Chapter 1:
Applicability of the Act

Chapter One: When does the Act apply?

(Index Topic 1)

Chapter Summary: To be subject to the Act, an entity must fall within the Act's definition of a "public body." Then, 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, and they must be performing one of the "functions" subject to the Act. Determining whether the Act applies to a particular gathering is thus a three-step process.[1] Each step, in turn, has multiple elements, some with multiple sub-parts. 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 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 needs first 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

[1] For an illustration of the Compliance Board's application of the three-step process, see 6 *OMCB Opinions* 21 (2010).

the five sets of principles discussed below. If an entity does not meet the Act's definition of "public body," the Act does not apply to that entity's gatherings.

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, 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* 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) ("agency staff meetings are not generally subject to the Open Meetings Act, because staff members are not a 'public body'"); 7 *OMCB Opinions* 284 (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 (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 (2015) (mediation session held by Department of Natural Resources employees for lease applicant and protestants was not a gathering of a "public body").

Next, the entity has to 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)(2). 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 Op. Att'y Gen. 90, 92 (1995).

The list of instruments was amended in 2013 to add memoranda of understanding ("MOUs") and master agreements signed by the Department of Education and a majority of the county boards of education. § 3-101(h)(ii)(4). As to other MOUs, 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 (2013) ("the Act should not be interpreted to allow a parent public body to sidestep the Act by creating committees through MOUs with private entities").

Questions arise as to when a committee of a public body meets the "created by law" test for a public body. The test is clearly met when the committee is identified by name in the public body's bylaws, resolutions, or rules, as when a bylaw provision states, "There shall be a Finance Committee." Less clear is the status of a committee created under the authority granted by a bylaw, resolution, or rule that does not itself create the committee. The answer might depend on the degree to which the provision identifies the function of the committee—that is, the more precisely the provision identifies the function of a committee, the more likely it is that the committee will be deemed a public body. A case decided by the Court of Appeals and later applications of the definition by the Compliance Board give some general guidance on where that dividing line might fall.

In *Avara v. The Baltimore News American*, 292 Md. 543 (1982), 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." The Court noted that such a committee had been appointed in every year since 1976 and that it was "likely" that a similar committee would be appointed in 1982. *Id.* at 547. 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, though lawfully transacting public business and exercising legislative or advisory functions, were nevertheless merely authorized but not required to exist." *Id*. at 550-51. 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*. at 551.

Likewise, the Compliance Board has deemed a committee to be a "public body" when a law, regulation, or bylaw has required the creation of an entity to perform certain tasks. *See* 5 *OMCB Opinions* 189 (2007) (panel "established in accordance with a statute that required the Critical Area Commission to appoint a panel of 5 of its members to conduct a public hearing on a proposal to amend a local critical area program"); 7 *OMCB Opinions* 21, 27 (2010) (boundary study committee appointed by an assistant superintendent in accordance with Board of Education policy requiring the appointment of such committees to advise on school districting); 7 *OMCB Opinions* 176, 184 (2011) (committee mandated by parent body's resolution to perform certain functions); 10 *OMCB Opinions* 117 (2016) (development corporation that city created as private entity to perform city function). By contrast, the Compliance Board has found that the definition was not

met by a library board's finance committee that had been appointed pursuant to the board president's broad power, under the bylaws, to appoint special committees and the board's power to appoint "such standing committees as the [b]oard may desire." 7 *OMCB Opinions* 105 (2011). Unlike the provisions in *Avara*, the boundary committee matter, and the Critical Area Commission matter, the bylaws neither described the particular committee nor delegated particular functions to a committee. The Compliance Board found that the committee had not been created by the bylaws.

Another question about committees is whether a committee that the parent body creates by an "informal consensus," as opposed to a formal resolution, meets the "created by law" test. The Compliance Board has concluded that a committee created informally does not meet this prong. *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."). Nonetheless, a public body that creates a committee by consensus has not necessarily put that committee beyond the reach of the Act. The Compliance Board has cautioned that a public body's formal delegation of duties to an informally-created committee "comes very close to making that group a public body for that purpose." *See* 9 *OMCB Opinions* 83, 85 (2013). As discussed below in ¶ 5, the courts, too, have been unwilling to promote form over function when considering whether an entity is a "public body." *See, e.g., Avara,* 292 Md. 543.

2. The second test – for State entities - members appointed by the Governor or someone subject to his 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)

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 subject to the policy direction" of the Governor or the 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). 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 (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. The police captain, a merit system employee, was supervised by the deputy to the police chief, who had been appointed by the county executive. 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. 9 *OMCB Opinions* 279 (2015).

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 an Executive Branch public body whose members were appointed by the Governor *or* by someone subject to that entity's policy direction, with 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 not employed by the State, that committee will be a "public body." The test thus brings under the Act the committees that are made by State agencies headed by boards, rather than by a department secretary. This definition of "public body" was added in 2009 with the enactment of House Bill 1194.

4. The exclusions – entities that are specifically excluded from, or included in, the definition

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, and that other entities expressly are subject to the Act. *See* § 3-101(h)(2), (3). Among the specific exclusions are certain subcommittees, judicial nominating commissions, grand juries, petit juries, courts (except when they are engaged in rulemaking), the Governor's Cabinet, and a local counterpart to the Governor's Cabinet. § 3-101(h)(3). One entity, the Maryland School for the Blind, is expressly identified as a public body. § 3-101(h)(2)(iii).

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.

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

The Maryland 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, the entity performs a purely public function, and 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 (2006). The fact that a private entity receives or administers government funds is not by itself enough. 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 the city attorney, at the mayor's direction, to operate the city's zoo, the Court of Special Appeals 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 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 id*. at 252-54 (discussing cases).

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 only applies 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 Op. Att'y Gen. 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").

The Act defines the verb to "meet" as "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). So, a public body's gathering will be a "meeting" under the Act if three elements are met: (1) a quorum of its members is present; (2) the gathering is convened for the "consideration or transaction" of public business; and (3) when the gathering occurred by chance or social reasons, the quorum nonetheless used it to discuss public business.

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, whether the group was discussing the public body's business, and how many members were present for that discussion. If a quorum was not "meeting," the Act does not apply.

1. The presence of a quorum

This element raises the questions of "what is a quorum?" and "can a quorum be met when the members are not physically present?"

A "quorum" is "a majority of the members of a public body" or else "the number of members that the law requires." § 3-101(k). For example, if eight members of a 15-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 be defined by regulations and executive orders. However, the Compliance Board has concluded that a bylaw, by itself, is not "other law" that would exempt a public body from the Act's definition of a quorum as the majority of the members. *See* 9 *OMCB Opinions* 307, 310 (2015).

As for physical presence, a member who participates in a meeting by telephone will be deemed present. *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"). A discussion conducted entirely by teleconference will thus meet this element when a quorum is on the call.

The presence of a quorum for purposes of the Act gets murky when the members are not simultaneously in one place or on one conference call but nonetheless seem able to discuss public business as a group. The Compliance Board has often addressed complaints that a public body reached a decision through e-mails, separately-held telephone calls, or other modes of communication outside of a meeting of a quorum of the members. Usually, the Act's definition of a "meeting" to require the presence of a quorum has meant that the Act does not apply to sequential or written communications among the members. The Compliance Board reached that usual result in 7 *OMCB Opinions* 193 (2011). There, the board of commissioners seemed to have reversed itself on a decision without having deliberated in public, and the complainant inferred that they had met secretly. In fact, as explained to the Compliance Board, the commissioners had not "met"; they had reached the consensus "through sequential and one-on-one communications" with the board president, "conducted in person, by e-mail, and by telephone." *Id.* Nonetheless, the Compliance Board cautioned against "this way of proceeding." *Id*. at 194. *See also* 8 *OMCB Opinions* 38, 40 (2012) ("when a public body . . . decides [a] matter, without discussion, on the basis of a lengthy motion, the public body should not be startled when a member of the public infers that every aspect of the matter was discussed and decided in secret.").

The Compliance Board has also cautioned that courts might look beyond the quorum requirement to determine whether, as a practical matter, a quorum of the public body was in on the discussion. In 8 *OMCB Opinions* 56 (2012), a county board heard a land-use appeal in open session, announced that it would take the matter under advisement, and then, at a subsequent open meeting, adopted without discussion a written statement of its findings and conclusions. The board's counsel explained that, as was the custom, he had prepared the statement and taken it to each member separately, and that the members had not discussed the document as a group. On those facts, the Compliance Board concluded that no "meeting" had occurred—but it also advised the public body of the risks of such practices:

> We are reluctant . . . to give the impression that the quorum requirement provides public bodies with an absolute defense to an alleged Open Meetings Act violation. In fact, a public body risks violating the Act by manipulating a quorum so as to avoid the Act's mandates. The Court of Appeals addressed such a violation in *Community and Labor United for Baltimore Charter Committee* (*"C.L.U.B."*) *v. Baltimore City Board of Elections*, 377 Md. 183 (2003). There, the City Council President closed a meeting without a vote after she ascertained that a quorum of the councilmembers was not present. *Id*. at 190-91. The Court held that the Council had violated the Act, and, further, that it had done so willfully. *Id*. at 196-97. The *C.L.U.B.* Court thus concluded that a public body, acting willfully to evade the Act, may be subject to the Act even in the absence of an actual quorum.[2]

Id. at 59. [3]

In 9 *OMCB Opinions* 283 (2015), the Compliance Board held that a county board of appeals violated the Act when it abruptly called a ten-minute recess in the middle of detailed deliberations on a special exception application and then returned to open session

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[2] The Compliance Board further explained that courts in other states have given the term "walking quorum" to a public body's use of the quorum requirement to avoid deliberating in public. *See, e.g., Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 706-707 (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") (citations and some internal punctuation omitted); *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, 471-478 (W.D. Tex. 2001) (reviewing cases on public bodies' use of a quorum requirement to avoid public deliberations). *See also State ex. rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St. 3d 540, 668 N.E.2d 903 (Ohio 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.").

[3] *C.L.U.B.* implicitly qualifies the Court's earlier dicta in *City of College Park v. Cotter*, 309 Md. 573 (1987). In *Cotter*, the Court of Appeals 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 592-94. 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.*, such meetings, if designed to circumvent the Act, could be subject to challenge. *See also* fn. 4.

with a complete resolution of the matter. The board had recessed after its counsel suggested a break to "let your thoughts settle down," and all of the members had left the meeting room together. 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.* at 285. 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 opinion states, "will be the totality of the circumstances, including whether the deliberations have continued during the break." *Id*.[4]

Questions arise as to whether the exchange of electronic communications among a quorum means that a quorum is present. This Office opined in 1996 that sequential e-mail communications, which it then analogized to the exchange of information through regular mail, are not subject to the Act. *See* 81 Op. Att'y Gen. 140, 142 (1996). That conclusion, reached before the development of most forms of social media and easy texting, should not be construed to apply automatically to all forms of electronic communication or even to all e-mail communications. In fact, the opinion states that the "result would be different" if the members were able to "use e-mail for 'real time' simultaneous interchange." *Id*. at 143-44. Under the functional approach taken by the Court in *C.L.U.B.,* an online discussion in which a quorum of the public body participates on a near-simultaneous basis might well be deemed to meet this element of the "meeting" test.[5]

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[4] 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 Court of Appeals 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. Noting that "it is true that a quorum is technically necessary to trigger the Act," the circuit court nonetheless examined whether, from the "totality of the circumstances," the committee had violated the Act. The circuit court found that the committee had "intentionally avoid[ed] holding a meeting" of a quorum. 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 (quoting the circuit court's opinion). The extent to which the Court adopted the circuit court's reasoning is unclear. *See* 94 Op. Att'y Gen. 161 (2009).

[5] 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

The Compliance Board has advised public bodies about the risks of using the "reply all" and forward functions in email communications among the members of a public body. *See* 9 *OMCB Opinions* 259, 264 (2015). There, the Compliance Board quoted with approval the advice of Wisconsin's Attorney General on the use of electronic communications by entities subject to that state's open meetings law. The advice included the following 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." *Id.* (quoting 2005 Wisc. AG LEXIS 29, 2-4 (Wisc. AG 2005)) (internal quotation marks and citation omitted).

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

3. 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, 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 (2011). The same is true of a "retreat." *See, e.g.*, 3 *OMCB Opinions* 122, 124 (2001).

Also irrelevant is the fact that the quorum does not make a decision or take an action. The Court of Appeals has said that a public body's "consideration" of public business includes all phases of its deliberation, not just the decision,[6] and the Compliance Board has

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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."). A survey of the 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: 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.

[6] *See, e.g.*, *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) ("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.").

explained that receiving a briefing on public business is part of the process of considering it. *See* 7 *OMCB Opinions* 85, 87 (2011). 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 (2007). Likewise, for example, 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* 269.

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 to conduct that entity's business. 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 Court 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 81. 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. The council members neither joined the discussion nor 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 Court of Special Appeals 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); *see also* 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. *Id*. 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 (2012).

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.
- Near-simultaneous electronic discussions among a quorum raise questions as to whether the members are "meeting" as a quorum, and those discussions should be avoided.
- 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 also might not provide a defense to a public body that has intentionally evaded the Act.

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 zoning 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 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. If a meeting does not fall within an express exclusion, then the Act applies. *See also* 78 Op. Att'y Gen. 275, 278, n. 3 (1993) (stating, in effect, 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").

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. 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 his "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)(4).

The advisory function is usually performed by task forces and commissions that have been appointed to study an issue and report back. For example, 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).

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

This definition extends to 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).

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

This provision also applies more broadly 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.

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 Court of Appeals 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 Association 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 that 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 Op. Att'y Gen. 55, 68-70 (2015) (discussing the history of the provision). Other land use cases in which Open Meetings Act issues were raised include *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. The "quasi-judicial function" also includes the Compliance Board's determination of an open meetings complaint under the Act. § 3-101(i).

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 Court of Special Appeals, 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 Op. Att'y Gen. 152, 155-56 (2010); *see also Dyer v. Board of Education*, 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).

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, 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: "'there [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, 136 (2011) (quoting 5 *OMCB Opinions* 42, 44 (2006)).

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), or a medical review panel applies regulations to the facts of the cases before it. 7 *OMCB Opinions* 250, 254 (2011). Another generalization is that the development of new policy does not qualify as "administrative." *See id*.; *see also* 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").[7]

The Compliance Board has repeatedly commented on the difficulty of applying the administrative function exclusion with confidence.[8] If in doubt, the public body should 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.

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[7] The Compliance Board has given these examples of how it has applied the administrative exclusion:

> 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").

9 *OMCB Opinions* 110, 112-) 13 (2014). For examples of administrative, and non-administrative, functions performed by a board of county Commissioners, see 7 *OMCB Opinions* 225 (2011).

[8] 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 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* fn. 10, above, and Chapter 4, part A, below, of this manual.

Practice notes on the second step:

- A policy that has not yet been adopted is not susceptible to being "administered." 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. *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 ("this 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.