

Complying with Maryland's Open Meetings Act

) Training requirement:

- Every Board and Commission must designate a member, officer, or employee to receive training but **NEW**: no longer need to send the name of that person to the Open Meetings Compliance Board.
- **NEW**: there must be one MEMBER of the public body (not staff) that is trained and present at all open meetings OR must fill out the AG Compliance Checklist as part of the minutes of that meeting
- **NEW**: there must be one MEMBER of the public body (not staff) that is trained and present at the open and closed portion of any meeting for the body to close at all
- *Designated member must complete training within 90 days after being designated*
- Any training done prior to October 1, 2013 does not count.
- Training is either on-line (http://www.igrs.umd.edu/VLC/OMA/class_oma_intro1.php) or through the Academy of Excellence in Local Government.

) When to close:

- **NEW**: there must be one MEMBER of the public body (not staff) that is trained and present at the open and closed portion of any meeting for the body to be allowed to close at all
- The exemptions listed in the Act allow you to close a meeting (or a portion of it) but do NOT require a closed meeting.
- You must weigh the benefits and need for closure against the public interest in transparency of decision making.
- *Do NOT plan to close a meeting without consulting the Mayor's Office or the City Solicitor (or their designees) when the meeting will address a topic of interest to the public or when similar types of meetings have not been closed in the past.*

) Advertising Meetings and Providing an Advanced Agenda:

- You must advertise your meeting's date/time and location as soon as you know that info.
- *Notify the media and put meeting information on a website.* Giving that information to Legislative Reference may not be enough.
- Keep a copy of meeting notices for at least a year.
- AT LEAST 24 HOURS PRIOR TO A MEETING, publish an agenda that has known topics of discussion, and whether the body expects to close any portion of the meeting
- If the agenda is known at the time of notice of the meeting itself, the agenda should be published at the same time as the notice
- If there is an emergency scheduling of a meeting, the agenda can be made available a reasonable time after the meeting

) Minutes

- Contain: each item the public body considered, the action the body took on that item (if any) and any votes
- Keep for FIVE years
- Post on-line
- **NEW**: must include in minutes a completed AG Compliance Checklist if there is no MEMBER of the public body (not staff) that is trained and present for the whole meeting

) Failure to Comply:

- Can result in the invalidation of actions taken by the Board or Commission.
- Can result in payment of litigation costs/attorney's fees and fines up to \$1,000!

Open Meetings Act Brief Primer

Maryland's Open Meeting Act (hereinafter "OMA"), codified in Title 3 of the General Provisions Article of the Maryland Code, mandates that the public be given the ability to observe "the deliberations and decisions that the making of public policy involves," which requires the "ability of the public, its representatives, and the media to attend, report on, and broadcast meetings of public bodies." Md. Code, Gen. Prov., §3-102. Thus, the central tenet of the OMA is that "it is the public policy of the State that the public be provided with adequate notice of the time and location of meetings of public bodies, which shall be held in places reasonably accessible to individuals who would like to attend these meetings." Md. Code, Gen. Prov., §3-102.

However, the OMA only gives members of the public an opportunity to observe the public meeting; it does not give them the right to participate. *See, e.g., City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) ("the Act does not afford the public any right to participate in the meetings."). The public body should adopt rules for conduct for the public that observe the meetings. Md. Code, Gen. Prov., §3-303. If a member of the public disrupts an open session, he or she can be removed. Md. Code, Gen. Prov., §3-303(c).

Public Body

"Public body" is defined as "an entity that: (i) consists of at least two individuals; and (ii) is created by: (1) the Maryland Constitution; (2) a State statute; (3) a county or municipal charter; (4) a memorandum of understanding or a master agreement to which a majority of the county boards of education and the State Department of Education are signatories; (5) an ordinance; (6) a rule, resolution, or bylaw; (7) an executive order of the governor; or (8) an executive order of the chief executive authority of a political subdivision of the State." Md. Code, Gen. Prov., §3-101(h)(1).

Even if not created by one of the laws listed above, the OMA also recognizes as a public body "any multimember board, commission, or committee appointed by the governor or the chief executive authority of a political subdivision of the State (*i.e.* the Mayor), or appointed by an official who is subject to the policy direction of the governor or chief executive authority of the political subdivision, if the entity includes in its membership at least two individuals not employed by the State or the political subdivision." Md. Code, Gen. Prov., §3-101(h)(2).

City entities that qualify as public bodies and are subject to the OMA include, *but are not limited to*, the City Council, every Committee of the City Council, the Board of Estimates, the Planning Commission, the Board of Finance, the Board of the Baltimore Development Corporation ("BDC"), the Board of Municipal Zoning Appeals ("BMZA"), the Planning Commission, the Board of the Environmental Control Board, the Board of the Parking Authority, and the Ethics Board. As noted above, all entities created by City Charter or ordinance or by Executive Order of the Mayor are covered; however, the Mayor's Cabinet is not a public body and is not subject to the OMA. Md. Code, Gen. Prov., §3-101(h)(3).

A subcommittee of a public body is generally NOT a separate public body, unless it is composed of a quorum of the parent public body or it is, itself, created in one of the ways listed in Section 3-101(h)(1) of the Open Meetings Act. Md. Code, Gen. Prov., §§3-101(h)(1)(ii); 3-101(h)(3)(ix). Thus, any committee of at least two people that is created by a law or a rule, resolution or bylaw of the parent body is subject to the OMA. Md.

Code, Gen. Prov., §3-101(h)(3)(ix); §3-101(h)(1). It is therefore extremely important to know how a subcommittee was created. If the parent body has by-laws, for example, that create standing subcommittees, those would be subject to the OMA. Likewise, any subcommittees created by a resolution of a board, would be subject to the OMA. Generally, a subcommittee of a public body that is simply designated by the presiding official of that public body would not need to follow the OMA. However, the Open Meetings Act Manual (8th ed. Nov. 2015), p. 7, (hereinafter “OMA Manual”), is clear that subcommittees “should not be used as a way to perform the parent body’s functions behind closed doors.”

All committees of the Baltimore City Council are subject to the OMA. City Council Rule 6-7; *accord CLUB v. Baltimore City Board of Elections*, 377 Md. 183, 186-87 (2003).

Advisory Function

The OMA generally applies to all meetings of a public body. It also explicitly applies when a public body meets to grant a license, permit, special exception, variance, conditional use, zoning classification, enforce a zoning law or regulation or any other zoning matter. Md. Code, Gen. Prov., §3-103(b). Thus, it will always apply to the BMZA whenever it meets.

However, the OMA does *not* apply when a public body is performing an administrative, judicial or quasi-judicial function, or during a purely social gathering. Md. Code, Gen. Prov., §3-103(a). An example of a quasi-judicial function is when the Board members of the Environmental Control Board meet to decide appeals.

An administrative function is defined as implementing a law, rule or regulation or bylaw (other than zoning rules/regulations listed above). Md. Code, Gen. Prov., §3-101(b). If the public body closes an open session to perform an administrative function, the minutes of the next meeting must include “a statement of the date, time, place, and persons present at the administrative function meeting; and a phrase or sentence identifying the subject matter discussed at the administrative function meeting.” Md. Code, Gen. Prov., §3-104. An example would be if the Ethics Board was meeting to write an Ethics Opinion. This is merely the execution of its functions as a board, is not advisory to the Mayor (although it may advise a particular employee) and is not quasi-judicial. *See, e.g.*, 64 Op. Attn’y Gen. 162, 167 n.3 (1979); Opinion No. 78-079 (June 7, 1978)(unpublished). This can be a very tricky exception and the public body should consult with the Law Department when deciding not to be open to the public during such a function.

An advisory function is defined as the study of or making of recommendations on a matter. Md. Code, Gen. Prov., §3-101(c). If an advisory function is being performed, the meeting must be open unless there is a permitted reason to close it (see section below). Most bodies perform advisory functions most of the time.

Quorum and Meeting

The OMA defines a meeting to be one in which a quorum of the members convenes to transact public business. Md. Code, Gen. Prov., §3-101(g). A quorum is defined as a majority of the members “or any different number that law requires.” Md. Code, Gen. Prov., §3-101(k). The quorum is designed to be the number of the body that must exist for it to lawfully act. 81 Op. Att’y Gen. 140, 142 (1996). The by-laws, rules or regulations governing a public body may set the number of members needed for a quorum. If not, a quorum is a majority of the membership of the body. Md. Code, Gen. Prov., §3-101(k).

For the OMA to apply, the members of the public body must actually “meet,” not merely exchange e-mails or other documents. *See, e.g.*, 1 OMCB Op. 218, 219 (1997)(Op. 97-4)(“As the Attorney General has advised, ‘the Open Meetings Act does not apply to an exchange of paper, because such an exchange does not ‘convene a quorum of a public body’ and is therefore not a ‘meeting.’””); *accord* 81 Op. Att’y Gen. 140, 142 (1996). A telephone conversation between two members, which constitute less than a quorum, would also not be subject to the OMA.

However, *if a quorum can simultaneously dialogue*, by text, e-mail or telephone (it does not need to be in person), then a meeting is occurring that is subject to the OMA.¹ As “for physical presence, a member who participates in a meeting by telephone will be deemed present.” OMA Manual, p. 9 (citations omitted). The OMA requires that the body afford the public (perhaps by a call in number for a teleconference) the ability to listen to the discussions. *Id.* Although, “the Act’s definition of a ‘meeting’ to require the presence of a quorum has meant that the Act does not apply to sequential or written communications among the members,” the Attorney General notes that the “Compliance Board has also cautioned that courts might look beyond the quorum requirement to determine whether, as a practical matter, a quorum of the public body was in on the discussion.” *Id.*

The OMA does *not* apply to “a chance encounter, social gathering, or other occasion that is not intended to circumvent [the Act].” Md. Code, Gen. Prov., §3-103(a)(2). Meetings which have a social purpose and are intended and conducted to improve communication among those who serve together are not covered by the OMA. *See* 2 OMCB Opinions 5, 7 (1998). Note, however, that unplanned participation by three of five members of a county board on a radio talk show broadcast was recently held to violate the OMA, even though it was aired publically, because the procedures of the OMA were not followed. 9 OMCB 40, 43 (2013). Note also that parties (for holidays, birthdays, retirement, etc.) where a quorum of a body is invited should not discuss any business of that public body.

The OMA has no special provisions for retreats where a quorum is present. The question is whether the retreat is a “meeting” of the body. A meeting is where the board conducts business. If “the purpose of the retreat is simply to improve interpersonal relations, the Act would not apply. A retreat or similar informal gathering would be a meeting, however, if it were a device to set the public body’s agenda or discuss the merits of specific matters that are to be dealt with by the body.” 3 OMCB, 01-10, 124 (2001); *see also* 6 OMCB 63, 64 (2001)(meeting of a quorum of a public body at a restaurant to discuss interpersonal relationships and dinner-chatter was not a meeting of a public body). The Open Meetings Compliance Board (“OMCB”) has held that if the public body discussed its mission, it was discussing the underlying foundations of any policy that would be made, and therefore a meeting was held to which the OMA applied. It was immaterial that no decisions were made at the retreat. 3 OMCB, 01-10, 124 (2001).

If the body is a board or commission, it is prohibited by *the City Code* from meeting on a day of a general or primary election in the City. City Code, Art. 1, § 6-3.1. Additionally, the BMZA is prohibited from holding only daytime hearings; once in every two calendar months, the BMZA must hold a meeting after 5pm. City Code, Art. 32, §3-202.

¹ The City’s Zoning Code provides a greater restriction than otherwise would exist by requiring a BMZA member to be physically present to participate in a hearing. City Code, Art. 32, §3-202. Thus, unlike other public bodies, a quorum of the BMZA must be physically present together to conduct a hearing. Other members may listen, as the public could, by telephone or in another remote fashion, but may not participate.

Notice

Once a meeting is scheduled to be held, the OMA requires “reasonable advance notice” of that meeting. Md. Code, Gen. Prov., §3-302(a). That notice must be reasonable under the circumstances. Md. Code, Gen. Prov., §3-302(c). “The touchstone of ‘reasonableness’ is whether a public body gives notice of a future meeting as soon as is practicable after the body has fixed the date, time, and place of the meeting.” OMA Manual, p. 20. Although a meeting could be announced as soon as it is scheduled, a meeting cannot be scheduled in such a way as to “foil the public’s right to attend and observe.” Thus, the public body should publish the date, time and location (or call-in number) for any meeting, a statement that part of the meeting may be closed (if appropriate), as soon as it is able. The notice could be placed on the internet. The media, however, should be alerted as to the specific website where meeting notices will be routinely posted. The notice of the meeting must be kept for a least year. Md. Code, Gen. Prov., §3-302(d).

If the body at issue is a board or commission established by City Charter or Code, *the City Code* imposes the following additional notice requirements:

(a) *7-day notice to be provided.*

(1) It shall be the duty of each board or commission established by the Baltimore City Charter or the Baltimore City Code to furnish written notice to the Department of Legislative Reference, for posting on a space designated by the Department of Legislative Reference, no less than 7 days before any meeting held by that board or commission.

(2) The posted notice shall include the time, date, and place of meeting.

(b) *Emergency meetings; cancellations.*

(1) The 7-day requirement may be waived in case of emergency meetings, but notice of occurrence of such meeting shall be posted as soon as possible, before or after such meeting.

(2) Notice of the cancellation of a meeting should be given at least 48 hours prior to the scheduled time of the meeting.

(c) *Legislative Reference to provide space.*

It shall be the duty of the Department of Legislative Reference to:

(1) provide space within the Department or the City Hall, clearly available to any onlooker, for the posting of meeting notices; and

(2) furnish at least 1 copy of each notice to the press.

(d) *Failure to comply.*

If any department, board, or commission fails to furnish written notice of meetings as provided in this section, such meeting will be deemed to have no legal standing.

City Code, Art. 1, §6-4

Agenda

Public bodies must make an agenda available in advance of the meeting. Md. Code, Gen. Prov., §3-302.1). The agenda must list the known items of business or topics to be discussed at any open portion of the meeting and whether the body expects to close any portion of the meeting.

If the agenda has been determined at the time that the public body gives notice of the meeting itself, it must be provided at the time notice is given. The agenda can (and arguably should) be given in the same manner (posted on same websites) as notice of the meeting. If not, it must be provided as soon as practicable but no later than 24 hours before the meeting. If the public body cannot comply with this advanced agenda requirement because the meeting was scheduled in response to an emergency or other unanticipated situation, the agenda must be made available within a reasonable time after the meeting. However, the public body is free to deviate from its agenda at the actual meeting. The minutes of the meeting, discussed below, will reflect that deviation from the agenda.

When and How Meetings May Be Closed

The OMA *allows* for closed sessions for a limited number of narrow purposes, although the OMA is to be presumptively read in favor of open meetings. Md. Code, Gen. Prov., §3-305. *Just because a meeting may legally be closed is not reason to close it*; discuss closures of any meetings that will be of interest to the public or that have been open in the past with the Mayor's Chief of Staff or the City Solicitor (or their designees).

The OMA was recently amended to prohibit a public body from closing a meeting if it does not have present a member (not staff) of the public body that has received the requisite training. Md. Code, Gen. Prov., §3-213(d). That trained member should be present for the entire open and closed portion of the meeting. While not requiring every member of every public body to take the training course (usually done on-line), the practical effect is to encourage most members take the training. Training one, or only a few, members of a public body could result in the body being unable to close the meeting because a trained member is not present. Thus, while the training requirement can be met by merely training a staff person, this is no longer the best way for the body to meet that training requirement. It is far better if all, or nearly all, members of the public body take the training course and keep a copy of the certificate received after completion.

Assuming a trained member (not staff) of the body is present, the OMA does allow the meeting to be closed to:

- 1) discuss the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials over whom it has jurisdiction; or any other personnel matter that affects one or more specific individuals;
- 2) protect the privacy or reputation of individuals with respect to a matter that is not related to public business;
- 3) consider the acquisition of real property for a public purpose and matters directly related thereto;
- 4) consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State;

- 5) consider the investment of public funds;
- 6) consider the marketing of public securities;
- 7) consult with counsel to obtain legal advice;
- 8) consult with staff, consultants, or other individuals about pending or potential litigation;
- 9) conduct collective bargaining negotiations or consider matters that relate to the negotiations;
- 10) discuss public security, if the public body determines that public discussion would constitute a risk to the public or to public security, including: the deployment of fire and police services and staff; and the development and implementation of emergency plans;
- 11) prepare, administer, or grade a scholastic, licensing, or qualifying examination;
- 12) conduct or discuss an investigative proceeding on actual or possible criminal conduct;
- 13) comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter; or
- 14) discuss, before a contract is awarded or bids are opened, a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.

Md. Code, Gen. Prov., §3-305(b).

Meetings may also be closed to perform an administrative function, discussed above, which means to implement a rule or existing law. If the public body closes an open session to perform an administrative function, the minutes of the next meeting must include “a statement of the date, time, place, and persons present at the administrative function meeting; and a phrase or sentence identifying the subject matter discussed at the administrative function meeting.” Md. Code, Gen. Prov., §3-104.

Note that closing a meeting or portion of a meeting for one or more of these purposes is allowed, but not required. Officials voting on closing a meeting should consider whether closing the meeting serves some important public purpose that outweighs the transparency achieved by allowing public viewing of the deliberations. Members must also ensure that present at the open and closed portion of the meeting is a member of the body itself that has received the requisite training.

The OMCB has recently clarified that **exception (4)** to discuss businesses that intend to locate, expand or remain in the state must be “under circumstances in which the *business* insisted on the need for confidentiality in order to protect the businesses own identity and information.” 9 OMCB Op. 15, p. 10, 11 (2013) (citations omitted)(emphasis added). If the business does not want the confidentiality, the exemption does not apply. Discussion of the real estate needs of those businesses in closed session is appropriate. 7 OMCB Op. 148, 161 (2011) (“Obviously, businesses that are considering relocation or expansion will be

concerned about the site.”). The discussion can go into topics “that could not have been ‘practically separated and discussed outside of the context of the specific business proposal,” including “the applicability of an existing law in a discussion ‘tied to’ the proposal.” 9 OMCB Op. 15, p. 10 (2013) (citations omitted). However, if any part of the discussion can be open to the public because it includes information that already has been made public, then that part of the discussion must be open. *Id.* at 11.

Similarly, the OMCB provides that public bodies closing meetings under **exceptions (5) and (6)** for the investment of public funds and the marketing of public securities should be careful to exclude the public *only when there is a discussion of confidential information that would impair the investment or marketing.* *Id.* at 11-12. The OMCB has cast doubt on the ability of any City public body to invoke the exemption prior to the City authorizing the creation of public securities, such as by the Board of Finance or BDC prior to the passage of the ordinance necessary to create debt, like a bond or tax increment financing (“TIF”). *Id.* at 13. Moreover, if the “proposed initial market is the developer, which itself would hold the bonds,” using the exemption is also dubious because it is hard to imagine a situation in which disclosing information to the public about the developer would impact the developer’s ability to own the bond for its own project. *Id.* It appears, then, that using this exemption will be considered appropriate when a project is underway and the bonds will be sold to outside investors. Thus, the exemption is likely never appropriately used by BDC or by the Board of Finance when considering whether to recommend a certain public security be created by ordinance.

Closing a meeting to consult about pending litigation under **exception (8)** applies only if the potential for litigation is “more than a theoretical possibility,” but instead “when a suit has been threatened or a realistic possibility of a suit is otherwise obvious.” OMA Manual, p. 33(citation omitted); *accord* 3 OMCB Op. 233, p. 239 (2002) (Op. 02-13). Closing a meeting under this exception is only appropriate to discuss the litigation matters (including how to ward off the litigation) but not a related policy matter. OMA Manual, p. 33. This cannot be used to shield discussions from public view like budgetary matters “merely because someone speculates that a lawsuit is possible if funds are not spent for some purpose.” *Id.* Therefore, the rule of thumb is that the meetings should be closed under this exception for a discussion about the facts of the events that will likely be the subject of the litigation, but not when the discussion is about general policy. The OMCB has recognized this approach for many exceptions under the OMA, but has acknowledged how difficult this approach can be in practice because a discussion starting with the particulars can evolve into one about policy. *See, e.g.,* 1 OMCB 56, 60-61 (1994)(“while city council could discuss in closed session possible ways to avert a lawsuit related to alleged zoning violation by a day care center, its discussion of alternative locations for the day care center exceeded the scope of the exception.”)(cited in OMA Manual, p. 33); *accord* 1 OMCB Op. 73, 76 (1997) (Op. 94-5).

Exception (14) that allows closure before a contract is awarded and bids are opened is *designed to protect the bidding process.* Thus, a meeting of a public body to discuss what bid to recommend to the BOE for contract award, for example, may be closed to the public *only* if that discussion would adversely affect the competitive bidding and proposal processes in general. *See, e.g.,* 7 OMCB 1, 3 (Jan. 21, 2010) (approving the closed meetings for oral presentations to the public body by advertising agencies seeking to be awarded the contract so that competitors could not hear others’ presentations and get an advantage when making a subsequent presentation); *but see* 8 OMCB 137, 140-42 (Feb. 26, 2013)(closed session must be for something more than merely discussing a contract). For the exemption to apply, it must center on competing proposals prior to the award of the contract. *See* 5 OMCB 126, 128 (March 9, 2007). The OMCB cautions that while the public body has discretion to determine when the competitive process may be harmed by discussing bids in an open session, it “should have documented the possibility of an adverse impact on its closing statement so as to

demonstrate that the members considered the question and establish the applicability of the exception.” 8 OMCB 63, 66 (May 4, 2012). It is not enough to say that such harm would result automatically from the discussion of the bids prior to selection of a winning bid.

If the public body does legitimately close a meeting, it is free to vote on matters related to the reason for the exception in the closed session. *See, e.g., J.P. Delphey Ltd. P’ship v. Mayor and City of Frederick*, 396 Md. 180, 201-02 (2006) (OMA “authorizes a public body to discuss or act on any matter listed” in a closed session). However, there is a caveat: if the public body is a board or commission “in control of any department, bureau, or other agency in the executive and administrative branch of the government of the City of Baltimore,” *the City Code* prevents it from adopting a “resolution, rule or regulation” during an “executive session in which the public is excluded.” City Code, Art. 1, § 6-1(b). Therefore, if a board or commission closes to discuss how to act, it is best to reopen prior to a voting on any matter.

Procedure for Closing Meetings

When the public body wishes to discuss topics in a closed session, the first step is make sure that at least one member (not staff) of the public body has received the requisite training. As of October 1, 2017, any public body that closes must prove that it had a member present during that meeting who took the required training. A trained staff person is not sufficient to allow closure.

Then, the presiding officer of the public body must “conduct a recorded vote on the closing of the session and make a written statement of the *reason* for closing the meeting before the vote is taken, including a *citation of the authority* under this section, and a *listing of the topics to be discussed.*” Md. Code, Gen. Prov., §3-305(d)(2)(emphasis added: the three elements of the written statement are in *italics*). The written statement “need not disclose a level of detail that would undermine the confidentiality permitted by law,” however, “merely paraphrasing the statutory language is insufficient, in that it provides the public no opportunity to weigh whether the discussion reasonably fits within the cited statutory exception.” 6 OMCB 77, 82 (2009)(citation omitted).

The public body must think carefully about whether closing is really in the best interest of the *public*. This is not about what is in the best interest of the government, elected officials, employees or the public body itself. It may be more beneficial to keep the meeting open and not face scrutiny of the procedures used to close the meeting. The General Assembly has intended that public bodies meet in open session most of the time. Nevertheless, the law recognizes that there will be times when the body will choose to close because an open discussion could be harmful. The Law Department can assist in evaluating the pros and cons of closing all or a portion of a meeting. The Attorney General’s recommended form to use to close a meeting can be found on-line at: https://www.oag.state.md.us/Opengov/Openmeetings/PO_CLOSING_STATEMENT.pdf

The process is:

1. Make sure a member (not staff) of the public body that has taken the requisite training is present
2. Fill out the written statement (reason, citation of authority and list topics); it is best to use the form closing statement available on-line
3. Presiding officer sign the statement
4. Vote on the decision to close the meeting; and
5. Then close.

The OMCB has been adamant that this process is required and is not a mere formality. 9 OMCB Op. 15, p. 7-8 (2013). The written statement must give the public the ability to compare the anticipated topic to be discussed with what the minutes of the next open session will reflect was actually discussed in the closed session to be sure that it was closed properly and that the discussion stayed within the scope of the exception. *Id.* Thus, as highlighted above, the statement must include: the reason for closing the meeting, a citation of the authority for closing, and a listing of the topics to be discussed. Md. Code, Gen. Prov., §3-305(d)(2). The statement must be disclosed to the public on request and must be kept for one year after the date of the meeting. Md. Code, Gen. Prov., §3-305(d)(4), (5). If there is an objection to the closing, the public body must send a copy of the written statement to the OMCB. Md. Code, Gen. Prov., §3-305(d)(3). This must occur even if the objector never files a complaint with the OMCB.

If the public body is aware of a topic that should be discussed in an open session, and it is just as easy to discuss it before discussing the matters requiring the closed session, then those topics that can be discussed in open session should be discussed before the meeting goes to closed session.

It is not permissible to vote to close a future meeting. 1 OMCB Op. 73, 83 (1997) (Op. 94-5) (“those who are present at the meeting to be closed are the ones who must make the decision to close the meeting and who are held accountable for that decision. Since there is no assurance that the members of a public body who are present at one meeting will be present at the next, a vote at one meeting to close the next one does not satisfy the statutory requirement.”); *accord* 6 OMCB 77, 81 (2009) (“We have long held that the vote to close a session must occur at the meeting being closed, not at a prior meeting.”).

Minutes

The OMA requires that any public body keep recorded minutes either 1) written and posted on-line (if practicable) or 2) live and archived video that is posted on-line (if practicable) and both written or video must always be available on request. Md. Code, Gen. Prov., §3-306. The minutes must be prepared as soon as possible after a meeting. Md. Code, Gen. Prov., §3-306(b). The minutes must include:

- (i) each item that the public body considered;
- (ii) the action that the public body took on each item; and
- (iii) each vote that was recorded.
- (iv) If no member (not staff) present at the meeting has taken the requisite training, the minutes must include a copy of the Attorney General Meeting Compliance Check-List found at: http://www.marylandattorneygeneral.gov/OpenGov%20Documents/Openmeetings/COMPLIAN CE_CHECKLIST%20.pdf

Md. Code, Gen. Prov., §§3-213; 306(c)(1).

If the meeting is closed, then the minutes of the next open meeting must contain:

- (i) a statement of the time, place, and purpose of the closed session;
- (ii) a record of the vote of each member as to closing the session;
- (iii) a citation of the authority under this subtitle for closing the session; and

- (iv) a listing of the topics of discussion, persons present, and each action taken during the session².

Md. Code, Gen. Prov., §3-306(c)(2).

If the public body at issue is a board or commission created by the City Charter or Code, *the City Code* imposes the additional requirements for the minutes kept:

(a) *Required.*

Minutes shall be taken at all meetings, including regular, special, and emergency meetings, of all appointed boards and commissions established by the Baltimore City Charter and the Baltimore City Code.

(b) *Filing.*

A copy of the minutes shall be filed with the Department of Legislative Reference no later than the 7th day after the next regularly scheduled meeting or within 60 days, whichever comes first.

City Code, Art. 1, §6-5.

The minutes and recordings are public records and shall be open for public inspection during normal business hours. Md. Code, Gen. Prov., §3-306(d).

Minutes or recordings of a properly closed portion of a meeting remain confidential. Md. Code, Gen. Prov., §3-306(c)(3). However, when a meeting is closed to discuss the investment of public funds under Section 3-305(b)(5), once the investment is made, the minutes or recordings are unsealed automatically and must be disclosed to the public and should be placed on-line. Md. Code, Gen. Prov., §3-306(c)(4)(i). Similarly, when a meeting is closed to discuss the marketing of public securities under Section 3-305(b)(6), once the marketing is done, the minutes or recordings are unsealed automatically and must be disclosed to the public and should be placed on-line. Md. Code, Gen. Prov., §3-306(c)(4)(ii). Additionally, if the public body votes to unseal the minutes or recordings of any closed session for any reason, then they become open to public inspection and should be placed on-line.

The minutes must be kept for at least FIVE years and placed on-line. Md. Code, Gen. Prov., §3-306(e).

Penalties

Failure to follow the procedures and requirements of the OMA can result in either a complaint being filed with the OMCB or a lawsuit or both. Md. Code, Gen. Prov., §3-401. The press has a habit of filing complaints and publishing excerpts from resulting OMCB opinions. If the OMCB determines that a violation of this subtitle has occurred:

1. at the next open meeting of the public body after the Board has issued its opinion, a member of the public body shall announce the violation and orally summarize the opinion; and

² As noted above, if the public body is a board or commission, the City Code prevents it from adopting a “resolution, rule or regulation” during a closed session. City Code, Art. 1, § 6-1(b). Therefore, if the board or commission closes to discuss how to act, it must reopen prior to a vote to adopt any resolution, rule or regulation.

2. a majority of the members of the public body shall sign a copy of the opinion and return the signed copy to the Board.

The public body may not designate its counsel or another representative to provide the announcement and summary.” Md. Code, Gen. Prov., §3-211.

The OMCB will also now place on-line a list of the nature and type of violations committed by all the public bodies in the state. Md. Code, Gen. Prov., §3-211.

If a lawsuit is filed, it may result in invalidating the actions of the public body where the violation of the OMA was willful or knowing. Md. Code, Gen. Prov., §3-401(b), (d). This has actually happened to an important piece of legislation passed by a previous Baltimore City Council. *CLUB v. Baltimore City Board of Elections*, 377 Md. 183, 189 (2003). The Court held that the Council violated the OMA, declared the legislation void and it was not presented to the voters on the ballot as had been intended. *Id.* at 197.

Additionally, any “public body that willfully meets with knowledge that the meeting is being held in violation of the provisions of this subtitle is subject to a civil penalty.” Md. Code, Gen. Prov., §3-402. The penalty can be as much as \$1,000!

Training

Every public body must now designate a member, officer or employee to complete OMA training. Md. Code, Gen. Prov., §3-213. The name of the designated individual is no longer required to be submitted to the OMCB. The training must be done within 90 days of the designation. Training done prior to October 1, 2013 does not count to satisfy this training requirement. The training can be done in a class or on-line at: http://www.igsr.umd.edu/VLC/OMA/class_oma_intro1.php.

Training only staff is not advisable because the body will never be able to close. Closing now requires that a member (not staff) of the public body that has received training be present for that meeting. Md. Code, Gen. Prov., §3-213(d). And while the body can otherwise meet in the open, if a member (not staff) is not present at an open meeting, the minutes of the meeting must include a copy of the completed Attorney General Checklist. This 2017 change in the law did not require all the member of a public body to receive training: the training requirement can still be met by merely training a staff person. However, this is no longer the best way for the body to meet that training requirement. It is far better if all, or nearly all, members of the public body take the training course and keep a copy of the certificate received after completion.

Additional Information

The OMCB’s web page, <https://www.oag.state.md.us/Opengov/Openmeetings/index.htm>, gives a brief history of the OMCB and outlines its functions. It includes a link to an additional source on the OMA (although likely containing more detail than needed), the OMA Manual referenced herein, which can be found at: https://www.oag.state.md.us/Opengov/Openmeetings/OMA_manual_2015.pdf. This manual includes template forms for closing a meeting and a checklist for meeting requirements.

Contact Hilary Ruley in the Baltimore City Law Department (6-3291) if you have any questions.