13 *Official Opinions of the Compliance Board* 47 (2019)

- **1(B)(1) Meeting – Generally. Electronic communications, guidance.**
- **1(B)(3) Meeting – Determined not to be a Meeting. Public body's consideration of public business, one-by-one with town manager, without any interaction or discussion among themselves.**
- **1(C)(3) Administrative Function. Discussion outside of exclusion. Policy about public comment period**
- **Violations: none**

*Topic numbers and headings correspond to those in the Opinions Index posted on the Open Meetings webpage at www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx

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September 9, 2019

Re: Town of Greensboro Mayor and Council

The complaint alleges that the Mayor and Council of the Town of Greensboro ("Council") violated the Open Meetings Act by not affording the public the opportunity to observe its deliberations and action on a new policy regulating public participation at Council meetings. Under the old policy, members of the public who wished to address the Council during a meeting could sign up to do so at that meeting. Under the new policy, members who wish to address the Council during a meeting must sign up seven days in advance, unless the Council waives that requirement, and provide any written materials that the individual wants the Council to consider. The complaint acknowledges that the Act does not entitle the public to speak at a public body's meeting and that, in any event, the seven-day requirement was waived for the complainant on the evening he learned of the change, so this matter only involves the manner in which the Council adopted the new policy.

An attorney for the Town, responding on the Council's behalf, states that the Council members did not deliberate among themselves, whether as a quorum or otherwise, on the new policy. The response explains that the Town manager had emailed a draft of a new policy to the Council members because three members had complained to her, separately, "over time" and for different reasons, that each thought the current practice was not working.[1] Then, the response states,

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[1] The response states that one member thought that the Council could better address an individual's concerns if the Council knew about them and could look into the matter before the meeting; one member was concerned that the current sign-up practice did not give everyone a chance to speak; the mayor was concerned that the public comment process made it hard for the Council to complete the other agenda items.

The complainant questions the existence of the Town manager's email because, the complaint alleges, the Town did not produce it in response to a PIA request that the complaint characterizes as a request for "all documents and communications reflecting how Town officials considered and approved the new rule." However, the complainant's PIA request, as attached to the complaint, did not sweep so broadly. It asks for "All Documents Concerning the approval [of the policy]," a request that, read literally, could seem to seek only records that communicated the members' approval of the draft policy. The PIA request also

each member separately conveyed his approval of the draft "by separate phone calls and visits to the Town office." The response asserts that the Act did not apply to these events, for two reasons: first, a quorum did not meet, as that term is defined by the Act, and, second, even if a quorum had met, the Council's adoption of the meeting policy was an administrative function, which is expressly excluded by the Act. *See* § § 3-101(g) (defining the term "meet'); 3-301 (requiring public bodies to "meet" openly); 3-103(a)(1)(i) (excluding the performance of an "administrative function" from the Act). [2] The response states that the Council was administering the Town Charter requirement that the public be given a reasonable opportunity to speak at Council meetings.

All agree that the Council did not approve the new policy in an open meeting. The only question before us is whether the Act applied to the Council members' separately-held in-person and telephone communications to the Town manager. As explained below, the facts that we have do not establish that those communications amounted to a "meeting" under the Act. We therefore conclude that the Act did not apply here. At the same time, we urge public bodies to conduct their business in meetings open to the public not only for all of the reasons stated in the Act's statement of policy, *see* § 3-102, but also because of the risk of the type of violation we found recently in 13 *OMCB Opinions* 39 (2019), where we found that a Council's interactive electronic communications on a matter violated the Act. Also, for the Council's guidance, we will explain that its adoption of a new policy was not an administrative function.

1. *Whether a quorum of Council members held a "meeting" as defined by the Act*

Except as expressly provided otherwise, the Open Meetings Act applies whenever a public body "meets"—a word that the Act defines to mean "to convene a quorum of a public body to consider or transact public business"—and requires the public body to meet openly. §§ 3-301, 3-101(g). As explained in the Open Meetings Act Manual, a "meeting" can occur whether or not the members are physically present in one place; a quorum can convene via telephone or electronic communications. *See id*., Chapter 1, part B; *see also, e.g*., 13 *OMCB Opinions* 39, 46 (2019) (stating that a "meeting" occurs "when the sequence of electronic communications is such that a collective deliberation among a quorum has occurred, with the opportunity for the quorum to interact on public business subject to the Act, actual interaction, and awareness that a quorum is at hand for a specific period of time").

Here, the submissions show only that the Town manager sent an email to the members and that they spoke with her, one by one, apparently without any interaction or discussion among themselves about the merits of the draft policy. These facts do not establish that a quorum of the Council ever convened to deliberate on the policy, so we find that the Council did not "meet" and that the Act did not apply. Still, in such cases, we have hardly endorsed this method of conducting public business. *See e.g*., 10 *OMCB Opinions* 18, 21 (2016) (pointing out that conducting business out of the public eye invites suspicion); 2 *OMCB Opinions* 49, 50 (1999) (while finding that Act did not apply to voting by separate telephone calls, recognizing "that this way of proceeding deprives the public of an opportunity to observe the real decision-making process").

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sought "All E-mails from the [Town's] Council members" and specified four elected officials' addresses; it did not seek emails from the Town manager.

[2] Statutory references are to the General Provisions Article of the Maryland Annotated Code (2014, with 2018 supp.).

The complainant questions whether the new policy can be deemed to have been approved by the "Mayor and Council," as a body, "without ever convening a quorum." We do not address that question because the Open Meetings Act does not govern it. Instead, a public body's authority to take an action by a separate polling of its members would be determined by reference to the laws that created the particular public body. *See, e.g., id*., n. 2 ("We express no view on the question whether this method of decision-making is contemplated by the Maryland Racing Act, the Commission's regulations, or other pertinent law.").

The complainant also asserts that a public body's decision to take actions without convening a quorum is evidence that the public body has intentionally avoided the Act. We are not equipped to assess intent and do not do so here. *See, e.g*., 8 *OMCB Opinions* 56, 60 (2012) ("This Board is not in a position to infer that a public body has acted with the intent to evade the Act. As we have noted above, we lack investigative powers; we also were not set up as a fact-finding body."). The complainant also asks us to "invalidate" the new policy. We lack the authority to do that; we are an advisory body.

2. *Whether the adoption of a new public-comment policy was an administrative function, exempt from the Act*

Under the Act, a public body performs an administrative function when it administers an existing law, rule, or regulation, and is not otherwise performing any other function defined by the Act. § 3-101(b). We have explained the applicable principles as follows:

> When a public body meets solely to perform an administrative function, the meeting is exempt from the Act under § 3-103(a). Very generally speaking, a public body performs an administrative function when it is merely applying pre-set regulations to particular circumstances, and it is not performing an administrative function when it is discussing the adoption of a new policy, whether its own or for recommendation to another body. § 3-101(b); *see also, e.g.*, 10 *OMCB Opinions* 12, 15-16 (2016) (explaining the administrative function exclusion).

10 *OMCB Opinions* 22, 26 (2016); *see also* Open Meetings Act Manual, chapter 1, Part C (2) (explaining the exclusion). The threshold question, then, is whether the Town was applying or interpreting a pre-existing law, rule, or regulation when it discussed new procedures by which members of the public could comment at its meetings. Here, although the Town Charter apparently requires that the public be given a reasonable opportunity to speak at Council meetings, the Council was not applying a pre-existing law or policy to a particular situation; it was instead adopting an entirely new policy to apply generally. Therefore, the administrative function exclusion would not have applied to a discussion of the new meeting policy. *See, e.g*., 1 *OMCB Opinions* 113 (1995) (board was not performing an administrative function when it met in closed session to discuss how to handle request by meeting attendees to comment); *see also* 10 *OMCB Opinions* 31, 33 (2016) (explaining that the adoption of a new policy regarding "housekeeping" matters usually does not fall within the exclusion).

Conclusion

On the basis of the facts before us, we find that a quorum of the Council did not convene to address the new policy. We thus conclude that there was no "meeting" to which the Act would have

applied, and, therefore, that the Council did not violate the Act. We caution, as we have countless times before, that public bodies should avoid conducting public business by methods that deprive the public of the opportunity to observe the public body doing its work. We have also given advice on the limits of the administrative function exclusion.

Open Meetings Compliance Board

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