

Minutes
Open Meetings Compliance Board
Annual Meeting
August 22, 2019, 11:00 pm
200 St. Paul Place, Baltimore, Maryland

Board: April C. Ishak, Esq., Chair; Nancy M. Duden, Esq. and Patrick S. Meighan, Esq., members

Staff: Janice Clark, Administrator; Ann MacNeille, Counsel; Jeffrey Hochstetler, Assistant Attorney General

Members of the Public: Tierra Bradford, Common Cause; Cathy Coble, Northeast Maryland Waste Disposal Authority; Alan J. Dunklow, Office of the Attorney General; Justin A. Fiore, Maryland Municipal League; Kim Gordon, Northeast Maryland Waste Disposal Authority; Margaret-Ann F. Howie, Esq., Baltimore County Public Schools; Kyle Ann Ross; Nancy Soreng, League of Women Voters of Maryland; Rebecca Snyder, Maryland-Delaware-District of Columbia Press Association

1. *Call to order.* The Chair called the meeting to order at 11:00 a.m., and declared a quorum. She explained that she was appointed to the Board as a member in 2015 and as chair in June of this year, and she introduced the two new members, Ms. Duden, appointed in June 2019, and Mr. Meighan, appointed in July, 2019. She also thanked Jonathan Hodgson, the prior Chair, for his leadership. She invited staff and the members of the public in attendance to introduce themselves, and they did.
2. *Comments on the year's work:* The Chair commented on the past year's work. She stated that the Board had not seen any significant trends and had seen nothing that boards were getting wrong on a regular basis. She discussed the Board's most recent opinion on the use of electronic communications to deliberate on public business and noted that there was apparently some public commentary to the effect that the opinion reflected a change in the Board's view on the subject. She explained that the Board had proceeded consistently with opinions it had issued beginning in 2015 and had looked at the facts, including the facts that the public body had admitted deliberating and that there were communications among a quorum. On another topic, she reported that she had been contacted directly by participants in matters before the Board, and she stated her view that those contacts were inappropriate or could be deemed inappropriate in light of the Board's functions and that clarification might be needed.

Counsel reported on staff activities and noted the Administrator's assistance to the Board. Counsel reported that, as Ms. Howie had suggested to the Board at last year's annual meeting, a template for closed session summaries has now been posted on the open meetings webpage of the Attorney General's website. Updates to the Office of the Attorney General's Open Meetings Act Manual are underway to reflect two very recent reported opinions from the

Maryland appellate courts and also the Board's three opinions this year on electronic communications. An Open Meetings Act case is now pending in the Court of Appeals, and the updates will be completed after the Court issues its opinion.

3. *Review of complaint procedures.* Counsel explained staff's routine for processing complaints. The Board discussed whether the Board itself should address requests for extension of time or whether the Administrator should continue to handle requests for extensions no longer than 5 working days and to seek the Chair's approval for any extensions longer than that. Ms. Duden stated her view that having staff handle the requests would keep the process flowing; Mr. Meighan agreed; the Chair stated that the current process was working. The Administrator and counsel noted that requests for extensions are rare. The Board chose to leave the current procedure in place.

The Board considered also whether to change the routine for receiving submissions and draft opinions. Ms. Duden and Mr. Meighan stated that they could not volunteer to serve on the Board if they had to research the law and write the opinions themselves and would not be able to turn the opinions around in time without a draft to work with. The Chair noted that she does not always agree with the conclusions in the drafts, that she makes changes to them, and that having a draft works well for the private practitioners on the Board. Ms. Duden stated that she wished to assure everyone that she is not a "rubber stamp" and looks carefully at the citations and submissions. The Board decided not to change the routine.

The Board addressed whether to include in its complaint procedures an instruction to the participants to not contact any Board member directly. Ms. Duden stated that the Board needs to look at the submissions without the influence of outside communications. After further discussion, the Board agreed by consensus to add this sentence to the complaint procedures: "In order to avoid the need for a recusal of a member, all communications should be to the Board's Administrator."

The Chair asked members of the public whether anyone had comments on the Board's procedures. Ms. Snyder expressed appreciation for the smooth processing of complaints. Ms. Howie posed questions about refresher training, updating of the online training, parliamentary procedure for electronically-held meetings, and guidance on electronic communications. She also stated that the Maryland Association of Boards of Education had recently held a three-hour workshop on open meetings. Updating the Manual to include this year's electronic communications opinions was discussed. Ms. Ross asked about mediation procedures. The Chair noted that the Board encourages people to work out their concerns before filing a complaint, but the Board is only an advisory board. The Administrator explained that mediation procedures only applied in Public Information Act matters, and she responded to Ms. Ross's questions about deadlines.

4. *Issues to study or recommend for legislative changes.* The Board discussed whether legislative changes were needed to address a public body's use of electronic communications to deliberate on public business. The Chair explained that the Board had in the past decided that the past guidance was adequate and that it was best to decide these cases on a case-by-case

basis, and she noted the difficulty in making a blanket rule work. She asked the Board whether the Board should recommend legislation, whether for a study or changes to the law. Ms. Duden expressed the view that it would be premature to recommend changes, because by the time legislation was passed, a different situation would arise, and the law would be behind the curve. She stated that legislation to establish exact procedures would be difficult and stated “a study, maybe.” The Chair stated that in working with public bodies, she has always cautioned people, “Do not reply all,” as that is a red flag that implicates some sort of deliberative process; she also cautions that another red flag is raised when a public body’s members are deliberating on whether the public body is going to take an action. She explained that, by contrast, discussing availability for a meeting date is administrative and not subject to the Act. She stated her view that there are gray areas but that there is enough information out there to provide cautionary guidance, and that it would be premature to suggest legislation before it is known whether the problem is big. Mr. Meighan stated that it would be very difficult to come up with an exhaustive list of what triggers the Open Meetings Act and that the Board can tell when it sees reply to all messaging. The Chair said that the use of such communications were similar to other modes of unofficial discussions that should be held in a public meeting and that members should ask themselves whether the topic they are discussing is one that should be deliberated on in an open meeting. Ms. Duden agreed with Mr. Meighan that the more one tries to make an exhaustive list, the more it can be argued that something is permitted because it was not on the list.

The Chair raised the issue of follow-up training and asked counsel for background on the training requirements. Regarding the question on whether to legislate re-training, Ms. Duden noted the members of public bodies can take the training multiple times and stated that public bodies and their counsel should follow changes to the Act. The Chair asked about monitoring training, and counsel explained the conclusions in the report that the Board submitted on that subject. Counsel explained that the online training is updated every time the Act is amended, that she has seen some local government staff and officials appear multiple times at the open meetings classes at the local government association conferences, that there is an ongoing effort to stay informed, and that public bodies’ counsel help them with updates. The Chair noted that the public bodies’ counsel or the trained members can keep them up to date and that she did not know that legislative action was needed for that. The Chair also noted that she thought the Board was receiving fewer complaints about public bodies’ closed meeting practices and notices and that the violations seemed less serious. She said that, if there was a trend, it seemed as though public bodies were getting better at handling closed sessions.

After further discussion, the Chair proposed to include in the Annual Report language to the following effect:

The Board doesn’t recommend any legislative study or action at this time. The Board discussed the potential for electronic communications legislation but deemed that it would be premature and that the Board should continue to deal with those complaints on a case-by-case basis. The Board also considered a follow-up or

updated training requirement and felt that that could best be handled by the public bodies themselves rather than by the Board.

Ms. Duden so moved, Mr. Meighan seconded the motion, and the Board adopted it by consensus. The chair asked counsel to make grammatical changes as needed.

The Chair asked the members of public if anyone had additional suggestions or concerns for the Board to consider. They did not.

5. *Review of draft annual report and instructions to staff for content.* On motion by Ms. Duden, seconded by Mr. Meighan, and by consensus, the Board adopted the draft report with two corrections to dates that Ms. Duden had identified to staff before the meeting and with the addition of the language on legislative changes.

Ms. Duden moved to adopt the draft Annual Report with the two corrections and the extra language on page 9 under the legislative heading. Mr. Meighan seconded the motion, and the Board adopted it.

6. *Closing remarks and public comment.* The Chair thanked the Administrator for keeping the process on track and her hard work for the Board. The Chair asked if anyone had comments. Mr. Fiore thanked the Board and assured the Board to take comfort that Open Meetings Act training occurs basically every year through the Academy for Excellence in Local Governance training held at the Maryland Municipal League and Maryland Association of Counties conferences and that the associations also work with their attorney affiliates to spread the word about changes to the Act.
7. *Adjournment.* The Chair thanked everyone for attending and asked for a motion to adjourn. Upon Ms. Duden's motion to adjourn, seconded by Mr. Meighan, and adopted by consensus, the Chair adjourned the meeting at 11:53 a.m.