

## Chapter 4: Permissibility of Closed Sessions

### Chapter 4: Will the discussion fall within one of the 14 “exceptions” that permit the public body to exclude the public?

(Index Topic 4)

**Chapter summary:** When a public body holds a meeting subject to the Act, the meeting must be open to the public unless the topic of discussion falls within one of the fourteen exceptions that allow a public body to exclude the public. *See* §§ 3-301, 3-305. Before closing an open meeting under one of the statutory exceptions, the public body must disclose the particular exception that permits the closed session. Then, in the closed session, the attendees may discuss only matters within the scope of that exception. § 3-305(b), (d); *see also* 7 *OMCB Opinions* 125, 127 (2011) (“discussions at closed meetings must fall within the scope of the exception claimed by the public body in advance”).

For the most part, the decision to invoke an exception to close a meeting is discretionary. Although other laws, such as medical privacy laws, might require a public body to discuss a topic in a closed session, the Act itself does not mandate closed sessions; instead, it provides that the public body “may” meet in closed session to discuss an excepted topic. § 3-305(b). As noted below, two exceptions - the procurement and public security exceptions, may only be invoked after the public body finds that a public discussion of the matter would cause certain types of harm.

The Act does *not* authorize public bodies to close meetings for discussions that fall outside of the exceptions. *See* § 3-305(b) (providing that a public body may close a meeting “only” to discuss one of the fourteen topics). Although the Act once permitted public bodies to close a meeting for “an exceptional reason” that was “so compelling” as to override the public interest in open meetings, that exception was repealed in 1991. *See* 1991 Laws of Md. ch. 655. The exceptions now reflect the General Assembly’s efforts to balance the public’s need to know with public bodies’ need to address certain specific topics in private. A local government with home rule powers may enact an open meetings ordinance with fewer exceptions—that is, a law that more stringently requires openness—but it may not add exceptions. *See* § 3-105 (“Whenever [the Act] and another law that

relates to meetings of public bodies conflict, [the Act] applies unless the other law is more stringent.”).

This chapter discusses the scope of the fourteen exceptions, which, under the Act, must be “strictly construed in favor of open meetings.” § 3-305(a). The exceptions should also be read in light of the stated policy of the Act that public bodies’ meetings are to be open “except in special and appropriate circumstances.” *See* § 3-102(c).

It is important to note that no exception authorizes a closed session unless the public body has disclosed its reliance on the exception *before* the closed session. Put another way, if the public body has not cited the exception before it excludes the public, the exception does not apply. The preconditions that the Act places on closing a session—that the presiding officer make written disclosures about the upcoming session and conduct a motion on a vote to close—are discussed in Chapter 5, as are the disclosures that must be made after a closed meeting and the members’ duty to confine the discussion to the matters disclosed on the closing statement.

To figure out whether a closed-session discussion fell within an exception, a person should gather the public body’s written disclosures about the session, as well as any other facts that have emerged about it. The Compliance Board’s opinions on each exception can be found under Topic 4 in the Index, in the order in which they appear here and in the Act.

#### ***A. The “personnel matters” exception: § 3-305(b)(1)***

This exception allows a public body to close a meeting to discuss various personnel actions with regard to, or the evaluation of, “an appointee, employee, or official over whom it has jurisdiction” or “any other personnel matter that affects one or more specific individuals.” The Compliance Board has explained that the discussion must involve individual employees, as opposed to an entire class of employees. *See, e.g., 7 OMCB Opinions* 131, 134 (2011).

Similarly, the Compliance Board has explained that a discussion about the “‘elimination of a position,’ while it is vacant, likely involves the setting of policy, rather than the discussion of information specific to a particular individual.” *7 OMCB Opinions* 216, 220 (2011). The discussion about the elimination of a position or department must be open “[e]ven where the discussion involves a position held by so few employees that everyone knows whose positions are being discussed, . . . unless it involves the performance or other attributes of those individual employees.” *3 OMCB Opinions* 335, 337 (2003). This exception thus “does not apply where anyone in the position would be affected by the action being considered.” *Id.* It also does not extend to policy issues such as the method of making the appointment. *See, e.g., 3 OMCB Opinions* 67, 69 (2000).

A discussion of another entity's employee, appointee, or official would not fall within the exception unless the public body was considering appointing or employing that individual. *See, e.g., 9 OMCB Opinions* 132, 136 (2014) (“[A] discussion that involves a vendor’s performance of its contract to supply people to provide services would likely exceed the exception.”).

The Compliance Board has found that some discussions about particular employees or appointees also fall within the administrative exclusion. *See* notes 7 and 8 in Chapter 1. In that case, the Act would not apply, with exception of the disclosure requirements applicable when a public body closes an open meeting to address administrative matters. *See* § 3-104. If in doubt, the public body should proceed on the assumption that the Act applies, for multiple practical reasons: the courts have not addressed this point, so the law is not settled; a public body that convenes behind closed doors to address administrative matters invites suspicion that its members are secretly conducting more substantive business; the disclosure requirements that attach to meetings closed under the Act give the public some assurance that the closed session is legal and some information about it; and, though the Act’s requirement that public bodies prepare minutes is regarded by some as a nuisance and a reason to treat a discussion as “administrative,” memorializing the events of a meeting is one of the basics of efficient meetings practices.

***B. The “privacy or reputation” exception: § 3-305(b)(2)***

This exception allows a public body to close a meeting to “protect the privacy or reputation of an individual with respect to a matter that is not related to public business.” The Compliance Board has seldom addressed it, probably because most discussions about a person’s private matters would not likely relate to public business, and many others would fall, instead, into the personnel exception. In *9 OMCB Opinions* 71 (2013), a university board cited the exception as a basis for closing a meeting to discuss possible honorees. The Compliance Board found that the exception applied to the discussion of “the personal and non-University related reputations of [the] potential honorees.” *Id.* at 77. A discussion of public information about an individual would not fall within the exception, as the closed session would not be necessary to “protect” that information. The Compliance Board has suggested that a discussion about honorees’ personal attributes might also fall within the exception for the discussion of personnel and appointees. *8 OMCB Opinions* 166, 167-68 (2013).

***C. The “real property acquisition” exception: § 3-305(b)(3)***

This exception allows a public body to close a meeting to “consider the acquisition of real property for a public purpose and matters directly related to the acquisition.” Within the exception are discussions about acquiring interests in real property, whether by

purchase, lease, or easement. *See, e.g., 7 OMCB Opinions 225, 233 (2011) (easement).* The purpose of the exception is to protect the public body's bargaining power.

The exception does not extend to discussions about selling or renting out the public body's own property. *See, e.g., 9 OMCB Opinions 29, 34 (2013) ("Th[e] exception does not apply to discussions about real property the public body already owns.")*. It also does not apply to acquisitions of personal property. *See 1 OMCB Opinions 73, 77 (1994) (council's discussion about selling the city's junk-grade cars did not fall within the exception, because it involved neither an acquisition nor real property).*

In the one reported case on the application of the exception, the Court of Appeals held that the exception applied to a closed meeting at which a board of town aldermen voted to condemn some land for a town parking garage. The Court held that the exception permitted the aldermen to discuss and vote on the matter, an action that the Court deemed legislative in nature. The Court emphasized the evidence that the aldermen had held multiple public hearings on the matter and had included the garage in the budget. After reviewing Open Meetings Act cases in which public bodies had clearly intended to evade the Act, the Court noted that "no such evasive devices have been exploited by the Aldermen in a very public campaign to construct a new parking deck." *J.P. Delphey Ltd. P'ship v. Mayor & City of Frederick*, 396 Md. 180, 201 (2006).<sup>1</sup>

#### **D. The "business location" exception: § 3-305(b)(4)**

This exception allows a public body to close a meeting to "consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State." The Compliance Board has noted that the General Assembly added the exception on the basis of its "understanding that some businesses might be deterred from making proposals about relocation, expansion, or retention of an existing facility if all such

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<sup>1</sup> The *Delphey* opinion adds a little uncertainty to the application of § 3-105, which requires that, when the Act and "another law that relates to meetings of public bodies conflict, [the Act] applies unless the other law is more stringent." The Court found that the real property exception, which the Court construed to permit the aldermen to vote on the real estate matter in closed session, conflicted with Article 23A, § 8 (now § 4-104 of the Land Use Article), which prohibits municipal legislative bodies from adopting ordinances and resolutions in closed sessions. 396 Md. at 198-99. Under § 3-305, it would seem that Article 23A, § 5, as the more stringent provision, would have taken precedence. However, without mentioning § 3-105 (then § 10-504 of the State Government Article), the Court applied the common-law canon of statutory construction that resolves conflicts between statutes by preferring the more specific provision. The Court then decided that the real property acquisition exception, as the more specific provision on the topic under discussion, prevailed. *Id.* Nonetheless, the opinion contains no indication that the Court intended to modify *City of College Park v. Cotter*, 309 Md. 573 (1987), (see fn. 3 in Chapter 1), and the Court's application of § 3-105 in *Cotter* is probably still good law. *See* 94 Op. Att'y Gen. 161, 172, n. 20 (2009) (noting that neither party in *Delphey* had "focus[ed] on" the provision in their briefs).

discussions were open to public view.” 7 *OMCB Opinions* 148, 159-63 (2011) (summarizing the prior Compliance Board opinions on the exception). The Compliance Board therefore has interpreted the exception “to address the business’s interest in protecting its own identity and information,” *id.* at 163, and not to apply to discussions of information that does not belong to the business or plans that the business itself has disclosed in earlier public meetings. *See* 9 *OMCB Opinions* 15, 25 (2013).

Noting that the Act requires that the exceptions be construed strictly, the Compliance Board has stated that it does “not construe [§ 3-305(b)(4)] broadly to apply every time a property owner, its developer, or a coordinating agency seeks legislation to enable a land use or financing that might in turn generate proposals from new businesses.” *Id.* at 27. The Compliance Board thus does not construe the exception to extend to “steps in the legislative process.” *Id.*; *see also, e.g.,* 7 *OMCB Opinions* at 163 (declining to extend the exception to “closed-session discussions on generally applicable land-use legislation”).

***E. The “investment of public funds” exception: § 3-305(b)(5)***

This exception pertains to the use of public funds for investment purposes and not to the expenditure of public funds. The Compliance Board has instructed, generally, that the discussion must be “sufficiently related to a concrete investment possibility as to justify invoking the exception.” 4 *OMCB Opinions* 114, 117 (2005). The Compliance Board has declined to extend the exception to a public body’s discussions about whether to donate funds to a charity. 7 *OMCB Opinions* 195, 203-05 (2011). Also not within the exception was that public body’s meeting to approve a governing document of a corporation owned by the public body. *Id.* at 204-05.

After the funds have been invested, the public body must unseal the minutes of the closed meeting. § 3-306(c)(5).

***F. The “marketing of public securities” exception: § 3-305(b)(6)***

This exception shields a public body’s discussions about the terms on which to issue bonds. After the bonds have been issued, the public body must unseal the minutes of the closed meeting. § 3-306(c)(4).

The Compliance Board has construed this exception in a matter that involved the issuance of tax increment financing (“TIF”) bonds for which the sole buyer was to be the developer of the project that was to be financed through the bonds. *See* 9 *OMCB Opinions* at 27-28. The Compliance Board questioned whether that “market” of one would be adversely affected by public disclosure of the discussion and found that, in any event, discussions about the developer’s site plans and whether to approve legislation for the TIF

did not fall within the exception. *Id.* In another matter involving proposed tax increment financing, the Compliance Board concluded that the exception did not apply to a development corporation's discussion, at an early concept stage, about whether to recommend to a city council the adoption of ordinances that would lead to steps that would result in the city's marketing of TIF bonds. 10 *OMCB Opinions* 46 (2016). The Compliance Board found that the connection between the particular discussion and the actual marketing of securities was "too attenuated for the exception to apply." *Id.* at 49.

**G. The "legal advice" exception: § 3-305(a)(7)**

The original version of this exception was known as the "legal matters" exception and broadly permitted public bodies to "consult with counsel on a legal matter." The General Assembly narrowed the exception in 1991 to apply only when the public body wishes to "consult with counsel to obtain legal advice." See 1991 Md. Laws, ch. 655. Thus, as explained by the Compliance Board, the exception "is to be narrowly construed to cover only the interchange between the client public body and its lawyer in which the client seeks advice and the lawyer provides it." 1 *OMCB Opinions* 1, 5 (1992). The exception "does not allow for closed discussion among members of the public body merely because an issue has legal ramifications." 1 *OMCB Opinions* 53, 54 (1993).

The Compliance Board has concluded that a city council exceeded the "legal advice" exception when it discussed the need to have an ordinance drafted, "however brief and devoid of substantive discussion." 1 *OMCB Opinions* 145, 149 (1995). The Compliance Board instructed: "Once the advice has been sought and provided, the body must return to open session to discuss the policy implications of the advice it received or anything else about proposed legislation." *Id.* Likewise, two public bodies violated the Act when, in a joint closed session, the conversation "strayed away from advice from [counsel] and instead became a government-to-government discussion." See 1 *OMCB Opinions* at 55.

The exception does not apply to a discussion between the public body and anyone other than its lawyer. See 1 *OMCB Opinions* at 3. To close a session on the theory that the discussion will involve "legal advice," the public body must either consult with counsel to receive legal advice under this exception, or, under the exception provided by § 3-305(b)(8), consult with others about pending or potential litigation. Further, if the public body is communicating to the attorney information that would be protected by the attorney-client privilege, the "other law" exception, discussed in Part M below, would potentially apply to the communication.

### ***H. The “pending or potential litigation” exception: § 3-305(b)(8)***

This exception authorizes a public body to “consult with staff, consultants, or other individuals about pending or potential litigation.” Counsel need not be present; this exception contemplates, for example, that staff may brief the public body on the progress of settling a particular claim before suit is filed. *See, e.g., 1 OMCB Opinions* 38, 41 (1993).

The Compliance Board has explained that “potential” litigation means more than a theoretical possibility: “Strict construction of the “litigation” exception means that the exception may be invoked regarding “potential litigation” only when suit has been threatened or a realistic possibility of a suit is otherwise obvious.” *1 OMCB Opinions* 38, 41 (1993). For example, a public body “may not discuss budgetary or related matters in a closed session merely because someone speculates that a lawsuit is possible if funds are not spent for some purpose.” *Id.* By contrast, the exception does permit a public body to close a meeting to discuss options for settling a particular claim before suit is filed. *Id.*

As with the “legal advice” exception, the pending or potential litigation exception “may not be used as a pretext for engaging in closed discussions concerning an underlying policy issue that, though related to the litigation, can reasonably be discussed separately.” *7 OMCB Opinions* 148, 152 (2011); *see also 1 OMCB Opinions* 56, 60-61 (1994) (while city council could discuss in closed session possible ways to avert a lawsuit related to alleged zoning violation by a day care center, its discussion of alternative locations for the day care center exceeded the scope of the exception).

The exception does not apply after the “pending litigation” has been settled or otherwise concluded. *See 8 OMCB Opinions* 42, 44 (2012).

### ***I. The “collective bargaining” exception: § 3-305(b)(9)***

Under this exception, a public body may close a meeting to “conduct collective bargaining negotiations or consider matters that relate to the negotiations.” The Compliance Board has concluded that this exception applies to a public body’s discussions about whether to approve collective bargaining agreements that are not deemed final without that approval. *9 OMCB Opinions* 71, 76 (2013).

For other applications of this exception, *see 7 OMCB Opinions* 58, 61-62 (2009).

**J. The “public security” exception: § 3-305(b)(10)**

Added to the Act after 9/11, this conditional exception permits public bodies to close a meeting to discuss “public security, including (i) the deployment of fire and police services and staff; and (ii) the development and implementation of emergency plans.” Before closing a meeting under this exception, the public body must first “determine that public discussion would constitute a risk to the public or to public security.”

It is unclear whether the General Assembly intended this exception to shield discussions about the security of data systems that contain personal information. The Public Information Act, however, requires records custodians to “deny inspection of the part of a public record that contains information about the security of an information system,” § 4-338, and a discussion that would result in the disclosure of that information will potentially fall under the “other law” exception provided by § 3-305(b)(13), discussed in Part M, below of this Chapter.

The public body should document its “public risk” finding in the minutes of the public body’s proceedings on a motion to close a meeting under § 3-305(b)(14), in the presiding officer’s written statement of the reasons for closing the session, or both. For an application of this exception, see 7 *OMCB Opinions* 225, 229 (2011).

**K. The “scholastic, licensing, and qualifying examination” exception: § 3-305(b)(11)**

Boards that “prepare, administer, or grade a scholastic, licensing, or qualifying examination” may perform those duties in closed session.

The Compliance Board has applied this exception once, in a matter involving a county board of electrical examiners. See 1 *OMCB Opinions* 13 (1992).

**L. The “investigative proceeding regarding criminal conduct” exception: § 3-305(b)(12)**

A public body may close a session to “conduct or discuss an investigative proceeding on actual or possible criminal conduct.”

The Compliance Board found that this exception permitted a town council to close a session to discuss efforts to prompt the State prosecutor to conduct a criminal investigation of the mayor’s conduct. 1 *OMCB Opinions* 50 (2000). The town council in 5 *OMCB Opinions* 42 (2006) failed to properly invoke the exception before holding a



closed-door session with the State’s Attorney to discuss an investigation into the misappropriation of town funds. Had the town cited the exception as a basis for closing the meeting, the exception would have applied to the session. *Id.* at 45.

When a “criminal conduct” discussion involves the public body’s own employee, the discussion might also fall within the personnel exception discussed in Part A, above.

**M. The “other law” exception: § 3-305(b)(13)**

The Act contains a catch-all exception that permits a public body to close a meeting to “comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosure about a particular proceeding or matter.” Examples of laws that might prevent public disclosure are the State procurement laws, which govern the disclosure of offers and offerors’ names before bids or proposals are opened, *see* St. Fin. & Proc. § 13-210; federal laws that prevent the disclosure of various types of personal information, *see, e.g.*, Health Insurance Portability and Accountability Act (“HIPAA”), 42 U.S.C. § 1320d *et seq.* (2012); and provisions of the Public Information Act (“PIA”) that require a governmental unit to deny requests for certain records or types of information. *See* §§ 4-304 through 326 (specifying records that may not be inspected); §§ 4-328 through 355 (specifying the types of information that may not be inspected).

For example, as explained by the Compliance Board, a provision of the PIA, § 4-335,

prevents public disclosure of confidential commercial or financial information contained in documents possessed by a State agency. Therefore, under exception 13 of the Act, a public body is permitted to close a meeting when public discussion of that information would compromise its confidentiality.

8 *OMCB Opinions* 137, 142, n. 4 (2013). The Act itself prevents a public body from disclosing closed-session minutes until they are unsealed, so a public body may invoke this exception to meet in closed session to discuss those minutes. *See* 9 *OMCB Opinions* 160, 164 (2014) (“Public bodies must adopt minutes of their closed sessions, and those minutes, by law, ‘shall be sealed and may not be open to public inspection.’”).

**N. The “procurement” exception: § 3-305(b)(14)**

The procurement exception is conditional. It allows a public body to close a meeting to “discuss, before a contract is awarded or bids are opened, a matter directly related to a negotiating strategy or the contents of a bid or proposal”—but only “if public discussion or disclosure would adversely impact the ability of the public body to participate in the

competitive bidding or proposal process.” The Compliance Board has explained that “a public body may close a meeting to hear competing offerors’ presentations of their proposals, because that information, if made public, would give an advantage to the offerors who have not yet presented their proposals and would thereby compromise the process.” *See 7 OMCB Opinions 1, 3 (2010).*

Several criteria for the procurement exception have emerged from the Compliance Board’s opinions. First, the discussion must involve “a pending procurement or an impending procurement that is actually in the works.” *9 OMCB Opinions 132, 137 (2014).* This criterion is not met by “the possibility that a public body might decide to initiate a competitive procurement process in the future.” *Id.* A general discussion about procurement procedures thus exceeds the scope of the exception. *Id.*

Second, § 3-305(b)(14) protects the competitive procurement process and does not shield discussions about other contract matters. Thus, discussions about sole-source contracts and modifications of a contract that has already been awarded seldom fall within the exception. The Compliance Board has posited that the discussion might apply when a public body is awarding a sole-source “gap” contract for services needed while a competitive procurement for those services is pending, but only “if the public body can establish that the disclosure of the discussion about the gap contracts would affect the public body’s leverage in the competitive procurement.” *8 OMCB Opinions 8, 15 (2012).*

Third, the public body must find that public discussion of the matter would “adversely impact the ability of the public body to participate in the competitive bidding or proposal process.” § 3-305(b)(14). The public body should document that finding in the minutes of the public body’s proceedings on a motion to close a meeting under § 3-305(b)(14), in the presiding officer’s written statement of the reasons for closing the session, or in both. *See, e.g., 8 OMCB Opinions 63, 66 (2012).*

*Practice notes on the exceptions:*

- None of the exceptions applies to a meeting that was closed without a public vote to close and a closing statement (*see* Chapter 5).
- Ideally, the need for a closed session will be identified before the meeting, so that counsel (or, if counsel is not available, an officer, member, or employee who has taken training on the Act), can assess whether the discussion will fall within an exception.

- If, during the meeting, a member of the public body unexpectedly requests a closed session, the member must disclose enough information for the presiding officer to complete the closing statement and the other members to hold an informed vote on whether to exclude the public.
- If a public body expects to close part of a meeting, it must include that expectation on its meeting notice (*see* Chapter 2, Part B).
- If in doubt about whether an exception applies to the discussion that the public body expects to hold, the presiding officer may recess the meeting briefly in order to consult separately with counsel. Or, the presiding officer may call for a vote to close the meeting and disclose on a written closing statement that counsel's advice will be sought on the permissibility of the proposed closed session.