

## Chapter Two

# Scope of the Open Meetings Act

### A. “PUBLIC BODIES”

The Open Meetings Act applies only to entities that consist of at least two people. §10-502(h)(1)(i). Thus, the Act is inapplicable to a meeting held by the chief executive of a jurisdiction, a department head, or another official acting as “a single member entity.” §10-502(h)(3)(i).<sup>1</sup> If a statute requires a single official to hold a public hearing, for example, the Open Meetings Act does not govern notice or other requirements concerning the hearing; the other statute would.

From the initial passage of the Act, it has applied to multi-member bodies created by the following formal legal instruments: the Maryland Constitution; a State statute; a local government charter; an ordinance; a rule, resolution, or bylaw; an executive order of the Governor; or an executive order of the chief executive of a political subdivision. §10-502(h)(1)(ii). Therefore, the first and often determinative step in analyzing whether the Act applies to an entity is to review the basis for the entity’s existence. For example, the “public body” status of a county delegation to the General Assembly depends on the formal legal authority for its existence, namely the pertinent rule of the House of Delegates or the Senate.<sup>2</sup>

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<sup>1</sup> See 1 Official Opinions of the Open Meetings Compliance Board 175 (1996) (Opinion 96-8). For brevity’s sake, we shall henceforth refer to the volumes of Compliance Board opinions as “OMCB Opinions.”

<sup>2</sup> 80 Opinions of the Attorney General 53 (1995); advice letter from Assistant Attorney General Richard E. Israel to Senator Timothy R. Ferguson (August 1, 2000).

In contrast, an entity formed as a result of a memorandum of agreement consisting of a single representative from two local governments and one from a private association is not a “public body.” 5 OMCB Opinions 194 (2007).

Sometimes a subgroup of a public body is itself a public body, separately subject to the Open Meetings Act when it meets. In one case, for example, the Court of Appeals held that a group of members of a school board, numbering less than a quorum of the board, itself constituted a “public body” when authorized by statute and board resolution to negotiate a labor agreement.<sup>3</sup> Similarly, the Compliance Board has concluded that an advisory panel consisting of members of the Critical Area Commission required pursuant to a statutory directive that, among other things, prescribed panel quorum requirements was a public body.<sup>4</sup> Conversely, if the authority for the existence or the functions of a subgroup of a public body is not set out in a statute, bylaw, resolution, or other formal instrument identified in §10-502(h)(1)(ii), the subgroup itself would not be a “public body.” Thus, the Compliance Board ruled, “[a] subcommittee that is simply designated by the presiding official ... is not a public body.”<sup>5</sup>

Except as discussed below, the Act does not apply to bodies that exist simply as a result of long-standing practice, informal arrangements, or other means apart from any of these formal governmental enactments. For example, the Court of Special Appeals held that the Act does not apply to a political gathering or party caucus.<sup>6</sup> Similarly, a political party central committee is not a public body, because it is created by the party’s constitution and bylaws, not a State statute.<sup>7</sup> A group of employees, not chosen by a public official nor created by constitution, statute, ordinance, rule, or executive order, is not a “public body”; therefore, the group is not required to meet in open session.<sup>8</sup>

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<sup>3</sup> Carroll County Educ. Ass’n v. Board of Educ., 294 Md. 144, 155, 448 A.2d 345 (1982). See also Avara v. Baltimore News American, 292 Md. 543, 550-51, 440 A.2d 368 (1982) (legislative conference committee “authorized” by rule is a “public body”).

<sup>4</sup> OMCB Opinions 189 (2007).

<sup>5</sup> OMCB Opinions 70, 72 (1999) (Opinion 99-12). See also 1 OMCB Opinions 69 (1994) (Opinion 94-4).

<sup>6</sup> See Ajamian v. Montgomery County, 99 Md. App. 665, 639 A.2d 157, cert. denied, 334 Md. 631, 640 A.2d 1132 (1994).

<sup>7</sup> OMCB Opinions 278 (2003) (Opinion 03-6).

<sup>8</sup> 80 Opinions of the Attorney General 90 (1995). See also 4 OMCB Opinions 43 (2004).

The second paragraph of the definition of “public body” extends the term – and accordingly, the Act itself – to certain entities created less formally.<sup>9</sup> This second paragraph describes two alternatives under which informally created entities may qualify as a public body subject to the Act.

First, the Act applies to “any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, 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 2 individuals not employed by the State or a political subdivision.” §10-502(h)(2)(i).<sup>10</sup> For example, if the chief executive uses a letter instead of an executive order to designate a group of people, including at least two private citizens, to study a matter of public concern, the entity will be covered by the Act.

Second, the Act applies to “any multimember board, commission, or committee” appointed either by a public body in the Executive Branch of State government whose members are appointed by the Governor or by an official who is subject to the policy direction of such a public body, if the entity includes at least two individuals who are neither members of the appointing entity nor employees of the State. §10-508(1)(2)(ii).<sup>11</sup>

Some officials have expressed concern about the extension of the Act to informal citizen groups – for example, if the mayor of a town appoints a committee of citizens to make recommendations about the siting of a new playground. The definition is indeed broad, and such a committee would be a “public body.” And

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<sup>9</sup> See *City of Baltimore Dev. Corp. v. Carmel Reality Assoc.*, 395 Md. 299, 323, 910 A.2d 406 (2006).

<sup>10</sup> The language about “an official subject to ... policy direction” was added by Chapter 440, Laws of Maryland 2004. An account of the legislative history and an application of Chapter 440 is set out in 4 OMCB Opinions 132 (2005).

<sup>11</sup> This provision was added by Chapter 164, Laws of Maryland 2009. See Memorandum from Assistant Attorney General William R. Varga to Principal Counsel (September 14, 2009) (illustrating practical application of the change).

The Compliance Board has opined that §10-502(h)(2)(ii) does not apply to local boards of education appointed by the Governor. 7 OMCB Opinions 21 (2010).

if, as in this example, the committee is carrying out an “advisory function,” the Act would apply.

In an era of privatization and entrepreneurial government, the status of private corporations can be controversial. In general, private corporate boards are not “public bodies.” Moreover, the receipt of public funds does not itself subject a private corporation to the Open Meetings Act.<sup>12</sup> Under a test adopted by the Court of Special Appeals, however, the origin and functions of some nominally private corporations would cause them to be considered “public bodies”:

A private corporate form alone does not insure that the entity functions as a private corporation. When a private corporation is organized under government control and operated to carry on public business, it is acting, at least, in a quasi-governmental way. When it does, in light of the stated purposes of the statute, it is unreasonable to conclude that such an entity can use the private corporate form as a parasol to avoid the statutorily-imposed sunshine of the Open Meetings Act.<sup>13</sup>

According to the Court of Special Appeals, a private corporation that “was organized and has functioned as an extension or sub-agency of the ... government” is a “public body” under the Act.<sup>14</sup> Moreover, the Compliance Board has opined that if a corporation’s existence is authorized by a direct legislative act, and the legislative body intended the corporation to be governmental in character, the corporate board is a “public body.”<sup>15</sup>

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<sup>12</sup> OMCB Opinions 212, 216 n. 4 (1997) (Opinion 97-3). See also Opinion of the Attorney General 96-011 (February 29, 1996) (unpublished).

<sup>13</sup> *Andy’s Ice Cream v. City of Salisbury*, 125 Md. App. 125, 154-55, 724 A.2d 717, cert. denied, 353 Md. 473, 727 A 2d 382 (1999).

<sup>14</sup> 125 Md. App. at 157.

<sup>15</sup> See 1 OMCB Opinions 212 (1997) (Opinion 97-3). In addition, the Maryland School for the Blind is specifically covered by the Act. §10-502(h)(2)(ii).

More recently, the Court of Appeals addressed the application of the Act to the Baltimore Development Corporation, a not-for-profit corporation formed to plan and implement development strategies in Baltimore City. *City of Baltimore Dev. Corp. v. Carmel Realty Assoc.*, 395 Md. 299, 910 A.2d 406 (2006). Focusing on the Mayor's role in the selection of entity's board of directors as well as public traits of the corporation, the Court concluded that the Baltimore Development Corporation is "in essence, a public body for purpose of the Open Meetings Act." *Id.*

The Act lists entities that are excluded from the definition of "public body" and therefore are excluded from the Act's coverage. Among these specific exclusions are judicial nominating commissions, grand juries, petit juries, courts (except when they are engaged in rulemaking), the Governor's Cabinet, and a local counterpart to the Governor's Cabinet. §10-502(h)(3).<sup>16</sup> The Act does not apply, for example, to a meeting between a board of county commissioners that is the executive as well as legislative head of county government and the heads of the departments of county government, because that group of administrative advisers to the executive would be the "local counterpart" to the Governor's Cabinet in that county.<sup>17</sup> The actual nature of the body, rather than its label, determines whether the entity is subject to the Act.<sup>18</sup>

## B. "MEETINGS"

The Open Meetings Act applies only if a public body is holding a "meeting." The Act, however, does not specify the circumstances under which a meeting is required; it merely governs the meetings that do occur. Furthermore, as the Compliance Board put it, the Act does not "control a public body's decision

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<sup>16</sup> Other exclusions are the Appalachian States Low Level Radioactive Waste Commission, the governing bodies of hospitals, and certain self-insurance pools.

<sup>17</sup> See 1 OMCB Opinions 50 (1993) (Opinion 93-10); advice letter from Assistant Attorney General Jack Schwartz, Chief Counsel for Opinions and Advice, to Delegate Stephen J. Braun (September 19, 1991). On the other hand, the "local counterpart" exclusion does not extend to a meeting of town council members in their capacity as heads of municipal departments. 3 OMCB Opinions 26 (2000) (Opinion 00-7).

<sup>18</sup> See 1 OMCB Opinions 104 (1994) (Opinions 94-9); 1 OMCB Opinions 50 (1993) (Opinion 93-10).

whether to discuss a matter [at a meeting].”<sup>19</sup> Other laws sometimes limit a public body’s decision-making process to a convened meeting; the Open Meetings Act does not.<sup>20</sup>

The term “meet” is defined as follows: “to convene a quorum of a public body for the consideration or transaction of public business.” §10-502(g). A quorum is a majority of the membership unless some other provision of law specifies a different number. §10-502(k). Hence, the Act does not apply to conversations between, for instance, any two members of a public body having a membership greater than three. As the Compliance Board put it, the Act “does not preclude politicking and lobbying, individually, outside the meeting.”<sup>21</sup> If a public body announced an open meeting but a quorum of members does not attend, the Act would not govern discussions among the members who did attend. It would be prudent, nonetheless, for those members to maintain the open session that otherwise would have occurred, given their and the public’s expectation that the matters would be discussed openly.

Although the presence of a quorum in the same room would ordinarily characterize a “meeting,” joint physical presence is not a prerequisite to the convening of a meeting. For example, a telephone conference call in which a

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<sup>19</sup> OMCB Opinions 70, 71-72 (1999) (Opinion 99-12 ).

<sup>20</sup> Dictum in a 2009 Court of Appeals decision might be viewed as casting this interpretation in doubt to the extent it cryptically endorsed the lower courts’ apparent conclusion that the Act required a city council committee to hold a meeting. *Armstrong v. Mayor and City Council of Baltimore*, 409 Md. 648, 976 A.2d 349 (2009). Nevertheless, the Court’s dictum and the Open Meetings Compliance Board’s long-standing interpretation of the Act may be reconciled in that the requirement to hold a meeting could be traced to a provision of the City’s zoning code. Any committee meeting involving a zoning matter would need to be conducted in accordance with the Open Meetings Act. §10-503(b)(2); see 94 Opinions of the Attorney General 161, 174 n.22 (2009).

<sup>21</sup> OMCB Opinions 101, at 103 (1994) (Opinion 94-8) (internal quotation omitted). See also 4 OMCB Opinions 51 (2004) (one-to-one serial conversations); *Jochum v. Tuscola County*, 239 F.Supp. 2d 714 (E.D. Mich. 2003) (canvassing of votes individually); *Telegraph -Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 533 (Iowa 1980) (series of individual discussions); *Moberg v. Independent School Dist.*, 336 N.W. 2d 510, 518 (Minn. 1983) (series of telephone calls). Other states have prohibited serial communications. See Ann Taylor Schwing, *Open Meeting Laws* §6.40c.

quorum of members is conducting business simultaneously is a “meeting” that must comply with the Act.<sup>22</sup> If a public body meets in open session via telephone or video conference, it must afford the public access to the discussion. A telephone conference is open to the public if a speaker-phone is available at an announced location; a video conference, if a monitor is similarly available.

A meeting can also occur in unconventional venues. For example, if a quorum of a public body rides together in a vehicle and conducts public business while doing so, they are holding a meeting. If the meeting is one that the public is entitled to observe, the public body has violated the Act, for obviously the public cannot gain access to the meeting site.

Although the common physical presence of members of a public body is not a prerequisite for a “meeting” to occur, the possibility of immediate interaction is.<sup>23</sup> Therefore, the Act does not apply to an exchange of correspondence among members of a public body: “A piece of paper that moves from person to person does not ‘convene a quorum of a public body,’ even if the paper reflects ‘the consideration or transaction of public business.’ Because an exchange of paper is not a ‘meeting,’ the Act does not apply.”<sup>24</sup> Likewise, the Act does not apply to conventional e-mail messages.<sup>25</sup> Other law might address whether a public body is allowed to make decisions by these means, but the Act does not.

The General Assembly’s statement of legislative policy speaks of the public’s entitlement “to witness the phases of the deliberation, policy formation, and

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<sup>22</sup> OMCB Opinions 58, 61 (2004). See also H. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 11 (1976), reprinted in 1976 U.S. Code Cong. & Adm. News 2247 (explaining scope of term “meeting” in federal Government in the Sunshine Act).

<sup>23</sup> See 2 OMCB Opinions 206, 208-09 (1997) (Opinion 97-2).

<sup>24</sup> Letter of advice from Jack Schwartz, Chief Counsel for Opinions and Advice, to Jeffery S. Getty, Esquire, City Attorney of Frostburg (July 11, 1995) (citing *City of College Park v. Cotter*, 309 Md. 573, 595 n. 32, 525 A.2d 1059 (1987)). See also 6 OMCB Opinions 57 (2008); 1 OMCB Opinions 218 (1997) (Opinion 97-4).

<sup>25</sup> 81 Opinions of the Attorney General 140 (1996); 2 OMCB Opinions 78 (1999) (Opinion 99-15). The Virginia Supreme Court reached the same conclusion about a comparable provision in Virginia’s “sunshine” law. *Beck v. Shelton*, 593 S.E.2d 195 (Va. 2004). The result might be different if a quorum were participating in a simultaneous medium like a pre-arranged “chat room.”

decision making of public bodies ....” §10-501(b)(1). “In this regard,” the Court of Appeals has stated, “it is clear that the Act applies, not only to final decisions made by the public body exercising legislative functions at a public meeting, but as well as to all deliberations which precede the actual legislative act or decision, unless authorized by [the Act] to be closed to the public.”<sup>26</sup> This reasoning also applies to briefings or other information-gathering. This often critical phase of the decision-making process must be open to public view.<sup>27</sup>

A public body cannot avoid its obligations under the Act by labeling its meeting a “work session” or “pre-meeting,” or by gathering together at some location other than the customary meeting room. As the Court of Appeals put it, “the Act makes no distinction between formal and informal meetings of the public body; it simply covers all meetings at which a quorum of the constituent membership of the public body is convened ‘for the purpose of considering or transacting public business.’”<sup>28</sup> The Court of Appeals quoted with approval the following passage from a Florida case:

One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic premeeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute ....<sup>29</sup>

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<sup>26</sup> City of New Carrollton v. Rogers, 287 Md. 56, 72, 410 A.2d 1070 (1980).

<sup>27</sup> 71 Opinions of the Attorney General 26, 29 (1986); 3 OMCB Opinions 30 (2000) (Opinion 00-8); 1 OMCB Opinions 35 (1993) (Opinion 93-6).

<sup>28</sup> Rogers, 287 Md. at 72.

<sup>29</sup> Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (1974).



As the Court of Appeals observed, “every step of the process ... constitutes the consideration or transaction of public business.”<sup>30</sup>

The fact that a quorum of a body might be together at the same time, however, does not necessarily make that gathering a “meeting” subject to the Act. Rather, both the context for the gathering of the quorum and the content of the discussion must be considered, because the Act does not apply to “a chance encounter, social gathering, or other occasion that is not intended to circumvent this subtitle.” §10-503(a)(2).<sup>31</sup>

If a majority of members of a public body attends a gathering convened by an entity to which the Act does not apply, the Act does not become applicable merely because a quorum is present. In one case, the Court of Special Appeals held that the presence of five members of the Montgomery County Council at a meeting of the local Democratic Central Committee (“DCC”) did not violate the Open Meetings Act.<sup>32</sup> Although the members attending would constitute a quorum if convened as such, and the discussion concerned issues before the Council, they did not act in that capacity during the meeting. That is, the Court based its decision on the activity of the Council members at the DCC meeting, rejecting the argument that the mere presence of the Council members necessarily implicated the Act. Likewise, the Compliance Board had opined, even before the court decision, that a public body is not subject to the Act simply because a quorum is present at another organization’s meeting.<sup>33</sup> At the same time, a public body cannot escape its obligations under the Act if, in the course of another group’s meeting, the public body itself convenes and engages in business that is subject to the Act.<sup>34</sup>

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<sup>30</sup> Rogers, 287 Md. at 72.

<sup>35</sup> OMCB Opinions 93 (2007).

<sup>32</sup> *Ajamian v. Montgomery County*, 99 Md. App. 665, 639 A.2d 157 (1994), cert. denied, 334 Md. 631, 640 A.2d 1132 (1994). See also *Jochum v. Tuscola County*, 239 F. Supp. 2d 714 (E.D. Mich. 2003).

<sup>33</sup> OMCB Opinions 6 (1992) (Opinion 92-2); see also 3 OMCB Opinions 242 (2002); 6 OMCB Opinions 77 (2009).

<sup>34</sup> OMCB Opinions at 7 (1992) (Opinion 92-2). See also, e.g., 1 OMCB Opinions 142 (1995) (Opinion 95-10); 1 OMCB Opinions 120 (1995) (Opinion 95-4); and 1 OMCB Opinions 104 (1994) (Opinion 94-9).

The Act also does not apply to meetings with civic or neighborhood groups that are intended merely to allow citizens to question members of the public body. In the City of New Carrollton case, the Court of Appeals considered the Act's applicability to a meeting at which the city's mayor and members of its council went to a forum, at the invitation of a neighborhood group, "for the purpose of answering questions that their residents might have about [the city]." The Court held that "[p]ublic notice of this event was not required by the Act to be given to the citizens of the [city] since, as we view it, it was not a 'meeting' of the public body but rather, within the contemplation of §[10-503(a)(2)], was an [occasion that is not intended to circumvent this subtitle]."<sup>35</sup>

The content of a quorum's discussion can also determine whether the Act applies. For example, a discussion of a member's personal circumstances (illness, for example), although it might be indirectly related to the carrying out of the member's duties, is not "the consideration or transaction of public business."<sup>36</sup> Moreover, the Act is not violated merely because a majority of a public body might gather together informally before a meeting or during a break. So long as the members simply engage in social conversation and avoid any phase of the public body's own decision-making process, the Act would not apply.<sup>37</sup> Similarly, the Act would not apply to a training session aimed at improving leadership or team-building skills.<sup>38</sup> Likewise, a public body does not engage in the conduct of public business merely by listening to a general informational presentation not linked to specific items of pending business. At a library board reception, for example, the Act was not violated when board members heard "a summary of improvements to the libraries as well as problems the libraries face in the future."<sup>39</sup> In a social setting, the Compliance Board has recognized, public officials can be expected to "make stray comments relating to public business." This inevitable occurrence is

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<sup>35</sup> 287 Md. at 71.

<sup>36</sup> See 1 OMCB Opinions 129 (1995) (Opinion 95-7).

<sup>37</sup> See, e.g., 6 OMCB Opinions 63 (2008); 3 OMCB Opinions 257 (2003) (Opinion 03-2); 1 OMCB Opinions 227 (1997) (Opinion 97-7); 1 OMCB Opinions 157 (1996) (Opinion 96-3); and 1 OMCB Opinions 92 (1994) (Opinion 94-6).

<sup>38</sup> 80 Opinions of the Attorney General 241 (1995).

<sup>39</sup> 1 OMCB Opinions 227, 231-32 (1997) (Opinion 97-7).

not a legal problem so long as the conversation is confined merely to “passing references to the work of the [public] body.”<sup>40</sup>

Whether a “retreat” is a meeting depends not on how it is labeled but rather on its purpose. If, for example, the purpose of the retreat is simply to improve interpersonal relations, the Act would not apply.<sup>41</sup> 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 specific matters that are to be dealt with by the body.<sup>42</sup>

### C. SUBJECT MATTER: FUNCTIONS INCLUDED AND EXCLUDED

#### 1. Functions included.

The scope of the Act is determined in part by the “function” carried out by the public body. If, at a meeting, a public body is engaged in an “advisory function,” “legislative function,” or “quasi-legislative function,” the Act applies.

An advisory function is “the study of a matter of public concern or the making of recommendations on the matter, under a delegation of responsibility” by law, gubernatorial or other chief executive designation or by the designation of an official who is subject to the policy director of the governor or other chief executive, or by formal action of a public body. §10-502(c).<sup>43</sup> A legislative function is “the process or act of ... approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy.”<sup>44</sup> It also includes “approving or disapproving an appointment,” §10-502(f); this language refers to the public body’s consideration of an appointment proposed by an executive official or a subordinate

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<sup>40</sup> OMCB Opinions 5, 7 (1998) (Opinion 98-2).

<sup>41</sup> See 3 OMCB Opinions 274 (2003) (Opinion 03-5).

<sup>42</sup> OMCB Opinions 122 (2001) (Opinion 01-10).

<sup>43</sup> The reference to the designation of an official subject to the policy direction of a chief executive was added by Chapter 643, Laws of Maryland 2007.

<sup>44</sup> See, e.g., 64 Opinions of the Attorney General 208, 210 (1979) (action of Lottery Commission to increase prize payout is the exercise of a legislative function). The Compliance Board has considered how this definition applies to the role of local government in the State legislative process. 4 OMCB Opinions 12 (2004).

of the public body rather than to the public body's making an appointment.<sup>45</sup> A quasi-legislative function includes the process of rulemaking, "approving, disapproving, or amending a budget,"<sup>46</sup> and "approving, disapproving, or amending a contract." §10-502(j). A contract can include an employment contract<sup>47</sup> or a franchise assignment.<sup>48</sup>

The Act also applies to functions not defined in the Act at all. In the Compliance Board's simile, "just as the universe of subatomic particles probably contains particles as yet undetected, so the universe of activities subject to the Open Meetings Act contains functions that are undefined by the Act .... If a discussion fits within none of the functional definitions of the Act, then the discussion is subject to the Act."<sup>49</sup>

## 2. Functions excluded.

The Open Meetings Act does not apply, however, to every possible item of public business. With an important exception to be discussed below, it does not apply when a public body is carrying out an "administrative function," a "judicial function," or a "quasi-judicial function." §10-503(a)(1).<sup>50</sup> If the Act does not apply, a public body is free, but is not required, to comply with the Act's provisions on notice, openness, and the like.

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<sup>45</sup> 1 OMCB Opinions 252 (1997) (Opinion 97-14); and 1 OMCB Opinions 123 (1995) (Opinion 95-5).

<sup>46</sup> See 4 OMCB Opinions 104 (2004).

<sup>47</sup> 1 OMCB Opinions 125 (1995) (Opinion 95-5).

<sup>48</sup> 5 OMCB Opinions 200 (2007); 5 OMCB Opinions 7 (2006).

<sup>49</sup> 1 OMCB Opinions 96, 98 (1994) (Opinion 94-7). See also 4 OMCB Opinions 12 (2004).

<sup>50</sup> For many years, an executive order required agencies in the Executive Branch to hold open meetings (with certain exceptions) even when carrying out what is now called an administrative function. See Executive Order 01.01.1976.09 (issued May 25, 1976). This executive order was rescinded on January 12, 1987. See Executive Order 01.01.1987.01 (rescinding 52 executive orders said to have become "obsolete").

Of the activities that are outside the scope of the Open Meetings Act, the definitions of judicial function and quasi-judicial function are straightforward. A judicial function is “the exercise of any power of the judicial branch of the State government,” except rulemaking. §10-502(e). A quasi-judicial function is “a determination of ... a contested case” under the Maryland Administrative Procedure Act or any other administrative proceeding subject to judicial review under Title 7, Chapter 200 of the Maryland Rules. §10-502(i).<sup>51</sup>

The term “administrative function,” defined in §10-502(b), is new, but the underlying concept is not. In legislation enacted in 2006, the General Assembly changed the former term “executive function” to “administrative function” but kept the definition the same.<sup>52</sup> This change in terminology, recommended by the Compliance Board,<sup>53</sup> is aimed at avoiding the confusion that arose between “executive function,” the term previously used in the Act, and “executive session,” commonly used to refer to any closed meeting. The change, however, does not affect the interpretation of the exclusion. In other words, all prior judicial and Compliance Board interpretations of the executive function exclusion are preserved and may be used in applying the “administrative function” exclusion.

The Compliance Board has described the executive function – now termed the administrative function – exclusion as “the most bedeviling aspect of Open Meetings Act compliance ....”<sup>54</sup> Applying this exclusion requires two distinct steps. First, the public body must consider whether the matter to be discussed falls within the definition of any of the other defined functions. If so, then the administrative function exclusion is ruled out. §10-502(b)(2). If not, the public body must consider whether the matter to be discussed involves the development of new policy, or merely the implementation of an already-established law or policy. The

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<sup>51</sup> OMCB Opinions 76 (2004); 3 OMCB Opinions 260 (2003) (Opinion 03-3); 2 OMCB Opinions 1, 2-3 (1998) (Opinion 98-1).

<sup>52</sup> Chapter 584 (House Bill 698) of the Laws of Maryland 2006 (effective October 1, 2006).

<sup>53</sup> Open Meetings Compliance Board, Use of the Executive Function Exclusion Under the State Open Meetings Act 19-20 (December 2005).

<sup>54</sup> OMCB Opinions 105, 106 (2001) (Opinion 01-7).

administrative function exclusion covers only the latter.<sup>55</sup> Public bodies should be particularly careful about aspects of the contracting process, which might seem administrative in character but are a quasi-legislative, not an administrative, function.<sup>56</sup> The Compliance Board has issued numerous opinions examining this exclusion in various contexts. References to these are included in Appendix F to this manual.

In counties that have not adopted a form of home rule, in home rule counties without a county executive, and in many municipalities, the legislative body exercises administrative functions as well. The applicability of the Act will depend on which role the body is playing.<sup>57</sup> In a commissioner county, for example, the early phases of the budget preparation process correspond to activities of the county executive in a charter home rule county; these budget preparation activities are, therefore, part of the administrative function, rather than the quasi-legislative function of budget review.<sup>58</sup>

Similarly, a county board of education carries out some activities within the administrative function exclusion and some that are not excluded. The Compliance Board has given extensive guidance on this matter in an opinion involving the Board of Education for Howard County.<sup>59</sup>

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<sup>55</sup> See 78 Opinions of the Attorney General 275 (1993). For example, this office has concluded that the issuance of advisory opinions by the State Ethics Commission is an administrative (formerly executive) function, not an advisory function. See 64 Opinions of the Attorney General 162, 167 n.3 (1979); Opinion No. 78-079 (June 7, 1978) (unpublished).

<sup>56</sup> See 4 OMCB Opinions 127 (2005).

<sup>57</sup> See *Board of County Commissioners v. Landmark Community Newspapers*, 293 Md. 595, 602-05, 446 A.2d 63 (1982); Compliance Board Opinion 92-2 (October 23, 1993), reprinted in 1 OMCB Opinions 6. The Compliance Board has held that the distinction drawn in *Landmark*, between the executive and the quasi-legislative phases of the budget process, “is limited to a situation in which preexisting law clearly delineates the distinct phases of the process in question.” 3 OMCB Opinions 105, 110-11 (2001) (Opinion 01-7).

<sup>58</sup> *Landmark Community Newspapers*, 293 Md. at 605. See generally 1 OMCB Opinions 227 at 229-30 (1997) (Opinion 97-7).

<sup>59</sup> OMCB Opinions 39 (2001) (Opinion 01-10).

Although administrative and quasi-judicial functions are generally outside the scope of the Act, these exclusions do not extend to certain licensing and all zoning matters. Under §10-503(b), the Act applies to a public body when it is meeting to consider:

- (1) granting a license or permit; or
- (2) a special exception, variance, conditional use, zoning classification, enforcement of any zoning law or regulation, or any other zoning matter.

Thus, it does not matter whether a particular license application or zoning matter would fit within the definition of the administrative or quasi-judicial functions. If the item deals with “granting a license or permit” or with zoning, the Open Meetings Act applies to the meeting at which the matter is considered.<sup>60</sup>

This provision has resulted in a significant change in practice for some public bodies. Zoning appeals boards, for example, which once were outside the Act when carrying out their quasi-judicial role, are required to conduct their deliberations in open session unless one of the Act’s exceptions applies, and often none will. The General Assembly unquestionably meant to legislate this result; not only is the statutory language unambiguous, but the General Assembly also rejected amendments that would have permitted these deliberations to be nonpublic.<sup>61</sup>

But the reach of §10-503(b) might not have been considered by the General Assembly in another area: occupational licensing applications.<sup>62</sup> When a person applies for a license under the Health Occupations or Business Occupations and Professions Articles, the licensing board’s meeting to consider the application would fall within the terms of §10-503(b)(1) and therefore is subject to the Open Meeting Act. Of course, exceptions in the Act might permit the meeting to be closed – especially §10-508(a)(2), regarding the protection of personal privacy, and §10-

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<sup>60</sup> OMCB Opinions 182 (2002) (Opinion 02-3).

<sup>61</sup> See generally *Wesley Chapel Bluemount Ass’n v. Baltimore County*, 347 Md. 125 (1997). This case decided that development or subdivision plans are, for purposes of §10-503(b)(2), a “zoning matter.”

<sup>62</sup> The only example that we could locate in the legislative history of a proceeding to be covered by §10-503(b)(1) is liquor licensing.

508(a)(13), permitting invocation of confidentiality requirements in other law. These and other exceptions are discussed in Chapter 4 below.

The Act applies even if the licensing board has before it a recommendation that a license application be denied; the item to be considered remains whether to grant the license. The Act would not apply, however, to suspension or revocation proceedings, which do not concern the “granting” of a license.

#### D. WRITTEN MATERIAL

With the exception of certain records required by the Open Meetings Act, discussed in Chapter 3, the Act does not regulate access to documents. Instead, the Maryland Public Information Act governs public access to State and local records.<sup>63</sup> Thus, even if members of a public body refer to certain documents at a public meeting, the Open Meetings Act does not require that the documents themselves be made public; the status of the documents would be determined by the Public Information Act or other law.<sup>64</sup>

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<sup>63</sup> See Title 10, Subtitle 6, Part III of the State Government Article. A manual and other material about the Public Information Act may be found on the Attorney General’s website, <http://www.oag.state.md.us/Opengov/pia.htm>.

<sup>64</sup> OMCB Opinions 78 (1999) (Opinion 99-15).