- **1(B)(1) Meeting – Generally. Electronic communications, guidance.**
- **1(B)(2) Meeting – Determined to be a Meeting. Under the circumstances, public body's consideration of public business, via a continuous exchange of electronic communications, over a discrete period of time.**
- **1(C)(3) Administrative Function. Discussion outside of exclusion. Public body's positions on legislation.**
- **3(A) Open Meeting – Generally. Guidance on how to provide public with opportunity to observe discussions conducted on short notice in order to comment on legislation in the General Assembly.**
- **Violations:** § 3-301; 3-302

*Topic numbers and headings correspond to those in the Opinions Index posted on the Open Meetings webpage at www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx

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July 1, 2019

Re: Talbot County Council

The complaint alleges that the Talbot County Council violated the Open Meetings Act by deciding via emails and texts throughout February 18 and 19, 2019, to take positions on legislation on two bills before the General Assembly. The complaint states that the Council held the discussion entirely out of the public eye, so much so that the public had no way of knowing that the Council was considering submitting comments on the bills. The complaint asserts that, under the circumstances of this case, the Council members' email deliberations throughout those two days were, in effect, a Council meeting subject to the Act's requirement that public bodies meet in public. *See* §§ 3-301 (requiring public bodies to "meet in open session" unless the Act expressly provides otherwise); 3-101(g) defining "meet" to mean "to convene a quorum of a public body to consider or transact public business").[1]

On the Council's behalf, the County Attorney asserts that the Act did not apply to the Council's conduct. The response asserts, first, that the Act did not apply because the presence of a quorum was not demonstrated, so no "meeting" occurred within the scope of the Act, and, second, that the Council's consideration of whether and how to comment on legislation was an administrative function, a function that § 3-103 expressly excludes from the Act's openness mandate. The response provides a list of the fifteen messages exchanged among Council members from the afternoon of February 18 through the evening of the 19th, when the matter was finally decided. The list describes the messages by date, time, and topic. The topic of each was "[d]eliberations on whether the County Council should send letters to the General Assembly supporting or opposing HB298/SB448 and/or HB166/SB280." The County has not provided us

[1] All references are to the General Provisions Article of the Maryland Annotated Code (2014, with 2018 supp.).

with the text of those messages[2] but has provided some other emails and the affidavits of its members that they had no intention of violating the Act, that they had neither received advice on how to evade the Act nor discussed evading the Act, and that there was "no physical gathering of a quorum" to discuss the bills.

Indisputably, the Council did not conduct its deliberations in an open meeting, so the only question is whether those deliberations were subject to the Act.

The exchange among a quorum of a public body's members, of electronic communications on matters subject to the Act, whether or not that exchange is intentionally structured to avoid the demonstrable presence of a quorum, violates the goals that the Act was intended to achieve, and, depending on the circumstances, may also violate the letter of that law. Here, the submissions show that the Council considered and decided two discrete issues, via email, over a discrete period of time, entirely in the dark, with an awareness among the members that they were deliberating towards (and reaching) a group decision. In effect, a quorum gathered, deliberated, and reached a decision by a majority. Given those circumstances, from the limited information provided to us, and as we will explain, we conclude that the Council, however unintentionally, violated the Act. We do not interpret the Act so mechanically as to allow public bodies to avoid it by simply holding their deliberations electronically and in comparative slow motion. Put another way, if the Act were interpreted so as to exclude such deliberations, public bodies in Maryland—specifically, those unconstrained by charter provisions or other laws specific to a public body—could permissibly transact public business in the dark.

We recognize that the General Assembly's compressed legislative process often leaves public bodies (and the public) little time in which to understand a bill and consider whether to comment on it. We will give brief guidance on how public bodies may perform that important function in the open. We will also make clear that public bodies are not performing an administrative function when they consider whether to give the General Assembly their views on bills pending there.

Background

The complained-of events occurred during the General Assembly's 2019 Session and arose from a Council member's inquiry about whether the County wished to submit comments on two sets of bills to the Senate and House of Delegates committees to which each bill had been assigned. The first set, collectively "HB298/SB448,"[3] had been introduced on January 28 in the House and February 4 in the Senate, with hearings scheduled for February 22 and 27, respectively. The second

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[2] Although a public body must provide sealed minutes of a closed meeting upon request, and we must keep those minutes confidential, §3-206(b), the Act does not require a public body to provide us with other confidential materials, and it is not clear either that we would have the authority to keep such materials confidential or that, if a public body is required to keep a record confidential, the public body may distribute it to us. Here, the Council's list of withheld emails sets forth the attorney-client and executive privileges and the Public Information Act ("PIA") exemptions that the Council cites as authority for withholding each. PIA matters are not within our purview, so we do not comment on the applicability of the cited privileges and exemptions.

[3] House Bill 298, cross-filed with Senate Bill 448.

set, "HB166/SB280,"[4] had been introduced in the House on January 23 and in the Senate on January 28, with committee hearings on February 8 and 21, respectively. The submissions yield the following facts:

On the afternoon of Monday, February 18, the County manager received an email from the Council member whom the Council has designated as its representative to the Maryland Association of Counties ("MACo") and, apparently, also to a coalition of counties that is a MACo affiliate. Both are private groups. The council member's email attached the coalition's position letter on HB298/SB448 and asked: "Do we want to send our own. Email to council?" At 2:45, the County manager forwarded those communications, with the attachment, to the County Council and staff, but not the County Attorney, with this note: "Per [the Council member], please advise as to whether the County Council would support sending a letter similar to that attached from the Maryland Rural Counties Coalition."

About ten minutes later, the Council member emailed a similar inquiry to the County manager about HB166/SB280. The Council member asked: "Minimum Wage letter from Talbot County? All 5 signatures? For the Senate hearing this Thursday." Attached to that email was a coalition email, dated February 14, to recipients in various counties. The coalition's email stated that "each county is encouraged to do an analysis" of the bill's fiscal impact on the county, and it provided, as an illustration, the analysis that Talbot County had already done. At 3:32 p.m., the County manager forwarded the communications to the Council and staff, with this note: "Please advise as to whether the County Council would support sending a letter similar to that attached opposing the minimum wage legislation being proposed." Attached was the Council member's own letter, dated February 8, 2019, that she had sent to the relevant House committee "as a member of the Talbot County Council," expressing her own opposition to the bill.

A series of email and text communications ensued in response to the two inquiries. At 7:46 p.m. on the evening of February 18 a Council member sent an email about the bills to all five members of the Council. At 8:06 p.m., two Council members exchanged a total of six text messages. At 8:45 p.m., a Council member sent an email to the County manager, copied to staff. The County manager emailed a Council member at 7:21 a.m. on the morning of February 19. At 9:42 a.m. that morning, two Council members exchanged a total of two text messages. Then, at 10:47 a.m., a member sent an email to the four other Council members, the County manager, and staff. A second such email from one member to the other four, and staff, ensued at 12:16 p.m. By 1:45 p.m., County staff had prepared a draft opposition letter for one bill, and she sent that to one member. At 2:11 p.m., one member emailed another member, and, finally, at 9:09 p.m. that evening, a member emailed another, with copies to the rest of the Council. Thus, not counting the county manager's initial email, Council members exchanged fifteen messages between 7:46 p.m. on February 18 and 9:09 pm on the 19th. Four messages were demonstrably among a quorum. With regard to the emails among fewer members, the list provided to us does not show whether those emails either conveyed

[4] Senate Bill 280, cross-filed with House Bill 166.

or included communications from other members. The Council members' affidavit does not address that question.[5]

Finally, the discussion concluded at 10:19 p.m. on the 19th, when the Council president informed a Council member that "[a] majority of the Council is in favor of sending a letter in opposition to HB298 and hope it will be received before the Feb 22nd hearing." On February 20, the Council submitted opposition letters for both sets of bills. The letters were signed by the president "on behalf of a majority of the Talbot County Council."

Complainant states that he was interested in HB298 and that he follows the Council's meetings, either by attending or watching the videotaped meetings. He did not know until after the February 22 hearing on that bill that the Council had submitted written comments to the committee, and he first learned about the letter when someone told him that a delegate had mentioned a position letter from the Council. The complainant inquired immediately, as the bill was still pending. He learned that the Council had sent letters to both committees on two bills. He asked the Council to withdraw its letters. The Council did not. On March 12, the Council met publicly to discuss what positions to take on legislation pending in the General Assembly. When HB298/SB448 came up for discussion, a Council member noted that the Council had already commented, and the Council moved on to the next bill. The transcript reflects that, on other bills, the Council had held a public work session and heard comments from the public.

Discussion

1. *Whether the Council's electronic "[d]eliberations on whether the County Council should send letters to the General Assembly" constituted a meeting subject to the Open Meetings Act*

Except as expressly provided otherwise, the Open Meetings Act applies whenever a public body "meets" – a word that the Act defines to mean "to convene a quorum of a public body to consider or transact public business"—and requires the public body to meet openly. §§ 3-301, 3-101(g). In considering whether a public body has "met," we have cautioned that "the Act does not automatically switch off during a discussion when the number of members present falls briefly below the number required for a quorum." 9 *OMCB Opinions* 283, 288 (2015). There, addressing whether the Act applied when a planning commission recessed mid-deliberations and then returned to open session with a fully-formed decision, we did not condition the applicability of the Act on a demonstration that a quorum of members had been together during the break. Noting that the Court of Appeals "has not taken a mechanical approach to the quorum requirement," we explained that "there are some circumstances under which the members of a public body will be deemed to have deliberated as a quorum even if a quorum was not present at one precise instant in time." *Id.*, citing *Community and Labor United v. Baltimore City Board of Elections*, 377 Md. 183 (2003). In that

[5] Each member testifies that "[t]here was no physical gathering of a quorum," that he or she "did not attempt to purposefully or intentionally evade [the Act]," and that the exchanges did not include any discussions about how to evade the Act. The affidavits provide no information on the electronic presence of a quorum at any time.

context, we stated that "[o]f more significance . . . will be the totality of the circumstances, including whether the deliberations have continued during the break." 9 *OMCB Opinions* at 288.

This matter poses the issue of how to apply these principles to deliberations that a public body conducted electronically over the space of about a day and a half, sometimes demonstrably among a quorum, sometimes not, but continuously. We have long cautioned against the use of electronic communications to decide substantive matters, both in the interest of the public—which is clearly deprived of the opportunity to observe the public body conduct its business—and in the interest of the members of public body, who are at risk of violating the Act whenever they hold group discussions electronically. *See, e.g.*, 8 *OMCB Opinions* 125, 126-27 (2013) (stating that "the practice of taking actions by e-mail does not serve the goal of the Act that public business be conducted publicly").[6] Our cautions have partly been informed by a 1996 Opinion of the Attorney General. *See* 81 Op. Att'y Gen. 140 (1996); *see also* 9 *OMCB Opinions* 259, 261 (2015)(discussing the opinion and the application of the Act to electronic communications). In that opinion, the Attorney General analogized the exchange of emails to "an exchange of paper" by mail and concluded that a planning commission's members were not "present," and thus not "meeting," when they exchanged three emails at separate times over two days. The opinion noted that each member had "opened the electronic folder containing his or her email at a convenient time," and that they "were not simultaneously sitting at computers, exchanging thoughts as if they were engaged in a telephone conversation." *Id.*, 141, 142-44. Then, however, the Attorney General observed that the technology might change:

> To be sure, e-mail could conceivably be the medium of exchange when a quorum of a public body has convened. If the members of a public body are able to use e-mail for "real-time" simultaneous exchange, the result would be different. Then the analogy would be to a telephone conference call, the hallmark of which is the capacity for immediate group interaction and which constitute a 'meeting' under the Open Meetings Act.

Id. at 143-44.

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[6] That matter involved a complaint that a public body had not timely adopted its minutes. We interpreted the Act to permit public bodies to adopt minutes by electronic communications when waiting for the next meeting would unduly delay the public's access to that information. In that case, we advised, the Act's goal of openness, as implemented by the requirement that minutes be prepared reasonably promptly, is better served by prompt adoption than by a delayed adoption in open session. "The discussion of other issues by e-mail," we stated, "serves no goal of the Act." 8 *OMCB Opinions* at 126. We have also found that a public body did not "meet," and thus did not violate the Act when, after it had deliberated on an application in open session, staff emailed a draft decision to each member separately and collected each member's vote, in separate phone calls. In the open session, the public body had decided to hold the matter pending receipt of certain documents from the applicant, but the members had stated that they had no further questions, and the chair had stated that no further deliberations were needed. On those facts, we saw "no reason to believe that the Commission members used the calls as a means to deliberate collectively among themselves, with the executive director as intermediary." 10 *OMCB Opinions* 18, 21 (2016). Still, we cautioned that "conducting substantive public business this way—out of the public eye—invites suspicion." *Id.*

In 2015, we considered how that observation might apply to the use of "reply all" emails. *9 OMCB Opinions* 259, 263 (2015). There, a town attorney had sent a group email to the town council members, asking each to respond with his or her own understanding of the meaning of a motion on which the council had already voted. Four members, a quorum, responded to her question, each with one "reply all" email, each at separate times, over the space of four hours. Noting that "the capacity for interaction among a quorum might have been there," we stated our view that, "in the context of electronic media, . . . we think that something more is needed for a meeting than mere 'capacity' for immediate group interaction; in our view, there should also be some level of awareness that a quorum is present for a specific period of time." We found that the "timing and content of these emails do not establish that a quorum of the Council 'met' that afternoon to consider public business." We noted that "this already-close question would have been much closer had the emails reflected actual interaction among the group on how to act on an issue and had the emails occurred within a shorter period of time." We then advised "members of public bodies [to] simply forebear from conducting business electronically because of the ease with which a conversation between two members (when a quorum is four) may be transmitted to the others and thereby effect an impermissible 'crystallization of secret decisions to a point just short of ceremonial acceptance.'" *Id.* at 264 (quoting *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980). Finally, we referred with approval to the advice of the Wisconsin Attorney General that a case would likely turn on whether the "electronic communication is more like written correspondence . . . or more like conversations," and, to that end, on factors such as the number of members participating, the number of communications, the time frame, and the extent of the "conversation-like interactions." *Id.* at 265.

Here, the totality of the circumstances leads us to conclude that the Council's deliberations were more akin to conversations among a group that effectively convened to decide on the Council's positions than to the sporadic exchange of written correspondence. Those circumstances include: the number of messages, some among the entire Council, some not, but at a frequency that shows a continuous deliberation throughout the two days; the Council's decision, taken during that period and apparently solely by electronic communications, to send letters on behalf of "a majority"; the awareness of the members that the Council as a group was addressing the bills during that time; and the evolution of electronic communications (and devices) to the point where the opportunity for members to interact on a topic under consideration is effectively constant. We have given less weight to the timeframe in this matter, given the apparent continuity of the deliberations. Put another way, we do not read the Act to apply to electronic deliberations only when it is known how many members, all in separate places, are looking at their devices at the same time.[7]

As for guidance on avoiding the use of electronic communications to respond to short-fuse inquiries about legislation in the General Assembly, the only real obstacles are logistical: how to arrange for public observation and how to provide reasonable advance notice. As we have advised

[7] *Id.* at 143-44. To the same effect, at our September 8, 2016 annual meeting, we discussed whether the Act should be amended to address electronic communications. The then-Chair noted that all types of communications among members occur sequentially, "over a space of time," and he suggested that "the Board may discern whether the public body is using email as a means of conducting business and interpret the Act accordingly." After further discussion, we concluded that the Act "gave [us] the flexibility to address the issue on a case-by-case basis and that legislation was not needed at this time."

before, public bodies can provide access to teleconferences by publishing a call-in number or by making a speakerphone available at a published location. Our advice on last-minute notice is summarized in Chapter 2, Part A, of the Open Meetings Act Manual.[8] As noted there, the webpage for this Board alerts the public to the possibility that we will need to meet on short notice during the General Assembly's sessions. That way, the public knows to check frequently for notices during those 90 days.

2. *Whether the Council was performing an "administrative function," exempt from the Act, when it deliberated on whether to comment on legislation pending in the General Assembly*

The Council maintains that the Council was merely performing an "administrative function"—a function that is expressly exempt from the Act—when it considered whether to express its position on the two bills in question. In support of that contention, the response states that the Council had authorized a member to represent it when MACo was considering what position the association would take on bills in the General Assembly, that the member had already voted at MACo on the position to be taken by the MACo affiliate, and that "the Council, therefore, had already taken a position on the bills when the discussion about sending supplemental letters from the Council began." Further, the response states, the County Charter authorizes the Council to delegate its responsibility "for the enforcement of this Charter and its laws passed under [it]," "and the officials and employees so charged shall have the authority conferred upon them by the laws of Talbot County." The response does not identify the charter provision or county law that the Council delegated the member to "enforce[]" when it designated her to act as its representative to MACo.

The Act does not apply when a public body is meeting solely to perform an "administrative function," as defined in § 3-101(b). *See* § 3-103(a)(1)(i). The multi-step analysis that the definition often entails is extensively explained in Chapter 1, part C(2) of the Open Meetings Act Manual. Here, we need only address the first part of the definition, under which the exclusion only applies if the public body was carrying out "the administration of" a law of the State or political subdivision of the State, or of a rule, regulation, or bylaw of a public body. § 3-101(b)(1). The position that a private association or its affiliate has decided to take on a bill in the General Assembly is not a law, rule, regulation, or bylaw of the governmental bodies listed in § 3-101(b)(1). Further, the Council was not merely implementing a policy decision that it had already reached; the deliberations we have described above occurred because the Council member wanted to know whether the full Council would take a position on legislation introduced in the General Assembly. We find that the Act applied to these deliberations and that the Council violated it by failing to provide the public with the opportunity to observe them.

Conclusion

We conclude that the Council violated the Act when it did not provide the public with an opportunity to observe its deliberations on its position on legislation pending in the General

[8] Here, it appears that the Council might have been able to address the bills earlier, as each had been introduced in late January; in fact, one Council member had already addressed one of the bills on February 8. That fact doesn't change the reality that public bodies are often faced with short deadlines by which to address bills and amendments to them.

Assembly. We have explained that when the sequence of electronic communications is such that a collective deliberation among a quorum has occurred, with the opportunity for the quorum to interact on public business subject to the Act, actual interaction, and awareness that a quorum is at hand for a specific period of time, we will deem the public body to have held a meeting subject to the Act.[9] And, once again, we strongly discourage the exchange of electronic communications on public business, no matter how carefully structured to avoid the presence of a quorum, as violative of the goals that the Act was intended to achieve.

This opinion is subject to the acknowledgment requirement set forth in § 3-211.

Open Meetings Compliance Board

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[9] For a discussion of our opinions about when the exchange of electronic communications constitutes the convening of a quorum, see the Open Meetings Act Manual, Chapter 1, pp. 10-11. The Manual's "Practice notes on the presence of a quorum," *id.* at 13, caution: "Near-simultaneous electronic discussions among a quorum raise questions as to whether the members are 'meeting' as a quorum, and those discussions should be avoided."