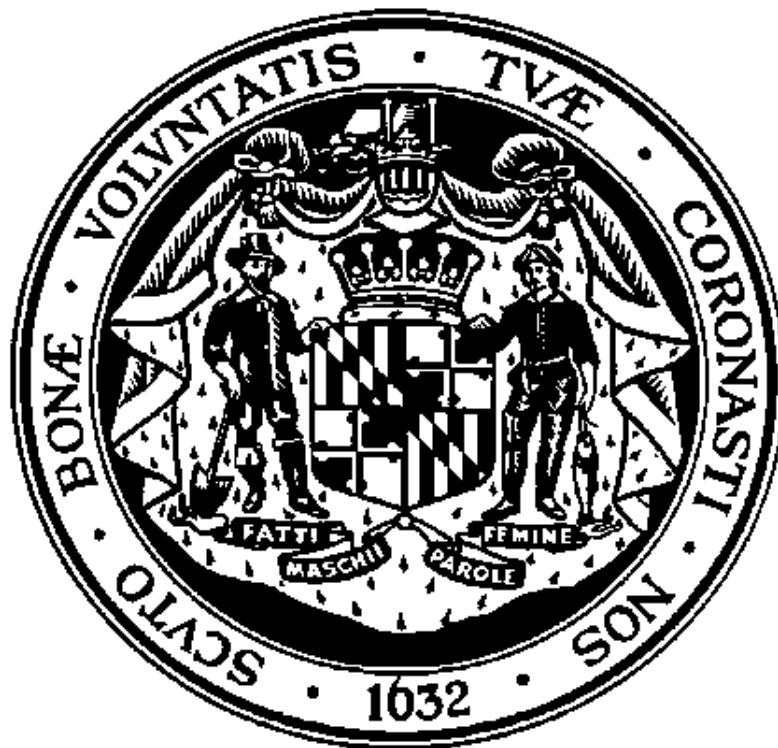


FOURTEENTH ANNUAL REPORT
OF THE
OPEN MEETINGS COMPLIANCE BOARD



BOARD MEMBERS

Walter Sondheim, Jr., Chairman
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October 2006

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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, 2005, through June 30, 2006.

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 2006. 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, 2005 through June 30, 2006, the Compliance Board received 21 complaints alleging violations of the Open Meetings Act.¹ Many of the complaints alleged more than one violation. One complaint was pending on June 30, 2005; the opinion in response was issued in July 2005. Two opinions were issued about complaints received prior to July 1, 2005. In one instance, we consolidated two complaints about the same public body into a single opinion.

¹ One complaint was withdrawn. Another was closed after the complainant failed to respond to the Compliance Board's request for information necessary to proceed further with the matter.

Table 1 below indicates the categories of complainants.

TYPE OF COMPLAINANTS	
Type	Number
Citizens	11
Government Officials	5
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	5
County School Board	3
Municipality	10

Table 2

During the reporting period, the Board issued 19 opinions. In 14 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:²
<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

² 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.³ 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 two instances during the reporting period, the Compliance Board found violations when required information was omitted from notices. 4 *Official Opinions of the Maryland Open Meetings Compliance Board* 155 (2005); 4 *Official Opinions of the Maryland Open Meetings Compliance Board* 168 (2005). In one instance, a violation occurred when notice was provided to a group of interested persons but not by a method available to the public generally. 4 *Official Opinions of the Maryland Open Meetings Compliance Board* 178 (2005)

II

Legislative Recommendations

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 four

³ In addition, the notice requirements of the Act, like the rest of the Act, are entirely inapplicable to an "administrative function," formerly called an "executive function."

recommendations this year, presented in narrative form below and in a draft bill appended to this report.

Recommendation: Conforming Change to Definition of “Advisory Function”

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)(l). 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.”

Recommendation: Repeal of Term Limits

Each member of the Compliance Board is appointed to a term of three years. State Government Article, §10-502.2(b)(1). We propose no change in this provision, because the Governor (and the State Senate, through its opportunity to reject a nominee) should be able to make changes in the Board’s composition at reasonable intervals, if that is deemed desirable.

What we question, and recommend be repealed, is the provision limiting a member to no more than two consecutive terms. State Government Article, §10-502.2(b)(5). Whatever justification term limits might have for senior policy-making positions, they do not make much sense for the Compliance Board, with its strictly advisory role. The Open Meetings Act, although embodying a key principle of transparency in government, is in many ways a highly technical statute. It takes a long time to gain detailed familiarity with it. After six years of working with the Act, a member is able to see the issues presented by a complaint and help frame a sensible response that builds upon and is consistent with the body of prior Compliance Board opinions. Little is gained by a provision that ends a member’s

service no matter that his or her continuation on the Board is desired by all stakeholders.

This recommendation, we should make clear, is not meant to perpetuate our own service, which has exceeded two terms. Whether this proposal is enacted or not, the Governor is free at any time to replace us simply by appointing new members. The three of us continue to serve beyond our last appointed terms, and beyond the current term limit, only because of the so-called “holdover doctrine,” the Act’s version of which is set forth in §10-502.2(b)(3): “At the end of a term, a member continues to serve until a successor is appointed.”

Recommendation: Defunct Public Bodies

In 4 *Official Opinions of the Maryland Open Meetings Compliance Board* 111 (2004), we concluded that current law does not contemplate a complaint against a public body that no longer exists, primarily because no entity would have responsibility to respond to such a complaint. This construction of current law frustrates those who do not learn of a possible violation of the Act until after the public body in question has gone out of existence.

We recommend that the Act be amended to require, under these circumstances, that a response to a complaint be filed by the official or entity that appointed the now-defunct public body. If the public body only recently went out of existence, staff members of the appointing authority, who often will have served as staff to the public body, might have personal knowledge that can shed light on the issues raised in the complaint. They will also be able to consult relevant records. Of course, the passage of time and changes in personnel might leave the appointing authority unable to provide a substantive response. In that case, however, the appointing authority need only say as much to comply with its obligation.

Our suggested language is that, after “the official or entity that appointed the public body” receives the complaint, it “shall, to the extent feasible, comply with the requirements” related to a public body’s response to a complaint.

Recommendation: Notice via Internet

As we noted in Part I above, the Open Meetings Act permits great flexibility in the means by which public bodies give notice of meetings. We favor retaining this flexibility. Our recommendation is simply to add another explicitly permitted means of notice: Internet posting. Reporters and others who are following the activities of

a public body will usually have Internet access at home or work and can easily consult the public body's web site. To be sure, not everyone has a computer with Internet access. However, anyone can visit a public library, which offers both Internet access and professional assistance.

Our suggested language is as follows: "If the public body has previously given public notice that this method will be used, ... by posting the notice on a World Wide Web site ordinarily used by the public body to provide information to the public."

HOUSE (SENATE) BILL ____

P1
Regular Session

2007

7lr ____

By: Delegate _____
Introduced and read first time: _____, 2007
Assigned to: _____

A BILL ENTITLED

AN ACT concerning

Open Meetings Act

FOR the purpose of modifying the definition of an “advisory function” under the Open Meetings Act; specifying an alternative method by which notice of a meeting may be given; eliminating a restriction on the number of consecutive terms a member of the State Open Meetings Law Compliance Board may serve; prescribing a process for the handling of a complaint filed with the Compliance Board when the public body that is the subject of the complaint no longer exists; and generally relating to the Open Meetings Act.

BY repealing and reenacting, with amendments,
Article - State Government
Section 10-502(c), 10-502.2, 10-502.5, and 10-506
Annotated Code of Maryland
(2004 Replacement Volume and 2006 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article - State Government

10-502.

(c) “Advisory function” means the study of a matter of public concern or the making of recommendations on the matter, under a delegation of responsibility by:

(1) law;

(2) the Governor OR AN OFFICIAL WHO IS SUBJECT TO THE POLICY DIRECTION OF THE GOVERNOR;

(3) the chief executive officer of a political subdivision of the State OR AN OFFICIAL WHO IS SUBJECT TO THE POLICY DIRECTION OF THE CHIEF EXECUTIVE OFFICER; or

(4) formal action by or for a public body that exercises an executive, judicial, legislative, quasi-judicial, or quasi-legislative function.

10-502.2.

(a) (1) The Board consists of 3 members, at least one of whom shall be an attorney admitted to the Maryland Bar, appointed by the Governor with the advice and consent of the Senate.

(2) From among the members of the Board, the Governor shall appoint a chairman.

(b) (1) The term of a member is 3 years.

(2) The terms of members are staggered as required by the terms provided for members of the Board on July 1, 1991.

(3) At the end of a term, a member continues to serve until a successor is appointed.

(4) A member who is appointed after a term has begun serves only for the rest of the term and until a successor is appointed.

[(5) A member may not serve for more than 2 consecutive 3-year terms.]

10-502.5.

(a) Any person may file a written complaint with the Board seeking a written opinion from the Board on the application of the provisions of this subtitle to the action of a public body covered by this subtitle.

(b) The complaint shall:

(1) be signed by the person making the complaint; and

(2) identify the public body, specify the action of the public body, the date of the action, and the circumstances of the action.

(c) (1) On receipt of the written complaint, AND EXCEPT AS PROVIDED IN PARAGRAPH (3) OF THIS SUBSECTION, 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.

(2) (i) The public body shall file a written response to the complaint within 30 days of its receipt of the complaint.

(ii) On request of the Board, the public body shall include with its written response to the complaint a copy of:

1. a notice provided under § 10-506 of this subtitle;

2. a written statement made under § 10-508(d)(2)(ii) of this subtitle; and

3. minutes and any tape recording made by the public body under § 10-509 of this subtitle.

(iii) The Board shall maintain the confidentiality of minutes and any tape recording submitted by a public body that are sealed in accordance with § 10-509(c)(3)(ii) of this subtitle.

(3) (I) IF THE PUBLIC BODY IDENTIFIED IN THE COMPLAINT NO LONGER EXISTS, THE BOARD SHALL PROMPTLY SEND THE COMPLAINT TO THE OFFICIAL OR ENTITY THAT APPOINTED THE PUBLIC BODY.

(II) THE OFFICIAL OR ENTITY THAT APPOINTED THE PUBLIC BODY SHALL, TO THE EXTENT FEASIBLE, COMPLY WITH THE REQUIREMENTS OF PARAGRAPH (2) OF THIS SUBSECTION.

(4) If after 45 days, [the public body has not filed] a written response IS NOT RECEIVED, the Board shall decide the case on the facts before it.

(d) The Board shall:

(1) review the complaint and any response; and

(2) if the information in the complaint and response is sufficient to permit a determination, issue a written opinion as to whether a violation of the provisions of this subtitle has occurred or will occur not later than 30 days after receiving the response.

(e) (1) If the Board is unable to reach a determination based on the written submissions before it, the Board may schedule an informal conference to hear from the complainant, the public body, or any other person with relevant information about the subject of the complaint.

(2) An informal conference scheduled by the Board is not a "contested case" within the meaning of § 10-202(d) of this title.

(3) The Board shall issue a written opinion not later than 30 days following the informal conference.

(f) (1) If the Board is unable to render an opinion on a complaint within the time periods specified in subsection (d) or (e) of this section, the Board shall:

(i) state in writing the reason for its inability; and

(ii) issue an opinion as soon as possible but not later than 90 days after the filing of the complaint.

(2) An opinion of the Board may state that the Board is unable to resolve the complaint.

(g) The Board shall send a copy of the written opinion to the complainant and to the affected public body.

(h) (1) On a periodic basis, the Board may send to any public body in the State any written opinion that will provide the public body with guidance on compliance with the provisions of this subtitle.

(2) On request, a copy of a written opinion shall be provided to any person.

(i) (1) The opinions of the Board are advisory only.

(2) The Board may not require or compel any specific actions by a public body.

(j) A written opinion issued by the Board may not be introduced as evidence in a proceeding conducted in accordance with § 10-510 of this subtitle.

10-506.

(a) Before meeting in a closed or open session, a public body shall give reasonable advance notice of the session.

(b) Whenever reasonable, a notice under this section shall:

(1) be in writing;

(2) include the date, time, and place of the session; and

(3) if appropriate, include a statement that a part or all of a meeting may be conducted in closed session.

(c) A public body may give the notice under this section as follows:

(1) if the public body is a unit of the State government, by publication in the Maryland Register;

(2) 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;

(3) if the public body previously has given public notice that this method will be used[,]:

(I) by posting or depositing the notice at a convenient public location at or near the place of the session; or

(II) BY POSTING THE NOTICE ON A WORLD WIDE WEB SITE ORDINARILY USED BY THE PUBLIC BODY TO PROVIDE INFORMATION TO THE PUBLIC; OR

(4) by any other reasonable method.

(d) A public body shall keep a copy of a notice provided under this section for at least 1 year after the date of the session.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 2007.