STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

January 21, 2022

The Honorable Shane E. Pendergrass, Chair
Health and Government Operations Committee
House Office Building, Room 241
6 Bladen Street
Annapolis, Maryland 21401

Re: House Bill 235
Position: Opposed

Dear Chair Pendergrass:

As Chair of the Open Meetings Compliance Board, I am writing to convey the Board's opposition to House Bill 235, which proposes the same change to the Open Meetings Act as did House Bill 920 in the 2021 regular legislative session.

In its present form, the Act does not apply to a public body when it is carrying out "an administrative function," Md. Code Ann., Gen. Prov. ("GP") § 3- 103(a)(1)(i), which the Act defines in both the affirmative (what an administrative function is) and the negative (what it is not). "Administrative function" means the administration of a law of the State or a political subdivision, or a rule, regulation, or bylaw of a public body. GP § 3-101(b)(1). "Administrative function" does not include advisory, judicial, legislative, quasi-judicial, or quasi-legislative functions. GP § 3-101(b)(2). House Bill 235 proposes adding to this list of exclusions "the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom a public body has direct jurisdiction."

If the purpose of House Bill 235 is to make personnel matters more open to the public, the bill does not achieve that goal. Although removing personnel matters from the definition of "administrative function" makes them subject to the Act, the Act also includes fifteen exceptions to the openness requirement, including a so-called "personnel matters exception." GP § 3-305(b). Under this exception, a public body may meet in a session closed to the public to discuss: "(i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom it has jurisdiction; or (ii) any other personnel matter that affects one or more specific individuals[.]" GP § 3-305(b)(1). House Bill 235 does not propose any change to this personnel matters exception in § 3-305(b)(1). Thus, in practice, the legislation will not enable the public to observe a public body's meetings on personnel matters.

Another concern for the Board is the additional burden that House Bill 235 would have on public bodies and the Board. Although public bodies would be entitled to discuss personnel matters in private, House Bill 235 would require them to comply with various procedural requirements under the Act. For example, to discuss or interview candidates for a job vacancy, a public body would have to provide notice and an agenda of the meeting, convene in the open, vote to close the session, draft and make available to the public a closing statement providing the reason and statutory authority for the closure, convene in closed session, take minutes of that session, provide the public a brief summary of what occurred in the closed session,[1] and retain the minutes for at least five years. GP §§ 3-302, 3-302.1, 3-305, 3-306. The legislation would also likely create more work for this Board because the increase in the number of closed meetings to discuss personnel matters would almost certainly result in more complaints challenging the propriety of such meetings. But the complaint process would not inform the public of what happened behind closed doors; while the Act allows this Board to review minutes of closed sessions, the minutes remain sealed to the public, GP § 3-306(c)(3), and this Board's opinions discuss the substance of closed sessions in only the most general terms, *see, e.g.*, 15 *OMCB Opinions* 99, 106 (2021).

The Board previously shared these concerns with respect to House Bill 920, which was introduced in the 2021 regular legislative session and proposed the same substantive amendment to the Open Meetings Act. *See* Attachment A (Letter from Lynn Marshall to Delegate Shane Pendergrass (March 10, 2021)); Attachment B (Letter and appendices from Open Meetings Compliance Board to Delegate Shane Pendergrass (August 30, 2021)). Because House Bill 235 does not address the Board's concerns, the Board remains opposed to the legislation.

Sincerely,

Lynn Marshall /rs

Lynn Marshall, Esquire
Chair, Open Meetings Compliance Board

[1] Whenever a public body meets in closed session, the minutes of its next open session must include a closed session summary detailing when and where the closed session took place, the purpose and statutory authority for the closure, the vote of each member as to the closing of the meeting, and the topics of discussion and action taken during the session. GP § 3-306(c)(2). Because this "closed-session summary is designed to be public," however, it "contains only the information about a closed session that the public body deems non-confidential." 9 *OMCB Opinions* 127, 131 (2014). Thus, as the Board notes above, imposing this additional requirement on public bodies under House Bill 235 would not result in the public obtaining information about the specific personnel matters discussed in closed sessions.

STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

March 10, 2021

The Honorable Shane E. Pendergrass, Chair
Health and Government Operations Committee
House Office Building, Room 241
6 Bladen Street
Annapolis, MD 21401

Re: House Bill 920
Position: Opposed

Dear Chair Pendergrass:

As Chair of the Open Meetings Compliance Board, I am writing to convey the Board's position regarding House Bill 920. Currently, the Open Meetings Act does not apply to a public body when it is carrying out "an administrative function." Md. Code Ann., Gen. Prov. ("GP") § 3-103(a)(1)(i). House Bill 920 would exclude "any personnel matter that affects one or more specific individuals" from the definition of "administrative function."

In applying the current law, the Board has advised that various personnel matters generally fall within the administrative function exclusion and are thus exempt from the Act's requirements, including job interviews, 4 *OMCB Opinions* 182, 184 (2005), staff appointments, 1 *OMCB Opinions* 123, 124 (1995), performance evaluations, 10 *OMCB Opinions* 104, 106 (2016), and dismissal of individual employees, 9 *OMCB Opinions* 290, 295 (2015). House Bill 920 would subject these tasks to all requirements of the Act.

Although the Board supports bringing additional clarity to the often-confusing administrative function exclusion, the Board opposes House Bill 920. The Board has two

primary concerns. First, while the bill expressly removes personnel matters from the administrative function exclusion, thus making them subject to the Act, it leaves in place the open-meeting exception in § 3-305(b)(1). Section 3-305(b)(1) currently provides that a public body may meet in closed session to consider "the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom it has jurisdiction" or "any other personnel matter that affects one or more specific individuals." GP § 3-305(b)(1).

Thus House Bill 920 would not in practice enable the public to observe public body meetings on personnel matters. Instead, it merely would require public bodies to observe the Act's closing procedures before handling any personnel business, no matter how routine. For example, House Bill 920 would require a town council to give public notice and begin an open meeting, followed by a vote to close and a formal closed session, to conduct a job interview or speak with an employee about a minor disciplinary matter such as lateness. Expanding the Act's scope in this way would heighten the burden on our volunteer Board, by significantly increasing the frequency of Open Meetings Act complaints, but more importantly would substantially add to the compliance burden on public bodies, for no clear public benefit.

Second, it is the Board's view that significant changes to the Open Meetings Act should be enacted only after careful study of the proposed amendment's impact on the Act's purposes and on public bodies. No such study has been conducted here, and the Board is concerned that hasty amendments to significant legislation have the potential to do more harm than good.

In sum, the Board is concerned that this far-reaching bill could add significant administrative burdens for both public bodies and the Board itself, without any meaningful benefit in terms of increased public access to government decision-making. The Board supports the effort to clarify the administrative function exclusion and encourages careful study of the matter.

Thank you for considering the position of the Compliance Board on this bill.

Very truly yours,

Lynn Marshall /tc

Lynn Marshall, Esquire
Chair
Open Meetings Compliance Board

cc: Open Meetings Compliance Board

STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

August 30, 2021

Shane E. Pendergrass, Chairman
House Health and Government Operations Committee
Maryland House of Delegates
6 Bladen Street Room 241
Annapolis, Maryland 21401

Dear Chairman Pendergrass:

We write in response to your July 28, 2021, letter regarding House Bill 920. Below, we offer more details about why the Open Meetings Compliance Board ("Board") opposed the legislation, offer additional information about the Board's prior study of how the Open Meetings Act ("Act") applies to administrative functions, and provide data about how often the Board has found violations involving personnel matters and the Act's definition of "administrative function."

Earlier this year, upon learning of House Bill 920, former Board member Nancy Duden tried unsuccessfully to contact the sponsor, Delegate Alfred C. Carr, Jr., to discuss the proposed legislation. At an open meeting, the Board discussed the apparent purpose and potential effects of the bill and ultimately decided to oppose the legislation. Shortly after the Board submitted written testimony in opposition, Board Chair Lynn Marshall learned of a proposed amendment to the legislation. Acting through the staff of the Office of the Attorney General, Chair Marshall told Delegate Carr's staff that the amendment did not address the Board's concerns about House Bill 920.

As you know, House Bill 920 proposed amending the definition of "administrative function" in the Open Meetings Act. In its present form, the Act does not apply to a public body when it is carrying out "an administrative function," Md. Code Ann., Gen. Prov. ("GP") § 3-103(a)(1)(i), which the Act defines in both the affirmative (what an administrative function is) and the negative (what it is not). "Administrative function" means the administration of a law of the State or a political subdivision, or a rule, regulation, or bylaw of a public body. GP § 3-101(b)(1). "Administrative function" does not include advisory, judicial, legislative, quasi-judicial, or quasi-legislative functions. GP § 3-101(b)(2). House Bill 920 proposed adding to this list "any personnel matter that affects one or more specific individuals."

Although the Board recognized that the definition of "administrative function" is sometimes difficult to apply, the Board opposed House Bill 920 because the legislation would not have achieved its apparent purpose: making personnel matters more open to the public. To be sure, the bill would have removed personnel matters from the definition of "administrative function," making them subject to the Act. But the Act includes fifteen exceptions to the openness

requirement, including a so-called "personnel matters exception." GP § 3-305(b). Under this exception, a public body may meet in a session closed to the public to discuss:

> (i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom it has jurisdiction; or
>
> (ii) any other personnel matter that affects one or more specific individuals[.]

GP § 3-305(b)(1). House Bill 920 did not propose any change to the personnel matters exception. Thus, in practice, the legislation would not have enabled the public to observe a public body's meetings on personnel matters.

Another concern for the Board was the additional burden that House Bill 920 would have on public bodies and the Board. Although public bodies would be entitled to discuss personnel matters in private, House Bill 920 would require them to comply with various procedural requirements under the Act. For example, to discuss or interview candidates for a job vacancy, a public body would have to provide notice and an agenda of the meeting, convene in the open, vote to close the session, draft and make available to the public a closing statement providing the reason and statutory authority for the closure, convene in closed session, take minutes of that session, provide the public a brief summary of what occurred in the closed session,[1] and retain the minutes for at least five years. GP §§ 3-302, 3-302.1, 3-305, 3-306. The proposed legislation would also likely create more work for this Board because the increase in the number of closed meetings to discuss personnel matters would almost certainly result in more complaints challenging the propriety of such meetings. But the complaint process would not inform the public of what happened behind closed doors; while the Act allows this Board to review minutes of closed sessions, the minutes remain sealed to the public, GP § 3-306(c)(3), and this Board's opinions discuss the substance of closed sessions in only the most general terms, *see, e.g.*, 15 *OMCB Opinions* 99, 106 (2021). Thus, the Board opposed House Bill 920 because of related concerns that the legislation would place additional burdens on this Board and public bodies without an appreciable benefit to the public.

The proposed amendment to House Bill 920 did not resolve the Board's concerns. It would have amended House Bill 920 to exclude from the definition of "administrative function" "the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom a public body has direct jurisdiction." In other words, it would have borrowed language from the personnel matters exception in § 3-305(b)(1). But the amended version of the bill would not have eliminated that exception. Thus, the effect of House Bill 920 would have been the same: public bodies and

---

[1] Whenever a public body meets in closed session, the minutes of its next open session must include a closed session summary detailing when and where the closed session took place, the purpose and statutory authority for the closure, the vote of each member as to the closing of the meeting, and the topics of discussion and action taken during the session. GP § 3-306(c)(2). Because this "closed-session summary is designed to be public," however, it "contains only the information about a closed session that the public body deems non-confidential." 9 *OMCB Opinions* 127, 131 (2014). Thus, as the Board notes above, imposing this additional requirement on public bodies under House Bill 920 would not result in the public obtaining information about the specific personnel matters discussed in closed sessions.

this Board would have seen an increased workload, but personnel matters would not have been any more open to the public.

On August 19, this Board convened for its annual meeting and reaffirmed its opposition to House Bill 920. In addition to the concerns expressed above, the Board noted more generally the lack of evidence suggesting a need to amend the Act's definition of "administrative function" as it relates to personnel matters. In 2005, the Board conducted a study of the administrative function (then known as the "executive function") and recommended no substantive changes to the definition. In the fifteen years since, the Board has found violations involving the "administrative function" and personnel matters in only four cases.[2] In four additional cases, we lacked sufficient information to decide whether a public body had mistakenly applied the administrative function exclusion to a personnel matter.[3] Given the volume of opinions we issue each year – ranging from 17 to 37 opinions annually since 2005 – this relatively small number of violations does not, to us, signal a need to amend the Act's definition of "administrative function" as HB 920 proposes. We note, too, that we received no public comments at our annual meeting recommending any change to the Act.

We hope this letter answers any questions that you have about the Board's position on House Bill 920. Enclosed, please find a copy of the Board's 2005 study (Attachment A), as well as a list of our cases that have involved personnel matters (Attachment B). From the latter, you will see the wide variety of activities and topics that touch on personnel matters and, thus, the many issues that would entail new procedural obligations of public bodies were the General Assembly to amend the Act's definition of "administrative function" to exclude personnel matters. Please let us know if we can provide any other data about the complaints that this Board has received or the nature of the violations that we have found.[4]

Sincerely,

Open Meetings Compliance Board
Lynn Marshall, Esq.
Jacob Altshuler, Esq.

---

[2] *See* 13 *OMCB Opinions* 27 (2019); 11 *OMCB Opinions* 59 (2017); 11 *OMCB Opinions* 65 (2017); 10 *OMCB Opinions* 104 (2016).

[3] *See* 15 *OMCB Opinions* 19 (2021) (noting ambiguity about whether a public body had discussed an employment contract, an administrative function, or discussed the employee's performance, not an administrative function) ; 12 *OMCB Opinions* 13 (2018) (noting ambiguity about whether a local school board had evaluated a superintendent's performance, an administrative function, or discussed the superintendent's contract, not an administrative function); 10 *OMCB Opinions* 22 (2016) (noting ambiguity about whether a public body had evaluated an employee's performance, an administrative function, or discussed an employment contract, not an administrative function); 8 *OMCB Opinions* 89 (2012) (noting ambiguity about whether a public body had discussed an employee's performance, an administrative function, or policy, not an administrative function).

[4] The Board's opinions are available at www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx.

Use of the Executive Function Exclusion

Under the State Open Meetings Act

Study and Recommendations By the State Open Meetings Compliance Board

Walter Sondheim, Jr.
Courtney J. McKeldin
Tyler G. Webb
Board Members

December 2005

Table of Contents

I

Introduction

Maryland's Open Meetings Act ("the Act") generally requires that "public business be performed in an open and public manner," thereby allowing citizens to observe "the performance of public officials and the deliberations and decisions that the making of public policy involves."[1] When a public body holds an open meeting, it must give notice of the meeting, allow for public attendance, and produce minutes of the meeting. A public body is not required to have an open meeting when the public body is discussing a topic that the Act allows to be discussed in a closed session or, pertinent to this report, when the public body is carrying out a function that is excluded from the Act.

Excluded from the Act are executive functions, judicial functions, and quasi-judicial functions.[2] If a public body discusses a matter that falls within one of these exclusions, the discussion is not governed by the Act. Consequently, discussions of excluded matters may be carried out without notice, in secret, and without any subsequent disclosure about the meeting.

Of these exclusions, the executive function is the most controversial. Opponents of the exclusion argue that it allows public bodies to conduct business secretly on important issues, such as budget preparation. Proponents of the exclusion argue that it allows for the efficient conduct of the many day-to-day operations of a government that are of little public interest. If not for the exclusion, proponents argue, some local officials would likely be overburdened by the procedural and record-keeping obligations of the Act.

---

[1] §10-501(a) of the State Government Article, Maryland Code.

[2] §10-503(a)(1). However, the issuance of licenses and zoning matters, which often are executive or quasi-judicial functions, are covered by the Act in any event. §10-503.

In Chapter 533 (House Bill 295) of 2005 (reprinted in Appendix A), the General Assembly directed the Open Meetings Compliance Board to examine the executive function exclusion from the Act. Our task was to review how the exclusion has been applied and, after appropriate consultation, consider whether and how we believe it ought to be changed.

Following this introduction, the report summarizes the scope and application of the executive function exclusion (Part II and Appendix B); how local government officials, representatives of the press, and others use and view the exclusion (Part III); how other states approach the issue of applying an open meetings law to day-to-day operational matters (Part IV and Appendix C); and what we recommend (Part V and Appendix D). We are grateful to Assistant Attorneys General Jack Schwartz and William Varga for their exceptional work in preparing an earlier version of this report; to Elizabeth November, a student in the law and public health schools at St. Louis University, who, during an internship in the Attorney General's Office, did the legal research that is summarized in Part IV; and to Kathy Izdebski, of the Attorney General's Office, who provides superb administrative support for the Board.

Our recommendations are these: (1) The exclusion should be renamed into one for "administrative functions," but the definition should be the same as is now in the Act for executive functions, and it should remain as a general exclusion from the Act. (2) The entire budget process, including the budget preparation phase, should be subject to the Act, not excluded from it. (3) Although the Act's normal notice provisions should not apply to administrative functions, a public body should be required to give the public some limited information about meetings for this purpose.

II

Maryland's Executive Function Exclusion

The term "executive function" is defined in §10-502(d) as follows:

(1) "Executive function" means the administration of:

(i) a law of the State;

(ii) a law of a political subdivision of the State; or

(iii) a rule, regulation, or bylaw of a public body.

(2) "Executive function" does not include:

(i) an advisory function;

(ii) a judicial function;

(iii) a legislative function;

(iv) a quasi-judicial function; or

(v) a quasi-legislative function.

The Compliance Board has described the application of this definition as "[t]he most bedeviling aspect of Open Meetings Act compliance."[3] To translate it into practical terms, we have formulated a two-step analysis for applying the definition:

> The first step is to answer this question: Does the matter to be discussed fall within the definition of any other 'function' defined in the Act? If the answer is 'yes,' the executive function exclusion does *not* apply, because the definition of the term 'executive function' in §10-502(d)(2) specifically rules out a matter within any of the Act's other

[3] Compliance Board Opinion 01-7 (May 8, 2001), *reprinted in* 3 *Official Opinions of the Open Meetings Compliance Board* 105, 106. For brevity's sake, we shall hereafter cite our opinions as ___ *OMCB Opinions* ___.

> defined functions. If the matter to be discussed is not encompassed by any other defined function, then a second question is presented: Does the matter involve 'the administration of' a state or local law or a public body's rule, regulation, or bylaw? §10-502(d)(1). Here, the key issue is whether the matter under discussion involves the administration of an *existing* law or policy, as distinct from a step in the process of creating new law or policy.[4]

The key to determining whether a discussion falls within the executive function exclusion is whether the topic is "administrative in character."[5] The Compliance Board's opinions provide examples of excluded and non-excluded topics. To provide a picture of the line-drawing required by the exclusion, we have reprinted in Appendix B the summary of our holdings prepared by the Attorney General.[6]

---

[4] 3 *OMCB Opinions* at 107.

[5] *Id.*

[6] Office of the Maryland Attorney General, Open Meetings Act Manual (5th ed. Oct. 2004).

III

Survey Results and Comments

A. Local Government Survey

In order to gain a better understanding on how public bodies utilize the executive function exclusion, the Compliance Board surveyed the governing bodies of each county and municipal corporation and each county's board of education. To be sure, a significant number of other public bodies are also subject to the Open Meetings Act, but it was felt that the meeting practices of these key bodies would be representative of meeting practices overall. Local government bodies are also diverse, reflecting government structures in which a separate executive official (county executive or mayor) is largely responsible for administrative matters as well as structures in which the body has not only legislative but administrative responsibilities as well.

As illustrated in Table 1, the response was impressive, with an overall response rate of over 65%.

Public Body	Number Surveyed	Number Returned	Percentage*
Counties and Baltimore City	24	21	88%
Municipal Corporations	158	93	59%
Local Boards of Education	24	19	79%
Total	206	133	65%

Table 1 ***Percentages rounded**

In some cases, the survey instrument was completed by the presiding officer of the public body. In other cases, the public body's legal counsel or a staff member completed the survey on the public body's behalf. The Compliance Board expresses its appreciation to all of those who took the time to assist us in this effort.

One result of the survey is evidence of what we know from our own experience, difficulty in understanding the meaning and scope of the term "executive function." We observed confusion between meetings that fall outside the scope of the Open Meetings Act because they involve an executive function, §§10-502(d) and 10-503(a)(1)(i), and meetings that may be closed under the Act in accordance with the Act's procedural requirements, §10-508. This confusion no doubt in part results from the fact that the nomenclature used in the Act, "executive function," is so similar to the commonly used term "executive session" to describe *any* closed session. Another factor is the potential overlap between items that might meet the definition of an "executive function" and yet could also be handled during a meeting closed pursuant to provisions of the Act.[7] This confusion is consistent with our 13-years' experience in issuing opinions under the Act, addressing what the Attorney General has described as the "amorphous" executive function.[8]

Because some survey responses reflect divergent and possibly erroneous interpretations of the executive function exclusion, the results are not presented as statistically valid or as affording direct evidence of the need for a statutory change (except with respect to the confusing term itself, as discussed in Part V A). Nevertheless, they provide at least some empirical evidence of current practice, which the General Assembly might find helpful in deciding whether to change the law.

Some of the results were surprising. We would have expected a sharp contrast between the frequency of executive function sessions between governmental

---

[7] For example, a municipal government with a commission governmental structure that employs a manager pursuant to its municipal charter to assist in the day-to-day operations of the government could consider the manager's employment evaluation as an executive function outside the scope of the Act. Alternatively, the evaluation could be conducted in a meeting closed under the Act based on the fact that it involves a personnel matter.

[8] Office of the Attorney General, *Open Meetings Act Manual* p. 13 (5th ed. 2004).

structures under which a public body is responsible primarily for legislative functions versus those where the public body is primarily responsible for both legislative and executive/administrative functions.

To some extent, this proved true. Of the nine counties that have adopted charter home rule, only one with an elected county executive reported ever having executive function sessions, and those were very infrequent.[9] In contrast, two charter counties without an elected executive described having executive function sessions. One county indicated that these sessions occur before or after other meetings; however, the other county described holding executive function sessions on an average of only once a year.

Similarly, the four responding counties that have adopted code home rule were divided on the need for executive function sessions.[10] Two indicated that they do not currently have executive function sessions, while two indicated that they do. Of the latter group, however, one county indicated that the frequency of such sessions was, at most, two or three times a year. Counties that operate under traditional commission governments (without home rule) were also divided on the need for separate executive function sessions.[11]

Local boards of educations, which are responsible for both policy development and administrative responsibilities, also varied in their reliance on the executive function exclusion. While several local boards reported holding such sessions regularly, seven boards reported not holding executive function sessions

---

[9] This is a form of county government in which home rule derives from a voter-approved charter, a kind of local constitution. The charter determines whether there is a county executive. Municipalities similarly have home rule under charters, which allocate power among municipal officials.

[10] Code home rule allows for home rule without a county charter. Code home rule counties do not have county executives.

[11] St. Mary's County has a separate open meetings statute that, in some respects, is more stringent than Title 10, Subtitle 5 of the State Government Article, Maryland Code. *See* Article 24, §4-201, *et seq.*, Maryland Code.

at all.[12] Nor does there appear to be a clear distinction concerning reliance on the executive function between municipal corporations that have a strong mayor governmental structure, in which the municipality's multi-member council would concentrate on legislative matters, versus those where the public body would also routinely handle executive or administrative responsibilities.

We note that a public body's decision not to conduct separate executive function sessions does not indicate whether the body handles matters that would qualify under the Open Meetings Act's definition of executive function. In many cases, a public body may simply handle such matters during the course of meetings, whether open or closed, conducted in accordance with the Act. Often, we surmise, trying to figure out whether an item is an executive function is simply not worth the effort.

Seeking to evaluate the perceived procedural burden of conducting closed meetings in accordance with the Act's procedural requirements, we asked those public bodies that rely on the executive function exclusion for some of their meetings to score the burden of the Act's procedural requirements on a scale of one to five, with 1 being little or no burden and 5 being excessive or disruptive. Only 7.3% ranked the Act's procedural requirements as high, assigning a score of 4 or 5. 19.5% scored the procedural burden at 3, while 73.1% of respondents scored the procedural burden as 1 or 2, suggesting that few perceived the Act's current requirements for conducting closed sessions as particularly burdensome. Of course, it is possible that officials in some of the smallest municipalities which did not respond might have rated the burdens higher.

---

[12] There is some evidence that local boards of education rely on the executive function when conducting hearings involving personnel or students, a factor leading one local board of education to suggest that the definition of "quasi-judicial function, §10-502(i), be expanded. However, the current definition covers not only appeals of contested case proceedings under the Administrative Procedure Act, but also any administrative hearing in which judicial review would be conducted pursuant to Title 7, Chapter 200 of the Maryland Rules. *See* 90 *Opinions of the Attorney General* 17, 19-21 (2005).

Until September 30, 2005, the Howard County Board of Education was statutorily prohibited from holding closed sessions by reliance on the executive function exclusion under the Act. *See* §3-704 of the Education Article, Maryland Code.

Beyond the responses to specific questions, comments provided along with the answers are of interest. Not surprisingly, many respondents argued in favor of the status quo. As one respondent explained:

> The existing procedures work well to [en]sure the public's right to observe government decision making with the government's ability to function. Executive decisions must be made in government just like any business, and there is no reason to require that the government follow additional procedures when making executive decisions.

Another respondent argued that the current executive function is too restrictive and should be expanded to cover "any executive act, typically the type of action taken by a chief executive." Another respondent felt no change is required; however, if there were sufficient interest in changing the law, the executive function ought to be incorporated as an additional justification for a closed session under §10-508(a). Another respondent defended the current law but suggested that every member of a public body attend a training session given by the Office of Attorney General or the Compliance Board on provisions of the Open Meetings Act. Other respondents also emphasized the need for more training on the executive function exclusion. Yet, training alone may not be the answer. As one respondent indicated, "I think immense confusion persists, even by officials and staff that have received training."

While many respondents defended the status quo, others desired more clarity in the definition and application of the executive function exclusion. One respondent indicated that "[i]t would be helpful to have a clearer definition of what is covered by the [e]xecutive [f]unction." Another asked that the Act be amended to clarify when a public body should rely on the executive function exclusion versus closing a meeting under provisions of the Act. One respondent suggested that the executive function should be renamed. One respondent suggested the need for a "clear, concise set of guidelines." Perhaps a municipal clerk summarized the situation best: "The executive function exclusion continues to be a bit confusing."[13]

---

[13] One respondent asked that the Act be clarified to specifically state that a board of education's evaluation of a school superintendent is within the executive function exclusion as long as discussion does not involve contractual matters – in effect, codifying the results of our opinions. *See* 1 *OMCB Opinions* 123 (Opinion 95-5); 3 *OMCB Opinions* 159

(continued...)

B. Other Comments

At an open meeting on September 29, 2005, the Compliance Board invited comments from those in attendance. Representatives of local government and the Maryland-Delaware-D.C. Press Association who had told us they would be attending were provided a staff discussion draft of the report in advance of the meeting, as was Delegate Smiegel, the sponsor of House Bill 295.

The meeting was attended by all three Board members and staff. Members of the public in attendance were: David Bliden and Leslie Knapp, with the Maryland Association of Counties; Candace Donoho, with the Maryland Municipal League; John Mathias, Frederick County Attorney; Amanda Conn, with Funk & Bolton, representing Caroline County; Michael Field, with the Baltimore County Office of Law; Tom Marquardt, with *The Capital,* and James Keat, both representing the Maryland-Delaware-D.C. Press Association; and Eric Brousades and Eric Gunderson, attorneys who represent local boards of education.

Mr. Schwartz outlined efforts undertaken as part of the study and reviewed options available to the Compliance Board in making recommendations to the Legislature, namely, maintaining the status quo, repealing the executive function exclusion, or substituting an alternative that might be viewed as "Open Meetings Act Lite." After explaining his view that the first two options were unsatisfactory, he summarized the elements of a draft legislative proposal. First, the term "executive function" should be replaced by an alternative term, "administrative function," encompassing day-to-day operational matters by public bodies. It would not extend to policy, contractual, or budgetary matters or other functions that are excluded under the Act's current definition of "executive function." Under the proposal, public bodies would be required to make public a schedule of planned

---

[13] (...continued)
(Opinion 01-18).

Other comments were not directly related to the executive function exclusion. One respondent suggested the need for "real penalties for violations." A number of respondents expressed concern about the Open Meetings Act's notice requirement and the problem of compliance when there was the need for an emergency meeting. Given the Act's "reasonable notice" requirement, this is somewhat surprising. Of course, the Act does not require notice in advance of a session that involves an executive function.

administrative sessions, but minutes would not be required and changes in scheduled administrative sessions would not require additional notice except to those who specifically inquired. An administrative session could be closed by a simple consensus of those members of the public body present. If an administrative session was conducted that had not been included in the public schedule, it would be announced in the minutes of the next public meeting, so the public could be aware that the session in fact occurred.

On behalf of the Maryland Association of Counties, David Bliden explored, among other matters, the history of the current provisions of the Open Meetings Act and argued that compelling circumstances that might justify revisiting the balance reached in the 1991 amendments to the Act simply do not exist today. Mr. Bliden also addressed concerns over issues that would arise due to ambiguity in the language proposed by staff and noted that a significant body of case law, Attorney General opinions, and Compliance Board opinions providing guidance under the current Act would be lost. A written statement was also submitted on behalf of the Maryland Association of Counties. John Mathias presented several "real life" examples justifying retention of the status quo and discussed concerns he saw in the proposed language.

Tom Marquardt disagreed that the problems leading to the 1991 amendments were less compelling than those presented today. Jim Keat argued that simply getting rid of the term "executive function" was a step forward. Mr. Keat also suggested changes in the proposed notice language to make clear that any "person," including the media, could ask for notice of changes in the schedule of administrative sessions. Both Mr. Marquardt and Mr. Keat discussed the problem of the lack of minutes for any meeting of a public body. In light of the limited time period between circulation of the draft and the date of the meeting, representatives of the Press Association indicated that they would submit further comments for the Compliance Board's consideration. In a later telephone conversation, however, Carol Melamed, of *The Washington Post* and Chair of the Press Association's Government Affairs Committee, indicated that the Press Association supported the staff proposal and had no specific additional comments.

Also following the meeting, Scott Hancock, Executive Director of the Maryland Municipal League, submitted a letter in which he commented that "the proposed changes in the largest part will do little to advance the end of greater openness in government while adding another level of complexity for local

government officials to learn, comprehend and conform to while trying to comply with the law." He did indicate support for changing the relevant statutory term from "executive function" to "administrative function," without, however, the other changes proposed in the staff discussion draft. The Maryland Association of Boards of Education subsequently presented essentially the same position.

IV

Alternatives to the Executive Function Exclusion – Other States' Approaches

A. Excluding Administrative Matters from an Open Meetings Act ("OMA").

The OMAs of Idaho and Pennsylvania exclude the execution of a decision adopted at a previous meeting by the governmental body.[14] The OMAs of Utah and Vermont exclude discussions concerning administrative matters if the governmental body takes no formal action on the matter.

Several states (Alabama, Hawaii, Michigan, Nevada, Tennessee, and West Virginia) define "meeting" narrowly, as gatherings for the purpose of making a decision or deliberating toward a decision. Implicitly, these statutes would not reach meetings for the purpose of presenting information, where the presentation does not contribute to the group's decision making. Under Iowa's OMA, the definition of "meeting" does not include "a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy ...."

B. Relaxing Notice and Minutes Requirements.

Two key features of OMAs require a governmental body to (1) give advance notice of a meeting, so those interested can plan to attend and (2) make some kind of record of its meetings (minutes) available to the public.

Under the Maryland Act, unless a public body is engaged in an executive or other excluded function, it must abide by the Act's requirements for notice and minutes.[15] An argument in favor of retaining the executive function exclusion is the concern that these requirements would be overly burdensome for some entities if applied to all meetings on executive functions (although, as discussed in Part IIIA above, the Act's procedural requirements are not widely seen as onerous) .

---

[14] The pertinent provisions of each state OMA are quoted briefly or summarized in the text. More detail about many of them may be found in Appendix B.

[15] §§10-506 (detailing the notice requirement) and 10-509 (detailing the requirement for minutes).

Rather than indirectly lessening the burden on public bodies by means of the executive function exclusion, however, the Act could be amended to relax notice or minutes requirements explicitly. Other states' OMAs exemplify this approach.

1. States with Relaxed Notice Requirements.

Under the Maryland Act, a public body must provide notice of each meeting to the community at large in one of four ways: (1) publication in the Maryland Register; (2) informing the news media; (3) posting or depositing the notice at a convenient public location at or near the meeting place; or (4) by any other reasonable method.[16] This section discusses three ways in which comparable notice requirements are relaxed: eliminating an affirmative obligation to provide notice, exempting small government entities from the notice requirement, and exempting meetings involving administrative matters from the notice requirements.

a. Minimal Notice Required: Providing Notice Upon Request

Under Arkansas' OMA, "[t]he time and place of each regular meeting shall be furnished to anyone who requests the information."[17] Kansas' OMA requires governmental bodies to give notice to "any person requesting such notice ...."[18] Vermont has similarly relaxed the notice requirement for regular, as opposed to special, meetings. Under Vermont's OMA, "[t]he time and place of all regular meetings ... shall be clearly designated by statute, charter, regulation, ordinance, bylaw, resolution or other determining authority of the public body and this information shall be available to any person upon request."[19] Minnesota's OMA requires a governmental body to keep a schedule of its regular meetings on file at its primary offices.[20] A governmental body need not take additional action to inform

---

[16] §10-506(c).

[17] Ark. Code Ann. §25-19-106(b)(1) (2003).

[18] Kan. Stat. Ann. §75-4318(b) (2002).

[19] Vt. Stat. Ann. tit. 1, §312(c)(1).

[20] Minn. Stat. §13D.04, subdivision 1 (1997).

the public of planned meetings unless it decides to hold a meeting at a time or place different from that listed on the schedule.[21]

b. Excluding Small Government Bodies from the Notice Requirement

Iowa's OMA exempts one type of local government entity, township trustees, from the generally applicable notice requirement. Iowa's law reads: "A governmental body, except township trustees, shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to apprise the public of that information."[22] Presumably, the Iowa Legislature determined that this requirement was either unnecessary or unduly burdensome for these typically small governmental units.[23]

c. Notice Not Required for Meetings Concerning Administrative Matters

Indiana, New Mexico, Colorado, and Wyoming exempt at least some meetings concerning administrative matters from otherwise applicable notice requirements.

- The notice requirements of Indiana's OMA do not apply to the meetings of the executive of a county or the legislative body of a town "held solely to receive information or recommendations in order to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit."[24]

- Under New Mexico's OMA, notice is required for "[a]ny meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a majority or quorum of the body is in

---

[21] *Id.*

[22] Iowa Code §21.4(1) (1996).

[23] The vast majority of Iowa townships have a population of less than 1,000.

[24] Ind. Code §§5-14-1.5-5(f)(2) (2003) ("'Administrative functions' do not include the awarding of contracts, the entering into contracts, or any other action creating an obligation or otherwise binding a county or town.").

attendance ...."[25] Some administrative matters may not be considered the discussion or adoption of a "proposed resolution, rule, regulation or formal action." Therefore, discussion of these matters would be exempt from New Mexico's notice requirement.

- Colorado's OMA implicitly exempts some meetings concerning administrative matters from notice requirements. Colorado's Supreme Court interpreted the OMA as requiring local governments to provide notice only for meetings involving policymaking.[26] Because many administrative matters do not involve policymaking, discussion of these matters would be exempt from Colorado's notice requirements.

- Wyoming's OMA expressly exempts meetings concerning administrative matters from notice requirements: "Day-to-day administrative activities of an agency shall not be subject to the notice requirements of this section."[27]

2. States with Relaxed Minutes Requirements

This section discusses states with OMAs that relax requirements that minutes be kept. One consequence of relaxed minutes requirements is that the public's opportunity to learn about the meetings' proceedings may be reduced or eliminated. Under these states' laws, governmental bodies are still required to give the public notice of their meetings. Therefore, the meetings would not be entirely secret.

a. Minimal Minutes Required: Recording of Votes

Alaska and Wisconsin require governmental bodies to record few details of the proceedings of meetings. Under Alaska's OMA, governmental bodies are only required to record the votes made at a meeting: "The vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote."[28] Under Wisconsin's OMA, "[t]he motions and roll call votes of each meeting of a

---

[25] N.M. Stat. Ann. §10-15-1(D).

[26] *Costilla County v. Costilla County Conservancy Dist.*, 88 P.3d 1188, 1189 (Colo. 2004).

[27] Wyo. Stat. §16-4-404(e) (1995).

[28] Alaska Stat. §44.62.310(a) (2001).

governmental body shall be recorded, preserved and open to public inspection ...."[29] Alaska's and Wisconsin's minutes requirements are relaxed compared to Maryland law, which requires public bodies to keep more detailed records of their proceedings.[30]

b. Minutes Not Required

The OMAs of Alabama, California, Kansas, and Maine do not appear to require any governmental bodies to keep minutes of regular meetings.[31] In addition, South Dakota exempts local governments from its OMA's requirement for minutes. Although South Dakota's OMA applies to local governments, its minutes requirement is exclusive: "Any board or commission of the various departments of the State of South Dakota shall keep detailed minutes of the proceedings of all regular or special meetings."[32] The requirement for minutes would not apply to purely local government entities.

Colorado's OMA requires local governments to record minutes in the following circumstances: "Minutes of any meeting of a local public body at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or could occur shall be taken and promptly recorded, and such records shall be open to public inspection."[33] Some administrative matters may not be considered the adoption of a "proposed policy, position, resolution, rule, regulation or formal action." Therefore, discussion of these matters would be exempt from Colorado's minutes requirement.

---

[29] Wis. Stat. §19.88(3) (1981).

[30] §10-509(c).

[31] Maine's OMA does not contain any provisions requiring that minutes be kept of regular sessions. However, if minutes are kept, then the minutes must be made open to public inspection. Me. Rev. Stat. Ann. tit. 1, §403 (1975).

[32] S.D. Codified Laws §1-25-3 (1996).

[33] Colo. Rev. Stat. §24-6-402(2)(d)(II) (2002).

Under Wyoming's OMA, "[m]inutes of a meeting:... [a]re not required to be recorded or published for day-to-day administrative activities of an agency."[34]

[34] Wyo. Stat. §16-4-403(c)(ii) (1995).

V

Recommendations

In formulating our recommendations, we acknowledge the need to strike a balance. We are committed to the policy objectives of the Open Meetings Act, which means that we are loath to accept the status quo, which allows some meetings to be completely hidden from public observation, without even any acknowledgment that the meeting took place. Yet, complying with the Open Meetings Act should not ask too much of the citizen-volunteers who, especially in small jurisdictions with little or no staff support, step forward to accept the responsibilities for day-to-day operational decisions.

We do not discern in the laws of other states, surveyed in Part IV, any obviously superior approach. Hence, we do *not* recommend a simple repeal of the executive function exclusion. Indeed, we suggest that an exclusion be retained. Neither do we accept, however, that Maryland's executive function exclusion is optimal. We think it can be improved modestly without upsetting the necessary balance between accountability to the public and avoiding undue burden.

Below, we identify three issues for the General Assembly's consideration. For each, we set forth our recommendation and a brief rationale. A draft bill embodying our recommendations may be found in Appendix D. We also summarize the position on each issue of the Maryland Association of Counties (MACo), the Maryland Municipal League (MML), and the Maryland-Delaware-DC Press Association (MDDC), which were identified in Chapter 533 as particular consultative colleagues in our development of this report.

A. Issue: Should the Term "Executive Function" Be Replaced?

1. <u>The Compliance Board's recommendation: Yes</u>

Our first recommendation is to replace the term "executive function" with "administrative function" *but* to retain unchanged the elements of the definition now found in § 10-502(d).

The change in terminology would avoid the recurrent confusion, evidenced by some of the survey responses, between "executive function" and "executive

session," the latter term not appearing in the Act but widely used to characterize any closed session. Keeping the old definition for the new term, however, would preserve the Compliance Board's body of opinions applying the current executive function exclusion to a variety of situations. We agree with the concerns expressed at the September 29 meeting about the risk that a new definition might introduce additional confusion and uncertainty.

2. The local governments' position: Not opposed

MACo and MML do not object to this change so long as the legislative history reflects a clear intention to preserve the scope of the exclusion as it has been.

3. The Press Association's position: Supports

MDDC supports this change.

B. Issue: Should the Budget Process Be Fully Subject to the Act?

1. The Compliance Board's recommendation: Yes

Under current law, the steps that a public body takes to develop or prepare its budget for the next fiscal year is considered an executive function, not subject to the Act. Only after the developed budget is submitted for the public body's approval does the process become quasi-legislative and so subject to the Act. We see this as poor public policy. The budget process is of such potential interest and importance to the public that a public body ought either to hold an open meeting or have a specific justification for closing it.

Taxpayers and recipients of services are entitled to hold their government accountable for that most fundamental of public policy decisions, how to allocate resources. Moreover, key decisions are sometimes made early in the process. To take an obvious example, if, during the early budget preparation phase, a department head is instructed not to request more than X dollars when he or she later submits the department's proposed budget, that might be the most crucial moment in the entire process. Yet, under current law, that discussion is not subject to the Act. It need not be open to public observation, nor the fact that such a meeting occurred even disclosed.

Consequently, we recommend that a public body's consideration of budget matters be fully subject to the Act, from beginning to end. The budget process would be have the same status as the granting of a license or a zoning matter, to which the Open Meetings Act applies even if the matter is an executive (or quasi-judicial) function § 10-503(b).

Of course, not all budget-related meetings would necessarily be open. For example, suppose a public body was trying to figure out whether it needed to put aside a pot of money for a possible settlement of a lawsuit. This discussion undoubtedly could be closed under an exception in § 10-508. But, unlike the result under current law, at least all budget-related meetings would be subject to the Act and so required to be held in accordance with its procedures.

2. The local governments' position: Oppose

MACo and MML strongly oppose this change. They believe that it unfairly subjects to the requirements of the Act a process that, in a jurisdiction with a single executive, is non-public. As MACo put it: "If implemented the proposed change would create an inequitable and illogical differentiation, which would compromise the credibility of the Act. In circumstances where the government structure differentiates between the executive and legislative functions, a county executive or mayor conducting budget meetings would not be subject to the ... Act. Yet, in the analogous situation, where the legislative body also serves as the executive, the deliberations would be subject to all the provisions of the Act, including penalties. This distinction is not fair." They fear that the requirement would be burdensome and difficult to administer. MACo also challenges the Compliance Board's premise about the special importance of the budget process: "Last, segregating budget deliberations for special consideration creates a questionable distinction from other critical functions. While budget deliberations may be critical to some citizens, deliberations relating to homeland security, school assignments, or health issues are likely more critical to other citizens."

3. The Press Association's position: Supports

MDDC supports this change, for the reasons put forward by the Compliance Board. MDDC also observes that "the distinction between budget preparation and

budget approval is not always clear, leaving the possibility of abuse (or the appearance of abuse) of the executive function exclusion."

C. *Issue: Should the Public Be Able to Learn that an Administrative Function Meeting Is Scheduled or Already Occurred?*

1. The Compliance Board's recommendation: Yes

Under current law, a public body need say nothing whatever about an executive function meeting. This secrecy is the antithesis of the public policy declarations at the beginning of the Open Meetings Act. Yet, too many record keeping obligations might be unduly burdensome for local officials handling day-to-day administrative matters. Hence, we do not recommend that the Act's normal requirements for notice and minutes be applied to administrative functions. Instead, we think that the Act should provide for certain limited disclosure about executive function meetings: if they are scheduled in advance, what the schedule is; and if they are not, when they took place and what the subject was.

Regularly scheduled meetings. Some public bodies hold regularly scheduled meetings at which they discuss what they deem to be executive function matters. Often these meetings precede or follow a meeting subject to the Act; sometimes they are scheduled on different days. Examples of these include what are often called "work sessions" or "executive sessions" of county or municipal bodies, involving reports from officials responsible for various components of the government (who, in a small jurisdiction, might be the public body members themselves). Similar sessions of a school board would involve a report from the school superintendent about ongoing activities and operational issues. These meetings would fit within the proposed definition of "administrative functions."

We recommend that, when a public body has this practice, the Act require the schedule of these meetings to be made available to the public. That way, reporters and interested citizens would be able to ask, in advance of a meeting, what was likely to be discussed. Members of the public body would answer that question or not, as they chose, but at least citizens would have the opportunity to inquire.

Under this proposal, public bodies would not be confined to the announced schedule. Changes could be freely made without further notice, but reporters and

others would know that the meetings were originally scheduled and could ask about any changes. When the meeting occurred, it would not be subject to the Act's general requirement for open meetings nor to its procedures for closing a meeting. Of course, as the survey indicates, many public bodies now routinely allow public observation of executive function discussions. This should not change if our proposal were adopted. If, however, a public body wanted to exclude members of the public, it could do so. Either way, minutes would not have to be kept.

Impromptu or urgent meetings. Sometimes a meeting on an administrative function occurs unexpectedly. Suppose, for example, that a town council does not have regularly scheduled meetings on administrative matters, but by happenstance two members of the town's three-member council run into each other at the post office and want to talk about an ongoing street repair project. In addition, sometimes a public body that has a regular schedule of meetings on administrative matters finds it necessary to meet promptly, off schedule, to deal with some pressing problem – a school board, say, on an influx of students evacuated from the hurricane area. Under our proposal, no particularized notice of either meeting would be required. If members of the public were present at the time of the meeting, the public body could decide at the time whether to allow them to observe or to exclude them. Minutes would not have to be kept. However, in order to ensure some degree of accountability by enabling reporters and members of the public to ask what had gone on, the Act would require a limited form of after-the-fact disclosure about the meeting. That is, the minutes of the next open meeting would set out the date, time, and place of the prior meeting; a phrase or sentence, no more than that, identifying what was discussed at the meeting; and the fact that it was viewed as an administrative function.

2. The local governments' position: Oppose, for the most part

MACo strongly opposes this change. MACo argues against the suggested requirement for disclosure of a schedule of anticipated future meetings on the grounds that the "concept of a notice requirement when a meeting is 'anticipated' is inherently ambiguous. And, although the meeting time could be changed, those changes from the published schedule could create the appearance of a subterfuge, subjecting well-intentioned public officials to unjust criticism." The government activity at issue, MACo continues, " should be either worthy of Act consideration or not. Creating this new additional Act category, subject to less rigorous

application standards, but the same penalties, would merely promote confusion." More generally, MACo objects to "an inequitable and illogical differentiation, solely based on the government structure," meaning that the Act would require more of a multi-member executive body than a single county executive. MACo urged the Compliance Board to consider an alternative, under which a public body would be required to disclose in later minutes the same information about an executive function closed meeting as about a closed meeting subject to the Act, but only if the executive function meeting took place immediately after adjournment of an open meeting. The Compliance Board considers this proposal to be insufficient to meet the problem of wholly undisclosed meetings.

MML does not object strongly to the portion of the recommendation dealing with disclosure of a schedule of future meetings but characterizes as "a significant burden on volunteer elected officials" the requirement for after-the-fact disclosure of unscheduled meetings, with little public benefit accruing.

3. The Press Association's position: Supports, with a preference for a minutes requirement

MDDC supports this change but urges that it does not go far enough. MDDC recommends that minutes be required for all of these meetings, so that members of the public could learn what actions, if any, were taken during the meeting. As MDDC puts it, "these requirements [suggested by the Compliance Board] provide only a modicum of public accountability. In particular, we are concerned about the absence of minutes. In the event that a meeting is subsequently found to have been improperly closed, the absence of minutes means that the public would not have a reliable way of learning what happened in the meeting." The Compliance Board considers a requirement for minutes, however, to risk imposing an undue burden on officials in small jurisdictions. At an open meeting on December 7, MDDC representatives indicated that they viewed the disclosure of brief information about a meeting's topic, as reflected in the Compliance Board's recommendation, to be a reasonable middle ground.

CHAPTER 533 (HOUSE BILL 295) OF 2005

Open Meetings Act – Executive Function – Study

FOR the purpose of requiring the State Open Meetings Law Compliance Board to undertake a certain study and issue a certain report on or before a certain date relating to the executive function under the Open Meetings Act.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That:

(a) The State Open Meetings Law Compliance Board shall study the use of the executive function exclusion under the Open Meetings Act.

(b) As part of its study, the Compliance Board shall:

(1) consider the reliance on the executive function exclusion and the inappropriate use of the executive function, as reflected in the opinions of the Compliance Board;

(2) consult with the Maryland Association of Counties, the Maryland Municipal League, the Maryland-Delaware-DC Press Association, and any other organization that the Compliance Board deems appropriate in connection with use of the executive function;

(3) consider the benefits of retaining or restricting the executive function exclusion under the Open Meetings Act and any alternatives that the Compliance Board considers appropriate; and

(4) develop any recommendations that the Compliance Board considers appropriate for modification of the Open Meetings Act in connection with the executive function.

(c) (1) On or before December 1, 2005, the Compliance Board shall report to the House Health and Government Operations Committee and the Senate Education, Health, and Environmental Affairs Committee on the results of its study.

(2) The report may include proposed legislation that might be recommended by the Compliance Board as a result of its study.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2005.

SUMMARIES OF COMPLIANCE BOARD OPINIONS ON EXECUTIVE FUNCTION

✧ ***Within Exclusion, discussion of:***

Administration of existing leave policy

Administrative and budgetary matters by community college board

Administrative and housekeeping matters concerning school system

Administrative matters by municipal planning commission

Administrative matters by Wicomico County Council

Agreement to dismissal of lawsuit filed against county council, absent any reconsideration of council's prior policy decisions

Appointment by county commissioners to fill planning commission vacancy

Appointment by school board of interim superintendent

Appointment by town council to fill council vacancy

Audit report, manner in which it would be released

Budgetary administration not involving proposal to amend budget

Budget preparation and department head meetings by Wicomico County Council

Budget preparation, financial oversight, and investment decisions by Pratt Library Finance Committee

Choice of newspaper for legal advertising

Complaint against electrician by regulatory board

Construction of barrier between elementary school grounds and adjacent retail property

Dismissal of employee

Effect of cuts in state aid to counties

Evaluation of school superintendent's performance

Exercise of supervisory authority over town manager's preparation of compensation and benefit plans

Future budget options

Hearing by municipal ethics commission on complaint of alleged ethics violation

Hospital management issues when county commissioners have oversight responsibility over hospital

Management issues under existing program and information briefing on possible future budgetary impacts

Merging of county and city purchasing departments under current law

Oversight of election board performance

Personnel grievance hearing

Preliminary budget matters between department heads and Wicomico County Council

Press release about a controversial city event

Procedure to regulate public comments by members of a public body

Proposed development on border of municipality

Relationship between existing sewer connection ordinance and prior sewer maintenance agreement with landowner

Remedies in enforcing a loan agreement

Solicitation of advice from colleagues by town council member who had certain administrative responsibilities

Specific schools eligible for reconstitution by State Board of Education

✧ ***Outside Exclusion, discussion of:***

Amendment to inter-governmental agreement

Changes in law to achieve merger of county and city purchasing departments

Composition of local management board

Contract amendment

Developer's proposal to buy property and convert it to low-income housing

Mission of library

Municipal governance – general topics

Municipal governance issues in wake of charter amendment

Petition drive within special tax district

Policy about attendees' desire to address public body

Preliminary aspects of policy and contractual matters

Resigning school superintendent's waiver of part of salary

Town council's position on General Assembly bill to authorize county tax

SELECTED EXCERPTS FROM OTHER STATES' LAWS

ALABAMA:
OMA applies to "... the deliberative process of governmental bodies ...." S. 101, 2005 Reg. Sess., sec. 1(a) (Ala. 2005). Deliberation is defined as: "An exchange of information or ideas among a quorum of members of a governmental body intended to arrive at or influence a decision as to how the members of the governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the body immediately following the discussion or at a later time." S. 101, sec. 2(1).

HAWAII:
OMA defines "meeting" as: "... the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power." HAW. REV. STAT. §92-2(3) (1976). Hawaii exempts the presentation of information from the OMA in limited circumstances. State of Hawaii, Office of Information Practices, *Open Meetings: a Guide to "The Sunshine Law"* 7-8 (Aug. 2004), *available at* www.state.hi.us/oip/sunshine_guide_book_format.pdf (last visited August 9, 2005); §92-2.5.

IDAHO:
OMA covers meetings convened to make a decision. Idaho Code §67-2341(6) (1992) (defining "meeting."). The definition of "decision" does not include "ministerial or administrative actions necessary to carry out a decision previously adopted in a meeting held in compliance with sections 67-2342 through 67-2346, Idaho Code." §67-2341(1).

MICHIGAN:
OMA defines "meeting" as "... the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under ... of the home rule city act ...." Mich. Comp. Laws §15.262(b) (2001). "'Decision' means a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." §15.262(d). The Court of Appeals of Michigan defined "deliberation" as careful consideration, discussion, exchange of views and debate. *Ryant v. Cleveland Township*, 608 N.W.2d 101, 104 (Mich. Ct. App. 2000). The circumstances will determine whether a meeting for the presentation of information will be considered deliberation, and therefore, whether these discussions constitute a meeting within the OMA. *Id.* (finding a township supervisor's comments before a planning commission did not rise to the level of deliberating towards or rendering a decision on a proposed zoning amendment.); 1979 Op. Att'y Gen. Mich. 29 (Jan. 31, 1979; Op. No. 5433) (finding presentations of administrators to be part of the deliberative process.).

NEVADA:
OMA defines "meeting" as "[t]he gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power." NEV. REV. STAT. §241.015(2)(a)(1) (2001). Under Nevada's OMA, there are limited circumstances in which a governmental body's receipt of information would be excluded from the Act. The Attorney General discussed these circumstances in an opinion regarding County Commissioners' attendance at a meeting in which they received information: "The commissioners may attend purely social gatherings or gatherings which only provide general information of interest to all public officials if the commissioners do not receive information about or otherwise deliberate on matters over which they have supervision, control, jurisdiction or advisory power." 2001 Op. Att'y Gen. Nev. No. 5, 6 (Mar. 14, 2001; Op. No. 2001-05).

PENNSYLVANIA:
OMA requires meetings at which "agency business" will be discussed to be open to the public. 65 PA. Cons. Stat. §702 (1998). "Agency business" is defined as: "The framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action." §703 (2004). "Administrative action" is defined as: "The execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency. The term does not, however, include the deliberation of agency business." §703. Thus, administrative actions are carved out from the OMA. Meetings Act.

TENNESSEE:
OMA defines "meeting" as ". . . the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter." TENN. CODE ANN. §8-44-102(b)(2) (1998). "Deliberation under the Open Meetings Act 'refers to discussing, debating, and considering an issue for the purpose of making a decision and does not include a discussion solely for the purpose of information gathering or fact finding.'" Op. Att'y Gen. Tenn. No. 99-090, 2 (Apr. 12, 1999) (citing *University of Tennessee Arboretum Society, Inc. v. City of Oak Ridge*, slip op. (E.S. Tenn. Ct. App. May 4, 1983.).

UTAH:
OMA's definition of "meeting" does not include the following: "(ii) The convening of a public body that has both legislative and executive responsibilities where no public funds are appropriated for expenditure during the time the public body is convened and: (A) the public body is convened solely for the discussion or implementation of administrative or operational matters for which no formal action by the public body is required; or (B) the public body is convened solely for the discussion or implementation of administrative or operational matters that would not come before the public body for discussion or action." Utah Code Ann. §52-4-2(2)(b)(ii) (1994).

VERMONT:
OMA provides that, "Routine day-to-day administrative matters that do not require action by the public body, may be conducted outside a duly warned meeting, provided that no money is appropriated, expended, or encumbered." Vt. Stat. Ann. Tit. 1, §312(g) (1999).

WEST VIRGINIA:
OMA defines "meeting" as "... the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action." W.Va. Code §6-9A-2(4) (1999). "The term meeting does not include ... [g]eneral discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to any official action." §6-0A-2(4)(D). The Supreme Court of Appeals of West Virginia upheld a lower court's determination that there was no violation of West Virginia's OMA when members of a local health board held a secret meeting for educational purposes, and the meeting did not involve deliberation toward a decision or a vote. *Found. Indep. Living, Inc. v. Cabell-Huntington Bd. Health,* 591 S.E.2d 744, 760-61 (W.Va. 2003).

HOUSE BILL ___

P3
6lr____

By:
Introduced and read first time:
Assigned to:

A BILL ENTITLED

AN ACT concerning

Open Meetings Act - Administrative Function

FOR the purpose of renaming the executive function exclusion under the Open Meetings Act by designating it an exclusion for administrative functions; prescribing certain procedures applicable to a public body that conducts a meeting limited to administrative functions, including notice of anticipated meetings and, in certain cases, documentation that a meeting has occurred; providing that the Open Meetings Act applies to a public body when it conducts a meeting pertaining to any aspect of budget preparation; and generally relating to the scope of the Open Meetings Act and procedural requirements in connection with meetings involving certain administrative matters.

BY repealing and reenacting, with amendments,
Article - State Government
Section 10-502 and 10-503
Annotated Code of Maryland
(2004 Replacement Volume and 2005 Supplement)

BY adding
Article - State Government
Section 10-506.1
Annotated Code of Maryland
(2004 Replacement Volume and 2005 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article - State Government

10-502.

(a) In this subtitle the following words have the meanings indicated.

(b) (1) "ADMINISTRATIVE FUNCTION" MEANS THE ADMINISTRATION OF:

(I) A LAW OF THE STATE;

(II) A LAW OF A POLITICAL SUBDIVISION OF THE STATE; OR

(III) A RULE, REGULATION, OR BYLAW OF A PUBLIC BODY.

(2) "ADMINISTRATIVE FUNCTION" DOES NOT INCLUDE:

(I) AN ADVISORY FUNCTION;

(II) A JUDICIAL FUNCTION.

(III) A LEGISLATIVE FUNCTION;

(IV) A QUASI-JUDICIAL JUNCTION; OR

(V) A QUASI-LEGISLATIVE FUNCTION.

(C) "Advisory function" means the study of a matter of public concern or the making of recommendations on the matter, under a delegation of responsibility by:

(1) law;

(2) the Governor;

(3) the chief executive officer of a political subdivision of the State; or

(4) formal action by or for a public body that exercises an executive, judicial, legislative, quasi-judicial, or quasi-legislative function.

[(c)] (D) "Board" means the State Open Meetings Law Compliance Board.

[(d) (1) "Executive function" means the administration of:

(i) a law of the State;

(ii) a law of a political subdivision of the State; or

(iii) a rule, regulation, or bylaw of a public body.

(2) "Executive function" does not include:

(i) an advisory function;

(ii) a judicial function;

(iii) a legislative function;

(iv) a quasi-judicial function; or

(v) a quasi-legislative function.]

(e) (1) "Judicial function" means the exercise of any power of the Judicial Branch of the State government.

(2) "Judicial function" includes the exercise of:

(i) a power for which Article IV, §1 of the Maryland Constitution provides;

(ii) a function of a grand jury;

(iii) a function of a petit jury;

(iv) a function of the Commission on Judicial Disabilities; and

(v) a function of a judicial nominating commission.

(3) "Judicial function" does not include the exercise of rulemaking power by a court.

(f) "Legislative function" means the process or act of:

(1) approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy;

(2) approving or disapproving an appointment;

(3) proposing or ratifying a constitution or constitutional amendment; or

(4) proposing or ratifying a charter or charter amendment.

(g) "Meet" means to convene a quorum of a public body for the consideration or transaction of public business.

(h) (1) "Public body" means an entity that:

(i) consists of at least 2 individuals; and

(ii) is created by:

1. the Maryland Constitution;

2.. a State statute;

3. a county charter;

4. an ordinance;

5. a rule, resolution, or bylaw;

6. an executive order of the Governor; or

7. an executive order of the chief executive authority of a political subdivision of the State.

(2) "Public body" includes:

(i) 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 the political subdivision; and

(ii) The Maryland School for the Blind.

(3) "Public body" does not include:

(i) any single member entity;

(ii) any judicial nominating commission;

(iii) any grand jury;

(iv) any petit jury;

(v) the Appalachian States Low Level Radioactive Waste Commission established in §7-302 of the Environment Article;

(vi) except when a court is exercising rulemaking power, any court established in accordance with Article IV of the Maryland Constitution;

(vii) the Governor's cabinet, the Governor's Executive Council as provided in Title 8, Subtitle 1 of this article, or any committee of the Executive Council;

(viii) a local government's counterpart to the Governor's cabinet, Executive Council, or any committee of the counterpart of the Executive Council;

(ix) except as provided in paragraph (1) of this subsection, a subcommittee of a public body as defined under paragraph (2)(i) of this subsection;

(x) the governing body of a hospital as defined in §19-301(g) of the Health - General Article; and

(xi) a self-insurance pool that is established in accordance with Title 19, Subtitle 6 of the Insurance Article or §9-404 of the Labor and Employment Article by:

1. a public entity, as defined in §19-602 of the Insurance Article; or

2. a county or municipal corporation, as defined in §9-404 of the Labor and Employment Article.

(i) "Quasi-judicial function" means a determination of:

(1) a contested case to which Subtitle 2 of this title applies;

(2) a proceeding before an administrative agency for which Title 7, Chapter 200 of the Maryland Rules would govern judicial review; or

(3) a complaint by the Board in accordance with this subtitle.

(j) "Quasi-legislative function" means the process or act of:

(1) adopting, disapproving, amending, or repealing a rule, regulation, or bylaw that has the force of law, including a rule of a court;

(2) approving, disapproving, or amending a budget; or

(3) approving, disapproving, or amending a contract.

(k) "Quorum" means:

(1) a majority of the members of a public body; or

(2) any different number that law requires.

10-503.

(a) Except as provided in [subsection (b)] SUBSECTIONS (B) AND (C) of this section, this subtitle does not apply to:

(1) a public body when it is carrying out:

(i) an [executive] ADMINISTRATIVE function;

(ii) a judicial function; or

(iii) a quasi-judicial function; or

(2) a chance encounter, social gathering, or other occasion that is not intended to circumvent this subtitle.

(b) The provisions of this subtitle apply 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, the enforcement of any zoning law or regulation, or any other zoning matter; OR

(3) A BUDGET FOR THE NEXT FISCAL YEAR, WHETHER OR NOT THE BUDGET HAS BEEN SUBMITTED TO THE PUBLIC BODY FOR APPROVAL.

(C) THE PROVISIONS OF §10-506.1 OF THIS SUBTITLE APPLY TO A PUBLIC BODY WHEN IT IS CARRYING OUT AN ADMINISTRATIVE FUNCTION.

10-506.1.

(A) (1) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION, A PUBLIC BODY THAT CONVENES A MEETING LIMITED TO AN ADMINISTRATIVE FUNCTION SHALL COMPLY WITH THE PROVISIONS OF THIS SECTION.

(2) NOTHING IN THIS SECTION PROHIBITS A PUBLIC BODY, IN CONNECTION WITH A MEETING LIMITED TO AN ADMINISTRATIVE FUNCTION, FROM COMPLYING WITH §§10-505 THROUGH 10-509 OF THIS SUBTITLE IN LIEU OF THE PROVISIONS OF THIS SECTION.

(B) (1) IF A PUBLIC BODY ANTICIPATES CONVENING A SERIES OF REGULARLY SCHEDULED MEETINGS LIMITED TO ADMINISTRATIVE FUNCTIONS, THE PUBLIC BODY SHALL MAKE THE SCHEDULE, INCLUDING THE DATE, TIME, AND PLACE OF EACH ANTICIPATED MEETING, AVAILABLE TO THE PUBLIC BY ANY REASONABLE MEANS.

(2) A PUBLIC BODY THAT HAS ISSUED A SCHEDULE OF ANTICIPATED MEETINGS PURSUANT TO PARAGRAPH (1) OF THIS SUBSECTION MAY, AS NECESSARY TO THE PROPER CONDUCT OF PUBLIC BUSINESS AND WITHOUT FURTHER PUBLIC NOTICE:

(I) CHANGE THE DATE, TIME, OR PLACE OF ANY ANTICIPATED MEETING; OR

(II) CANCEL ANY ANTICIPATED MEETING.

(3) A PUBLIC BODY THAT CHANGES THE DATE, TIME, OR PLACE OF ANY ANTICIPATED MEETING OR THAT CANCELS ANY ANTICIPATED MEETING SHALL DISCLOSE THE CHANGE OR CANCELLATION TO ANY PERSON WHO INQUIRES WHETHER A SCHEDULE OF ANTICIPATED MEETINGS HAS BEEN CHANGED.

(4) AS NECESSARY TO THE PROPER CONDUCT OF PUBLIC BUSINESS, A PUBLIC BODY MAY CONVENE A MEETING LIMITED TO AN ADMINISTRATIVE FUNCTION WITHOUT PRIOR SCHEDULING OR NOTICE TO THE PUBLIC.

(C) IF A PUBLIC BODY CONVENES A MEETING LIMITED TO AN ADMINISTRATIVE FUNCTION THAT WAS NOT INCLUDED IN THE SCHEDULE PREPARED PURSUANT TO SUBSECTION (B)(1) OF THIS SECTION, THE MINUTES OF THE PUBLIC BODY'S NEXT OPEN MEETING SHALL CONTAIN:

(1) THE DATE, TIME, AND PLACE OF THE MEETING;

(2) A PHRASE OR SENTENCE IDENTIFYING THE SUBJECT MATTER DISCUSSED AT THE MEETING; AND

(3) THE FACT THAT THE MEETING WAS CONDUCTED UNDER SUBSECTION (B)(4) OF THIS SECTION.

OPEN MEETINGS COMPLIANCE BOARD
Opinions Applying the Administrative Function Exclusion to Personnel Matters

Topics Within the Exclusion (i.e. not subject to the Act)

- Appointment of clerk-treasurer pursuant to municipal charter. 6 *OMCB Opinions* 53.
- Appointment of planning board members. 6 *OMCB Opinions* 57.
- Appointment/election of public body's own officers. 14 *OMCB Opinions* 8; 13 *OMCB Opinions* 14; 12 *OMCB Opinions* 37; 9 *OMCB Opinions* 180; 7 *OMCB Opinions* 101; 5 *OMCB Opinions* 93.
- Appointment by school board of interim superintendent. 1 *OMCB Opinions* 123.
- Appointment by town council to fill council vacancy. 9 *OMCB Opinions* 29; 1 *OMCB Opinions* 252.
- Discussion of employee's resignation and press release about the resignation. 9 *OMCB Opinions* 110.
- Dismissal of employee. 9 *OMCB Opinions* 290; 1 *OMCB Opinions* 166.
- Hearings on employee grievances. 4 *OMCB Opinions* 76.
- Job interviews and discussion of candidates. 4 *OMCB Opinions* 182.
- Personnel performance evaluations. 14 *OMCB Opinions* 92; 13 *OMCB Opinions* 71; 12 *OMCB Opinions* 88; 12 *OMCB Opinions* 13; 11 *OMCB Opinions* 12; 10 *OMCB Opinions* 104; 10 *OMCB Opinions* 57; 3 *OMCB Opinions* 218; 3 *OMCB Opinions* 159; 1 *OMCB Opinions* 123.

Topics Outside the Exclusion (i.e. subject to the Act)

- Adoption of plan for layoffs involving discretion. 14 *OMCB Opinions* 108.
- Discussion of how pay adjustments should be handled in the future. 5 *OMCB Opinions* 76.
- Discussion of employee's contract. 15 *OMCB Opinions* 19.
- Discussion of proposed contract for town attorney's new law firm. 11 *OMCB Opinions* 65.
- Hiring lobbyist to oppose legislation in the General Assembly (before adopting a resolution to take that position). 7 *OMCB Opinions* 131.
- Personnel matters within the jurisdiction of another public body. 4 *OMCB Opinions* 188.
- Resigning school superintendent's waiver of part of salary. 3 *OMCB Opinions* 159.