

The Maryland House of Delegates
ANNAPOLIS, MARYLAND 21401

Sponsor Testimony in SUPPORT of HB 235
Open Meetings Act - Definition - Administrative Function

February 25, 2022

House Bill 235 improves public confidence in government by strengthening the Maryland Open Meetings Act. It clarifies that personnel actions for direct reports are subject to the Act and do not fall under the administration function exception.

A public body's personnel actions like hiring, firing, demoting, conducting performance evaluations and compensating employees currently fall in a gray area. The Maryland Attorney General has long advised in the Open Meetings Act Manual that the best practice for public bodies is to meet in closed session using the personnel exception rather than the administration function.

HB235 simply codifies this best practice, thereby eliminating situations in which there is an appearance of secrecy. The bill only applies to employees who report directly to the public body, especially in cases where the employee's position is defined in statute or enabling legislation.

HB235 is in the same posture as HB920 which passed the Health and Government Operations Committee in 2021. Due to concerns expressed by the Open Meetings Compliance Board, Chair Pendergrass recommitted HB920 back to committee. Over the interim, she wrote to the Compliance Board to request that they study the underlying issue and report back with recommendations. Unfortunately the Board declined to take up the Chair's request.

I respectfully ask for a favorable report.

From the MD Attorney General's Open Meetings Act Manual (10th ed., Jan 2021):

The Compliance Board has repeatedly commented on the difficulty of applying the administrative function exclusion with confidence.¹⁰ If in doubt, the public body should proceed on the assumption that the Act applies. If the public body wants to treat the matter as “administrative” because the topic is confidential, the public body should instead analyze whether the meeting may be closed under the “exceptions” in the Act that permit closed-door discussions of certain topics. See Chapter 4.

¹⁰ For example, in 9 OMCB Opinions 110 (2014), the Compliance Board commented on “the regrettable difficulty, for public bodies, the public, and representatives of the press alike, of applying the administrative function exclusion.” *Id.* at 113. As noted there, the Compliance Board had studied the issue in 2005. *Id.*, citing *Use of the Executive Function Exclusion under the Maryland Open Meetings Act - Study and Recommendations by the Open Meetings Compliance Board* (December, 2005). One confusing aspect of the administrative function exclusion noted in the study was that the exclusion might also apply to discussions that fall within the “personnel matters” exception that permits a public body to close a meeting that is subject to the Act. *Id.*, citing Study p. 6. See also fn. 8, above, and Chapter 4, part A, below, of this Manual.

The Compliance Board has found that discussions about particular employees or appointees sometimes fall also within the administrative exclusion. See notes 7 and 8 in Chapter 1; see also 12 OMCB Opinions 46, 48 (2018) (“[P]erformance evaluations often fall within the administrative function exclusion.”). In that case, the Act would not apply, with the exception of the disclosure requirements that apply when a public body closes an open meeting to address administrative matters. See § 3-104. If in doubt, the public body should proceed on the assumption that the Act applies to these discussions, for multiple practical reasons: the courts have not addressed this point, so the law is not settled; a public body that convenes behind closed doors to address administrative matters invites suspicion that its members are secretly conducting more substantive business; the disclosure requirements that attach to meetings closed under the Act give the public some assurance that the closed session is legal and some information about it; and, though the Act’s requirement that public bodies prepare minutes is regarded by some as a nuisance and a reason to treat a discussion as “administrative,” memorializing the events of a meeting is one of the basics of efficient meetings practices.

July 28, 2021

Lynn Marshall
Chair, Open Meetings Compliance Board
c/o Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202

Dear Ms. Marshall,

The House Health and Government Operations Committee heard HB 920 on March 10, 2021. This bill would have altered the definition of "administrative function" as it applies to Maryland's Open Meetings Act (the Act) to exclude any personnel matter that affects one or more specific individuals so that such matters would not fall under the Act's administrative function exclusion. HB 920 passed the Committee and was scheduled for a second reader vote in the House of Delegates. Because of ongoing concerns about the bill's impact, however, I moved to recommit the bill to the Committee.

In the Open Meetings Compliance Board's written testimony on HB 920, the Board said that "changes to the [the Act] should be enacted only after careful study of the proposed amendment's impact on the Act's purposes and on public bodies." I respectfully ask the Board to undertake that study this interim, consider the issues the bill sought to address, and make recommendations to the Committee on an appropriate solution on or before December 31, 2021. Please include the bill sponsor, Delegate Alfred C. Carr, Jr., in your discussions.

This topic is of great interest to a number of legislators and stakeholders who are eager to learn the Board's recommendations. It would be helpful to receive a letter from you confirming the Board's intention to conduct the discussions outlined above. I respectfully request this confirmation by Friday, August 6, 2021.

Thank you for your assistance on this important matter. If you have any questions, please contact Lindsay Rowe, counsel for the House Health and Government Operations Committee at 410-946-5350.

Sincerely,

Shane E. Pendergrass, Chairman
House Health and Government Operations Committee