

AL CARR
Legislative District 18
Montgomery County

Health and Government Operations
Committee

Subcommittees

Insurance and Pharmaceuticals
Health Occupations and
Long-Term Care

The Maryland House of Delegates
6 Bladen Street, Room 222
Annapolis, Maryland 21401
410-841-3638 · 301-858-3638
800-492-7122 Ext. 3638
Fax 410-841-3053 · 301-858-3053
Alfred.Carr@house.state.md.us

The Maryland House of Delegates
ANNAPOLIS, MARYLAND 21401

Sponsor Testimony in SUPPORT of HB 920
Open Meetings Act - Definition - Administrative Function

March 10, 2021

House Bill 920 improves public confidence in government by strengthening the Maryland Open Meetings Act. It clarifies that personnel actions are subject to the Act and do not fall under the administration function exception.

A public body's personnel actions like hiring, firing, demoting, conducting performance evaluations and compensating employees currently fall in a gray area. The Maryland Attorney General has long advised in the Open Meetings Act Manual that the best practice for public bodies is to meet in closed session using the personnel exception rather than the administration function.

HB920 simply codifies this best practice, thereby eliminating situations in which there is an appearance of secrecy.

The sponsor amendment narrows the scope so that it applies to situations in which an employee directly reports to the public body.

I respectfully ask for a favorable report.

From the MD Attorney General's Open Meetings Act Manual (10th ed., Jan 2021):

The Compliance Board has repeatedly commented on the difficulty of applying the administrative function exclusion with confidence.¹⁰ If in doubt, the public body should proceed on the assumption that the Act applies. If the public body wants to treat the matter as “administrative” because the topic is confidential, the public body should instead analyze whether the meeting may be closed under the “exceptions” in the Act that permit closed-door discussions of certain topics. See Chapter 4.

¹⁰ For example, in 9 OMCB Opinions 110 (2014), the Compliance Board commented on “the regrettable difficulty, for public bodies, the public, and representatives of the press alike, of applying the administrative function exclusion.” *Id.* at 113. As noted there, the Compliance Board had studied the issue in 2005. *Id.*, citing Use of the Executive Function Exclusion under the Maryland Open Meetings Act - Study and Recommendations by the Open Meetings Compliance Board (December, 2005). One confusing aspect of the administrative function exclusion noted in the study was that the exclusion might also apply to discussions that fall within the “personnel matters” exception that permits a public body to close a meeting that is subject to the Act. *Id.*, citing Study p. 6. See also fn. 8, above, and Chapter 4, part A, below, of this Manual.

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.

HB0920/513226/1

BY: Delegate Carr
(To be offered in the Health and Government Operations
Committee)

AMENDMENT TO HOUSE BILL 920

(First Reading File Bill)

On page 2, strike beginning with "ANY" in line 9 down through "INDIVIDUALS" in line 10 and substitute "THE APPOINTMENT, EMPLOYMENT, ASSIGNMENT, PROMOTION, DISCIPLINE, DEMOTION, COMPENSATION, REMOVAL, RESIGNATION, OR PERFORMANCE EVALUATION OF AN APPOINTEE, EMPLOYEE, OR OFFICIAL OVER WHOM THE PUBLIC BODY HAS DIRECT JURISDICTION".