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February 11, 2021

To: The Honorable Shane E. Pendergrass  
Chair, Health and Government Operations Committee

From: Office of the Attorney General

Re: HB0344 – Open Meetings Act – Requirements for State Agencies and Local Boards of  
Elections – **Letter of Information**

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House Bill 344, among other things, would move certain livestreaming requirements that currently apply only to certain agencies to the Open Meetings Act and therefore under the jurisdiction of the Open Meetings Compliance Board; expand the agencies to which the livestreaming requirement would apply; and impose other new requirements on the entities covered by the bill, such as a requirement to post an agenda and all meeting materials 48 hours in advance of the meeting and a requirement to post searchable transcripts as well as the recordings of the meeting. The bill also would authorize a circuit court to void the action of a public body in violation of at least some of these requirements.<sup>1</sup>

This Office provides staff and counsel to assist the Open Meetings Compliance Board and also has a role in promoting public transparency through educational programs, such as the online class on the Open Meetings Act, and the dissemination of information on the open government portion of the Office's website. The Office submits this letter of information to make three comments on the bill.

First, the bill applies to “a public body that is a State agency in the Executive Branch or a local board of elections.” The phrase “public body that is a State agency in the Executive Branch” is ambiguous—it is not defined either in the General Provisions Article or the State Government Article—so we believe it will generate considerable uncertainty about which public

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<sup>1</sup> In what may be a drafting error, the current version of the bill allows for judicial enforcement of, among other things, what would be § 3-306(b) and § 3-306(d) of the Open Meetings Act. The new livestreaming requirement, however, would be codified at § 3-306(c). It is unclear to us whether the intent is to allow enforcement of § 3-306(b) and (d) or instead enforcement of the new § 3-306(c) and (d).

bodies are expected to meet the new requirements imposed by the bill. For example, it is not clear whether the bill is intended to apply to all “public bodies” that are housed within a Principal Department (e.g., the Department of Labor hosts a number of licensing boards), or only to independent units (like the State Board of Elections) that effectively operate as their own separate agency. It is similarly unclear whether the bill is intended to apply to advisory bodies (even if they are independent) with no power to, for example, allocate funds or to make administrative decisions. We also expect that questions might arise to whether the bill is intended to apply to public bodies that are considered State entities for some purposes and local entities for other purposes, such as local boards of education. Instead of leaving a large number of interpretive issues for this Office, the Open Meetings Compliance Board, and the courts to resolve, we would encourage amendments to make clear to which agencies or entities the bill applies so that we may instruct our clients and revise our educational materials accordingly.

Second, the bill requires a public body subject to these new requirements to post “all meeting materials” online unless relevant to the closed portion of a meeting. Depending on the intent behind that requirement, you may wish to make clear that the entity need not post materials that would be protected from disclosure under the Public Information Act. Questions may also arise with regard to materials that cannot be scanned for timely posting, as might occur with voluminous or oddly-formatted exhibits, and as to whether the phrase “meeting materials” refers only to materials provided to the members in advance of the meeting, to materials used at the meeting, or both. Because the bill allows—for the first time—a court to void an agency’s action for failure to post the meeting materials, clarity as to what is required is important so that we may instruct our clients and revise our training materials accordingly. Again, we would be pleased to work with you on clarifying amendments.

Third, we note that to the extent that the bill is intended to apply broadly to most or all State boards and commissions, there could be resource challenges for smaller boards and commissions who do not receive funding, including ones that this Office staffs. These resource issues arise because of the livestreaming requirement would be new for these public bodies, as would be the need to provide agendas with meeting materials 48 hours in advance and searchable transcripts. If the General Assembly in fact intends that the bill apply to such entities, it might be helpful to make clear that some centralized resource—such as the Department of Information Technology—must assist these boards and commissions with the technology necessary to meet these requirements.

cc: Committee Members