- Compliance Board – Authority and Procedures
  - Response to complaint – public body's response inadequate where it does not provide information on the statutory criteria at issue

- Meeting
  - Determined to be a meeting – convening of quorum of public body at committee meeting
  - Determined not to be a meeting – quorum not present or convened

- Minutes
  - Generally – not required to reflect events which were not discussed or acted on in meeting
  - Practices in violation – failure to identify attendees of closed session and other information

- Exceptions Permitting Closed Sessions
  - Procurement, §10-508(a)(14) – within exception: discussion of sole cource contract only to the extent intertwined with competition procurement that would be a member inspected by disclosure of sole source discussion
  - Litigation, §10-508(a)(8) – within exception:
    - discussion of settlement possibility
    - discussion of contract for litigations services in connection with lawsuit
  - Legal Advice, §10-508(a)(7) – within exception: discussion of settlement possibility, with counsel

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January 30, 2012

Re: Maryland Transportation Authority, Capital & Finance Committees (Craig O'Donnell, Complainant)

We have consolidated and considered the September, 16, 2011, and October 3, 2011, complaints of Craig O'Donnell ("Complainant") that the Maryland Transportation Authority (the "Authority") and two of its

committees have violated the Open Meetings Act ("the Act") in a variety of ways.[1]

As set forth below, we conclude that the Authority violated the Act in several respects.

1. Allegation that the Authority violated the Act when a quorum of its members met in a meeting published only as a meeting of its Capital Committee.

Complainant alleges that on May 5, 2011, the Authority's Capital Committee, itself a public body, held a meeting attended by members of the Authority's Finance Committee, and that the Finance Committee's attendance created a quorum of the Authority itself. The minutes show that the topic under discussion was a planning document which the Authority and the Finance Committee would later consider for approval. According to the Authority, the three Finance Committee members were present for two items addressed by the document in question. Counsel for the Authority states that while the two committees "usually hear different agenda items," they occasionally meet together for staff presentations on "a matter on which [staff] will seek a vote of approval by the whole MDTA Board to both committees...." The Authority asserts that its members did not act as the Authority when they attended the May 5 meeting.

The Act applies when a quorum of a public body meets for the "consideration *or* transaction of public business," *see* SG §10-502 (g) (emphasis added), whether or not the
public body takes an action. Indeed, the General Assembly stated, as the legislative policy to be implemented by the Act, that "[i]t is essential to the maintenance of a democratic society that, except in special and appropriate circumstances ... citizens be allowed to observe .... the deliberations and decisions that the making of public policy involves." SG §10-501(a). The General Assembly also emphasized that the "accountability of government to the citizens of the State" is ensured by their ability "to witness the phases of the deliberation, policy formation, and decision making of public bodies...." SG §10-501(b). And, in *Board of County Commissioners of Carroll County v. Landmark Community Newspapers*, 293 Md. 595, 446 A.2d 63 (1982), the Court of Appeals explained:

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[1] We have already addressed the status of the committees as public bodies and do not address allegations of events pre-dating November, 2010, when the Authority decided that the committees would follow the Act's procedures.

> It is ... the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business.

Id. at 293 Md. 601 (quoting *City of New Carrollton v. Rogers*, 287 Md. 56, 410 A.2d 1070 (1980)); *see also Community and Labor United v. Baltimore City Board of Elections*, 377 Md. 183, 832 A.2d 804 (2003) (stating, "The clear policy of [the Act] is to allow the general public to view the entire deliberative process.").

In accordance with this governing law, we have long considered all of the phases of a public body's formation of policy – "every step of the process" – to be subject to the Act. *See, e.g.*, 1 *OMCB Opinions* 23, 27 (1993) (stating that "information-gathering at the earliest stages of policy formation is part of the 'consideration ... of public business'").

The fact that a quorum may have been created unexpectedly does not exempt the discussion of public business from the Act's requirement that it be conducted openly. *See Community & Labor United for Balt. Charter Comm. v. Balt. City Bd. of Elections*, 377 Md. 183, 195 (2003) (rejecting the public body's argument that the appearance of a quorum of members at the gathering was unanticipated). Accordingly, we have concluded that a briefing on public business, "even if limited in scope and devoid of discussion," given to an "accidental quorum" of a public body's members, constituted a meeting as defined by the Act. *See* 3 *OMCB Opinions* 30,34-35 (2000) (stating, "members of a public body have a duty to be especially sensitive to Open Meetings Act issues when .... a quorum is together, the setting is ... not social...., and the topic bears directly on a pending matter").

These principles apply whether or not the public body itself called the meeting in question. *See Ajamian v. Montgomery County*, 99 Md. App. 665, 639 A.2d 157 (1994) (addressing whether quorum of county council attending central party committee meeting had considered public business there; holding that it had not). We have found that a public body "met" under the Act when a quorum of its members attended a subcommittee meeting "simply to 'observe.'" *See* 6 *OMCB Opinions* 155, 158 (2009).

We therefore conclude that the Authority violated the Act when a quorum of its members attended a meeting posted and recorded in minutes only as a meeting of one of its committees.

2. Allegations that Capital Committee meetings held from July, 2010, through April, 2011, were actually meetings of the Authority itself because, after the resignation of one member of the Authority, the members of that committee constituted a quorum of the Authority.

The parties dispute the effect of the resignation of one Authority member on the number of members needed to constitute a quorum of that public body. The Authority states that, under its Operating Policy, a quorum of the statutory eight members is created by the attendance of five members and, furthermore, that, by statute, members are to serve until their successors are appointed and qualify. Therefore, the Authority states, the resignation of one member did not serve to create a vacancy until his successor was appointed. Complainant states that the member resigned on the advice of the Judicial Ethics Commission that he could not serve both the Authority and the Judiciary and that if he is deemed to still be a member of the Authority, his service in the judicial branch contravenes the advice given in that opinion. Complainant also states that the Operating Policy had not been adopted until after the dates of the meetings in question.

The Act applies when a public body "meets," that is, when a quorum of the members convenes to consider or transact public business. SG §10-502(g). The Operating Policy definition of a "quorum" as five members reflects the usual definition of a quorum as a simple majority of the membership.[2] The Act defines "quorum" as "a majority of the members of a public body" or "any different number that law requires." SG § 10-502(k)(1) and (2). Therefore, with or without the Operating Policy, the Authority apparently cannot act without five members no matter how many vacancies there are in the membership. The Capital Committee meetings in questions were attended by fewer members than would constitute a quorum of the Authority and therefore were not meetings of the Authority itself.

We only have the authority to address alleged violations of the Act. We thus do not address whether a person who has resigned a position can be deemed to still occupy that position for purposes of ethics statutes.

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[2] Under the common law, "A majority of the total authorized membership is necessary to constitute a quorum, even when some seats are vacant." 2-25 ANTIEAU ON LOCAL GOVERNMENT LAW § 25.04 (2d ed. 2009).

3. Allegations that the Authority's minutes are deficient because they do not reflect the resignation of a member

Complainant states that one member's resignation from the Authority cannot be discerned from the minutes. He acknowledges that the Act does not require a public body to disclose an action it did not take but states that, in the interest of providing the public with information, a public body should record such an event in its minutes. The Authority states that the resignation was not a matter for its action.

Section 10-509 of the Act, which sets forth the minimum requirements of a public body's minutes, requires minutes to "reflect ... each item that the public body considered; .... the action that the public body took on each item; and .... each vote that was recorded." SG §10-509(c). The Authority did not violate this requirement; the member's resignation did not implicate a Board action or discussion. Because we only address issues governed by the Act, we do not address whether, in the interest of transparency, a public body should inform the public of a change in its membership.

4. Allegations that the summary of a Finance Committee closed session does not reflect the attendees, actions taken, and other information required by SG §10-509(c)(3)

Complainant alleges that the June 9, 2011, Finance Committee minutes do not reflect the information required of a public body which has closed an open session. SG § 10-509(c)(2) requires a public body to include, among other things, "a listing of the topics of discussion, persons present, and each action taken during the [closed] session" in the minutes of its next open session. We have reviewed both the June 9 minutes and the minutes of the July 7 meeting for compliance with SG § 10-509(c)(2). Neither set complies with that provision, because neither lists the attendees at the closed session held on June 9. Additionally, the June 9 minutes list the purpose behind closing the session but do not state what topics were actually discussed or actions taken, if any.

We refer the Authority to the specific guidance we gave in 3 *OMCB Opinions* 173, 178-80 (2002) and 5 *OMCB Opinions* 165, 169-170 (2007) on what the Act requires public bodies to include in their summaries of closed sessions and on how the minutes requirement differs from the closed-statement requirement. As explained in the latter opinion, the fact that members voted to go into closed session for a certain reason is not a substitute for information on what actually occurred there. For example, the Authority's June 23, 2011 minutes, which also do not list the attendees of a closed session closed for legal advice, does not state whether the meeting was confined to counsel and

Authority members, or instead open to other attendees of the open session. That fact is relevant to a member of the public wishing to "compare the [closing statement] with the [summary], in case some variance suggests a discussion beyond the scope indicated in the pre-closing statement." *See id.* at 170.[3]

In sum, the closed-session summaries in the Authority's minutes do not comply with the Act because they do not contain the information required by SG § 10-509(c)(2).

5. Allegations that the Authority's discussions of sole-source contracts and of "gap contracts," defined as extensions of existing contracts, did not fall within the exception provided by SG § 10-502(a)(14)

In his September 2011 complaint, Complainant states that the Finance Committee improperly closed its June 9, 2011, meeting to discuss extending the terms of certain contracts. Complainant contends that the exception claimed by the Authority pertains only to the pre-award stages of a competitive procurement process and does not apply to the extension of an already-awarded contract. Complainant similarly asserts in his October 2011 complaint that the exception does not apply to the discussion of sole-source contracts and memoranda of understanding with other public agencies.

The Committee's June 9 minutes refer to its decision to close the meeting in order to "discuss negotiation with current operators of the I-95 Travel Plazas over the terms of the new "gap" contracts for continued operation of the Plazas." The Authority's June 23, 2011, minutes reflect the Authority's open discussion of those contracts. Minutes quoted by Complainant also refer to sole source contracts and memoranda of understanding that may have been discussed by the Capital and Finance committees before November 2010, when they deemed the Act to apply to their meetings.[4] We address those types of agreements generically.

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[3] As a general matter, while closing a session to receive legal advice from counsel on compliance with the Act falls within the exception provided by SG §10-508(a)(7), the attendance of people other than members and appropriate staff of the public body may call into question the applicability of that exception to the discussion actually held. *See, e.g.*, 1 *OMCB Opinions* 1, 5 (1992).

[4] See 7 *OMCB Opinions* 176 (2011) for a history of the status of the Finance and Capital Committees as "public bodies" subject to the Act.

The Act expressly includes the "process or act of ... approving, disapproving, or amending a contract" as a quasi-legislative act to be performed in an open meeting unless an exception applies. *See* SG § § 10-503(a),10-502(j), 10-508 (defining the scope of the Act; excluding certain functions from the definition of an "administrative function" that may be performed in a closed session; providing exceptions on which a public body may rely to close a meeting). Here, the Authority and committees claimed the exception provided by SG § 10-508(a)(14). Under that exception, a public body may close a meeting, "before a contract is awarded or bids are opened, [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."

The Authority cites 5 *OMCB Opinions* 126 (2007) for the proposition that a "candid discussion would be difficult in open session" (our statement) when the topic involves the "negotiation strategy for contracts" (the Authority's summary). That matter, however, involved a discussion of "competing development proposals." *Id*. at 127. We stated that the §10-508(a)(14) exception"related to discussion of competitive bids or proposals," and we found that the particular discussion "was limited to topics within this exception." *Id.* We did *not* extend the exception to the "negotiation strategy for contracts" generally; under SG § 10-508(c), we must read the exceptions "strictly," not broadly. As we explained in 1 *OMCB Opinions* 233, 234 (1997), the §10-508(a)(14) exception is premised on the existence of a competitive bidding or proposal process and does not apply to "'negotiation issues' as such." *See also* 1 *OMCB Opinions* 73, 84-85 (1994) (stating that SG §10-508(a)(14) "does not extend to all matters of 'negotiation and compromise'; it is limited to the competitive bidding or proposal process"). In short, SG §10-508(a)(14) applies to discussions which, if held in public, would have an adverse impact on the public body's ability to engage in a competitive procurement, not to discussions concerning contracts in other contexts.

The application of these principles to the facts before us does not yield a clear result. Complainant asserts that the Travel Plaza gap contracts did not implicate the competitive process. The Authority asserts otherwise. Although the June 9 committee minutes do not indicate the existence of a competitive process for the Travel Plaza operators' contracts, the Authority's June 23 minutes refer to Travel Plaza concessionaires to be selected in the future, and Complainant has provided a description of the Authority's issuance, amendment, and cancellations of various requests for proposals throughout 2010. If discussion of the gap contracts implicated a impending procurement

process, and if open discussion would have adversely impacted that process, then, under those circumstances, the exception may have applied. We stress that for the exception to apply, the public body must be able to identify a tangible connection to a particular procurement in which the public body expects to engage or participate with another public body.

Sole source contracts and memoranda of understanding also do not involve the competitive process, but, in a particular case, they might be so intertwined with a competitive procurement as to support the invocation of the § 10-508(a)(14) exception. We do not know whether the Authority's discussions of modifications to already-awarded Inter-County Connector contracts, if held in public, would have had an adverse impact on its ability to engage in a competitive process inextricably related to those contracts; if not, those discussions should have been held in open session.

In sum: to the extent that the Authority and these two committees have discussed contract amendments, sole-source contracts, and memoranda of understanding in closed sessions under circumstances which neither establish an adverse impact on a competitive bidding or proposal process nor satisfy another exception, they violated the Act. When such a discussion would have an adverse impact on an ongoing competitive procurement, we encourage the Authority to provide the public with sufficient information in its closing statements and closed-session summaries to demonstrate the applicability of the exception to what otherwise might appear to be a separate matter.

6. Allegations that the Authority improperly relied on SG § 10-508(a)(7) and (8) as grounds for closing certain meetings and failed to identify the litigation matters discussed

Complainant asserts that the Authority should have identified the litigation discussed in meetings closed for the advice of counsel under SG §10-508(a)(7) or for consultation on pending or potential litigation under SG §10-508(a)(8). He queries whether discussion of settlements falls within the definition of "pending litigation" and states that the Authority should have identified the particular litigation because, in any event, the filing of a lawsuit against a particular entity is public information. He also questions the Authority's reliance on the exception for discussions about the Travel Plaza gap contracts and a sole source contract for "services in connection with pending litigation."

A public body's consideration of the possibility of settlement potentially falls within both exceptions when counsel is giving advice on the subject. *See, e.g.,* 3 *OMCB Opinions* 233,238 (2002) (concluding that SG §10-508(a)(7) and(8) applied to discussion about settling potential claims). As for the

identification of the case in the minutes, we have stated that "[t]he level of detail in the written statement required prior to a closed session and in the minutes of the ensuing open session may preserve the confidence of [the] information that led to the session's being closed in the first place." 1 *OMCB Opinions* 16,17 (1992). Although the existence of a filed lawsuit is a matter of public record, the very fact that a litigant is considering settling it could have an adverse impact on the public body's ability to do so advantageously. So, when a public body's identification of the case being discussed would impair the confidentiality of a properly-closed discussion, the public body need not identify the case.

We note that the Authority's discussions of sole-source contracts for services provided in connection with ongoing litigation were properly closed under the SG §10-508(a)(8) exception for consultation with others concerning pending or potential litigation. And, as a general matter, the discussion of various stages of a procurement process might fall within the exception for "advice of counsel" or "pending or potential litigation," as when, for example, the public body seeks advice on wording a request for proposals or avoiding a challenge to a procurement. The discussion need only stay within the scope of the exception claimed.

7. Allegations that the Capital Committee violated the Act when it did not approve the minutes of its May 5, 2011, meeting at its next meeting

Complainant states that the Capital Committee delayed its adoption of the minutes of the May 5, 2011 meeting for two months and that the delay violated the Act. Complainant notes that the meeting in question was attended by a quorum of the members of the Authority itself, involved a six-year planning document to be acted on later by the Authority, and was not publicly noticed as a meeting of the full Authority. Those facts, in conjunction with the fact that the minutes of the subsequent meeting at which the Authority adopted the document reflect no discussion by members of the Authority, led Complainant to observe, "It looks like the idea was to hide the May 5 full board meeting until after the ceremonial votes to approve the [document]."

Describing Complainant's statement as a "specious conspiracy theory," the Authority responds that the minutes were still being drafted when the committee met on June 2, 2011. The Authority quotes the following language from 6 *OMCB Opinions* 161 (2009):

> As a general rule, minutes should be available on a cycle that parallels a public body's meetings, with the only lag time being that necessary for drafting and review. We have, however, recognized that occasionally special circumstances might justify a brief delay.

Id. at 162. The Authority does not state whether the two-month lag between the meeting and the adoption of the minutes was in fact "necessary for drafting and review."

The Act requires a public body to prepare its written minutes "as soon as practicable after [it] meets...." SG § 10-509(b). The Authority's assertion that its minutes were still being drafted when the committee met on June 2 provides us with no facts with which to assess the practicability of preparing them in time for that day's meeting. Particularly, the Authority has offered no facts from which we could infer that "special circumstances," *see* 6 *OMCB Opinions* at 162, justified the delay. We are therefore unable to gauge the Authority's compliance with SG §10-509(b). As in 7 *OMCB Opinions* 64 (2010), which also involved the Authority, "[w]e ... find that the [Authority's] response failed to satisfy §10-502.5(c)(3)." We additionally observe that no provision of the Act makes a public body's opinion of a citizen's character or opinions relevant to our inquiry of whether the public body complied with the Act.

Conclusion

The General Assembly stated, as the policy of the Act, that the conduct of public business in open meetings increases the faith of the public in government...." SG § 10-501(b). Put another way, compliance with the Act serves to prevent the mistrust engendered by a public perception, even if unfounded, that a public body is conducting the public's business behind closed doors. Accordingly, we have encouraged the members of a public body to view the procedural requirements of the Act as "mechanism[s] which, when used properly, can serve to protect them against unwarranted suspicions that they are privately conducting business which the law requires them to conduct publicly." *See* 7 *OMCB Opinions* 225,229 (2011)(addressing the Act's requirements for disclosing information about actions taken in closed sessions).

Here, we encourage the Authority to continue to use its website as an efficient means of achieving transparency and increasing trust. With respect to the violations set forth above, we particularly encourage the Authority to use its website (and any other publication method) for the proper posting of a committee meeting as a meeting of the whole body when a quorum of the body

will attend, for the disclosure of the persons attending closed sessions, and for the provision of sufficient detail in its minutes and closing documents to establish the legitimacy of closing a session to discuss a topic behind closed doors. As illustrated by the allegations here, the provision of that detail is especially important when the primary topic or size of the attendance list gives the appearance that the discussion need not have been held confidentially.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin
Julio A. Morales, Esquire