COMPLIANCE BOARD – AUTHORITY AND PROCEDURES – COMPLAINT – COMPLIANCE CANNOT ADDRESS COMPLAINT AGAINST A PUBLIC BODY NO LONGER IN EXISTENCE

December 20, 2004

REVISED OPINION

Ms. Michele J. Fluss

The Open Meetings Compliance Board has received your complaint that the Advisory Committee on the Management and Protection of the State's Water Resources ("Advisory Committee"), a now-defunct public body, had violated the Open Meetings Act at several of its meetings. The alleged violations involved the Act's requirements regarding public notice and preparation of minutes. For the reasons stated below, the Compliance Board is unable to address the merits of a complaint against a public body that is no longer in existence. The complaint is dismissed.

I

Discussion

By letter of December 10, 2004, the complaint alleged that the Advisory Committee on the Management and Protection of the State's Water Resources failed to comply with the Open Meetings Act in various respects. Specifically, the complaint alleged that the Advisory Committee failed to give notice of meetings held on April 8 and May 21, 2004, and thereby deprived the public of an opportunity to attend these meetings, and therefore these meetings did not constitute an open meeting; failed to approve minutes of four meetings (April 8 and 29 and May 12 and 21, 2004) until September 29, 2004 (four months after it ceased operations); and failed to produce approved minutes of its last four meetings in response to requests. The complaint acknowledged that "the Committee no longer exists." The complaint noted, however, that the Advisory Committee had recommended the creation of a successor advisory body and sought to "to ensure that there will be no repetition of the Committee's ... mistakes by the successor committee."

There is no question that the Advisory Committee was a public body. It was created by an executive order of the Governor in 2002 to provide advice to the State on policies and programs relating to the management and protection of the State's water resources. The Advisory Committee was to report its findings by May 31,

2003. On March 7, 2003, the Governor, by executive order, extended the reporting deadline to May 31, 2004. The Advisory Committee submitted its final report by the new deadline and at that point, having completed the tasks assigned by the executive order, ceased operations.[1] The *Maryland Manual* lists the Advisory Committee among the "defunct units" of State government.

In our opinion, a defunct entity like the Advisory Committee is not subject to an Open Meetings Act complaint. To accept such a complaint would be inconsistent with the complaint process laid out by the General Assembly.

Under the Act, "any person may file a written complaint with the [Compliance] Board seeking a written opinion from the Board on the application of [the Act] to the action of a public body covered by [the Act]." §10-502.5(a) of the State Government Article, Maryland Code.[2] The Act's definition of "public body" is in the present tense: A public body "*consists of* at least 2 individuals" and "*is created by*" any of several specified legal instruments. §10-502(h)(1).

Moreover, the Act's complaint procedures are written on the premise that the public body against which the complaint was filed is presently in existence. That is, the Compliance Board is obligated to "promptly send the complaint to the public body ... and request that a response to the complaint be sent to the Board." §10-502.5(c)(1). The public body then "shall file a written response to the complaint within 30 days of its receipt of the complaint." Obviously, neither of these steps is possible if the public body no longer exists. Put another way, we think it unreasonable to construe the Act as imposing a duty to respond to a complaint on private citizens who have completed their work as members of a public body. Without a response from a public body with a stake in the matter, the Compliance Board cannot issue a meaningful opinion. Indeed, the primary purpose of the Compliance Board opinion process is to provide guidance to the public body against which the complaint was lodged. That is why the Act requires the Compliance Board to "send a copy of the written opinion to the complainant and to the affected public body." §10-502.5(g).[3]

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[1] The tasks explicitly assigned by the executive order, and completed, relate the Advisory Committee's reporting responsibility. If the allegations in the complaint are correct, the Advisory Committee did not complete the task of approving minutes by the time it ceased operations.

[2] All statutory references in this opinion are to the State Government Article, Maryland Code.

[3] To be sure, our opinions also serve to create a body of guidance that other public bodies can refer to, but that is beneficial consequence of the primary objective, to educate (and, if a violation is found, point the way toward improved practices by) the public body that responded to the complaint.

II

Conclusion

The Compliance Board complaint process is intended by the General Assembly to ground interpretations of the Open Meetings Act in the facts that emerge from both a complaint and the public body's response. For this reason, the Compliance Board was not given the authority to issue opinions outside the context of a complaint. And likewise for this reason, the Compliance Board will not address a complaint about a public body no longer in existence. As the complaint candidly acknowledges, we are in effect being asked to assess the practices of a defunct group in order to provide guidance to a future, hypothetical successor body. This, in our opinion, is beyond the role assigned to the Compliance Board by the Act. Consequently, the complaint is dismissed.

OPEN MEETINGS COMPLIANCE BOARD

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

February 25, 2005

Ms. Michele J. Fluss

Dear Ms. Fluss:

The Open Meetings Compliance Board has considered your request that we reconsider our January 11, 2005 opinion in response to your complaint about the Advisory Committee on the Management and Protection of the State's Water Resources ("Advisory Committee"). Your request, more specifically, asked us to (1) include more detail about your allegations, in lieu of the brief summary in the opinion; (2) modify our characterization that the Advisory Committee had completed its work; and (3) revisit our determination that the Compliance Board complaint process could not be invoked when a public body is defunct, as is the Advisory Committee. As explained below, we grant your request with respect to the first two aspects of your request and deny it with respect to the third. A revised opinion is attached.

Detail about complaint

We agree that the original opinion was too cryptic in summarizing your complaint. The revised opinion contains more detail.

Characterization of the Advisory Committee's work

The original opinion described the Advisory Committee as having "completed the tasks assigned by the executive order" and its members as having "completed their work." While these phrases accurately referred to the main task of the Advisory Committee, issuing a report, you objected that they gloss over the alleged failure of the Advisory Committee to complete minutes on time. We have added language to reflect your concern.

Processing of complaint

Although you acknowledged that the Advisory Committee no longer exists, you objected that the Compliance Board's declining to address the merits of the complaint unfairly deprived you of the Act's nonjudicial remedy. You requested that we send the complaint to the Governor for response, because you contended that the Governor, as the Advisory Committee's appointing authority, "is ultimately responsible for the [Advisory] Committee's actions or omissions." Alternatively, you requested that the Compliance Board address the merits of the complaint on the basis of the existing record, without a response.

We decline to do so. Although the Governor created the Advisory Committee through executive order, he had no duties under the Open Meetings Act. A single official is not subject to the Act, §10-502(h)(1)(i) and (3)(i), and we cannot expand the scope of the Act by in effect holding the Governor responsible for compliance obligations that fell exclusively on the Advisory Committee. Further, for the reasons stated in the original opinion, we decline to address allegations that cannot elicit a response from the public body whose compliance is questioned.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.
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