# Chapter 6:
# Meeting Documents

## Chapter 6: Did the public body prepare and retain the required documents and post its minutes online?

(Index Topic 6)

**Chapter summary**: Public bodies must prepare minutes "as soon as practicable" after they meet unless "live and archived video or audio streaming of the open session is available" or "the public body votes on legislation and the [members'] individual votes . . . are posted promptly on the Internet." § 3-306(b). Public bodies must retain meeting minutes and recordings for five years and, "to the extent practicable," must "post online the minutes or recordings" that they are required to retain. § 3-306(e). Meeting notices and closing statements for closed sessions must be retained for one year. *See* §§ 3-302, 3-305. Additionally, public bodies must make an agenda available before they meet. For that requirement, see Chapter 2, Part D.

Ordinarily, open-session minutes and closing statements should be produced for inspection, at no cost, when a member of the public comes to the public body's office and asks to see them, though the Compliance Board has recognized that a public body might not be able to grant immediate access to documents more than a year old. The Act does not require public bodies to send copies of minutes to members of the public at no charge.

The Act's documents requirements can pose challenges for unfunded task forces that have not been assigned administrative staff and do not have any members employed by the parent public body. *See, e.g.,* 8 *OMCB Opinions* 188, 189 (2013). The Compliance Board has "urge[d] officials and government bodies that create task forces to provide a level of staffing that will enable the members to do their work without violating the Act." *Id.*; *see also* 7 *OMCB Opinions* 121, 122-23 (2011) ("Where, as here, a local government structures an unfunded advisory committee of citizens as a public body subject to the Open Meetings Act, we suggest that measures be taken to provide that body with a repository for minutes and with a means of providing citizens with access to them.").

## *A. Written meeting notice*

The Act requires public bodies to issue their meeting notices "in writing" "[w]henever reasonable," § 3-302(b), and then to "keep a copy" for at least one year after the date of the meeting. § 3-302(d). Only rarely will a meeting occur on such an emergency basis that the only feasible way of giving notice is to telephone members of the press, and, even then, it is likely that the message could be conveyed "in writing" by social media or e-mail. So, the public body will almost always have a written notice to copy or print out and keep for a year.

Public bodies that post (and cancel) their meeting notices online have sometimes had trouble establishing later that they gave proper notice of a meeting. In one matter, for example, a city task force's only evidence that it gave notice online was the work orders that its staff sent to the city's website staff. *See* 8 *OMCB Opinions* 188, 189 (2013). The Compliance Board found that the task force had violated the one-year retention requirement and advised the task force to "ensure that staff print out a screenshot of the written notice and of any e-mailed notice given to the media, record the date of the print-out, and retain it." *Id*. at 190. In another matter, the Compliance Board found that a county committee had complied with the retention requirement after the county's information technology staff was able to recover a notice that the committee had posted online. 9 *OMCB Opinions* 175, 176 (2014).

Public bodies are not required to continue to post outdated notices on their websites. 9 *OMCB Opinions* 151, 154 (2014). They are also not required to include on the notice the date on which they posted it, but providing that information to the public might guard against suspicion that the public body posted the notice after the fact.[1]

For a discussion of the required content of meeting notices and the agenda requirement, see Chapter 2.

## *B. Meeting minutes – open and closed sessions*

Generally, "as soon as practicable after a public body meets, it shall have minutes of its session prepared." § 3-306(b)(1). There are two exceptions to that rule. First, a public body need not prepare minutes for an open session if "live and archived video or audio

[1] As explained in 6 *OMCB Opinions* 164, 167 (2009), the Compliance Board recommended, in its 2008 annual report to the Governor and General Assembly, "legislation that would have required meeting notices provided on a website reflect the date the notice was posted." *See* Sixteenth Annual Report of the Open Meetings Compliance Board, pp. 5-6 (October 2008). No such legislation has been enacted.

streaming of the open session is available," and, second, "the public body votes on legislation and the individual votes taken by each member of the public body who participates in the voting are posted promptly on the Internet." § 3-306(b)(2).[2]

Closed-session minutes are ordinarily sealed and thus not available for public inspection. They are available to the public body itself and, when there has been a complaint that the public body violated the Act by holding a closed session, to the Compliance Board. §§ 3-306(c)(3), 3-206(b)(2), (3). Generally, a public body that has not closed a session to discuss a confidential topic may not later redact the confidential material from its open-session minutes. 7 *OMCB Opinions* 64 (2010) ("If a matter was discussed in an open session governed by [the Act] – even if the meeting could have been closed under [§ 3-305], but the public body did not elect to do so – the minutes of that meeting are available to the public."). So, although it might not occur to a public body to vote to close a meeting when no members of the public are present, the minutes of the discussion will not be sealed unless the meeting has been closed.

Public bodies must keep a copy of the minutes and any tape recording of the session for at least five years, must post them online "to the extent practicable," and must make them "open to public inspection during ordinary business hours." § 3-306(e), (d). Problems sometimes arise when someone asks for old minutes that are no longer retained in the public body's main office. The Compliance Board has "generally recognized that public bodies do not necessarily keep older records handy for inspection upon demand." 9 *OMCB Opinions* 218, 224 (2015). It has "encouraged members of the public to recognize that reality, and public bodies to agree to retrieve [minutes] within a 'reasonable period.'" *Id*.

As to open-session minutes, the complaints before the Compliance Board usually fall into four categories: insufficient content generally; insufficient disclosures about closed sessions; belated adoption; and problems with providing members of the public with access. For closed-session minutes, questions sometimes arise as to a public body's duties to unseal them. These issues usually do not arise for live and archived video or audio streaming, though questions are sometimes raised about the quality of the audio and the public's ability to identify the speakers. When a public body relies on audio streaming for its minutes, the presiding officer should take special care to recognize the speakers by name.

[2] Some public bodies keep written minutes as well as audio or video minutes. Written minutes provide a more compact summary of each meeting, serve as a backup in case of technology failures, and, in any case, are required by some public bodies' bylaws. Written minutes may be handwritten, so long as they are legible. *See* 7 *OMCB Opinions* 121, 123 (2011); 1 *OMCB Opinions* 63, 64 (1994).

### 1. Content of minutes, generally

Under the Act, minutes must "reflect" three types of information: "each item that the public body considered," "the action that the public body took on each item," and "each vote that was recorded." § 3-306(c). As to minutes for an open session, the Compliance Board has explained that "[e]ach item must be described in sufficient detail so that a member of the public who examines the minutes can understand the issue under consideration." 3 *OMCB Opinions* 164, 166 (2001) (citing the 4th edition of this Manual). Also, as of October 1, 2017, a public body that conducts a vote to close a meeting, in the absence of a member designated to take training on the Act, must complete the Compliance Checklist that is posted on the Attorney General's website and include that document in the minutes. 2017 Laws of Md., ch. 525, adding § 3-213(d).

Closed-session minutes, which are initially sealed, should also meet the § 3-306(c) standards. The minutes of meetings closed under two of the fourteen exceptions must be unsealed at certain times, [3] and the minutes of meetings closed under the other exceptions are subject to unsealing if a majority of the members of the public body votes to do so, whether on its own initiative or in response to a person's request. § 3-306(c)(4)(iii). Additionally, closed minutes must be provided to the Compliance Board upon its request, and implicit in that requirement is the assumption that closed-session minutes will enable the Compliance Board to determine whether the discussion exceeded the bounds of the disclosures on the closing statement. *See* § 3-206(b)(2).

Otherwise, the contents of a public body's minutes are a matter for the public body's regulation, as permitted by other laws that might apply to its governance.

### 2. Audio or Video Streaming

"Audio or video streaming" may only be substituted for minutes if it is live and archived. § 3-306(b)(2)(i). If a public body elects either of these two methods of keeping minutes, it should take steps to ensure that the video or audio has captured at least the content that would be available had written minutes been prepared. For example, streaming should be designed in such a way as to capture the identities of speakers and of those voting to close a meeting. And, in cases of technological difficulty, the public body will need to prepare written minutes in order to comply with § 3-306. 9 *OMCB Opinions* 256 (2015). Because written minutes serve many functions in addition to those required by the Act, many public bodies continue the practice.

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[3] Under § 3-306(c)(4), the minutes of meetings closed to discuss the marketing of public securities and the investment of public funds, § 3-305((b)(5) and (6), "shall be unsealed" when the securities have been marketed or the funds invested.

### 3. Internet Posting of Votes on Legislation

When a public body has met to vote on legislation, it may, instead of preparing written minutes recording that vote, "promptly" post each member's individual vote on the internet. § 3-306(b)(2)(ii). As a practical matter, few public bodies other than the General Assembly meet exclusively to hold a vote on legislation.

### 4. Disclosure, in open-session minutes, of events of prior closed session

After a public body has met in a session closed under § 3-305, it must include a summary of the session in the minutes of its next public meeting. *See* § 3-306(c)(2). Public bodies may instead include the summary in the minutes of the public meeting held that day—that way, the public will see the summary sooner—but should follow a consistent practice or a cross-reference in the later set of minutes so that the public knows where to look.

The summary must include: (1) the time, place, and purpose of the closed session; (2) each member's vote on the motion to close the session; (3) the statutory exception claimed as a basis for excluding the public; and (4) a list of the topics discussed, persons present, and actions taken in the closed session. *Id.* The closed-session summary "serves as the members' representation of what occurred out of the public's view." *Id*. at 162.

As with closing statements, the public body is only required to disclose as much information as it can without compromising the confidentiality of the session. For example, if a public body closes a meeting under the personnel exception to discuss with an employee a disciplinary matter involving that employee, the list of "persons present" may refer to the employee generically. The "persons present" disclosure may also pose a challenge for closed meetings held by teleconference. For those closed meetings, each member should disclose whether there is anyone else in earshot and take the call out of the presence of any member of the public who would not have been admitted to an actual meeting room.

The closing statement does not serve as a substitute for the post-session disclosures, even when the closed session has gone as predicted on the closing statement. As explained by the Compliance Board, "a statement prepared before the meeting cannot report on the actions taken during the meeting, and a prediction as to the topics to be discussed during the closed session will not reflect the actual event . . . ." 9 *OMCB Opinions* 160, 161 (2014). As discussed in Part C of this Chapter and in Chapter 5, the second section of the model closing statement, labeled "for use in the minutes of the next regular meeting," is there to prompt the person keeping the minutes of the closed session to gather the information that the public body must include in the minutes of the next open meeting.

That section is not part of the closing statement, and the notes made on it do not constitute the public body's summary of the session until the public body adopts them as part of the minutes of its next open session. *Id*.

**5. Timing of minutes**

The Act requires public bodies to "have minutes prepared" "as soon as practicable" after their meetings. § 3-306(b). As explained by the Compliance Board, a draft summary of a meeting does not become a set of "minutes" until the public body has adopted it as minutes. *See* 6 *OMCB Opinions* 187, 190 (2009) ("To qualify as minutes of the public body, the public body must approve them.").

The Compliance Board has stated that the "[a]s soon as practicable" requirement "requires us to strike a balance between, on the one hand, the goal of promptly informing members of the public who cannot attend a meeting of the events that occurred there, and, on the other, the practical constraints faced by the public body that must prepare and adopt the minutes." 8 *OMCB Opinions* 150, 159 (2013). Given that the General Assembly chose not to quantify what is "practicable" for the wide variety of entities subject to the Act, the Compliance Board has seldom pronounced generally how long is too long. *See, e.g.*, 3 *OMCB Opinions* 85, 89 (2001) ("The Act allows practical circumstances to be considered and does not impose a rigid time limit") (citation and quotation marks omitted).[4] The Compliance Board instead has stated that, as "a general rule," "minutes are to be available on a cycle paralleling a public body's meetings" and has recognized that "special

[4] The circumstances addressed by the Compliance Board in 8 *OMCB Opinions* 173 (2014) illustrate the difficulty of setting a "rigid time limit" to be met by all of the public bodies subject to the Act. The advisory council there, comprised of 34 members, had a 3% share (less than 2 hours per week) of an administrative staffer's time. The staffer prepared detailed draft minutes within two to three weeks for review by the officers and then adoption at the next meeting, about eight weeks later. The council's policy was to provide the draft to people who asked for it. Although a copy of the draft was provided promptly to complainant, she complained to the Compliance Board that the council had not adopted minutes in a timely manner.

The Compliance Board found that, given the circumstances, the council did not violate the "as soon as practicable" standard. The Compliance Board observed:

> Of course, in an ideal world, every public body would be sufficiently funded and staffed and thus able either to stream its meetings online or to produce and adopt written minutes quickly. When the ideal fails to materialize through no fault of the public body, we suggest accommodations.

*Id*. at 174-75.

circumstances might justify a delay." 6 *OMCB Opinions* 164, 169 (2009) (citations to other opinions omitted).

Not included in that general rule are public bodies that meet only a few times a year. In 6 *OMCB Opinions* 85, 88 (2009), for example, the Compliance Board advised that "routine delays of several months would be unlawful," and it found that a "nearly four-month delay" violated the Act. 8 *OMCB Opinions* 173 (2013).[5] For public bodies that meet rarely, the Compliance Board has approved, albeit with a caution, the practice of adopting minutes by circulating copies among the members.[6] The Compliance Board has also encouraged public bodies to make draft information available, when possible, and members of the public to accept it, pending the adoption of the final set. *See, e.g.*, 8 *OMCB Opinions* 173, 174-75 (2013). There, for example, staff had sent detailed draft minutes to the complainant three days after she requested them. Noting that it was "not at all clear" that the complainant had been denied timely access to meeting information, the Compliance Board advised that members of the public who want to "know quickly what happened at a meeting might attend the meeting, or accept draft minutes, or ask a participant for details."

### 6. Inspection of minutes by the public

The Act requires public bodies to retain a copy of their minutes and any tape recordings of the meeting for five years. Minutes and tape recordings of open sessions "are

[5] *See also* 8 *OMCB Opinions* 176, 177 (2013) ("Public bodies that routinely only meet quarterly, we have stated, should find an alternative way of adopting minutes so that people who could not attend the meeting do not have to wait three months to find out what the public body did. That is the only objective standard we have set in our interpretation of the minutes requirement.")

[6] In 8 *OMCB Opinions* 125 (2013), for example, the Compliance Board stated:

> [O]ur encouragement, only to public bodies that meet infrequently, to adopt minutes by e-mail should not be taken either as an encouragement to regularly-meeting public bodies to adopt minutes that way or as our approval of any more general practice of taking actions by e-mail. As we have stated before, the practice of taking actions by e-mail does not serve the goal of the Act that public business be conducted publicly. The distinction between the adoption of minutes by e-mail when a public body meets rarely and any broader use of the practice is simple: the prompt availability of minutes serves the interest of transparency, though at some sacrifice to the ability of the public to observe the public body's discussion of the draft, while the discussion of other issues by e-mail serves no goal of the Act.

*Id.* at 126-27; *see also* 8 *OMCB Opinions* 150, 159 (2013) (same); 8 *OMCB Opinions* 176, 177 (2013) ("[W]e have very expressly stated that the adoption of minutes [other than in an open meeting] is the rare exception to the principle that public business should be conducted in the open.").

public records and shall be open to public inspection during ordinary business hours." § 3-306(c), (d). The Compliance Board has opined that written closing statements are also to be available for inspection by the public, not only at the meeting that was closed, but also "as a matter of course to any requester for at least the one-year period during which the statement must be kept." 5 *OMCB Opinions* 184, 187 (2007); *see also* § 3-305(d)(5) (requiring that closing statements be retained for one year).

As noted above, public bodies must now post online, "to the extent practicable," "the minutes or recordings" that they are required to retain. § 3-306(e). The Act does not require public bodies either to mail hard copies of minutes to members of the public or to scan minutes and send them electronically. A request for scanned or copied minutes is instead a request for records under the Public Information Act ("PIA"), which states the deadlines applicable to responses to such requests and permits government bodies to recoup copying costs. The Compliance Board has explained:

> [A] person who wants to see meeting documents has two separate options: either go to the public body's place of business and inspect them for free, as the Open Meetings Act provides, or, instead, ask the public body to send copies in accordance with the Public Information Act, wait for the public body's response under the timetable provided by that law, and pay such costs as the public body may charge, again under that law.

9 *OMCB Opinions* 218, 220 (2015). Thus, the Compliance Board explained, "the fact that a request for copies includes a request for meeting documents does not mean that the requester may jump in front of the line of other [PIA] requesters whose requests the public body might be processing." *Id*.

The expectation set by the Act for public access—that public bodies should be able to produce minutes for inspection by anyone who comes to the public body's office and asks for them—is workable for the public bodies, such as many municipalities, that maintain them in binders in an office staffed for in-person inquiries from members of the public. *See, e.g.*, 8 *OMCB Opinions* 122, 123 (2012). That expectation is harder to achieve for the many task forces and commissions without a central place of business, without dedicated staff, without any other function requiring in-person availability to the public, or with competing deadlines that staff must meet when the requester appears. Problems have arisen when the public body is a task force that has no assigned office space, *see* 7 *OMCB Opinions* 121 (2011) (minutes retained by chair of citizen task force without staff); when a member of the public asks for years' worth of minutes and the public body maintains minutes in the file for each meeting, *see* 8 *OMCB Opinions* 1 (2012)(member of the public came to office and requested minutes for the prior six years); when the public body's sole employee cannot leave the requester alone while she goes into the file room where the

minutes are kept, *see id*., or when the minutes that the person wants to see are with staff in another office at the time, as might happen if someone has requested copies of them under the Public Information Act and staff are preparing them for production that way, or the requester arrives on a day when staff have other pressing demands, or the minutes are those of a task force with which staff are unfamiliar. *See, e.g*., 9 *OMCB Opinions* 218 (2015).

The Compliance Board has set a general rule of reasonableness and good faith for both the members of the public who seek the minutes of a public body and the public body's staff. *See, e.g.,* 8 *OMCB Opinions* 1.

## C. *Closing statement*

For an explanation of the written disclosures ("closing statement") that a public body must make before closing a session under the Act, see Chapter 5, Part A. Closing statements must be kept for one year, are a matter of public record, and, the Compliance Board has stated, must be available for inspection, at the time of closing, by members of the public who so request. *See* § 3-305(d); 5 *OMCB Opinions* 184, 187 (2007). If a member of the public objects to the closing of a session, the public body must send a copy of the closing statement to the Compliance Board.

Of the two parts to the closing statement form posted on the Attorney General's website, only the first part, when completed, is the closing statement itself. The second part, with spaces for the information that must be disclosed in subsequent open-session minutes, is a worksheet for the use of the person who is recording the events of the closed session and is not a public record unless that part of the document is incorporated into the open-session minutes. The closing statement itself does not serve as a substitute for the post-session disclosures that must be made in the minutes of the next open session. See Part B.4 of this chapter and 9 *OMCB Opinions* 160, 161 (2014).