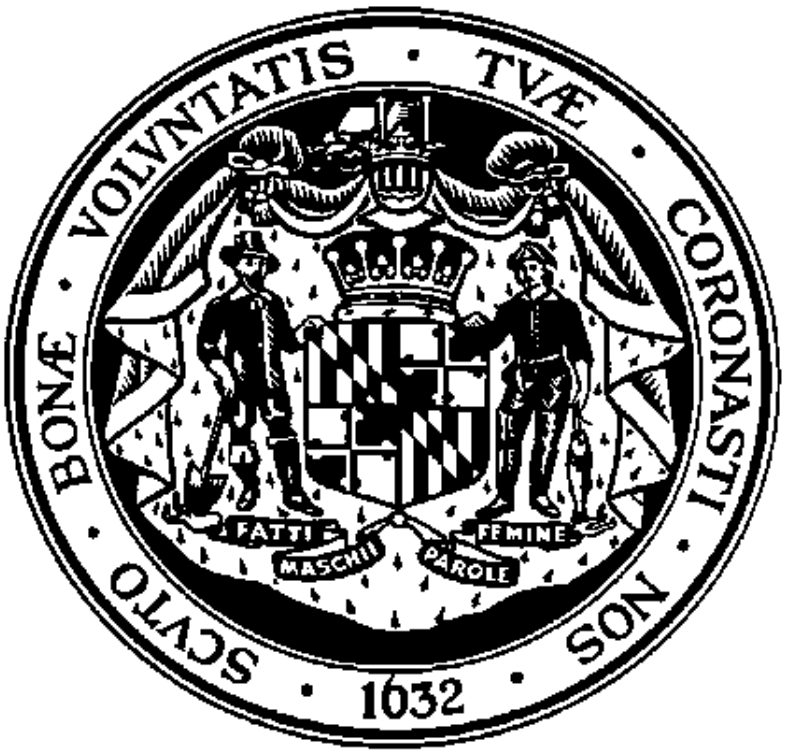
THIRTEENTH ANNUAL REPORT

OF THE

OPEN MEETINGS COMPLIANCE BOARD



BOARD MEMBERS

Walter Sondheim, Jr., Chairman
Courtney McKeldin
Tyler G. Webb

October 2005

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Pursuant to §10-502.4(e) of the State Government Article, the Board submits this annual report, covering the period July 1, 2004, through June 30, 2005.

I

Activities of the Board

A. Financial and Support Activities

No funds were specifically appropriated for the Compliance Board in the Budget Bill for fiscal year 2005. The Attorney General's Office has borne the incidental costs of copying and mailing Board-related documents. The Board is grateful to the Attorney General's Office for this assistance.

Indeed, the Board wishes to acknowledge more generally the ongoing support of the Attorney General's Office, especially the informed and dedicated involvement of Assistant Attorneys General Jack Schwartz and William Varga, who have provided the Board with essential advice and guidance. In addition, all of the recordkeeping and other clerical and administrative support for the Board are provided, with outstanding professionalism, by Ms. Kathleen Izdebski, of the Opinions and Advice Division of the Attorney General's Office. The cost to the Board would have been significant had it been required to obtain these support services elsewhere.

B. Complaints and Opinions

From July 1, 2004 through June 30, 2005, the Compliance Board received 17 complaints alleging violations of the Open Meetings Act. Some of the complaints alleged more than one violation. Two complaints were pending on June 30, 2004; the opinions in response were issued in July and August 2004. One opinion was issued about a complaint received prior to July 1, 2004. In one instance, we consolidated two complaints about the same public body into a single opinion.

Table 1 below indicates the categories of complainants.

TYPE OF COMPLAINANTS	
Type	**Number**
Citizens	11
Government Officials	1
News Media	5

Table 1

As Table 2 indicates, entities at every level of government were involved with complaints.

COMPLAINTS BY TYPE OF ENTITY	
Jurisdiction	**Number**
State	3
County	4
County School Board	4
Municipality	6

Table 2

During the reporting period, the Board issued 17 opinions. In 7 of these, the Board found a violation of the Act. Violations tended to concern the Act's procedural requirements for closing a meeting and its requirements for preparing minutes. All of the Board's opinions are available at this Internet location:[1]
http://www.oag.state.md.us/Opengov/Openmeetings/board.htm

As we have previously observed, although it is impossible to estimate the incidence of unreported violations, the Compliance Board believes that the low number of known violations reflects overall compliance with the law by public bodies at all levels of government. This conclusion is further supported by the fact that only

[1] We thank the Attorney General's Office for its maintenance of the Board's web page, which is an important source of information and guidance.

a handful of Open Meetings Act issues have been brought to court. Overall compliance is undoubtedly furthered by the ongoing educational efforts of the Academy for Excellence in Local Governance, the Maryland Association of Counties, the Maryland Municipal League, and the Office of the Attorney General. The continued interest of the press in asserting rights under the Act also has a salutary deterrent effect.

The Act calls upon us to discuss in particular "complaints concerning the reasonableness of the notice provided for meetings." §10-502.4(e)(2)(iii). In general, notice issues have not been a focus of complaints, probably because the Act is quite flexible in allowing a range of notice methods. That is, the Act allows notice to be given by "any ... reasonable method," including posting at a public location near the site of the meeting. Thus, the General Assembly left considerable discretion to each public body as to the method of public notice. As long as a public body posts the notice or takes one of the other steps set out in the law in a timely manner, the Board will not find a violation of the notice requirement.[2] Public bodies do face notice problems, however, when they call a meeting on short notice, delay a previously scheduled meeting, or decide to open a meeting that had previously been scheduled as a closed meeting. The Compliance Board's guidance is that the public should be told of unexpected scheduling developments as soon as practicable, by whatever means are feasible under the circumstances. In one instance during the reporting period, the Compliance Board held that the failure to provide proper written notice of a meeting was a violation. 4 *Official Opinions of the Maryland Open Meetings Compliance Board* 140 (2005).

Finally, during this reporting period the Compliance Board resolved, by consent agreement, a challenge to certain of its procedures when a complaint appeared to be deficient on its face. The agreement, entered in the case of *Melody Higgins v. Board of Education for Howard County, et al.*, Civil Action No. 13-C-03-056010 (Cir. Ct. Howard Cty.), requires the Compliance Board to report annually whether it returned any purported complaints because of obvious lack of jurisdiction or insufficient information. We did not do so during this reporting period.

[2] In addition, the notice requirements of the Act, like the rest of the Act, are entirely inapplicable to an "executive function."

II

Legislative Changes

The Compliance Board is to report annually "any recommendations for improvements to the provisions" of the Act. §10-502.4(e)(2)(v). We have three recommendations this year. In addition, we summarize two suggestions for amendments, submitted by interested citizens, that we do not support. Finally, pursuant to the requirement in Chapter 533 (House Bill 295) of 2005, we shall submit a separate report to the General Assembly on the "executive function" exclusion from the Act.

Recommendation: Exemptions for economic development corporations

We reiterate one recommendation from last year, concerning partial exemptions from the Act enjoyed by several economic development entities. Our construction of current law may be found in a opinion issued about the PenMar Development Corporation; its exemption is essentially identical to exemptions for the Maryland Economic Development Corporation, the Maryland Technology Development Corporation, and the Bainbridge Development Corporation. 4 *Official Opinions of the Maryland Open Meetings Compliance Board* 88 (2004).

The Open Meetings Act reflects a delicate balance between the public's interest in open government and the need to ensure confidentiality in limited circumstances. This balance is upset by the exemptions outside the Open Meetings Act for these specific entities. In our view, there is no compelling policy justification for these entities to be treated differently from other public bodies. If they were subject to the Act but needed to conduct some specific economic development work in closed session, they could invoke the Act's fourth exception, which allows a closed meeting to "consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State." We recommend that the Legislature review these provisions with an eye toward their repeal.

Recommendation: Notice

One option for notice is "by delivery to representatives of the news media who regularly report on sessions of the public body or the activities of the government of which the public body is a part." State Government Article, §10-506(c)(2). Although this method does assure that reporters have an opportunity to attend the meeting in question, it offers no comparable assurance that members of the public will receive

notice. The news media are not obliged to report the schedule of upcoming meetings and, in the case of comparatively obscure public bodies, often do not do so.

The member of the public who wrote us about this issue, Mr. John Medlin, suggested that the Act be amended to limit this form of notice to those news media that are known to publish schedules of the meetings of the public body. We agree with this suggestion. As amended, §10-506(c)(2) would read as follows: "by delivery to representatives of the news media who regularly report on sessions of the public body and routinely publish schedules of future sessions of the public body."

In our view, the provision on notice should also be amended to take account of widespread access to the Internet.[3] This could be accomplished by renumbering current items (3) and (4) to (4) and (5), respectively, and adding a new item (3) to read as follows: "if the public body has previously given public notice that this method will be used, by publishing the notice on a World Wide Web site maintained by the public body."

Recommendation: Conforming change

In Chapter 440 of 2004, the General Assembly amended the definition of "public body" so that it would encompass not only certain entities appointed by the Governor or chief executive authority of a political subdivision but also entities appointed by "an official who is subject to the policy direction of the Governor or chief executive authority of [a] political subdivision." State Government Article, §10-502(h)(2)(I). The reasoning was that Open Meetings Act coverage should not be easily evaded by having a subordinate select the members of the entity. Because the entities covered by this provision are typically citizen advisory panels, the Act's definition of "advisory function" ought to be amended in a parallel fashion. That is, the definition should provide that an advisory function means "the study of a matter of public concern or the making of recommendations on the matter, under a delegation of authority of responsibility by," not only "the Governor or chief executive authority of a political subdivision" but also "an official who is subject to the policy direction of the Governor or chief executive authority of a political subdivision."

[3] We recognize that not everyone has a computer with Internet access. However, anyone can visit a public library, which offers both Internet access and professional assistance.

Public Suggestions

We wish to report on two other proposals for amendments to the Act that were suggested by members of the public but that, for the reasons stated below, we do not recommend.

One suggestion has to do with public bodies that are no longer in existence when a complaint is filed. In 4 *Official Opinions of the Maryland Open Meetings Compliance Board* 111 (2004), we concluded that the Act did not authorize us to process a complaint against a public body that was no longer in existence.[4] The Act's procedure, involving the public body's opportunity to respond and the possibility of an informal conference involving the public body, presupposes a public body in existence and thus capable of carrying out its role in the complaint process. The complainant in that instance, Ms. Michelle Fluss, suggested that the Act be amended to require the appointing authority to respond if the entity no longer existed.[5] We do not support this proposal. The primary purpose of a Compliance Board advisory opinion is to educate the public body involved in the matter complained about. This purpose cannot be served when the public body is defunct. To be sure, Compliance Board opinions have a wider audience, but in the case of a defunct public body, gathering the information needed for a useful opinion will often be difficult. We do not think it reasonable to impose on an official who likely has no first-hand information the obligation to respond. Nor is it feasible to gather information from individuals who, having completed their service on the public body, have returned to their wholly private pursuits.

Another suggestion, from Mr. Medlin, has to do with the Act's civil penalty provision, § 10-511. Under this provision, "A member of a public body who willfully participates in a meeting of the body with knowledge that the meeting is being held in violation of the provisions of this subtitle is subject to a civil penalty not to exceed

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[4] The particular entity in that instance was the Advisory Committee on the Management and Protection of the State's Water Resources. Like many such public bodies, it ceased to exist once it issued a report.

[5] Ms. Fluss suggested that § 10-502.5(c)(1) be amended to read as follows: "On receipt of the written complaint, the Board shall promptly send the complaint to the public body identified in the complaint and request that a response to the complaint be sent to the Board. If the public body is no longer existing because the formal legal instrument that established it sunset, or was repealed or cancelled by another formal legal instrument, the Board shall send the complaint to the delegating authority that established the public body and request that a response to the complaint is sent to the Board." Letter to the Compliance Board (January 10, 2005).

$100." Mr. Medlin points to the possibility that an official on whom the penalty is imposed might be indemnified by the government entity. He suggests language be added to bar this possibility: "Such civil penalty may not be reimbursed." However, as far as we are aware, the civil penalty has never been imposed, let alone imposed and later reimbursed. This seems a theoretical concern not calling for legislative action at this time.