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STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

15 Official Opinions of the Compliance Board 161 (2021)
Housing Opportunities Commission of Montgomery County
December 6, 2021

The Complainant alleges that the Housing Opportunities Commission of Montgomery County (the “Commission”) has violated the Open Meetings Act (the “Act”) in the conduct of its virtual, live-streamed meetings. Specifically, the Complainant alleges that the Commission has provided a non-functioning link for at least one of its live-streamed meetings; that in certain instances the live stream has not begun until a short time after a meeting has already started; and that the Commission has failed to provide a way for members of the public who are attending the meeting remotely to object to the closure of the meeting. The Complainant also alleges that on at least one occasion a quorum of the full Commission attended a meeting of one of the Commission’s committees, yet the public received notice only of a committee meeting, not a meeting of the full Commission. The Commission’s General Counsel responded on the Commission’s behalf.

On the information presented to us, we are not able to find any violations of the Act with regard to the allegation that members of the public were excluded from portions of one or more Commission meetings. We also cannot resolve whether members of the public have been prevented from submitting objections to the closure of meetings, as this question turns on a factual dispute. However, we conclude that the Commission violated the notice requirement of the Act when a quorum of the full Commission attended and participated in a committee meeting, without giving notice of a full Commission meeting.

1. Public Access to the Commission’s Virtual Meetings

Like many of the State’s public bodies, the Commission has been meeting virtually during the COVID-19 pandemic. Members of the public are able to view the Commission’s meetings via YouTube. According to the Commission, a link for each meeting is posted on the Commission’s website about 12 to 24 hours before the meeting begins. Additionally, a link to the Commission’s YouTube channel, which in turn contains links to the Commission’s streamed meetings, appears on the main page of the

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Commission’s website,¹ and the live stream, when active, is also embedded on the website’s “Commissioners” page.²

The Act provides that “[w]henver a public body meets in open session, the general public is entitled to attend.” § 3-303(a).³ This same basic principle governs virtual as well as in-person meetings. Thus, a public body may violate the Act if it conducts a meeting via live stream but limits who can join, *see* 15 *OMCB Opinions* 32, 32-33 (2021) (finding violation when live stream was password-protected and meeting notice implied that password was only available to village residents), or when a live stream fails to function altogether, *see* 15 *OMCB Opinions* 28, 29 (2021). However, we have also recognized that minor technical difficulties do occur in livestreaming, and that as long as the public body has taken “reasonable efforts to address the shortcomings inherent in virtual meetings,” then brief “glitches and lapses” that do “not materially interfere with [public] access” might not rise to the level of a violation. 14 *OMCB Opinions* 111, 112 (2020); *see also* 14 *OMCB Opinions* 83, 86 (2020) (concluding that minor technical difficulties with live stream sound that may on occasion have prevented members of the public from hearing public body’s statements did not violate the Act); 14 *OMCB Opinions* 66, 71 (2020) (recognizing that in some cases an “alleged lack of access [may] be either so inconsequential or too theoretical to rise to the level of a violation”); “Open Meetings Act FAQ for Meetings Held During the COVID-19 Emergency,” at 3 (Mar. 13, 2020) (“[T]he public body must do its best to provide the public with the best possible opportunity to observe.”).⁴ The key question is whether the technical difficulties “substantially impaired the public’s ability to observe the meeting.” *Open Meetings Act Manual*, at 3-6 (10th ed. 2021).

The Complainant alleges that the link that the Commission provided for its September 1, 2021 meeting did not function correctly and did not allow her to access the meeting at its start time, although she also states that she was able to gain access to the meeting within a few minutes, and apparently without requiring any assistance from Commission staff. The Commission acknowledges that the original link it posted for the September 1 meeting was broken, but states that a new, working link was posted within the half hour prior to the meeting, and that the alternative methods of accessing the live stream described above were also available.⁵ We have reviewed the archive of the live

¹ <https://www.hocmc.org/> (last visited Dec. 6, 2021).

² <https://www.hocmc.org/about-hoc/commissioners.html> (last visited Dec. 6, 2021).

³ Unless otherwise noted, all statutory references are to the General Provisions Article of the Maryland Annotated Code.

⁴ This informal guidance by the Office of the Attorney General is available at <https://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx> (last visited Dec. 6, 2021).

⁵ The Complainant also argues that, even if the correct link was posted before the meeting began, the Commission violated the Act by not posting the correct link 24 hours in advance. While the Act does require that a meeting *agenda*

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stream, available on YouTube,⁶ and, assuming the YouTube archive reflects the content of the live stream as it occurred on September 1, it appears that the entire meeting was in fact livestreamed. Because it appears that, first, the entire meeting was actually livestreamed, and, second (as the complaint indicates) the information the Commission made available prior to the meeting was sufficient for the Complainant to access the meeting without further Commission assistance, we find no violation under the specific facts at issue here. That is, we cannot say that the Commission excluded the public from its September 1 meeting. *See, e.g., 11 OMCB Opinions 35, 36-37 (2017)* (explaining that there was no violation when a locked door accidentally closed on a member of the public and briefly delayed her re-admission to the meeting, because “the public body had given the public a means of gaining entry and had not taken measures to exclude anyone”).⁷

The Complainant’s allegation that on certain other occasions the beginning of the Commission’s live stream was delayed—that is, some portion of the beginning of the meeting was not livestreamed at all—presents a more difficult question. The Commission acknowledges that technical failures momentarily delayed the start of its meeting live stream on at least three occasions in March and April 2021 but represents that it has taken steps to address the problem by instructing Commissioners to wait for confirmation that the stream has started before beginning to speak.

In rendering our advisory opinions, we are not equipped to, and do not, decide factual disputes. *See, e.g., 14 OMCB Opinions 75, 76 & n.3 (2020); see also 15 OMCB Opinions 63, 66 n.4 (2021)* (explaining that the Board lacks power to compel public bodies to produce documents). From the Complainant’s and the Commission’s conflicting allegations, and because the YouTube archive does not include the portions of the meetings that were omitted from the live stream, we are not able to determine whether any substantive discussion occurred before the live stream began, or the duration of the non-livestreamed period (which lasted thirty to sixty seconds, according to the Commission, or multiple minutes, according to the Complainant).

be made available 24 hours in advance, *see* § 3-302.1, we have never opined that a public body violates the Act when it discovers a technical error in the access instructions for a virtual meeting and corrects it less than 24 hours before the meeting. On the contrary, we have recognized that a public body has some latitude to fix unexpected technical problems with a virtual meeting without canceling and re-noticing the meeting. We have indicated, for example, that when meeting attendance unexpectedly exceeds the capacity of a virtual meeting space, a public body may add a new mechanism for the overflow crowd to access the meeting, such as a conference call line, and continue the meeting. *See 15 OMCB Opinions 55, 56 (2021)*. In such situations, however, and especially when the issue is discovered before the meeting begins, the public body should make reasonable and good-faith efforts to disseminate the updated meeting access instructions as broadly as possible under the circumstances and to alert would-be attendees of the issue.

⁶ <https://www.youtube.com/watch?v=LhUmctnzBBY> (last visited Dec. 6, 2021).

⁷ The Complainant also briefly suggests that the Commission has “not list[ed] the proper link to sign in” on “numerous [other] occasions.” However, she does not provide any other details in her complaint or reply. We therefore do not address this allegation further.

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However, we can offer general guidance on this subject. As noted, minor technical glitches that do not materially interfere with public access to open meetings will not generally violate the Act. *See, e.g.*, 14 *OMCB Opinions* at 112; 14 *OMCB Opinions* at 86. This is especially true when the public body works in good faith to resolve technical problems as they arise, which the Commission apparently did here. While the Act requires a public body to make reasonable, good-faith efforts to accommodate every member of the public who wishes to attend its meetings, the Act does not mandate logistical perfection. *See, e.g.*, 10 *OMCB Opinions* 40, 41-43 (2016) (finding no violation where some attendees at school board meeting were directed to an overflow room with a noisy ice machine, where complainants alleged it was difficult to hear the meeting).

On the other hand, when members of the public are prevented from observing a substantial portion of a meeting, as when a live stream fails for a significant period of time, the Act may be violated even if the public body is unaware of the problem. 15 *OMCB Opinions* at 29. Whether a failure of virtual meeting technology will violate the Act thus depends on the period of time for which the meeting is inaccessible to the public and on whether any substantive discussion has occurred out of public view. We cannot resolve those questions on this complaint, but we hope our guidance will be useful to members of the public and to public bodies working to comply with the Act in the midst of the ongoing pandemic.

2. Mechanism to Object to Closure of Commission Meetings

The Complainant also alleges that on occasion the chat function associated with the Commission's live stream, intended to allow members of the public to communicate with the Commission during its meetings, has failed to function correctly. The Commission responds that the sole purpose of the YouTube chat window associated with its live streams is to permit members of the public to object to the closure of a meeting, not to submit comments to the Commission generally. The Commission also asserts that the chat feature is "fully functional."

The Commission is correct that, under the Act, it need not provide a mechanism for members of the public to submit general comments to the Commission during its meetings. "[T]he Act does not require public bodies to provide members of the public with the opportunity to comment," 14 *OMCB Opinions* at 112, although the Commission states that it usually does offer a public comment period. It is also true, however, that "the Act entitles a member of the public to register an objection to the public body's decision to close a meeting." *Id.*; *see* § 3-305(d)(3). We have recognized that public bodies have some flexibility on how to take objections to closure in the context of virtual meetings, but we have identified "the chat function that some online meeting platforms offer" as one acceptable option. 14 *OMCB Opinions* 92, 97 (2020).

The Commission instructs members of the public that they may submit objections to closure via the YouTube chat function when there is a motion to close a meeting, but the Commission does not make the chat function available for other purposes. This approach complies with the Act. All that remains, then, is a factual dispute over whether the YouTube chat function works correctly and has actually transmitted objections to closing meetings to the Commission. Again, we are unable to decide factual disputes. *E.g.*, 9 *OMCB Opinions* 271 (2015). Accordingly, we cannot resolve this portion of the complaint. *See* 14 *OMCB Opinions* 75, 76 & n.3 (2020).

3. Participation of a Commission Quorum in a Committee Meeting

The Complainant also raises an additional issue unrelated to live stream access. She alleges that on “numerous occasions,” meetings of the Commission’s committees (each of which consists of three Commissioners) are attended by one or more additional Commissioners who are not members of the committee in question, meaning that four or more Commissioners are present at the committee meeting—a quorum of the full seven-member Commission. Md. Code Ann., Hous. & Cmty. Dev. (“HCD”) § 12-306(b)(2). The Complainant specifically identifies a September 21, 2021, meeting of the Commission’s Budget, Finance, and Audit Committee, which was attended by the three committee members and by the Chair of the Commission, meaning four Commissioners in total were present. The Commission does not dispute that occasionally additional Commissioners will attend committee meetings but contends that they are merely observing and not participating in the conduct of any business of the full Commission.

Everyone agrees that the Commission’s committees, like the full Commission, are public bodies subject to the Act, because they were established by a resolution of the Commission. § 3-101(h)(1)(ii)(6); *see, e.g.*, 7 *OMCB Opinions* 176, 185 (2011); *accord* HCD § 16-105(b). The committees accordingly conduct their own meetings in the open, as the Act requires. The point of contention is that even when an additional Commissioner attends the committee meeting, meaning a quorum of the full Commission is present, the public is only given notice of a committee meeting, not a Commission meeting. The question, then, is whether the full Commission “meets” when a fourth Commissioner joins a meeting of a three-Commissioner committee. If the answer is “yes,” then advance public notice of a full Commission meeting is required. § 3-302.

A public body meets when a quorum “convene[s] . . . to consider or transact public business.” § 3-101(g). We have consistently concluded that a meeting of a parent body occurs when enough members of the parent body to constitute a quorum of the parent body attend a meeting of a committee, if the committee is considering business that could come before the parent body. For example, we opined that “when a third member of [a] five-member [City] Council attended a Finance Committee meeting . . . a quorum of the five-

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member Council had convened, whether it had planned to or not, on public business that was also the public business of the Council” meaning there had been a meeting of the full Council. 9 *OMCB Opinions* 83, 86 (2013). This rule applies even when the additional members are present in the meeting room “simply to observe.” 8 *OMCB Opinions* 8, 10 (2012) (quoting 6 *OMCB Opinions* 155, 158 (2009)).

The Act exists to ensure that members of the public will have access to “every step” of a public body’s decisionmaking process. 8 *OMCB Opinions* at 10. “Every step” includes not only deliberation and voting but also the receipt of information by the body. 8 *OMCB Opinions* 19, 22-23 (2012); 6 *OMCB Opinions* at 160; 1 *OMCB Opinions* 23, 26-27 (1993) (concluding that meeting occurred when quorum was present even though members were “simply briefed” by State legislators “and did very little talking”). Thus, when a quorum of a public body is present and receiving information about business that will come before the public body, the public body is meeting within the meaning of the Act. See 8 *OMCB Opinions* at 10.⁸

Here, on at least one occasion, a quorum of the Commission—four Commissioners—attended a meeting of the Budget, Finance, and Audit Committee. Because, as the Commission explains in its response, its committees exist to make recommendations to the Commission, any committee business is necessarily also Commission business. See 8 *OMCB Opinions* at 9-10 (concluding that parent body had met when a quorum of the parent body convened at a committee meeting to consider a document that would later be submitted to the parent body for approval). Because the committee’s consideration is a preliminary “step” on the road to action by the full Commission, when a quorum of the full Commission attends a committee meeting, the public is entitled to know that the full Commission is “consider[ing] . . . public business.” § 3-101(g).

We need not decide whether a meeting of the parent body subject to the Act would occur if the additional member merely watched the committee’s live stream in the same manner as other members of the public. At the September 21 committee meeting, the fourth Commissioner present—the Chair of the Commission—appeared on the live stream

⁸ In another line of opinions, involving cases where a quorum of a public body attended a larger gathering where public business was discussed, we have suggested that the level of actual participation by the members of the quorum might be relevant to whether a meeting has occurred. See 12 *OMCB Opinions* 46, 50 (2018); 7 *OMCB Opinions* 105, 109-10 (2009); 3 *OMCB Opinions* 310, 312 (2003). In each of those cases, however, *all* the members of the quorum were passive observers at a larger meeting, and the larger group was not formally related to the public body at issue, such as a committee or subdivision of the public body. That is, even if public business was discussed in the presence of a quorum, it was not a step leading up to a decision by the subject public body itself. This circumstance, combined with the absence of active participation by the members of the public body, meant that no meeting subject to the Act occurred. This line of opinions has less bearing on a case where a quorum attends a meeting of one of the public body’s own committees. Also, as noted below, at the September 21 committee meeting all four Commissioners present participated to at least some degree.

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alongside the committee members and Commission staff and spoke regarding committee business at least once during the meeting.⁹ Thus, because a quorum of the full Commission attended and participated in the September 21 Budget, Finance, and Audit Committee meeting without giving public notice of a meeting of the full Commission, the Commission violated the Act. 8 *OMCB Opinions* 76, 79 (2012).

We are not persuaded by the Commission's arguments to the contrary. First, the Commission contends that in 8 *OMCB Opinions* 8 (which the Complainant cited), we found a violation only because two committees of the parent body met together. However, our reasoning in that opinion did not turn on that fact, but instead on the fact that the joint participation of the two committees brought the total number of members participating up to a quorum of the full body. See 8 *OMCB Opinions* at 9-10. In another case, factually closer to this one, we found a violation when one additional member of the parent body attended a meeting of a single committee. 9 *OMCB Opinions* at 86.

The Commission also stresses that our previous opinions on this subject were rendered before the pandemic. In particular, the Commission suggests that the move to livestreamed meetings, and the resulting general availability of full recordings of many public bodies' meetings, renders some of the Act's mandates unnecessary. But we have repeatedly explained that while the pandemic has changed the way most public bodies do business, it does not excuse a public body's failure to fully comply with the Act. 15 *OMCB Opinions* 5, 6 (2021); 15 *OMCB Opinions* 85, 88-89 (2021).

Conclusion

We are unable to conclude that the Commission has excluded members of the public from its virtual meetings in violation of § 3-303 of the Act. We do not resolve the factual question whether the Committee violated § 3-305(d)(3) by failing to provide a means for members of the public to object to the closure of a meeting. Finally, we conclude that the Commission violated § 3-302 of the Act on at least one occasion when a quorum of the Commission attended and participated in a committee meeting on September 21, 2021 without giving public notice of a meeting of the full Commission.

This opinion is subject to the announcement and acknowledgment requirements of § 3-211 of the Act.

Open Meetings Compliance Board
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⁹ See video at approximately 19:00, <https://www.youtube.com/watch?v=ZAOKno6reWU> (last visited Dec. 6, 2021).