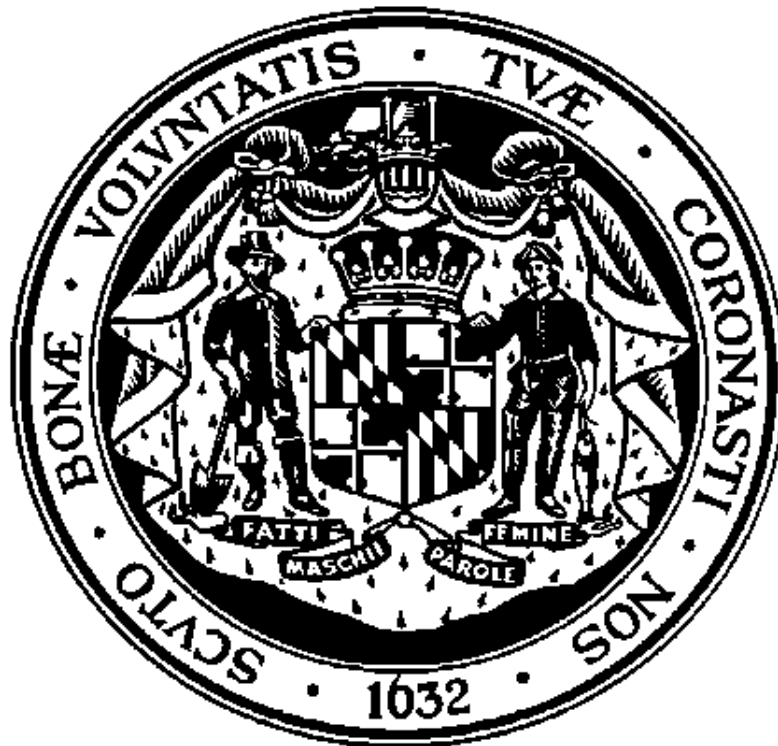


SIXTEENTH ANNUAL REPORT
OF THE
OPEN MEETINGS COMPLIANCE BOARD



BOARD MEMBERS

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin
Tyler G. Webb, Esquire

October 2008

SIXTEENTH ANNUAL REPORT**OF THE****OPEN MEETINGS COMPLIANCE BOARD**

Pursuant to §10-502.4(e) of the State Government Article, the Board submits this annual report, covering the period July 1, 2007, through June 30, 2008.

This year's report reflects a change in the composition of the Compliance Board. In November, 2007, Governor O'Malley appointed Elizabeth L. Nilson, Esquire, to serve as Chair, replacing Walter Sondheim, Jr., who passed away in February, 2007. In August, 2008, the Governor appointed Julio Morales, Esquire, to replace Tyler G. Webb, Esquire, who retired from the Board. Mr. Sondheim and Mr. Webb had served on the Compliance Board since its inception and played a significant role in the success of the Compliance Board and its efforts to promote compliance with the Open Meeting Act.

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 2008. 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 former Assistant Attorney General Jack Schwartz and Assistant Attorney General William Varga, who have provided the Board with essential advice and guidance. Mr. Schwartz, who retired from the Attorney General's Office on June 30, 2008, had guided the Compliance Board since its inception. 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, 2007 through June 30, 2008, the Compliance Board received 17 complaints alleging violations of the Open Meetings Act.¹ Many of the complaints alleged more than one violation. Four complaints were pending on June 30, 2008; the opinions in response were issued later. Five opinions were issued this fiscal year about complaints received prior to July 1, 2007.

Table 1 below indicates the categories of complainants.

TYPE OF COMPLAINANTS	
Type	Number
Citizens	10
Government Officials	0
News Media	7

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 ²
Local School Board	2
Municipality	6
Other	3

Table 2

¹ One complaint was withdrawn.

² One complaint was filed against a county and a municipality.

During the reporting period, the Board issued 17 opinions. In 11 of these, the Board found a violation of the Act. Violations tended to concern the Act's procedural requirements such as procedures for closing a meeting and its requirements for preparing minutes. All of the Board's opinions are available at this Internet location: <http://www.oag.state.md.us/OpenGov/Openmeetings/board.htm>.³

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 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 or, as of July 1, 2007, on an Internet website. 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.⁴ 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. Issues about notice were discussed in the following opinions: *5 OMCB Opinions* 165 (2007), *5 OMCB Opinions* 182 (2007), *5 OMCB Opinions*

³ We thank the Attorney General's Office for its maintenance of the Board's web page, which is an important source of information about the Open Meetings Act generally and about the Compliance Board's procedures.

⁴ 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."

184 (2007), 6 *OMCB Opinions* 1 (2008), 6 *OMCB Opinions* 9 (2008), 6 *OMCB Opinions* 15 (2008), and 6 *OMCB Opinions* 32 (2008).

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). The Board has no legislative recommendations of its own this year. However, we have considered a proposal at the request of the House Government Operations Subcommittee as well as several recommendations by a member of the public.

- **House Bill 349 (2008)**

During the 2008 Legislative Session, the House Government Operations Subcommittee requested that the Compliance Board consider a legislative proposal that would have amended the Open Meetings Act so as to prohibit a public body from conducting a vote during a closed session. (House Bill 349 (2008)). On February 20, 2008, we wrote to the Committee expressing concern that, if enacted as initially proposed, the legislation would raise significant interpretative problems. Subsequently, the sponsor of the bill proposed an amendment that would have limited the restriction to a final vote and limited the application to sessions closed under the Act to consider the acquisition of property (§10-503(a)(3)) and competitive procurements (§10-508(a)(14)). The Subcommittee requested that we evaluate the amended proposal during the interim.

The Compliance Board reviewed this proposal with representatives of the Maryland-Delaware-D.C. Press Association, the Maryland Association of Counties, the Maryland Municipal League, and other stakeholders. While the Compliance Board supports holding members of public bodies accountable for their votes, caution must be exercised so as to not compromise the underlying policies of the General Assembly in defining certain areas in which meetings legitimately may be closed. While we are sympathetic to goal of the bill's sponsor, the Compliance Board remains concerned that the amended version of the bill would still create problems for public bodies in its implementation in that, in many cases, it may not always be practicable to identify in advance what might constitute a final vote. Thus, we cannot support the amended version of the legislation. However, as an alternative, we would encourage the General Assembly to enact legislation whereby, under § 10-509(c)(2), a public body would be required to report in publicly available minutes any final roll call vote conducted in closed session on a matter governed by § 10-508(a)(3)

(acquisition of property) and (14) (competitive procurements). We believe that this approach would result in disclosure to the public of each member's vote on any controversial matter on which a roll call vote was required, while avoiding the interpretative problems addressed above. While we believe this would be an appropriate step, we believe further study is warranted before expanding this proposal to meetings closed under other provisions of § 10-508(a).

- **Advisory Committees**

We have been asked by a member of the public, Ms. Michelle Fluss, to consider endorsing a legislative proposal, modeled in part after a provision in the Federal Advisory Committee Act, 5 U.S.C. Appx. §§ 1 -16, to ensure that advisory committees appointed by Executive Branch agencies, which include one or more private citizens, be in the public interest and be "fairly balanced" in terms of points of view represented and "assure that the advice and recommendations ... [are] not ... inappropriately influenced by the appointing authority or by any special interest." Ms. Fluss also recommended that the public be kept informed about each advisory committee's membership, chairperson's name, purpose, duration, report submission dates, meeting notice location, contact information, and activities *via* the appropriate agency's website.

Similar recommendations were considered by the Compliance Board last year. Again, we decline to take a position on them.

- **Notice information**

Finally, Michelle Fluss requested that we consider recommending legislation to require a public body include in a meeting notice posted on the website the date on which the notice was posted and that the notice remain available on the website as an archived document for at least one year from the date of the meeting.

The Compliance Board believes this recommendation, as it relates to inclusion of posting dates, has merit. Unlike a newspaper announcement or notice in the Maryland Register, it is not always possible to document when notice is given *via* an Internet website or when a notice was actually posted on a bulletin board. Thus, questions arise whether the amount of notice was in fact reasonable. This could be accomplished by amending § 10-508(b) to read as follows:

Whenever reasonable, a notice under this section shall:

- (1) be in writing;
- (2) include the date, time, and place of the session;
- (3) INCLUDE THE DATE THAT THE NOTICE WAS POSTED IF NOTICE IS PROVIDED UNDER A METHOD IDENTIFIED IN SUBSECTION (C)(3) OF THIS SECTION; and
- [(3)] (4) if appropriate, include a statement that a part or all of a meeting may be conducted in closed session.

Subsection (c)(3) addresses use of an Internet website or posting notice at a convenient public location at or near the place of the session. Under current law, a public body is required to retain a copy of a meeting notice for at least one year after the date of the session. § 10-506(d). The Compliance Board takes no position on the suggestion that website notices must be kept available online for the one year period.

- **Technical correction**

Staff recommended that the reference to a "county charter" in the Act's definition of "public body" be amended to read "county or municipal charter." Prior to enactment of the State Government Article, the law referred to a "local charter." The substitution to a "county charter" is believed to be erroneous substitution as part of the code revision process.

Because the Compliance Board views this change as strictly a technical, corrective amendment, staff was asked to contact the Department of Legislative Services to request that this matter be included in the Department's annual corrective bill. The substitution could refer to a "county or municipal charter" or, returning to the pre-1984 language, a "local charter."