus, when the implementation of a town policy concerning the use of a town facility lay within the town administrator's purview, the town council was not performing an administrative function when it gave the town administrator its views about a particular organization's use of the facility. 13 *OMCB Opinions* 5, 7 (2019).

One generalization that has emerged is that "administering" a law can include applying an existing provision to a set of facts, as when an ethics commission applies existing ethics regulations to a particular set of facts in order to resolve a complaint, *Dyer v. Board of Education*, 216 Md. App. 530, 538 (2014), a medical review panel applies regulations to the facts of the cases before it, 7 *OMCB Opinions* 250, 254 (2011), or a municipal elections board conducts an election in accordance with existing procedures, 10 *OMCB Opinions* 22, 26 (2016) (finding that the exclusion applied to the implementation of pre-set procedures but not to its formulation of new procedures); *see also* 14 *OMCB Opinions* 60, 62 (2020) (citing matters in which the Compliance Board found that "a public body is performing an administrative function when it meets solely to address complaints that fall within its legal purview"). Likewise, a public body that allegedly exchanged communications about how to conduct a particular meeting "in accordance with the Health Officer's advice, the Governor's order referring local jurisdictions to the State's social

distancing recommendations, and the Open Meetings Act," and not about its meetings policies generally, was performing an administrative function. 14 *OMCB Opinions* 83, 87 (2020); *see also* 10 *OMCB Opinions* 31, 34 (2016) (citing opinions concerning the management of property).

Another generalization is that, while the Compliance Board has sometimes found that the application of an *existing* policy is "administrative," *see, e.g.*, 8 *OMCB Opinions* 89, 91 (2012) (involving the application of an expense policy); 17 *OMCB Opinions* 47, 48 (involving the application of an ethics policy), development of *new* policy (or the *amendment* of an existing policy) does not qualify as "administrative," 10 *OMCB Opinions* at 26; *see also* 16 *OMCB Opinions* 140, 156 (2022) (concluding that a public body was not performing an administrative function when it amended a personnel policy); 9 *OMCB Opinions* 1, 8 (2013) ("discussions about prospective policies and recommendations of future actions on subjects of public concern very seldom, if ever, qualify for the administrative function exclusion"); 7 *OMCB Opinions* at 254 (medical review panel's discussion of "what the standards should be" would not be "administrative").

In 9 *OMCB Opinions* 110 (2014), the Compliance Board provided a list of tasks that it has found to be "administrative":

> When a public body met to dismiss an employee, 1 *OMCB Opinions* 166 (1996), evaluate an employee's performance, 3 *OMCB Opinions* 218, 221 (2002), fill a vacancy, 1 *OMCB Opinions* 252 (1997), or make an appointment, 6 *OMCB Opinions* at 61, we have found those discussions to be administrative in nature. And, we have found that the wording of press releases and the procedures for issuing them are topics that fall within the exclusion. 1 *OMCB Opinions* 133 (1995) (discussion of press release by board of aldermen was not subject to the Act); 8 *OMCB Opinions* 89, 91 (2012) (county commissioners' discussion of current press release procedures "fall easily into the administrative function exclusion as we have applied it").

Id. at 112-13; *see also* 7 *OMCB Opinions* 225, 230-32 (2011) (providing examples of administrative and non-administrative functions performed by a board of county commissioners).

The Compliance Board has also repeatedly commented on the difficulty of applying the administrative function exclusion with confidence.[18] If in doubt, the public body should

[18] For example, in 9 *OMCB Opinions* 110 (2014), the Compliance Board commented on "the regrettable difficulty, for public bodies, the public, and representatives of the press alike, of applying the administrative function exclusion." *Id*. at 113. As noted there, the Compliance Board had studied the issue in 2005. *Id*., citing *Use of the Executive Function Exclusion under the Maryland Open Meetings Act - Study and Recommendations by the Open Meetings Compliance Board* (December, 2005). One confusing aspect of

proceed on the assumption that the Act applies. If the public body wants to treat the matter as "administrative" because the topic is confidential, the public body should instead analyze whether the meeting may be closed under the "exceptions" in the Act that permit closed-door discussions of certain topics. *See* Chapter 4.

Practice notes on the second step:

- A policy cannot be "administered" before the public body has adopted it. For example, a county council that had not yet adopted its position on legislation in the General Assembly could not claim that it was merely implementing that position when, before voting on the position, it held closed sessions to hire a lobbyist to advocate it. *See* 7 *OMCB Opinions* at 137.

- A public body is "administering" its bylaws when it elects its own officers under a bylaw requiring it to do so. *See* 9 *OMCB Opinions* at 9, 10 ("[T]his part of the test is met when a public body elects its own officers.").

- A discussion that begins as "administrative" in nature can easily stray into policy matters that may only be discussed in an open meeting. For that reason, many public bodies perform administrative functions in open meetings that satisfy the requirements for meetings subject to the Act. Otherwise, the discussion must be postponed until proper notice can be given.

---

the administrative function exclusion noted in the study was that the exclusion might also apply to discussions that fall within the "personnel matters" exception that permits a public body to close a meeting that is subject to the Act. *Id*., citing Study p. 6. *See also* Chapter 4, part A, below, of this Manual.