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STATE OF MARYLAND  
OPEN MEETINGS COMPLIANCE BOARD

**16 Official Opinions of the Compliance Board 185 (2022)**

**October 31, 2022**

**Mayor and Town Council of Sykesville,  
and Sykesville Planning Commission**

The Complainants allege several violations of the Open Meetings Act (the “Act”) arising out of the February 7 and March 21, 2022, meetings of the Sykesville Planning Commission (“Planning Commission”). They complain that “there were two separate conversations occurring simultaneously” at each meeting: “the public dialogue” and a “simultaneous private conversation” among members of the Planning Commission and members of the Mayor and Town Council of Sykesville (the “Council”). Specifically, the Complainants allege that: (1) a quorum of the Council attended the Planning Commission meetings and, while sitting in the public gallery, improperly discussed Council business; and (2) members of the Council improperly communicated with members of the Planning Commission “off the record” during the Planning Commission meetings. As we explain in more detail below, we lack sufficient information to decide whether members of the Planning Commission improperly engaged in side conversations that violated the Act by depriving the public (and other members of the Commission) the opportunity to fully observe the Commission’s deliberations. But we find that the Council met without proper notice under the Act when a quorum of the Council attended the Commission’s meetings and received information about a matter of public business that would be coming before the Commission for a vote. We further find a violation of the Act by the Council based on some Councilmembers’ text messaging about that public business during one of the meetings.

**Background**

The Planning Commission and the Council are both public bodies subject to the Act, and both deal with zoning regulations. When someone proposes amending a zoning regulation, the Planning Commission provides a report and recommendation to the Council, which alone has the power to amend or repeal the regulation. The Council consists of the Mayor and six other members. One member serves on the Planning Commission as a Council liaison.

On February 7, the Planning Commission met to consider a proposed zoning amendment. The Mayor and three other members of the Council attended the meeting; one Councilmember, the Council liaison, sat with the Planning Commission, while the other Councilmembers sat in the public gallery. The Mayor and one of the councilmembers sat next to each other and, throughout the meeting, spoke to one another. The Complainants allege that the Mayor, “certain council members,” and certain Planning Commission members “were actively referring to cell phones.” According to the Complainants, their “expressive body language and facial expressions . . . suggested texting between the Council members and Planning Commission members.”

On March 21, 2022, the Planning Commission met again to consider the same proposed amendment to the Town’s zoning provisions. Five members of the Council attended the meeting; the Councilmember who serves as liaison to the Planning Commission sat with the Planning Commission members; the other Councilmembers sat in the public gallery. Text messages from the time of the meeting appear to show conversations between the Mayor and two other Councilmembers who were sitting in the public gallery. More specifically, one text chain appears to show a conversation between the Mayor and a Councilmember about the possibility of having a collaborative workshop with the developer proposing the zoning amendment. A separate text chain appears to show a conversation between the Mayor and a different Councilmember expressing opinions about the quality of the proposed development.

### **Discussion**

#### *A. Whether the Council “met” during the Planning Commission meetings*

The Complainants allege that members of the Council attended the Planning Commission meetings and discussed public business amongst themselves, effectively convening meetings of the Council, without proper notice to the public. The Act requires generally that “public business be conducted openly and publicly,” with the public allowed to observe all “deliberations and decisions that the making of public policy involves.” § 3-102(a).<sup>1</sup> Thus, a public body must generally meet in open session, § 3-301, provide “reasonable advance notice” of a meeting, § 3-302(a), and allow the public to attend, § 3-303(a).

The Council concedes that a quorum<sup>2</sup> of the Council was present during the Planning Commission meetings but argues that the quorum’s presence did not convert the

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<sup>1</sup> Unless otherwise noted, statutory references are to the General Provisions Article of the Maryland Ann. Code.

<sup>2</sup> A majority of Council members constitutes a quorum. *See Sykesville Code*, § C-9 (providing that “[a] majority of the Council shall constitute a quorum for the transaction of business”); *see also* § 3-101(k) (“‘Quorum’ means: (1) a

## 16 Official Opinions of the Compliance Board 185 (2022)

October 31, 2022

Page 187

Commission meetings into meetings of the Council. Under the Act, “[m]eet’ means to convene a quorum of a public body to consider or transact public business.” § 3-101(g). The Council argues that a quorum of the Council did not consider or transact public business at the Planning Commission meetings.

As we have previously explained, “[t]he Act does not apply to a ‘chance encounter, social gathering, or other occasion that is not intended to circumvent’ the Act. 9 *OMCB Opinions* 94, 96 (2013) (quoting what is now § 3-103(a)(2)). Thus, when a quorum of the members of a public body is present at another entity’s event, we look to whether “the public body itself separately conducts public business, as distinct from the proceedings of the larger group.” 1 *OMCB Opinions* 183, 185 (1996). The conducting of public business, however, is not always limited to *deliberation* on matters before the public body. Rather, “[t]he Act exists to ensure that members of the public will have access to ‘every step’ of a public body’s decisionmaking process,” including “not only deliberation and voting but also the receipt of information by the body.” 15 *OMCB Opinions* 161, 166 (2021) (quoting 8 *OMCB Opinions* 8, 10 (2012)).

Applying these principles, we have recognized that even a mere “briefing on public business,” “devoid of discussion, given to an accidental quorum of a public body’s members,” may, depending on the circumstances, constitute “a meeting as defined by the Act.” 8 *OMCB Opinions* at 10 (internal quotation marks omitted). To be sure, we have suggested in some opinions “involving cases where a quorum of a public body attended a larger gathering where public business was discussed, . . . that the level of actual participation by the members of the quorum might be relevant to whether a meeting has occurred.” 15 *OMCB Opinions* at 166 n.8 (citing 12 *OMCB Opinions* 46, 50 (2018)); 7 *OMCB Opinions* 105, 109-10 (2009); 3 *OMCB Opinions* 310, 312 (2003)).<sup>3</sup> In none of those cases, however, was the discussion at the larger meeting “a step leading up to a decision by the subject public body itself.” 15 *OMCB Opinions* at 166 n.8. Thus, when considering whether the mere receipt of information constitutes the transaction of public business, we have “distinguished between a presentation [of information] having no connection to any particular legislative business [of the public body], which would not involve the conduct of public business, and a presentation linked in a specific way to a topic before the body, which is the conduct of public business.” 3 *OMCB Opinions* 30, 34 (2000) (involving a briefing on a supplemental budget). After all, generally speaking, “[t]he imparting of information about a matter, albeit unaccompanied by any discussion

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majority of the members of a public body; or (2) the number of members that the law requires.”).

<sup>3</sup> We have also said that “members of a public body do not violate the Act merely by attending a meeting of an entity that is not itself subject to the Open Meetings Act, even if the topic of discussion relates directly to a matter before the public body.” 1 *OMCB Opinions* 120, 121 (1994). But both the Planning Commission and the Council are public bodies subject to the Act.

## 16 Official Opinions of the Compliance Board 185 (2022)

October 31, 2022

Page 188

among the members of a public body, constitutes the ‘consideration or transaction of public business’ with respect to that matter.” 1 *OMCB Opinions* 35, 36 (1993).

Importantly, these general principles can apply even when the public body itself has not called the meeting in question. See 8 *OMCB Opinions* at 10. For example, on several occasions, we have found that a public body “met” when a quorum of the body’s members attended the meeting of a subcommittee of the public body. See, e.g., 15 *OMCB Opinions* at 161 (concluding that a public body violated the Act when a quorum of its members attended, and one of the members participated in, the meeting of a subcommittee); 8 *OMCB Opinions* at 10 (finding that a public body violated the Act when a quorum of its members attended a meeting posted and recorded in minutes only as a meeting of one of its committees). That is, of course, not the case here. But we have also found a violation when, as here, a quorum of a public body attended the meeting of a completely separate public body, for the purpose of receiving information about a matter of public business that was to come before both bodies. See 7 *OMCB Opinions* 92, 93 (2011) (finding that a town council violated the Act when a quorum of the council attended a closed session of a county commission to hear information about pending litigation that affected the town council, even though they “attended solely to listen to the County’s presentation” and “did not interact”). In all these cases, a key consideration was whether the other entity’s meeting involved the discussion of a specific item of business that was certain to come before the public body and was a preliminary step in the public body’s decision-making process. See 15 *OMCB Opinions* at 161 (noting that the committee’s consideration of a topic was a “preliminary ‘step’ on the road to action by the full” public body); 8 *OMCB Opinions* at 10 (noting that the topic of discussion at the subcommittee meeting was something that the parent public body “would later consider for approval”); 7 *OMCB Opinions* at 93 (noting that “[t]he briefing” at the county commission’s meeting “was a step in the [town] Council’s process of acting on that topic”).

As these prior opinions demonstrate, whether the presence of a quorum of members of a public body at another entity’s gathering constitutes a “meeting” of the public body requires us to consider the totality of circumstances. We consider such factors as whether the host entity is a private body or a public body subject to the Act, the nature of the gathering and the topic of discussion, whether the meeting is a step in the public body’s decision-making process, whether the topic of discussion involves a matter that is certain to come before the public body, and what the members of the public body do at the gathering.

Here, the record establishes that a quorum of the Council was present at meetings of the Planning Commission—a public body subject to the Act—when the Commission was receiving and discussing information about a proposed zoning amendment that would come before the Council for a vote. Indeed, the Council acknowledges in its response that members of the Council attended Planning Commission meetings “to listen to the

## 16 Official Opinions of the Compliance Board 185 (2022)

October 31, 2022

Page 189

perspectives of staff, [the proponent of the zoning amendment], and Planning Commission members,” who would be preparing an official report and recommendation to the Council ahead of the Council’s vote. The Councilmembers were thus receiving information about public business that was certain to come before them for a vote, as a step leading up to their eventual decision. The parties dispute whether a quorum of the Council discussed the proposed zoning amendment at the meetings, either in person or via text messages. The text messages that the Complainants included with their submissions appear to involve only three Councilmembers (including the Mayor), which is less than the four needed to establish a quorum of the Council. We thus cannot conclude that the exchange of text messages by itself rose to the level of a “meeting” under the Act. *See, e.g., 13 OMCB Opinions 39 (2019)* (concluding that a county council’s exchanges of emails and texts over a discrete period of time rose to the level of a meeting). But the messages reinforce our sense that the Councilmembers were attending the meetings in their official capacity as part of their official business, not solely as members of the public.

In sum, under the particular facts here, we conclude that the presence of a quorum of the Council, at the Commission meetings on February 7 and March 21, 2022, involving the presentation of information about a specific item of public business that would come before the Council, was sufficient to establish that the Commission meetings were also meetings of the Council. The failure to provide notice of the meetings as such violated the Act. *See §§ 3-301, 3-302(a), 3-303(a); 1 OMCB Opinions at 36.* We reiterate our earlier guidance “that ‘members of a public body have a duty to be especially sensitive to Open Meetings Act issues when, as here, a quorum is together, the setting is manifestly not a social one, and the topic bears directly on a pending matter.’” *7 OMCB Opinions at 93* (quoting *3 OMCB Opinions at 35*).

### *B. Whether members of the Council improperly communicated with members of the Planning Commission during the meetings*

The Complainants also allege that members of the Council improperly communicated in secret with members of the Commission during the February 7 and March 21, 2022, meetings. Specifically, the Complainants allege that the Mayor and other Council members made gestures to members of the Commission, and the Mayor went into the hallway for private conversations with an unspecified number of Planning Commission members and staff. In support of these allegations, the Complainants point to a text message that the Mayor apparently sent to a staff member during the March 21, 2022, meeting asking if the Councilmember who serves on the Planning Commission could move for a five-minute recess so that the Mayor could speak with that Councilmember and the chairman of the Planning Commission. In its response, the Council asserts that “the Complainants were not in the hallway” and, thus, “do not know what occurred.” It is not clear from the submissions whether the Commission chairman called a recess as the Mayor suggested, whether the Mayor convened in the hallway with anyone from the Planning

## 16 Official Opinions of the Compliance Board 185 (2022)

October 31, 2022

Page 190

Commission during the meeting or during a recess, and, if so, how many Commission members convened with the Mayor. As we have stated many times before, we are not equipped to resolve factual disputes in the record. *See, e.g., 9 OMCB Opinions* 186, 188 (2014) (noting that the compliance board is “not set up to resolve disputes of fact”); *see also* § 3-207(c)(2) (noting that a Compliance Board opinion “may state that the Board is unable to resolve [a] complaint”). We thus cannot determine whether any hallway conversations violated the Act but offer general guidance about the Act’s applicability to side conversations that take place during open meetings beyond the view or hearing of members of the public in attendance.

“When a meeting falls within the scope of the Act, the public body must give the public the ability to observe the meeting in a meaningful way.” *14 OMCB Opinions* 29, 31 (2020). But “the Act only regulates public bodies, and so the unilateral conduct” of any “member of the public” communicating with a member of the public body “is not attributable to the public body unless a quorum of its members somehow participates in [the conversation].” *Id.* For example, “the passive receipt of a text message, sent by a non-member to one member of the public body, generally does not violate the Act,” though “[t]hat does not mean that we approve of the practice.” *Id.*

A side conversation “among the members of a public body, during the meeting and on the public business at hand, poses a more difficult question.” *Id.* at 31. While “[t]he Act does not explicitly prohibit . . . less than a quorum” of a public body “from having side conversations with each other that the public cannot hear or read,” “the Act does impose on public bodies the duty to meet openly, and 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.* Thus, we have previously said that, generally, “all substantive communications among members, during a public meeting of a quorum, regarding the topic then under discussion, are subject to the Act regardless of whether a quorum is actually involved in the particular communication.” *Id.* At least under some circumstances, substantive side conversations among less than a quorum may violate the Act even when they happen during a recess. *See 9 OMCB Opinions* 283, 286, 288 (2015) (finding a violation of the Act when at least two members, but less than a quorum, of a public body continued discussions of the body’s public business during a recess, and the conversation helped the body reach consensus on the issue before it). But these are fact-intensive inquiries that depend on the circumstances. In this case, we simply cannot conclude whether two or more members of the Planning Commission improperly discussed public business in the hallway, outside of the public view, in a way that would violate the Act.

We do, however, have concerns about the texting among members of the Council at the March 21, 2022, meeting that was advertised only as a Planning Commission

## **16 Official Opinions of the Compliance Board 185 (2022)**

October 31, 2022

Page 191

meeting. We have already found that the meeting was also a meeting of the Council for purposes of the Act. As such, substantive conversations—such as the text exchanges about the possibility of having a collaborative workshop with the developer proposing the zoning amendment and about Councilmembers’ opinions regarding the quality of the proposed development—should have happened in the open. *See* § 3-301 (providing generally that a public body shall meet in open session); § 3-303(a) (providing that the public is entitled to attend open sessions); 14 *OMCB Opinions* at 31. We thus find that the exchange of text messages about the Council’s business among some of the Councilmembers during the March 21 meeting was a further violation of the Act’s openness requirements.

### **Conclusion**

We do not have enough information to decide whether members of the Planning Commission improperly engaged in side conversations that violated the Act by depriving the public (and other members of the Commission) the opportunity to fully observe the Commission’s deliberations. But we find that the Council violated the Act when a quorum of the Council attended the Commission’s meetings on February 7 and March 21, 2022, and received information about a matter of public business that would be coming before the Commission for a vote. Under the facts here, the receipt of information as part of a step in the process for a matter that was certain to come before the Council was the consideration of public business and thus constituted “meetings” of the Council on February 7 and March 21; the meeting notices, however, described only meetings of the Planning Commission. We thus find that the Council violated § 3-302 during each of those two Commission meetings. We further find that texting among members of the Council at the March 21 meeting violated the Act’s requirements, in §§ 3-301 and 3-303(a), that public bodies generally meet in open session and permit any member of the general public to attend. This Opinion is subject to the acknowledgement and announcement requirements of § 3-211.

**Open Meetings Compliance Board**

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