Chapter 4:

Permissibility of Closed Sessions – The Exceptions

**Chapter 4: Will the discussion fall within one of the 15 “exceptions” that permit the public body to exclude the public?**

(Index Topic 4)

**Chapter summary:** When a public body holds a meeting subject to the Act, the meeting must be open to the public unless the topic of discussion falls within one of the fifteen exceptions that allow a public body to exclude the public. *See* §§ 3-301, 3-305. Before closing an open meeting under one of the statutory exceptions, the public body must disclose the particular exception that permits the closed session. Then, in the closed session, the attendees may discuss only matters within the scope of that exception. § 3305(b), (d); *see also* 7 *OMCB Opinions* 125, 127 (2011) (explaining that “discussions at closed meetings must fall within the scope of the exception claimed by the public body in advance”). This chapter explains the fifteen exceptions. For an explanation of *how* to invoke an exception, see Chapter 5.

For the most part, the decision to invoke an exception to close a meeting is discretionary. Although other laws, such as medical privacy laws, might require a public body to discuss a topic in a closed session, the Act itself does not mandate closed sessions; instead, it provides that the public body “may” meet in closed session to discuss an excepted topic. § 3-305(b). Given the discretionary nature of the decision, the public body must articulate a reason for excluding the public. For that requirement, see Chapter 5.

Public bodies must construe the fifteen exceptions “strictly . . . in favor of open meetings.” § 3-305(a). Public bodies should apply the exceptions in light of the Act’s stated policy that public bodies’ meetings are to be open “except in special and appropriate circumstances.” *See* § 3-102(c). As noted below, three exceptions—the procurement, public security, and cybersecurity exceptions—may only be invoked after the public body finds that a public discussion of the matter would cause certain types of harm.

The Act does *not* authorize public bodies to close meetings for discussions that fall outside of the exceptions. *See* § 3-305(b) (providing that a public body may close a meeting “only” to discuss one of the fifteen topics). Formerly, the Act broadly permitted public bodies to close a meeting for “an exceptional reason” that was “so compelling” as to override the public interest in open meetings. That exception was repealed in 1991. *See* 1991 Md. Laws, ch. 655. The exceptions now reflect the General Assembly’s efforts to balance the public’s need to know with public bodies’ need to address certain specific topics in private. A local government with home rule powers may enact an open meetings ordinance with fewer exceptions—that is, a law that more stringently requires openness— but it may not add exceptions. *See* § 3-105 (“Whenever [the Act] and another law that relates to meetings of public bodies conflict, [the Act] applies unless the other law is more stringent.”).

It is important to note that no exception authorizes a closed session unless the public body has disclosed its reliance on the exception *before* the closed session. *See* § 3-305(c) (“A public body that meets in closed session under this section may not discuss or act on any matter not authorized under subsection (b)); § 3-305 (b) (providing exceptions

“[s]ubject to” § 3-305(d)); § 3-305(d) (requiring the adoption of a written statement and motion before the closed session). Put another way, if the public body has not cited the exception before it excludes the public, the exception does not apply. That condition and the multiple other conditions that the Act places on closing a session, including two new ones added in 2017, are discussed in Chapter 5, as are the disclosures that must be made after a closed session and the members’ duty to confine the discussion to the matters disclosed on the closing statement.

To figure out whether a closed-session discussion fell within an exception, a person should gather the public body’s written disclosures about the session, as well as any other facts that have emerged about it. The Compliance Board’s opinions on each exception can be found under Topic 4 in the Index, in the order in which they appear here and in the Act.

# A. The “personnel matters” exception: § 3-305(b)(1)

This exception allows a public body to close a meeting to discuss various personnel actions with regard to, or the evaluation of, “an appointee, employee, or official over whom it has jurisdiction” or “any other personnel matter that affects one or more specific individuals.” The discussion must involve individual employees. *See, e.g*., 13 *OMCB Opinions* 14, 15 (2019) (exception applied to school board’s discussion about the performance of its counsel, a school board employee). Discussions about an entire class of employees, even when the class is small, do not fall within the exception. *See, e.g.*, 7 *OMCB Opinions* 131, 134 (2011); *see also* 11 *OMCB Opinions* 38 (2017).

To the same effect, the Compliance Board has explained that a discussion about the “‘elimination of a position,’ while it is vacant, likely involves the setting of policy, rather than the discussion of information specific to a particular individual.” 7 *OMCB Opinions* 216, 220 (2011). The discussion about the elimination of a position or department must be open “[e]ven where the discussion involves a position held by so few employees that everyone knows whose positions are being discussed, . . . unless it involves the performance or other attributes of those individual employees.” 3 *OMCB Opinions* 335, 337 (2003). This exception thus “does not apply where anyone in the position would be affected by the action being considered.” *Id.* It also does not extend to policy issues such as the method of making the appointment. *See, e.g*., 3 *OMCB Opinions* 67, 69 (2000).

A discussion of another entity’s employee, appointee, or official would not fall within the exception unless the public body was considering appointing or employing that individual. *Compare, e.g*., 9 *OMCB Opinions* 132, 136 (2014) (“[A] discussion that involves a vendor’s performance of its contract to supply people to provide services would likely exceed the exception.”) *with* 3 *OMCB Opinions* 340, 343 (2003) (concluding that the exception extended to a session closed to discuss renewing the town attorney’s contract).

The Compliance Board has found that discussions about particular employees or appointees sometimes fall also within the administrative exclusion. *See* notes 7 and 8 in Chapter 1; *see also* 12 *OMCB Opinions* 46, 48 (2018) (“[P]erformance evaluations often fall within the administrative function exclusion.”). In that case, the Act would not apply, with the exception of the disclosure requirements that apply when a public body closes an open meeting to address administrative matters. *See* § 3-104. If in doubt, the public body should proceed on the assumption that the Act applies to these discussions, for multiple practical reasons: the courts have not addressed this point, so the law is not settled; a public body that convenes behind closed doors to address administrative matters invites suspicion that its members are secretly conducting more substantive business; the disclosure requirements that attach to meetings closed under the Act give the public some assurance that the closed session is legal and some information about it; and, though the Act’s requirement that public bodies prepare minutes is regarded by some as a nuisance and a reason to treat a discussion as “administrative,” memorializing the events of a meeting is one of the basics of efficient meetings practices.