The County Council for Montgomery County, Maryland approves the following Act:
Sec. 1. Section 19A-15 is amended as follows:


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(b) (1) A public employee decision-maker must not consider any [ex parte or private] communication made outside of the record regarding any matter that must be decided on the basis of a record[[,]] [after giving interested parties an opportunity for a hearing] [[including any matter that would be subject to a future on-the-record proceeding which is reasonably foreseeable.]] A future proceeding is reasonably foreseeable if an interested party: 

(A) has engaged an attorney, expert, planner, architect, or other consultant to perform work on a specific matter that would be subject to a future on-the-record proceeding; or

(B) has taken any other action to prepare to file an application or other document on a specific matter that would be subject to a future on-the-record proceeding]

after an application is filed or a proceeding is otherwise initiated.

(2) Except as otherwise expressly authorized by law, any public employee decision maker, and any public employee who directly advises a decision maker, must not:

(A) initiate or participate in any communication outside the record with any person regarding a matter that must be decided on the basis of a record; or

(B) conduct an independent investigation of any fact [[in or]] related to [[a record of]] a matter that [[is before or will come before the decision-maker]] must be decided on the basis of a record.
The recipient of any communication made outside the record, including advice rendered by officials or staff of another government agency, must promptly enter that communication in the record. If the communication was oral, the recipient must write down the substance of the communication and enter it into the record. The decision-making body may consider any communication made outside of the record if all parties are given a reasonable opportunity to respond.

This subsection does not restrict a communication that consists solely of:

[(1)] (A) advice rendered to a decision-maker by an attorney employed or retained by the decision-maker’s agency;

[(2)] (B) advice rendered to a decision-maker by appropriate officials or staff of the decision-maker’s agency;

(C) a procedural question that does not involve the substance of facts in a record; and

[(3)] (D) discussions between members of a decision-making body.

Sec. 2. Section 2A-8 is amended as follows:


(b) Official record.
(1) The hearing authority must prepare, maintain and supervise the custody of an official record in each case. The record must include testimony, exhibits and verbatim transcript, if any, submitted during the hearing and at other times the record is open to receive evidence. Documentary evidence may be received in the form of copies, excerpts, photographic reproductions or by incorporation by reference. The hearing authority must make the official record available for inspection to all affected persons before any hearing.

(2) [a. This paragraph applies to any ex parte or private communication, written or oral, received by a member of a hearing authority if:

(i) the communication relates to a contested matter before the hearing authority;

(ii) all appellate rights regarding the contested matter have not been exhausted; and

(iii) the hearing authority is required by law to make a decision on the matter based on the record before it.

b. This paragraph does not apply to:

(i) legal or technical advice rendered by government agency staff or an attorney for the County at the request of the hearing authority;

(ii) any communication about the status or procedure of a pending matter or;

(iii) any communication between members of the hearing authority.
c. If a member of a hearing authority receives an oral ex parte or private communication, that member must reduce the substance of the communication to writing within a reasonable time after receipt of the communication.

d. If a final administrative decision has not been made prior to receipt of the ex parte or private conversation, the hearing authority must send a written notice to all parties that discloses the contents of the communication and states whether the hearing authority will consider the communication as a basis for its decision under subparagraph e.]

[e.] Section 19A-15(b) applies to any ex parte or private communications received by a member of a hearing authority. The hearing authority must include the ex parte or private communication in the record and may:

(i) consider the communication as a basis for its decision after giving all parties an opportunity to respond to the communication; or

(ii) decide the matter if the hearing authority expressly finds that it has not considered the communication as a basis for its decision.

[f.] The substance of an ex parte or private communication received after a final administrative decision and before appellate rights have been exhausted must be maintained in the case file and, in [[the event of]] any remand, treated [[in accordance with all other provisions of]] as required by this paragraph.
Approved:

Nancy Floreen 3/17/10
Nancy Floreen, President, County Council

Approved:

Isiah Leggett 3/26/10
Isiah Leggett, County Executive

This is a correct copy of Council action.

Approved:

Linda M. Lauer 3/29/10
Linda M. Lauer, Clerk of the Council