Chapter 3:
Open Meeting Requirement

Chapter 3: Will the meeting in fact be open to the public?

(Index Topic 3)

Chapter summary: Section 3-102(c) states the policy that public bodies' meetings must be held "in places reasonably accessible to individuals who would like to attend these meetings." Section 3-102(b) states that the ability of the public, its representatives, and the media to attend, report on, and broadcast . . . ensures the accountability of government to the citizens of the State."

The Act does not define what the right to "attend" a meeting entails. Two sections touch on the subject: § 3-303 requires public bodies to adopt rules of conduct and addresses the role of the presiding officer, and § 3-304, applicable only to State public bodies, addresses the provision of interpreters. For meetings held in a physical meeting space, the Compliance Board has elaborated on logistical matters such as access to the meeting room and the handling of videotaping. The Compliance Board has also addressed logistical matters arising from public bodies' efforts to enable the public to observe meetings held virtually or by teleconference. The circumstances under which a public body may meet in closed session are discussed in Chapters 4 and 5.

While this Manual does not address a public body's duties under the Americans with Disabilities Act and analogous State and local laws, those duties should be considered when the public body is choosing a meeting place. Also, some State agencies are subject to laws that require them to stream their meetings live.

To figure out whether a particular meeting met this requirement, a person needs facts on the public body's arrangements for the meeting and what occurred there.

A. *The right to "observe" a meeting*

Section 3-303(a) provides: "Whenever a public body meets in open session, the general public is entitled to attend." That means that members of the public may attend a meeting and observe it. With one exception pertaining to the closing of a meeting (see Chapter 5), it does not mean that they are entitled to speak. *See City of New Carrollton v.*

Rogers, 287 Md. 56, 72 (1980) ("While the Act does not afford the public any right to participate in the meetings, it does assure the public right to observe the deliberative process and the making of decisions by the public body at open meetings."). So, unless the public body is governed by laws that require the particular public body to receive public comment, the decision of whether to allow members of the public to speak is up to the public body.

Ordinarily, the management of any public comment period is up to the presiding officer. *See, e.g.*, 9 *OMCB Opinions* 232, 233 (2015) (stating that the Act does not regulate the presiding officers' decisions on whether to allow a member of the public to speak); 12 *OMCB Opinions* 77, 79 (2018). Complaints about the manner in which a presiding officer conducts a public comment period thus do not state Open Meetings Act violations. *See, e.g.*, 14 *OMCB Opinions* 83, 84 (2020) ("A public body . . . does not violate the Act by failing to provide members of the public with the ability to offer oral comments during a meeting."); 8 *OMCB Opinions* 84, 85 (2012).

The Compliance Board has addressed the ability to "observe" in a number of contexts. *See* 14 *OMCB Opinions* 29 (2020) (discussing appellate and Compliance Board opinions on the right to observe). In the context of complaints that the public body did not provide members of the public with copies of documents concerning an item under discussion, the Compliance Board has explained that the ability to "observe" does not mean that the public body must provide to the audience copies of the documents being reviewed by the members. *See, e.g.*, 9 OMCB *Opinions* 206, 212-13 (2015). However, the public must be given a grasp of what is being discussed and acted on. The Compliance Board has advised that an oral summary or general description of the documents in question will ordinarily serve this purpose. *Id*. Requests for records fall under the Public Information Act, not the Open Meetings Act, with the exception of the meeting documents discussed in Chapter 6.

In the context of text messages exchanged during a public meeting, the Compliance Board has advised: "Just as a public body should disclose, during a meeting, the subject matter of documents that it is addressing and not making available to the public at that time, . . . the gist of substantive electronic communications, among members on the dais or attending by other means, on the business at hand, should be disclosed to the public at the time." 14 *OMCB Opinions* 29, 31-32 (2020). There, the Compliance Board found that a public body violated the Act when two members of a public body, during a public meeting of a quorum of at least 4 members, exchanged text messages about the item of business that the quorum was then discussing. *See id*. at 31 ("The transmission of substantive side messages among a few members, on the topic being discussed at that time, including suggestions of actions to be taken, deprives the public (as well as the other members) of

the opportunity to observe the deliberations fully."). The Compliance Board further explained that "each member, as part of the collective whole, shares in the public body's duty to avoid interfering with the ability of the public to observe the members' conduct of public business during a public meeting." *Id.*

In the same opinion, the Compliance Board addressed electronic communications that a member had received from a member of the public during the meeting. *Id.* at 31. The Compliance Board noted that '"observing' a meeting could be construed to mean that the public is entitled to know when a nonmember is lobbying a member of the public body to vote a certain way on an item at the very moment when the public body is considering the item." However, the Compliance Board stated, "the Act only regulates public bodies, and so the unilateral conduct of a lobbyist (or, as here, any other member of the public) is not attributable to the public body unless a quorum of its members somehow participates in it." *Id.* Noting that the facts before it did not show that the nonmember's communications had influenced the member, the Compliance Board cautioned that "if the facts about another public body were to show such influence, or that a quorum of the members of a public body had been contacted during the meeting about the matter they were considering, we would be concerned that the public had been deprived of the opportunity to observe that, in effect, private access had been permitted during a meeting and out of the public eye." The Compliance Board encouraged public bodies to address the practice through meeting rules and advisories to the public.

In the context of recesses called during an open meeting, the Compliance Board has advised that a public body may not use such recesses as a means to "crystallize" the members' thinking by conferring in groups less than a quorum. *See* 9 *OMCB Opinions* 283, 288 (2015)("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."); 14 *OMCB Opinions* 16, 17 (2020) (explaining that although Robert's Rules of Order recommends the use of recesses as an "aid[] to the crystallization of opinion," the Act does not allow it); *see also* Chapter 1, Part B(2)(d)(discussing the application of the Act to communications among fewer than a quorum of a public body's members).

B. Access to a physical meeting space

As a general rule, when public bodies meet in a physical space, they must ordinarily admit members of the public to that space. However, when safety considerations beyond the public body's control or unanticipated emergency circumstances have prevented the public body from providing access to the meeting space, the Compliance Board has found the requirement to have been met so long as the public body provided an adequate

alternative method of observing the meeting while it is in progress. The guidance on access to the meeting space falls into two categories: whether the space is open to the public, and whether it can accommodate the public.

Ordinarily, a public body that meets in a physical space must do so in a facility that admits the public. For example, a public body may not meet in a juvenile detention center that does not permit the general public to enter, *see* 78 Op. Att'y Gen. 240 (1993), or at a private business that likewise is closed to the public. *See* 8 *OMCB Opinions* 188 (2013); *cf. WSG Holdings, LLC v. Bowie*, 429 Md. 598 (2012) (in applying open meetings provisions of a land-use law, holding that members of the public were improperly excluded from site visit to private property). A meeting may be held at a restaurant so long as the public is provided with places to sit and the members' discussion is audible. *See* 8 *OMCB Opinions* 111, 114 (2012) ("the Act does not prohibit a public body from having a meal during a meeting; does not prohibit a public body from meeting in a private meeting space to which there is access to members of the public at no cost to them; and does not regulate the members' choices of food and drink"). Members of the public who attend public meetings may be required to cooperate with the security procedures for the building in which the meeting is held. 9 *OMCB Opinions* 296 (2015).[1]

Also, as a general rule, the ability to gain access to the meeting space must be provided to all who wish to attend. Thus, "a public body may not deny, through its choice of meeting site, the right of a person with a disability to observe an open meeting," 1 *OMCB Opinions* 237, 239 (1997), may not restrict attendance to people who pay an admission fee, 8 *OMCB Opinions* 18, 25 (2012), may not restrict attendance to people on an invitation list, 7 *OMCB Opinions* 49 (2010), and may not exclude the press. 2 *OMCB Opinions* 67 (1999); *see also* 9 *OMCB Opinions* 290, 291 (2015) (meetings to be open to press and public "on equal terms"). The Court of Appeals has explained that "any action taken by the public body which discourages public attendance at the meeting to any substantial degree would likely violate the Act's provisions." *City of New Carrollton v. Rogers*, 287 Md. 56, 69 (1980).

Part of providing a "place reasonably accessible" to people who would like to attend the meeting is holding the meeting in a room large enough to hold them. 3 *OMCB Opinions* 118, 120 (2001). The Compliance Board has stated that "a public body would violate the

[1] Nonetheless, the inquiry is fact-sensitive. In addressing Texas's open meetings law, which, like Maryland's, is silent on whether a public body may meet in buildings where members of the public must show identification in order to be admitted, the Texas Attorney General opined that a court was unlikely to generally prohibit such a requirement but that the question was "ultimately a question of fact." Tex. Att'y Gen. Op. KP-0020 (2015).

Act if it had reason to expect a large crowd but nevertheless deliberately chose to meet in too small a space when a suitable, larger space was available." *Id*. Public bodies may include in their meeting notices a request that members of the public inform staff of their intention to attend the meeting, and the Compliance Board has recommended that practice for public bodies without regular access to large meeting rooms. 9 *OMCB Opinions* 206, 211 (2015).

In a few cases, the Compliance Board has recognized that a public body's ability to provide access to a physical meeting space was constrained by public health measures (usually the legal capacity of the room for fire safety purposes), emergency circumstances, or the size of a meeting room that the public body had reasonably expected to be adequate, and that, under the particular circumstances, the public body's substitute arrangements for observing the meeting were adequate. For the Compliance Board's explanation of the principles applicable to room size and the use of overflow space and of its prior opinions on that topic, *see* 13 *OMCB Opinions* 58 (2019).

In one matter that arose during the COVID-19 pandemic, for example, the Compliance Board found that a county council did not violate the Act when it excluded the public from the meeting room. There, the county health officer had advised against admitting the public to the room, and the council provided live access to the meeting by live streaming video, cable television, and a call-in number for people without a computer or cable subscription. 14 *OMCB Opinions* 85,86 (2019). The Compliance Board cited the informal guidance posted on the Attorney General's website as "Open Meetings Act FAQs for meetings held during the COVID19 Emergency" for the proposition that, "during this pandemic, '[t]he overriding principle is that when a public body encounters circumstances that challenge its ability to admit the public to an open meeting in the usual location, the public body must provide the public with the best possible opportunity to observe the conduct of public business, given those circumstances." *Id*.

C. Access to a teleconference or to a virtual meeting space

A public body that meets remotely, whether by telephone, videoconference, or other electronic means, must provide the public with the opportunity to observe the meeting while it is in progress. The requirement is not met by merely posting a recording afterwards. 14 *OMCB Opinion* 66, 71 (2020).

When the meeting "place" is a conference call, the public may be provided access either via a call-in number or by access to a meeting room with a speakerphone. 8 *OMCB Opinions* 111, 113 (2012). Some states limit public bodies' use of conference call meetings; for example, California law requires at least one member to be present in a meeting room.

See Cal Gov't Code § 11123(b)(1)(F). Maryland does not limit the use of conference-call meetings. Still, the members of public bodies that meet by teleconference should identify themselves and speak audibly so as to assure that the meeting, is in fact "open" to the public. It may also be advisable for each member to tell the group whether anyone is with the member at the time.[2]

The only Maryland case relevant to teleconferences is *Tuzeer v. Yim*, LLC, 201 Md. App. 443, 468 (2011). There, the court held that the presence of one member by telephone counted towards a quorum and that the meeting met the Act's "accessibility" requirement because "there was no indication that anyone was unable to hear her comments." *Id*. at 471.

The appellate courts have not yet addressed the use of virtual meeting platforms. The Compliance Board first gave guidance on virtually-held meetings in 2020, when public bodies' use of the technology proliferated in response to the COVID-19 pandemic. The issues addressed by the Compliance Board fall into several categories.

First, the Compliance Board has addressed complaints about the quality of the audio. As with complaints about a public body's arrangements for loudspeakers in an overflow room, the Compliance Board has assessed whether the technological difficulties substantially impaired the public's ability to observe the meeting. *See, e.g*., 14 *OMCB Opinions* 85,86 (2020) (finding that the technical difficulties with the sound, experienced by members of the public body and the public alike, were not "so extensive as to violate the Act"); 14 *OMCB Opinions* 111 (2020) ("[O]ur sampling of the video does not suggest that the occasional glitches in the audio, often caused when members did not unmute their microphone before speaking, substantially interfered with the public's opportunity to observe the meeting. In fact, it appears that the board members perceived the same pauses that the public did."). There, the measures that the public body had taken to enable the public to observe the meeting included the presiding officer's introductory request to the members that they identify themselves when speaking, her efforts to call on each by name,

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[2] The California open meetings statute sets several ground rules to ensure that members of the public can truly "attend" teleconference meetings. Votes must be by roll call, agendas must be provided in the room provided to the public, and the discussion must be "audible" to members of the public who listen in on the meeting. Cal Gov't Code § 11123(b)(1). The Texas open meetings law requires that minimum standards be set for the audio signal and requires that it be of "sufficient quality" that the public can "hear the voice of each participant." Tex. Gov't Code Ann. § 551.127. Under that law, "[a] meeting may be held by videoconference call only if a quorum of the governmental body is physically present at one location of the meeting," except that "a state governmental body or a governmental body that extends into three or more counties" may meet by videoconference call so long as the presiding officer is physically present at one location of the meeting that is open to the public during the open portions of the meeting."

her use of roll-call votes for all votes, and the identification of each member on the screen by the member's initials, and, occasionally, by their name. The Compliance Board stated:

> Often, watching a remotely-held meeting that the public body's members are separately attending through various methods might not seem to be a perfect substitute for observing a meeting that the members actually attend in a meeting room to which the public is admitted. Under the current circumstances, however, we find that the County Board's method provided the public with adequate access to the meeting, that the County Board took reasonable efforts to address the shortcomings inherent in virtual meetings, and that the glitches and lapses that occurred from time to time did not materially interfere with that access.

Id.

Second, the Compliance Board has given logistical guidance on how a public body that is closing a virtual meeting can enable the public to assert an objection to the public body's decision to meet in closed session. *See* 14 *OMCB Opinions* 92, 97 (2020) (suggesting that the public be given a way to contact staff during the meeting). However, the Open Meetings Act does not require a public body to enable members of the public to log into a meeting as participants. 14 *OMCB Opinions* 111 (2020).

Finally, in 14 *OMCB Opinions* 83, 86 (2020), the Compliance Board stated that "an important question about whether it is reasonable for a public body to rely on the internet to provide access to a meeting when a substantial number of people served by the public body lack access to the internet" was "not before us because the Council also provided access by telephone and cable television."

D. Regulation of videotaping and recording; meeting rules

Section 3-303 requires public bodies to "adopt and enforce reasonable rules regulating the conduct of persons attending its meetings and the videotaping, televising, photographing, broadcasting, or recording of its meetings." The Compliance Board has found that a prohibition on videotaping is not a "reasonable rule" and that public bodies violate the Act when they refuse to permit videotaping. 3 *OMCB Opinions* 356 (2003). The Compliance Board has also found that public bodies may not prohibit the videotaping of members of the public who are at the meeting. *See* 1 *OMCB Opinions* 137, 140 (1995) ("There is no right to be protected against the gaze of an observer in a public forum, or against the lens of the observer's camera.").

The Compliance Board deems a rule on the use of video recording equipment "reasonable" if the rule "(1) is needed to protect the legitimate rights of others at the meeting; and (2) does so by means that are consistent with the goals of the Act." 5 *OMCB Opinions* 22, 24-25 (2006). An example of a rule found "reasonable," if adequately posted beforehand, is a requirement that people wishing to videotape a meeting check in with staff before the meeting so that staff may tell them where they may stand. *Id*. Ordinarily, public bodies must afford members of the public and reporters access to an open meeting on equal terms. *Id*. (citing 2 *OMCB Opinions* 67 (1999)). However, where a county council, in order to comply with the county health officer's advice about meeting safely during the pandemic, admitted only the press to the meeting room, the Compliance Board found that, "under the circumstances with which the Council was faced, . . . the Council did not violate the Act by excluding all observers but the press from the meeting room." 14 *OMCB Opinions* 83, 86 (2020)

For the Compliance Board's summary of the principles applicable to videotaping, along with citations to its opinions on the subject, *see* 8 *OMCB Opinion*s 128, 131-33 (2013).

Model rules are posted under "Sample Forms and Checklists" at https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx. Public bodies that allow public comment may wish to include additional rules about such matters as time limits, advance registration if required, and the presiding officer's conduct of the session. The Open Meetings Act, however, does not require public comment periods and does not regulate them.

E. Role of the presiding officer; disruptions

Under § 3-303(c)(1), the public body may "have [an] individual removed" if the "presiding officer determines that the behavior of [the] individual is disrupting an open session." *Id.* The Compliance Board has also noted that the presiding officer has the discretion to ask that videotaping be done from an unobtrusive location. *See 8 OMCB* Opinions 128,133 (2013) ("A presiding officer thus has the authority to determine that a person's conduct is disruptive and, by implication, to address that problem by asking her to move."). A person making a presentation to the public body does not have the authority to order photographers to move. *Id.*

As above, the presiding officer ordinarily manages the meeting and any public comment period. *See also* Robert's Rules of Order (10th ed.), p. 434 (describing presiding officer's duties).