Chapter Four
Open and Closed Meetings

A. General Openness Requirement

A public body must hold an open meeting unless the matter under discussion is entirely outside the scope of the Open Meetings Act – for example, if it concerns an administrative, judicial, or quasi-judicial function other than licensing or zoning – or, if the Act applies, one of the specific exceptions set out in §10-508 is applicable. "When the ... Act requires a meeting to be open, it must be open to all. The Act does not contain an intermediate category of 'partially open' meetings, to which some members of the public are admitted and others excluded .... Accordingly, a public body may not bar reporters from an open meeting."[1]

B. Observing and Taping

The Act entitles members of the public to observe open sessions of public bodies; it does not afford the public any right to participate in the discussion.[2] Indeed, disruptive attempts at participation can result in removal from the meeting. §10-507(c)(1).[3] Conversely, the Act does not affect the application of any other law or policy that does grant members of the public the opportunity to be heard at a meeting.

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[1] 2 OMCB Opinions 67, 69 (1999) (Opinion 99-11).

[2] 1 OMCB Opinions 227 (1993) (Opinion 97-7).

[3] Under §10-507(c)(2), "[u]nless the public body or its members or agents acted maliciously, the public body, members, and agents are not liable for having an individual removed ...."

Every public body has a duty to "adopt and enforce reasonable rules regarding the conduct of persons attending its meetings and the videotaping, televising, photographing, broadcasting, or recording of its meetings." §10-507(b). The Open Meetings Compliance Board has prepared model rules to assist public bodies in carrying out this obligation; these are included in this manual as Appendix D. As introduced, the 1991 legislation (Senate Bill 170) would have expressly allowed public meetings to be videotaped, televised, photographed, broadcast, or recorded. That provision was deleted by amendment. Nevertheless, the Act's statement of public policy refers to "[t]he ability of the public, its representatives, and the media to attend, report on, and broadcast meetings of public bodies ...." §10-501(b)(1).

Accordingly, a public body may not bar the use of recording and transmitting devices, for a flat prohibition is not "reasonable": "[A] rule restricting videotaping or other similar activities is 'reasonable' only if it satisfies two criteria: (i) that the rule is needed to protect the legitimate rights of others at the meeting and (ii) that the rule does so by means that are consistent with the goals of the Act."[4] Thus, in regulating the taping of a meeting, a public body may not distinguish between representatives of the media versus members of the public.[5] The "legitimate rights" of attendees at an open meeting does not include a right to avoid photography: "There is no right to be protected against the gaze of an observer in a public forum, or against the lens of the observer's camera."[6] If a public body is concerned about the disruptive effect of bright lights or camera operators moving around the room, it can impose appropriate restrictions.

C. EXCEPTIONS ALLOWING CLOSED MEETING

If a meeting is within the scope of the Open Meetings Act, it must be open unless one of the specific reasons for closing it can legitimately be identified. A

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[4]1 OMCB Opinions 137, 140 (1995) (Opinion 95-9).

[5]5 OMCB Opinions 22 (2006).

[6] Id. at 141.

public body may not avoid an open meeting merely because a topic is controversial or potentially embarrassing.[7]

Fourteen circumstances exist under which a public body may close a meeting in its entirety or may close a portion of a meeting that is otherwise required to be open. All fourteen exceptions are to be "strictly construed in favor of open meetings ...." §10-508(c). Nothing in the Open Meetings Act itself requires a public body to invoke an exception; unless some other confidentiality law applies, it may meet in open session even if, under the Act, it could legally meet in closed session.[8] When a public body does invoke one of these exceptions, it must limit its discussion to that topic only. If the public body wishes to discuss other matters, it must return to open session, either to discuss the additional matter in public or vote to close the session based on another applicable exception.[9]

If a public body anticipates returning to an open session after a closed session, it should so inform those attending the meeting, Otherwise, if members of the public are given the impression that the public portion of the meeting had been completed, the reconvened open session could be "open in name but not in reality," resulting in a violation of the Act.[10]

One provision, §10-508(a)(13), recognizes that other law might require a meeting to be closed. Thus, it permits a public body to close a meeting in order to "comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter." Examples

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[7] The 1977 Open Meetings Act contained a provision, former §10-508(a)(14), under which a public body could close a meeting to "satisfy an exceptional reason that, by two-thirds vote of the members of the public body who are present at the session, the public body finds to be so compelling that the reason overrides the general public policy in favor of open sessions." This provision was deleted when the Act was revamped in 1991.

[8] See 65 Opinions of the Attorney General 347, 348 (1980).

[9] 3 OMCB Opinions 16, 21 (2000) (Opinion 00-5).

[10] 3 OMCB Opinions 115 (2001) (Opinion 01-8).

of other law that might require a meeting to be closed include federal law,[11] a State constitutional privilege,[12] a State statute,[13] and a common law privilege.[14]

Two of the exceptions in §10-508 are designed to protect the privacy of individuals. One generally permits a meeting to be closed to "protect the privacy or reputation of individuals with respect to a matter that is not related to public business." §10-508(a)(2). The other permits a meeting to be closed when the discussion deals with a "personnel matter" affecting one or more specific individuals. §10-508(a)(1). This exception includes discussion of possible personnel actions, compensation issues, and "performance evaluation of appointees, employees, or officials over whom [the public body] has jurisdiction." §10-508(a)(1)(i).[15] Like the other exceptions, this one is to be construed narrowly. It is inapplicable to discussions of issues affecting classes of public employees, as distinct from specific individuals.[16] Thus, the Compliance Board has held that this exception is not a basis to close a session to discuss matters such as agency consolidations or outsourcing services.[17] The exceptions only extends to discussions pertaining to specific personnel.

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[11] Potomac Group Home v. Montgomery County, 823 F. Supp 1285, 1299 (D. Md. 1993).

[12] Bill review letter (Senate Bill 170) from Attorney General J. Joseph Curran, Jr. to Governor William Donald Schaefer (May 6, 1991).

[13] Letter of advice from Assistant Attorney General Jack Schwartz, Chief Counsel for Opinions and Advice, to Barbara R. Trader, Esquire (October 7, 1996) (discussing provision of Public Information Act that bars disclosure of personnel records).

[14] 1 OMCB Opinions 96 (1994) (Opinion 94-7). See also 65 Opinions of the Attorney General 341, 343-44 (1980).

[15] The exception applies, however, to a discussion of any specific personnel matter, even if the public body does not have jurisdiction. §10-508(a)(1)(ii); 4 OMCB Opinions 188 (2005).

[16] The fullest discussion of this exception appears in 1 OMCB Opinions 73 (1994) (Opinion 94-5). See also, e.g., 3 OMCB Opinions 335 (2003) (Opinion 03-17); 1 OMCB Opinions 233, 236 (1997) (Opinion 97-8).

[17] 6 OMCB Opinions 180 (2009); 6 OMCB Opinions 104 (2009); see also 1 OMCB Opinions 255.

All of the other exceptions are intended to protect the public interest by allowing a body to discuss genuinely sensitive issues in closed session. Four of these exceptions relate to business or financial transactions: the acquisition of real property, §10-508(a)(3); proposals for a business or industrial organization to locate, expand, or remain in the State, §10-508(a)(4);[18] the investment of public funds, §10-508(a)(5); and the marketing of public securities, §10-508(a)(6).

The Act also allows a public body to close a meeting in order to "consult with counsel to obtain legal advice." §10-508(a)(7). This exception is more narrowly worded than its predecessor in the original Act. Prior to the 1991 amendments, this exception authorized the closing of a meeting to "consult with counsel on a legal matter." The Legislature tightened the wording to avoid the situation in which a lawyer sat in on a meeting to give a colorable basis for invoking this exception but was not a genuine participant in the discussion (lawyer as potted plant). As reworded by the 1991 amendments, §10-508(a)(7) requires that the issue be one on which the body seeks and obtains the advice of the lawyer. As the Compliance Board put it, "the exception is a relatively narrow one, limited to the give-and-take between lawyer and client in the context of the bona fide rendering of advice."[19] Furthermore, "once the legal advice is obtained, the public body may not remain in closed session to discuss policy issues or other matters. The exception for consultation with counsel "may never be invoked unless the lawyer is present at the meeting."[20] This exception only extends to discussions between a lawyer and public body that actually involve rendering legal advice, not where a lawyer is actually serving in an alternative capacity such as acting as a business agent.[21]

Another exception, §10-508(a)(8), permits a public body to close a meeting in order to consult with any individual "about pending or potential litigation." The exception can be invoked "only when the discussion directly relates to the pending or potential litigation; it may not [be invoked to] close a portion of the discussion

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[18] This exception applies to a discussion about a company's plans to relocate within the State. 1 OMCB Opinions 73 (1994) (Opinion 94-5).

[19] 3 OMCB Opinions 16, 20 (2000) (Opinion 00-5).

[20] 1 OMCB Opinions 35 (1993) (Opinion 93-6). See also 3 OMCB Opinions 16 (2000) (Opinion 00-5).

[21] See 5 OMCB Opinions 130 (2007).

that deals separately with the underlying [policy] issue.[22] The exception applies only if the potential for litigation is concrete, rather than speculative.[23]

Two other exceptions allow a public body to close a meeting in order to deal effectively with labor negotiations and procurement matters. Under §10-508(a)(9), a public body may "conduct collective bargaining negotiations or consider matters that relate to the negotiations" in closed session. With respect to procurement, "before a contract is awarded or bids are opened," a public body may meet in closed session 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 or bidding proposal process." §10-508(a)(14). This exception is evidently intended to protect against premature disclosure of sensitive information like the public body's negotiating strategy. Conversely, the exception was not intended to permit secret discussion by a public body of open bids submitted by various bidders. More generally, as the Compliance Board put it, "there is no exception in the Act for 'negotiation issues' as such."[24] Only negotiations of the types specified in the exceptions are covered.

Finally, three other exceptions deal with sensitive issues warranting closed meetings: the discussion of "public security," if "public discussion would constitute a risk to the public or public security," §10-508(a)(10);[25] the preparation, administration, or grading of "a scholastic, licensing, or qualifying examination," §10-508(a)(11);[26] and the conduct or discussion of "an investigative proceeding on actual or possible criminal conduct," §10-508(a)(12).

The Open Meetings Act does not prohibit a public body from taking final action at a session that is properly closed to the public under one of the exceptions.

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[23] 1 OMCB Opinions 56, 60 (1994) (Opinion 94-1).

[23] 3 OMCB Opinions 233, 239 (2002) (Opinion 02-13); 1 OMCB Opinions 237, 240 (1997) (Opinion 97-9).

[24] 1 OMCB Opinions 233, 234 (1997) (Opinion 97-8) (exception does not apply to negotiations among government jurisdictions over cost-sharing arrangement). See also 3 OMCB Opinions 233, 237 (2002) (Opinion 02-13).

[25] See 1 OMCB Opinions 73 (1994) (Opinion 94-5).

[26] See 1 OMCB Opinions 13 (1992) (Opinion 92-4).

So, for example, a public body may vote to make a particular kind of investment of public funds in closed session. Other law, however, may bar final action in a closed session.[27]

[27] See, e.g., Article 23A, §8 and Article 25, §5 of the Maryland Code (municipal and county legislative bodies may not finally adopt an "ordinance, resolution, rule or regulation" in an executive session); see also 94 Opinions of the Attorney General 101 (2009).