

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 sets the requirement that public bodies “give reasonable advance notice” before meeting in an open or closed session and then 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). The Compliance Board has also 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.” *Id.* 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, below 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 is the best source of this information.

In 2016, the Act was amended to require public bodies to make an agenda available when they post notice, or, if the agenda has not been determined then, as soon as practicable, but at least 24 hours before the meeting. *See* § 3-302.1.

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 posted notice too early. *See* 8 *OMCB Opinions* 125 (2013).

The Compliance Board has approved standing website notices of regularly scheduled meetings (“The Council meets on the third Wednesday of every month, at 3 p.m., in Room 12 at City Hall”). Public bodies must also post cancellation notices, 1 *OMCB Opinions* 183, 189 (1996), and changes to the required information. 3 *OMCB Opinions* 85, 87 (2001).

The Board has found that last-minute notices given on a website alone do not constitute “reasonable advance notice” because that method is effective only for members of the public who happened to check the website shortly before the meeting. 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. The Compliance Board itself has posted a notice on its webpage that it occasionally must meet on short notice during the General Assembly 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 (2015). 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. 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 different date must give notice of that date. *See, e.g., 5 OMCB Opinions* 184, 186 (2007).

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

Section 3-302(b) provides that notice must, “whenever reasonable,” be “written” and specify the “date, time and place” of the meeting. When notice is given on a website, the public body should print out or save a screenshot. As discussed in Chapter 6, the Act requires public bodies to retain a copy of each meeting notice for one year, and more than one public body has had trouble retrieving a notice that was no longer posted. *See, e.g., 8 OMCB Opinions* 188, 189-90 (2013). To establish the timeliness of notice given on a website, public bodies may also wish to include the posting date on the notice.

Additionally, under § 3-302(b)(3), the notice must, “whenever reasonable” and “if appropriate,” “include a statement that a part or all of a meeting may be conducted in closed session.” Read by itself, 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, it may only be closed after the members have voted in public to do so. *See* § 3-305(d). The Compliance Board has, therefore, 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) (approving the public body’s notice 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.”).

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, 209 (2015).

As discussed in D, below, the Act now requires public bodies to have an agenda for each meeting and to make it available.

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 Web site 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”). Consistency is also important; a change in method should be posted the usual way before that way is abandoned. And 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, and screenshots of notices given online should be printed out, with a notation of the posting date.

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

Formerly, the Act did not require public bodies to either create or produce agendas before their meetings. That changed on October 1, 2016, with the enactment of § 3-302.1.

With one exception, the new provision requires: “Before meeting in an open session, the public body must 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 GP § 3-305. Public bodies are not required to make available any information in the agenda regarding the subject matter of the closed portion of the meeting. GP § 3-302.1 (a), (c). Further, “A public body is not prevented from altering the agenda of a meeting after the agenda has been made available to the public.” GP § 3-302.1(e).

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 no later than 24 hours before the meeting. GP § 3-302.1 (a)(2), (3).

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 GP § 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.” GP § 3-302.1 (d).

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. GP § 3-302.1(b).