

## Chapter 2: Notice and Agendas

### **Chapter 2: For meetings subject to the Act, did the public body give “reasonable advance notice” and make an agenda available?**

(Index Topic 2)

**Chapter Summary:** The Act states the “public policy of the State that the public be provided with adequate notice of the time and location of meetings of public bodies, which shall be held in places reasonably accessible to individuals who would like to attend these meetings.” § 3-102(c). That policy is implemented by § 3-302, which requires public bodies to “give reasonable advance notice” before meeting in an open or closed session and addresses the form, content, and method of giving notice. The Compliance Board has observed that a “deficiency in one regard may sometimes be ameliorated by the public body’s extra efforts in another, as when a public body takes extra measures to publish a last-minute notice of an urgently-called meeting.” 8 *OMCB Opinions* 76, 80 (2012). Consistency is key: “[T]he public body must provide the public with a reliable and predictable way of getting accurate information, reasonably in advance, about when and where the public body will meet.” 12 *OMCB Opinions* 108, 110 (2018).

The Compliance Board has emphasized that “[t]he notice provisions of the Act are not merely technical; a meeting held without notice to the public is a secret meeting.” 8 *OMCB Opinions* at 79. The failure to give notice thus also means that the public body has violated the Act’s default requirement that public bodies “shall meet in open session.” See § 3-301.

Section 3-302 requires public bodies to retain a copy of their meeting notices. That requirement is discussed in Chapter 6 of this manual.

To figure out whether a public body gave proper notice, a person needs a copy of any notice that was posted online or published by other means, the date of the posting, and the date of the meeting. Also relevant might be the circumstances behind the scheduling of a meeting on short notice. Usually, the public body or its website, if it uses that means of giving notice, is the best source of this information.

The Act also requires public bodies to make an agenda available when they post notice, or, if the agenda has not been determined at the time of notice, to make the agenda

available as soon as practicable, but, for most bodies, at least 24 hours before the meeting. See § 3-302.1. A public body subject to § 3-307, which applies only to nineteen enumerated entities, must post an agenda to its website at least 48 hours before a meeting.

**A. *Timing – Did the public body post the notice “reasonably in advance” of the meeting?***

The Act states the policy that notice be “adequate,” § 3-102(c), and requires that “reasonable advance notice” be given. § 3-302(a). The Act does not specify how far in advance notice must be given; there is no requirement that notice be given “at least *X* days in advance.” The Compliance Board has explained:

As for timeliness, we have stated that “the touchstone of ‘reasonableness’ is whether a public body gives notice of a future meeting as soon as is practicable after it has fixed the date, time, and place of the meeting.” 5 *OMCB Opinions* 83, 84 (2006). A public body has not provided “reasonable advance notice” if it knew the deadline by which it needed to meet on a certain matter and delayed setting the date. 5 *OMCB Opinions* 139, 143 (2007). Put another way, when “a meeting is scheduled on short notice, as sometimes will be required by unexpected developments, the person responsible for scheduling [it] must provide the best public notice under the circumstances.” 1 *OMCB Opinions* 38, 39 (1993). For example, notice of a meeting one day in advance is insufficient when a public body could have anticipated the need for the meeting earlier. See 5 *OMCB Opinions* at 143.

8 *OMCB Opinions* at 80. Most of the Compliance Board’s timeliness opinions address allegations that a public body waited until the last minute to give notice. One complaint, however, alleged that the public body’s notice, posted in the Maryland Register four weeks in advance, was too early. See 8 *OMCB Opinions* 125, 125 (2013) (finding no violation).

The Compliance Board has approved standing website notices of regularly scheduled meetings (for example, “The Council meets on the third Wednesday of every month, at 3 p.m., in Room 12 at City Hall”), so long as they remain accurate. 9 *OMCB Opinions* 256, 257-58 (2015). Public bodies must also notify the public if the posted meeting has been canceled, 1 *OMCB Opinions* 186, 189-90 (1996), or if “some material element about the meeting – that is, its date, time, place, and closed or open status – changes,” 3 *OMCB Opinions* 85, 86 (2001).

The Board has found that last-minute notices given on a website alone and without any alert to the public to watch for short-notice meetings in certain circumstances do not constitute “reasonable advance notice” because that method is effective only for members of the public who happen to check the website shortly before the meeting. 9 *OMCB Opinions* 110, 115 (2014). For meetings held to address truly urgent matters, the

Compliance Board has suggested the use of “save-the-date” type notices when the meeting details will not be known until shortly beforehand. In 9 *OMCB Opinions* 125 (2014), the Board addressed the meetings of an entity that had to address urgent matters on short notice. Noting that “it can be hard for a public body’s staff to publish timely notice when the members have not yet decided on the date, time, and place of the meeting,” the Compliance Board advised:

Two methods, when used together, will often suffice. First, as soon as a public body knows that it will need to meet urgently, it might post that expectation on its website and alert the public to watch the website for details. At the same time, the public body might send that message by e-mail or through social media to the representatives of the press who follow its activities. Public bodies that often must meet on short notice might also develop a list of members of the public who want to receive such notices.

*Id.* at 126; *see also* 13 *OMCB Opinions* 39, 44-45 (2019) (suggesting that a county council use its website to alert the public to watch for notices of meetings called during the General Assembly’s session, when short notice is sometimes necessary, to consider the council’s positions on pending legislation). The Compliance Board itself has posted a notice on its webpage that it occasionally must meet on short notice during the General Assembly’s session to address questions about its position on pending legislation and that the public should check the website frequently during the General Assembly’s session.

A meeting should not be held on short notice if the matters are not urgent. The Compliance Board has advised that a public body has two options when it discovers, shortly before a meeting, that it has not given notice: “(1) if there is no emergency that must be addressed that day, it may postpone the meeting and give proper notice for a meeting at a later time; or, (2), if the meeting must be held that day, the public body may make good-faith efforts to reach its interested public by whatever method is likely to work.” 9 *OMCB Opinions* 199, 200 (2014). If the public body discovers at the meeting that notice was not given, it must adjourn the meeting and re-convene only after it has given adequate notice. 8 *OMCB Opinions* 188, 190 (2013). These principles apply whether or not a meeting is a “continuance” of an earlier one; the Compliance Board has advised that a public body that “continues” a meeting to a later time must give notice of that later time. *See, e.g.*, 16 *OMCB Opinions* 123, 125 (2022); 16 *OMCB Opinions* 77, 78 (2022); 5 *OMCB Opinions* 184, 186 (2007). Notice of a continuance is not adequate if only given orally at the meeting. *See* 8 *OMCB Opinions* at 82.

***B. Format and contents – Was the notice written, and did it contain the required information?***

Section 3-302(b) provides that notice must, “[w]henever reasonable,” be “in writing” and specify the “date, time, and place” of the meeting. As discussed in Chapter

6, the Act requires public bodies to retain a copy of each meeting notice for three years, so notice given electronically should be retrievable for at least that period. *See, e.g., 8 OMCB Opinions* 188, 190 (2013) (recommending that a public body’s staff print out a screenshot of the written notice and of any e-mailed notice given, record the date of the print-out, and retain it). When notice is given on a website or by social media, the public body should print out or save a screenshot. To establish the timeliness of notice given on a website, public bodies may also wish to document the posting date, whether by including it on the notice when space allows or by keeping a record in some other form.

Additionally, under § 3-302(b)(3), the notice must, “[w]henever reasonable” and “if appropriate,” “include a statement that a part or all of a meeting may be conducted in closed session.” Read in a vacuum, the provision seems to contemplate that a public body may post notice of an entirely closed session. However, if a meeting is subject to the Act, the public body may only close it after the members have voted in public to do so. *See* § 3-305(d) (spelling out the steps to be taken before a public body closes a meeting). Therefore, the Compliance Board has advised that the public body’s notice of a closed session must invite the public to an open meeting right before the anticipated closed session. *See, e.g., 8 OMCB Opinions* 150, 158 (2013) (suggesting that a public body convey in its notice for such a meeting that “The Board will meet in open session only for the purpose of voting to close its meeting to discuss matters that the Open Meetings Act permits it to discuss in closed session.”). A notice of an entirely closed session, when the session is subject to the Act, thus violates the Act. For an example of such a violation, see *Frazier v. McCarron*, 466 Md. 436, 442-44, 448 (2019), *reconsideration denied* (Jan. 23, 2020); *see also WSG Holdings, LLC v. Bowie*, 429 Md. 598, 625, n. 29 (2012) (“Clearly, notice of a public meeting cannot be effective where the notice itself closes the meeting.”) (citing *Cassidy v. Baltimore County Board of Appeals*, 218 Md. 418, 424 (1958)). For more information on the procedures for conducting a closed meeting, see Chapter 5.

The Act also does not address the question of whether public notices may include a request that people interested in attending contact the public body in advance. The Compliance Board has approved such requests as a way to ensure that the meeting place can accommodate the attendees. *See 9 OMCB Opinions* 206, 211 (2015).

The Compliance Board has addressed a few complaints that a public body’s website was difficult to navigate. Usually, the Compliance Board has declined to second-guess website design. *See, e.g., 13 OMCB Opinions* 27, 28 (2019) (stating that the Act does not require public bodies to publish notice on a website and also “does not micromanage the way in which a public body organizes its website when it does use it for posting notice”). However, problems can arise when a public body posts notice in multiple places on its website—for example, by an entry on a monthly calendar, by a standing notice on the public body’s general information page, and on a page dedicated to meeting notices and agendas—and then changes a meeting date in one place but not the others or does not provide complete information in any one place. *See, e.g., 10 OMCB Opinions* 22, 29

(2016) (“encourag[ing]” the public body “to include in its ‘Meetings’ information clear instructions on where the public can find meeting notices that contain all of the required information”); 14 *OMCB Opinions* 42, 44 (2020) (in addressing a school board’s website in detail, noting that “[s]ometimes, . . . a public body’s effort to give notice in a few places on its website results in confusion or inconsistency and, in the end, deficient notice”).

As discussed in D, below, the Act now requires public bodies to have an agenda for each meeting and to make it available. A public body that posts its agendas and notices in one combined document must be sure to include the items required by both § 3-302 and § 3-302.1.

***C. Methods of posting notice - Does the public body use methods that are reasonably likely to reach people who would be interested in attending its meetings?***

The Act gives public bodies considerable discretion on how to provide “reasonable advance notice.” Section 3-302(c) provides:

A public body may give the notice under this section as follows:

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

The Compliance Board has suggested that public bodies periodically revisit their choice of methods, because methods that once seemed adequate for a particular constituency might have become ineffective. *See* 9 *OMCB Opinions* 206, 209 (2015) (encouraging public bodies to “review their notice methods, to reasonably adapt them to the changing ways in which their interested public gets information, and, if possible, to use several methods”). The Compliance Board has also recognized that a method that might reach one public body’s interested public might not work for another public body. *See, e.g.,* 13 *OMCB Opinions* 9 (2019) (noting that website notices “are not always the most effective way (or even *an* effective way) for every public body to reach its own interested public”).

Consistency is also important. Thus, a change in method should be posted the usual way before that way is abandoned. In 11 *OMCB Opinions* 78, 82 (2017), the Compliance Board explained that “[a] hallmark of ‘reasonable’ notice under the Act is reasonable consistency as to the method used; notice is hardly effective if it does not appear in the place where the public expects to find it.” There, the Compliance Board found that the public body’s “apparent deviation from its usual method—its online calendar—violated the § 3-302 requirement of ‘reasonable advance notice,’ whether or not the [public body] had posted notice on its actual bulletin board.” *Id.* Also, a public body may not simply exclude some meetings from the notices that it posts on its website. *See, e.g., id.; see also* 12 *OMCB Opinions* 1, 1 (2018) (stating that “when a public body uses a calendar function for some meetings, it must post them all there,” and finding that a school board violated the Act by omitting its “work sessions” from its online meeting calendar). Likewise, a public body that uses its website to post meetings of its committees should use that method for all of its committees. *See* 8 *OMCB Opinions* 76, 83 (2012) (remarking on the appearance created by the “public body’s failure to employ its usual method of giving notice, particularly when that method is seemingly easy and efficient”).

*Practice notes on notice:*

- Members of public bodies can avoid unintentional violations of the Act by asking, at the outset of each meeting, how and when notice was provided to the public and by getting a clear understanding of which staff member has lead responsibility for doing that.
- Public bodies that create citizen task forces should, at the same time, assign lead administrative staff.
- Public bodies that might have to meet on an emergency basis should consider developing procedures and email notification lists to use in those emergencies.
- Copies of meeting notices must be retained, as discussed also in Chapter 6, so notices given online or through social media should be saved or printed out, with a notation of the posting date.

**D. Agenda Requirement – Has the public body made an agenda available within the applicable deadlines?**

The Act now requires public bodies to make agendas available before their meetings.<sup>19</sup> With an exception for emergency meetings, § 3-302.1 requires: “[B]efore meeting in an open session, a public body shall make available to the public an agenda” that (1) contains “known items of business or topics to be discussed at the portion of the meeting that is open” and (2) indicates “whether the public body expects to close any portion of the meeting” under § 3-305. A public body subject to § 3-307 must also, “[t]o the extent practicable,” include “the expected time at which the public body intends to adjourn the open session to a closed session.” Public bodies are not required to make available any information in the agenda regarding the subject matter of the closed portion of the meeting. § 3-302.1(a), (c).

The Act provides public bodies some leeway to add items to an agenda after the agenda has been made available to the public. *See* § 3-302.1(e) (“Nothing in this section may be construed to prevent a public body from altering the agenda of a meeting after the agenda has been made available to the public.”); § 3-307(j) (same); *see also* 11 *OMCB Opinions* 18 (2017) (applying § 3-302.1(e)). However, because “it is a violation of the Act to make available an agenda that omits a known item of business,” 14 *OMCB Opinions* 102, 102 (2020), the Act does not permit a public body to add an item to an agenda at the last minute when the item was known to the public body when it first made the agenda available. For example, in 12 *OMCB Opinions* 21 (2018), the Compliance Board found that a town council had violated the Act by omitting a known item of business from its agenda when some council members, but not the staff who prepared the agenda, knew that the item would be discussed. *Id.* at 21-22. The Compliance Board suggested: “Such violations can be avoided by establishing a routine by which the presiding officer or other officer reviews agendas before they are posted, as each public body, not its staff, is answerable for compliance with the Act.” *Id.* at 22.

The Compliance Board has also addressed what the term “item[] of business” encompasses. *See* 15 *OMCB Opinions* 1, 2-4 (2021). There, the Compliance Board concluded that the question of whether to adopt a bill on an “emergency basis,” such that the bill would become effective upon its first reading, was a separate item from the item that the agenda had described as the first reading of the bill, and that the public body had violated § 3-302.1 by failing to include the issue on the agenda. *Id.* at 3-4. The Compliance Board noted that the bill that had been posted before the meeting did not contain any reference to an effective date, immediate or otherwise, that the town clerk had recommended in materials posted at the time the agenda was posted that the bill could be

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<sup>19</sup> Public bodies subject to § 3-307 must also make available “a summary of any finalized documents, written testimony from the public, and other materials that the public body will vote on at the open meeting.” § 3-307(b)(1). The subject bodies need not disclose information that is protected by the Public Information Act. 2022 Md. Laws, ch. 346, § 2.

adopted on an emergency basis, and that, under the town’s charter, the adoption of a bill on an emergency basis required a separate motion, vote, and approval process. *Id.* at 1. After citing the legislative history of § 3-302.1 and referring to its “goal that members of the public be provided information that will help them decide whether to attend a particular meeting,” the Compliance Board further noted that a member of the public who was interested in the bill would have wanted to know that the council would consider not only the bill itself but also whether to make it effective that day, without the usual second reading and meeting. *Id.* at 3-4. The Compliance Board further decided that the items to be addressed must be listed in the agenda itself, not simply in a memorandum included in the agenda packet. 15 *OMCB Opinions* at 4.

The deadline for making an agenda available depends on when the agenda items or topics have been determined. If they have been determined at the time notice is given, the public body is to make the agenda available then. Otherwise, the public body must make the agenda available as soon as practicable, but, for most bodies, at least 24 hours before the meeting. § 3-302.1(a)(2), (3). A public body subject to § 3-307, which applies only to nineteen enumerated entities, must post an agenda on its website 48 hours before a meeting. Section 1-302(c) governs the calculation of time for purposes of the Act. *See* 15 *OMCB Opinions* at 2 (providing guidance on calculating the 24-hour period).

Section 3-302.1 gives public bodies flexibility as to the methods for making the agenda available. A public body may make the agenda available by any of the methods authorized for giving notice under § 3-302(c). Also, the “method that a public body uses for making available an agenda may be different from the method a public body uses for giving notice.” § 3-302.1(d). Public bodies subject to § 3-307, however, must post agendas on their websites. *See* § 3-307(b).

There is one exception to the requirement that an agenda be provided before a meeting. If a public body cannot meet the deadlines because it scheduled the meeting “in response to an emergency, a natural disaster, or any other unanticipated situation,” the public body must make the agenda available, on request, within a reasonable time after the meeting occurs. § 3-302.1(b). Public bodies subject to § 3-307, however, must still make an agenda available “as far in advance of the meeting as practicable” in the case of a meeting “being held due to an emergency, a natural disaster, or any other unanticipated situation”). § 3-307(b)(1)(ii).