

**Testimony in SUPPORT of HB 920 with sponsor amendment
Open Meetings Act - Definition - Administrative Function
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Between 2004 and 2014, I worked as a reporter in Kent County, covering state and local government. I have extensive experience with the Open Meetings Act in actual use day to day. I continue to follow open meeting questions in the state.

HB 920 as amended will clarify the extent of the “administrative exclusion” for specific personnel discussions by public bodies. It adds one item to the statute’s list of things that are not “administrative” in nature. See 3-101(b)(2).

The change follows the Open Meetings Compliance Board’s own practical advice in the many editions of the Open Meetings Act Manual. I respectfully ask for a favorable report.

Certain performance reviews and compensation decisions would be handled the same as other personnel discussions and subject to the same disclosures. These tend to be highly-paid public positions, where citizens might suspect information is being hidden. The amendment serves the purposes of open government and transparency.

In 2005, the General Assembly commissioned a report on the “Executive Function Exclusion” by Sondheim, McKeldin and Webb, the members of the Compliance Board (OMCB). The report resulted in some changes to the Act, including the use of the term “administrative function” going forward.

However, it did not resolve the question of deliberations that can fall under either an exception to the Act, or under the “administrative” umbrella, since some employees report to the public body by statute.

Normally, any public body’s discussion of individual employees is conducted under the “personnel” exception, 3-305(b)(1), in a properly closed meeting. It applies to

- (i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of an appointee, employee, or official over whom it has jurisdiction; or
- (ii) any other personnel matter that affects one or more specific individuals;

For many years the OMCB has observed, most recently in 15 OMCB 19 from January, that certain personnel matters fall into this gray area.

The Open Meetings Act Manual says:

“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’** and ‘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.’”

Then the Compliance Board recommends:

“If in doubt, the public body should proceed on the assumption that the Act applies, 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.”

The amendment to the bill will eliminate unnecessary complaints to the OMCB.

A simple change excludes certain discussions of positions such as executive director or superintendent from the “administrative” class and places them under the Act’s personnel exception.

This achieves several things.

1. Discussions of like kind fall under the same requirements.
2. Discussions of highly-paid employees are not treated differently than low-level workers.
3. The OMCB can render clear opinions if a question comes up.
4. The public is informed when and how these topics are handled.
5. Since the law is not settled, it eliminates a potential source of court cases.

This won’t remedy every possible point of contention stemming from the administrative exclusion, but it will eliminate a major one.

In the OMCB’s topical index of opinions through 12/31/2018 there are about 125 entries on the administrative exclusion. Each was raised at some point in a citizen complainant.

There are about 80 references to activities that are properly administrative and about 45 references to those not administrative in nature. Between 15 and 20 concern items that could be handled in a properly closed meeting under 3-305(b)(1).