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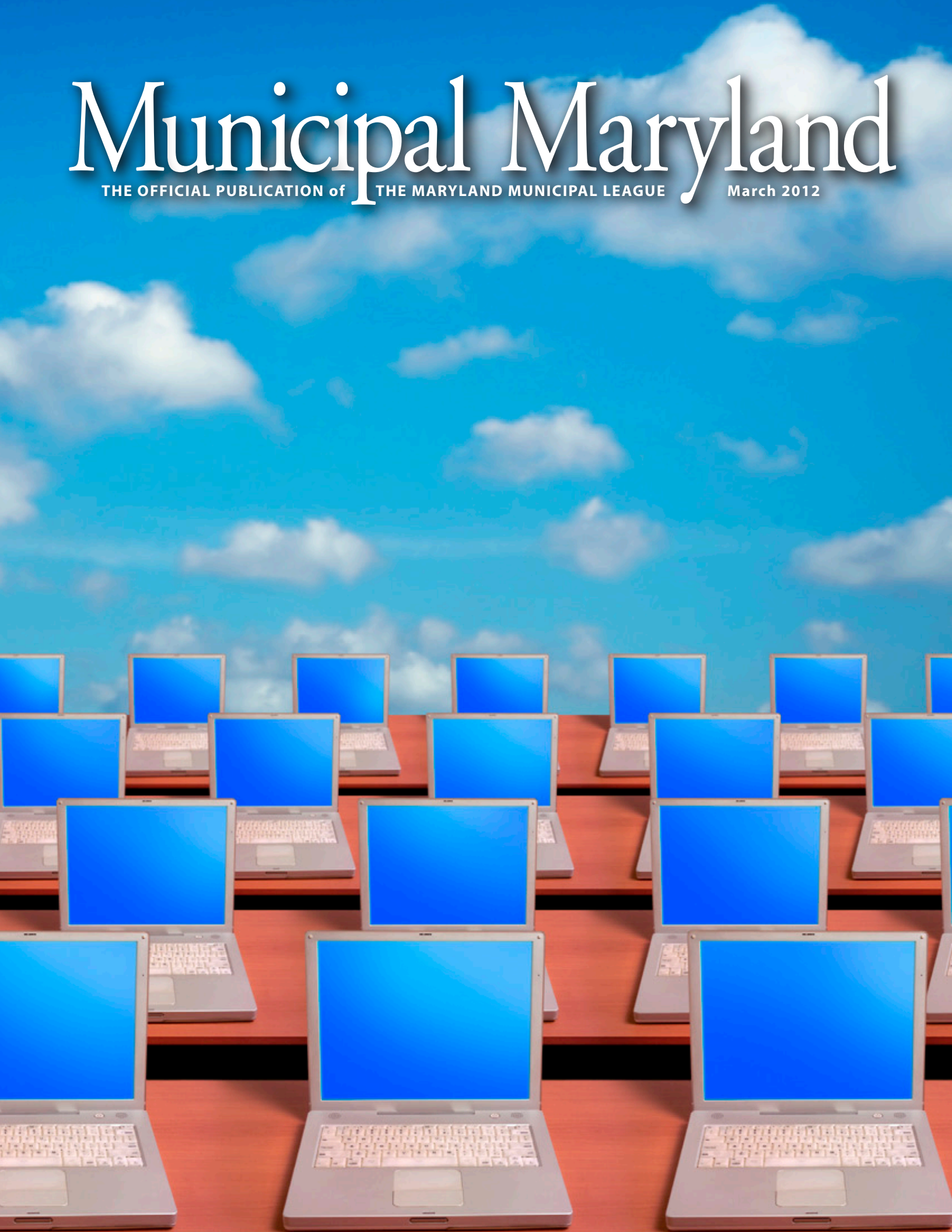

Open Meetings Act Update

By Ronald M. Bolt

The Open Meetings Compliance Board (the "Compliance Board") recently published its Nineteenth Annual Report summarizing, among other things, the complaints it received and the opinions it issued over the past reporting term concerning compliance with the Open Meetings Act (the "Act") by Maryland's many public bodies. The Compliance Board noted that 40 complaints were filed during the reporting period for fiscal year 2011. This total represented a significant increase from the 25 complaints filed during the previous year's reporting period. The Compliance Board found, however, that although it cannot estimate the incidence of unreported violations, the low number of known violations reflects overall compliance with the Act by Maryland's public bodies.

In its current report, and in recent prior reports, the Compliance Board has explained that most of the complaints it receives tend to concern procedural violations of the Act, such as when meetings may be closed and the requirements for preparing minutes. This article summarizes recent issues addressed by the Compliance Board and some common violations that arise.

Conducting Closed Meetings

A "hot topic" addressed by the Compliance Board this reporting period was the permissibility of making decisions by telephone or electronic mail. Public bodies, and members of the public, often question whether decisions can be made in such fashion. The Compliance Board explained that, *"Although other statutes or a public body's own procedures might require voting to take place in the presence of a quorum, the Act does not."*[1] While the Act imposes rules that must be followed when a "meeting" takes place, the Act does not apply where no "meeting" occurs. Under the Act, a "meeting" is the convening of a quorum of a public body for the consideration or transaction of public business.[2] A telephone conversation among less than a quorum of members is not a "meeting." On the other hand, the Compliance Board would find the Act applicable if a quorum of members were engaged in a conference call. The same conclusion would be expected for other contemporaneous communications, such as an online "chat."

Public bodies should be cognizant, however, of what voting requirements are imposed by their charters and other governing documents. A practice adopted by some public bodies includes announcing such decisions at the next open meeting and formally ratifying them.

Another common issue addressed was whether the Act applies when a quorum of a public body's members attend another entity's meeting. Reiterating the test that has been developed from Maryland case law and its own prior decisions,[3] the Compliance Board explained that a "meeting" does not take place under the Act if members of a public body merely attend a meeting of another entity, even if the topic of discussion relates directly to a matter also before the attending public body. On the other hand, a "meeting" does occur if the attending quorum participates in the other entity's deliberations or *"separately conduct[s] public business, as distinct from the proceedings"* of the other entity.[4]

For example, a meeting may take place if the visiting quorum is asked to participate in the other entity's discussion or the members of the public body interact with each other regarding public business. The Compliance Board has noted that the Act would be violated where a quorum attends the meeting of another entity and is solicited for input on potential legislation.[5] If the members provide input, their participation triggers the Act's various requirements. At that point, the members are engaging in a legislative function and the public has a right to witness the deliberations.

This past reporting period afforded the Compliance Board the opportunity to discuss the difficulty in "drawing the line" between meeting in closed session to obtain legal advice and discussing policy changes based on that advice. While it is permissible to ask questions about the implications of legal advice, a closed meeting should be opened before policy deliberations are begun. In a recent case, a public body met in closed session

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1 7 OMCB 176 (2011).

2 Md. Code Ann., State Gov't, § 10-502(g) (2009 Repl. Vol.; 2011 Supp.). All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

3 See, *City of New Carrollton v. Rogers*, 287 Md. 56, 410 A.2d 1070 (1980); *Ajamian v. Montgomery County*, 99 Md. App. 665, 639 A.2d 157, *cert. denied*, 334 Md. 63 (1994); see also, *e.g.*, 3 OMCB 278 (2003); 1 OMCB 120 (1995).

4 7 OMCB 105 (2011).

5 3 OMCB 278 (2003).

6 7 OMCB 148 (2011).

7 7 OMCB 49 (2010).

8 See, *e.g.*, 4 OMCB 168 (2005) (where the Compliance Board found that the Act was violated where a contractor's "sales pitch" was given in a closed session); see also, 7 OMCB 245 (2011) (where discussions about leasing property were part of the process of approving the lease contract and were, therefore, "quasi-legislative" and not administrative functions).

to obtain legal advice on pending litigation.[6] As a result of the discussions, the public body instructed legal counsel to draft a policy amendment apparently in an effort to clarify the law and render the litigation moot. The Compliance Board noted that the decision to direct legal counsel to prepare the amendment was not itself a request for legal advice covered by the attorney-client privilege. Thus, the discussion may have included policy deliberations rather than legal advice pertaining to the litigation. The Compliance Board concluded that, at a minimum, the decision should have been announced at the following open session.

Another commonly applied exception to the Act's open meeting requirements is the discussion of "personnel" matters. In a recent case, the Compliance Board addressed a situation where the exception was too broadly applied. A public body met in closed session to discuss whether to dismantle an economic development and tourism department of the local government, which would result in the termination of five employees. The commissioners conducted the meeting in closed session under Section 10-508(a)(1) of the Act, which allows the confidential discussion of certain personnel matters concerning specific identifiable individuals. The commissioners conducted the meeting in closed session, understanding that the employment of specific individuals was at stake. The Compliance Board, however, found that the Act was violated.

Although deciding to reduce the workforce because of budgetary constraints is a difficult task, and such matters are routinely conducted in private where the chief executive is a single individual, the Act requires such discussion to take place in the open where the chief executive is a public body.[7] Also, as the discussion concerned an entire class of employees, the personnel exception did not apply. It concerned a policy decision, i.e., the future of a department of the government, and not employment issues related to specific individuals, e.g., performance reviews, etc. Thus, the discussion had to take place in public, even if it meant publicly notifying employees of their pending termination in an open meeting setting.

As municipal governments are frequently told by their legal counsel, contracting is an example of a "quasi-legislative" function to which the Act applies. As a result, most stages of the procurement process are conducted in open session, often including the presentation and discussion of proposals by potential contractors.[8] In a recent decision, the Board addressed an important exception governing the presentation of proposals. The Board noted that a closed session can be held to hear oral presentations by competing contractors when necessary to preserve the competitive process.[9]

The case involved a local government's procurement of an advertising agency. The process included a written submittal and oral presentations. The oral presentations were conducted in closed session to prevent competing bidders from learning of the price structure of the other proposers. Prior to this case, it was clear that negotiation strategies and the contents of a bid could be discussed in closed session, as expressly allowed under the Act.[10] It was not clear to many agencies, on the other hand, whether a contractor's presentation or "sales pitch" must be given in open session. Because the subject presentations in this case were focused on the contents of the bid, the Board found that no violation of the Act occurred when the oral presentations were given. The Board found that, *"Had competing advertising agencies been able to sit through the presentations of their competitors who met with the Council and other members of the evaluation team, the competitive process would have been compromised."*[11] Thus, according to the rationale of this decision, a contractor's presentation can be given in closed session where the presentation is focused on the contents of a bid and an open discussion of the contents would adversely impact the competitive bidding or proposal process.

Preparing and Keeping Minutes

The Open Meetings Act requires public bodies to keep written minutes of open and closed meetings and retain them for at least one year.[12] The minutes for an open meeting must be prepared and available to public inspection as soon as "practicable" following the meeting. The Compliance Board has opined that a "practicable" amount of time is that which parallels the cycle of a public body's meetings. Thus, if a public body meets on a monthly basis, minutes should be prepared and approved within that time frame.[13]

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A failure to approve minutes at the next regularly scheduled meeting is likely to be deemed a violation. For example, the Compliance Board has ruled that a delay of approximately 60 days, for a public body that meets on a monthly basis, was a violation of the Act's requirement to have minutes approved as soon as "practicable."[14] As a result of the economic downturn, delay in preparing minutes is often attributable to staff constraints, but the Board has noted that, "*while a temporary staff shortage might justify a brief delay, resource constraints do not excuse a public body's obligation under the Act to produce minutes.*"[15]

The Act requires the following three distinct records in connection with a closed session: (1) a "*written statement*" for the

9 7 OMCB 1 (2010).

10 The Act provides that a closed session is permissible to discuss "*a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.*" § 10-508(a)(14).

11 7 OMCB 1 (2010).

12 § 10-510(c). Although meetings do not need to be audio-recorded, if an audio recording is made, the recording must also be retained for at least one (1) year. A recording does not satisfy the obligation to produce minutes. Minutes must be prepared and retained in writing. 6 OMCB 203 (2009).

13 7 OMCB 80 (2011).

14 7 OMCB 8 (2010).

15 6 OMCB 203 (2009).

closing of a meeting; (2) "*minutes*" of the closed session; and (3) a "*summary*" of the closed session to be included as part of the minutes of the next open session. Occasionally, the second and third of these records may be the same record, especially for brief meetings.

Before a public body goes into a closed session, the presiding officer must complete a *"written statement"* of the reason for closing the meeting, citing the relevant authority under Section 10-508(a), and listing the topics to be discussed.[16] The Attorney General has prepared a form document for this purpose. It is available online and found at Appendix C to the Attorney General's *Open Meetings Act Manual*. We suggest a slightly modified form, available on our firm's website, which includes additional blanks to help a public body subsequently prepare the third required document, the *"summary"* of the session, as discussed below.

A public body must also keep "minutes" of a closed session, reflecting, among other information, each item considered.[17] To preserve the confidentiality justifying the closed session, the minutes need not be disclosed to the public. Instead, the Act provides that such minutes "*shall be sealed and may not be open to public inspection.*" The public body may subsequently decide to unseal them, if the confidentiality surrounding the discussion expires.[18]

Subsequent to a closed session, a public body must include, as part of its publicly available minutes, a "*summary*" of the closed session reflecting, at a minimum: (1) a statement of the time, place, and purpose of the closed session; (2) a record of the vote of each member as to closing the session; (3) a citation of the authority under the Act for closing the session; and (4) a listing of the topics of discussion, persons present,[19] and each action taken during the closed session.[20] As the Compliance Board has noted, "*Although the information recorded in the written statement produced in advance of a closed session and the subsequent disclosure are similar, they are not identical, and both records must be kept.*"[21] Also, although the Act provides some leeway in the preparation of minutes of open meetings, *i.e.*, "*as soon as practicable*," the summary of the closed session must be provided in the minutes of the next open session.[22] The Compliance Board recently explained that the "*requirement that closed session summaries be promptly included in open session minutes makes sense: while actions taken in an open session are immediately ascertainable by the public, the public's knowledge of closed session actions depends entirely on the issuance of the summary.*"[23]

Municipal governments often struggle with what level of detail is necessary for the summary of a closed meeting. The summary is not expected to be so detailed as to compromise the purpose of the closed session but, as the Compliance Board has stated, the minutes "*must provide some level of information beyond merely parroting the applicable statutory exception*" and the description of the discussion "*ought to be sufficient to allow the public an opportunity to evaluate whether the topic fit within the cited exception.*"[24] Also, "*the minutes should describe each item considered in sufficient detail to allow a member of the public who reviews the minutes [to] gain an appreciation of the issue under discussion.*"[25] For example, in a recently decided case, the Compliance Board found that the Act was violated where open session minutes did not disclose the topics discussed in a prior closed session; the minutes stated merely that, "*the members unanimously voted to move into Closed Session pursuant to Section 10-508(a)(12) of the State Government Article ... to discuss an investigative proceeding on actual or possible criminal conduct.*"[26]

In another recent case, a public body reported as part of the minutes of its regular public meeting that the public body had met in closed session "*at 10:00 p.m. ... pursuant to [§10-508(a)(1)(i)] to consult with counsel to discuss the appointment, employment, assignment ... of appointees, employees, or officials over whom it has jurisdiction.*"[27] The minutes reflected who made and seconded the motion and that the motion received a unanimous vote. The minutes further noted the time that the meeting ended, but contained no more detail. The Compliance Board found that these minutes were insufficient. The minutes lacked a meaningful description of what was discussed. Also, the summary did not identify who was present. In its response to the complaint, the public body explained that the discussion had included the resignation of the administrator and the clerk and the resulting appointment of a new acting administrator, and the appointment of the existing assistant clerk as the new clerk. The Compliance Board found that the Act would have been satisfied had the summary contained this additional information. As this case demonstrates, it is often the case that a local government's minutes restate the grounds for closing a meeting but lack sufficient detail about the issue discussed or what actions were taken.

As the Nineteenth Annual Report reflects, compliance with the Open Meetings Act by Maryland's many public bodies is generally adequate, but there are some common errors that persist. The most common transgressions relate to when meetings may be closed and the preparation of minutes. Taking the lessons from recent cases, hopefully public bodies can avoid similar violations. ❖

16 § 10-508(d)(2)(ii).
17 § 10-509(b) and (c)(1).
18 § 10-510 (c) (3) and (4).
19 As the Compliance Board has noted, sometimes identifying a person by name would compromise the confidentiality of the session, as when the public body is interviewing candidates for a position or speaking with representatives of a business seeking to locate in the jurisdiction. 7 OMCB 225 (2011), see also, *e.g.*, 5 OMCB 86 (2006). In such cases, where confidentiality is to be preserved, the persons can be identified generically, *e.g.*, "a candidate for the position of clerk." However, the Act does not permit the public body to omit the person's presence altogether. 7 OMCB 225 (2011).
20 See, *e.g.*, 7 OMCB 5 (2010); § 10-509(c)(2).
21 6 OMCB 196 (2009).
22 § 10-509(c)(2).
23 7 OMCB 264 (2011).
24 7 OMCB 5 (2010).
25 7 OMCB 42 (2010).
26 7 OMCB 140 (2011).
27 7 OMCB 5 (2010).