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ANNUAL REPORT OF THE OPEN MEETINGS COM-
PLIANCE BOARD

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SECOND ANNUAL REPORT

OF THE

OPEN MEETINGS COMPLIANCE BOARD

Pursuant to State Government Article § 10-502.4(e)

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**SECOND 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, 1993, through June 30, 1994.

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 1994. With the cooperation of the Governor and the Chief of Financial Administration for the Governor's Office, Mr. Charles M. Stevenson, some funds have been made available to defray the expenses of the Board. During fiscal year 1994, none of these funds was actually expended, however; 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 Jack Schwartz, Chief Counsel for Opinions & Advice, who was the author of the invaluable *Open Meetings Act Manual* and who has 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 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.

With the assistance of Mr. Schwartz and Ms. Izdebski, the Board has prepared a topical index and citator for its opinions. These are attached as appendices to this report. We believe that these research aids will be of benefit to those who work with the Act, and we shall issue updates periodically.

B. *Complaints and Opinions*

From July 1, 1993 through June 30, 1994, the Compliance Board received eight complaints alleging violations of the Open Meetings Act. Some of the complaints alleged more than one violation. Four of these complaints were pending at the end of the fiscal year. The volume of complaints showed a marked decline from the first year of the Board's operation, when 20 complaints were filed.

Table 1 below indicates that the majority of the complainants have been members of the public who believed that a public body had violated the Act. The Board received more complaints from journalists than in the prior year, however (three instead of one).

TYPE OF COMPLAINANTS	
Number	Type
5	Citizen
0	Government Officials
3	Journalists

Table 1

• Most of the complaints have involved public bodies in municipalities, as Table 2 indicates. This fact is unsurprising, because there are several times as many municipalities as counties in Maryland. We are pleased to report that, during the two-year life of the Board, no complaint has been filed against a State agency.

COMPLAINTS BY TYPE OF PUBLIC BODY	
Number	Public Body
0	State
2	County
0	School Boards
6	Municipality

Table 2

During the reporting period, the Board issued five opinions.¹ In four of these opinions, the Board found one or more violations of the Act. Table 3 below indicates the types of violations found.

TYPES OF VIOLATIONS	
Type	Number
Unlawful closing	2
Improper notice	0
Improper closing procedures	0
Improper minutes	3

Table 3

Since most of the complaints were filed against municipal public bodies, not surprisingly most of the violations found by the Compliance Board were those of municipal public bodies, as Table 4 indicates.

¹ One of the opinions concerned a complaint that had been filed during the prior year.

VIOLATIONS BY TYPES OF PUBLIC BODY	
Public Body	Number
State	0
County	1
School Boards	0
Municipality	3

Table 4

Considering the many hundreds of public bodies in Maryland, and therefore the many thousands of meetings that took place during the reporting period, both the number of complaints and the number of violations found seem to the Compliance Board to be low. Although it is impossible, of course, to estimate the incidence of unreported violations, the Compliance Board believes that the low numbers 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.

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). 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

The Act also calls on the Board to discuss "the impact on State and local governments of the provision of §10-502(h)(2) of this article, including a discussion of how the affected entities had adhered to requirements of this subtitle." In §10-502(h)(2), the General Assembly extended the definition of "public body" to include "any multimember board, commission, or

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

committee appointed by the Governor or the chief executive authority of a political subdivision of the State, if the entity includes in its membership at least 2 individuals not employed by the State or a political subdivision of the State." This provision originally carried a "sunset" date of on June 30, 1994.

The Board received no complaints that an entity covered by this extended definition of "public body" had violated the Act. Again, although the Board cannot know of violations that are not brought to its attention, the dearth of complaints in this regard suggests that these public bodies have recognized their obligations and are complying.

As the Board recommended in its first annual report, the General Assembly has eliminated the sunset date for this provision. Chapter 473 of the Laws of Maryland 1994.

II

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 Compliance Board has two recommendations, one trivial and the other highly significant.

The trivial suggestion is that §10-502.4(e)(2)(iv) be eliminated from the law. As noted above, this provision requires every annual report of the Board to discuss "the impact on State and local governments of the provisions of §10-502(h)(2) of this Article, including a discussion of how the affected entities have adhered to the requirements of this subtitle." The provision referred to is the one that extended the definition of "public body" to include certain citizen advisory panels.

In all likelihood, the Compliance Board's duty to discuss this provision in its annual report was linked to the sunset provision. The General Assembly wished to ensure that it would have information enabling it to make a judgment about extending or eliminating the sunset provision. Now that the General Assembly in fact has eliminated the sunset provision, there appears to be no sound reason for *requiring* a discussion of the issue annually. Should some particular occurrence in the future merit discussion in an annual report, the Compliance Board will do so. But an annual, required recitation serves no purpose.

The Board's more significant recommendation concerns the "executive function" exclusion from the Act. In our last annual report, we commented that the definition of "executive function" was "troublesomely vague." Since we made that observation, Attorney General Curran has issued a lengthy opinion that provides helpful guidance in fathoming this most difficult provision. *See 78 Opinions of the Attorney General (1993) [Opinion No. 93-028 (July 28, 1993)]*.

But an Attorney General's opinion can only construe the law, not change it, and the end result remains the same: The Act contains a major loophole. Important discussions bearing on the manner in which a public body carries out its legal responsibilities are not only not open to the public, the public may not even know the discussions occurred. This is so because executive functions are simply excluded altogether from the Act. If the topic of discussion at meeting falls within the amorphous definition of "executive function," the public body need not give notice of the meeting, vote to go into closed session, cite any particular exception to have a closed meeting, keep minutes, or make any disclosure of what went on at the closed session.

The Compliance Board recognizes that some public bodies, particularly public bodies in counties and municipalities that have both legislative and administrative responsibilities, rely heavily on the "executive function" exclusion. It is possible that a simple repeal of the exclusion would have detrimental effects on these bodies.

Hence, the Compliance Board recommends a more moderate approach. We suggest that the exclusion for executive functions be transformed into an exception — that is, that executive functions become a new 15th exception in §10-508(a). If this recommendation were accepted, a public body that wished to discuss an executive matter in private could still do so, but public accountability would be significantly heightened, because the public body would be required to give notice of the meeting and follow the procedures that are now required when any of the other exceptions are invoked to close a meeting.

We are not including specific language for a legislative proposal at this point, because we have asked our counsel, Assistant Attorney General Jack Schwartz, to work with interested groups in drafting legislation. At the end of this consultative process, however, we will urge passage of appropriate legislation.

OPEN MEETINGS COMPLIANCE BOARD

TOPICAL INDEX

OPEN MEETINGS COMPLIANCE BOARD

TOPICAL INDEX

Opinions from July 1, 1992 — June 30, 1994

CLOSED SESSION PROCEDURES

- Topic to be discussed at closed session must be included in statement prior to closed session 92-1
- Oral discussion of basis for closing session, later recorded in minutes, does not satisfy requirement for written statement prior to closed session 92-4, 92-5
- Impromptu hallway meeting is subject to all procedural requirements for a closed session 93-1
- "Reason" for closing session, to be included in written statement, must go beyond uninformative boilerplate 93-2
- Written statement prior to closed session need not identify anticipated participants in closed session 93-9
- Exception that is not cited by public body in written statement prior to closed session may not be asserted subsequently as justification for closing the session 93-11

COMPLIANCE BOARD

- Compliance Board is not able to resolve disputed issues of fact 94-1

EXCEPTIONS PERMITTING CLOSED SESSIONS

Business Relocation

- Proposal by business entity to move from one site to another within the State falls within §10-508(a)(4) 93-3

Examinations

Discussion of electrician's examination, as part of process for obtaining a certificate of registration, falls within exception for certain examinations, §10-508(a)(11), including licensing examinations . . . 92-4

Legal advice

Advice from town attorney on individual compliance with ethics law falls within exception for advice from counsel, §10-508(a)(7) 92-1

Legal advice exception permits participation in closed session by non-lawyer who supplies information pertinent to counsel's formulation of legal advice, but does not permit discussion on topics beyond the rendering of that advice 92-1, 93-11

Legal advice exception may not be invoked to hear report from non-lawyer about counsel's advice; counsel must be present 93-6

Legal advice exception does not apply merely because topic of discussion has legal ramifications 93-11

Litigation

Litigation exception, §10-508(a)(8), applies to discussion about pending or potential litigation, including settlement options, whether public body would be plaintiff or defendant 94-1

Litigation exception does not apply to discussion of underlying policy issue not directly related to litigation 94-1

Personnel

Discussion of town manager's job description and employment status falls within "specific personnel" exception, §10-508(a)(1) 92-1

Discussion of status of specific county employees in the event of transfer to city's jurisdiction falls within "specific personnel" exception . . . 93-11

EXECUTIVE FUNCTION

- Meeting conducted by county commissioners with board of non-profit hospital, when commissioners have oversight responsibility over hospital, falls within "executive function" and therefore was not subject to Act 92-2
- Work session of municipal planning commission falls within executive function 92-3
- Discussion of complaint against electrician by county regulatory board falls within executive function 92-4
- Discussion by county commissioners in code home rule county of effect of cuts in State aid to counties falls within executive function 93-2
- Discussion by county commissioners confined to matters of budgetary administration and not involving proposal to amend budget falls within executive function 93-2
- Hearing by municipal ethics commission on complaint of alleged ethics violation falls within executive function 93-4

LEGISLATIVE FUNCTION

- Entire process by which City Council considers ordinance, including briefing about the ordinance, falls within legislative function and therefore is subject to the Act 93-6

LICENSING MATTERS

- Regulatory body's conduct of occupational licensing examination, even if within executive function, nevertheless subject to act as part of the process of granting a license 92-4

"MEETING"

When quorum of public body attends meeting of an entity that is not a public body, applicability of Act depends on whether public body is itself considering public business 92-2

Information-gathering at the earliest stages of policy formulation is part of the consideration of public business and therefore is a meeting 93-2, 93-6

MINUTES

Closed session statement

Level of detail in statement need not compromise goals of confidentiality that led to session being closed in the first place 92-5

While "topics of discussion" disclosed in minutes of next open session would ordinarily be the same as "topics to be discussed" in written statement prior to closed session, nothing in the Act prevents a public body from discussing less than it anticipated 93-9

Statement that fails to cite authority for closing session or to list the topic of discussion and the persons present violates the Act 94-2

Contents

Minutes must reflect item of business conducted 94-2

Act does not prescribe precise method by which minutes are prepared or amended 94-2

NOTICE REQUIREMENTS

- If public is told of the practice, notice through posting in a single location complies with the Act 92-3, 93-4
- Notice need not describe particular agenda items that are expected to be discussed at meeting 92-5
- Announcement of future meeting at open meeting attended by press is a "reasonable method" of public notice 93-5
- Public body is accountable for staff's clerical error resulting in failure to post notice 93-8

OPEN SESSION REQUIREMENT

- Act does not regulate the manner in which a public body makes decisions at an open session 92-5
- Session of county council held without notice and in an unusual meeting place violated open session requirement, even if a member of the public who happened upon the session would have been admitted . . 93-8

PUBLIC BODY

- Board of directors of a private, non-profit hospital is not a public body 92-2
- Employee of school board and his staff are not a public body 92-2
- Meetings between municipal officials and individual members of city council do not involve a public body 93-6
- County department heads and county commissioners in a county in which commissioners are executive head of county government comprise the equivalent of the Governor's cabinet and therefore are not a public body when they meet 93-10

QUASI-LEGISLATIVE FUNCTION

Budget preparation process, including earliest stages of information-gathering, is a quasi-legislative function subject to the Act 93-8

ZONING MATTERS

Zoning does not include planning for purposes of the Act 92-3

CITATOR

TO

OPEN MEETING COMPLIANCE BOARD OPINIONS

STATE GOVERNMENT ARTICLE

Section	Opinion No.	Page No.
10-501. Legislative Policy		
10-501(b)	94-1	5
10-502. Definitions		
10-502	93-2	4
10-502(d)	92-1	4
10-502(d)(1)	93-4	1
	93-2	2
10-502(d)(1)(ii)	92-3	2
10-502(f)	93-1	2
10-502(f)(1)	93-6	3
10-502(g)	93-6	2
	93-2	4
	93-1	2
	92-4	2
	92-2	2
10-502(h)	93-6	2
	92-2	2
10-502(h)(1)	93-10	2
	93-4	2
	92-2	3
10-502(h)(2)	92-2	3
10-502(h)(3)(viii)	93-10	2

STATE GOVERNMENT ARTICLE

<u>Section</u>	<u>Opinion No.</u>	<u>Page No.</u>
10-502(i)	93-4	2
10-502(j)(2)	93-8	2
	93-2	2
	92-2	3
10-502.1 through 10-502.6. Compliance Board		
10-502.5(d)(2)	92-1	1
10-502.5(f)(2)	94-1	3
	93-7	3
10-503. Scope		
10-503(a)(1)	92-4	2
10-503(a)(1)(i)	93-4	1
	93-2	2
	92-3	2
10-503(b)(1)	92-4	2
	92-3	3
10-503(b)(2)	92-3	2, 3
10-504. Conflict of Laws		

STATE GOVERNMENT ARTICLE

Section	Opinion No.	Page No.
10.505. Open Meetings Requirement		
10-505	94-1	3
	93-8	3
	93-7	3, 5
	93-6	3
	93-3	2
10.506. Notice Requirement		
10-506	92-3	3
10-506(a)	94-1	2
	93-8	2
	93-7	2
	93-2	3
10-506(b)	92-5	3
10-506(b)(2)	94-1	2
	93-7	2
10-506(b)(3)	94-1	2
	93-7	2
	93-2	3
10-506(c)	93-5	1, 2
10-506(c)(3)	93-4	3
10.507. Attendance at Open Meetings		
10-507(a)	93-3	2

STATE GOVERNMENT ARTICLE

Section	Opinion No.	Page No.
10.508. Closed Meetings Permitted		
10-508	93-2	3
10-508(a)	93-11	3
	93-9	2
	93-1	2
	92-4	2
	92-2	3
10-508(a)(1)	94-2	1-2
	93-11	2
10-508(a)(1)(ii)	92-1	4
10-508(a)(3)	93-11	2
	93-9	2
10-508(a)(4)	93-3	1, 2
10-508(a)(7)	94-3	1
	93-11	2, 3
	93-6	3
	92-5	2
	92-1	2, 3, 4, 5
10-508(a)(8)	94-3	1
	94-1	3, 5
	93-11	3
	93-7	3, 4, 5
	92-5	2
10-508(a)(11)	92-4	2
10-508(a)(14)	93-9	2

STATE GOVERNMENT ARTICLE

Section	Opinion No.	Page No.
10-508(c)	94-1	5
	93-7	4
	93-6	3
10-508(d)	94-1	5
	93-7	6
	93-2	3
10-508(d)(1)	93-1	2
10-508(d)(2)	94-1	5
	93-11	2
	93-7	5
	93-2	4
10-508(d)(2)(i)	93-1	2
10-508(d)(2)(ii)	93-9	2
	93-2	3
	93-1	2
	92-5	2
	92-4	2, 3
92-1	3	
10-508(d)(3)	92-4	3
 10.509. Minutes		
10-509	94-2	2
10-509(a)(2)	94-2	2
10-509(b)	94-2	2
	93-1	2
10-509(c)	94-2	2

STATE GOVERNMENT ARTICLE

<u>Section</u>	<u>Opinion No.</u>	<u>Page No.</u>
	93-1	2
10-509(c)(1)	94-2	2
10-509(c)(2)	94-3	1, 2
	94-2	3, 4
	94-1	6
	93-9	2
	93-7	6
	93-3	2
	93-1	2
	92-5	2
10-509(c)(2)((iii)	93-11	2
10-509(c)(3)(ii)	94-2	2

10.510. Court Enforcement

10.511. Civil Penalty

