

MINUTES
Open Meetings Compliance Board
Annual Meeting
September 8, 2016, 1:00 p.m.
Room 161, Arundel Center, 44 Calvert Street, Annapolis

In attendance

Board members: Jonathan Hodgson, Chair; Rachel Grasmick and April Ishak, members.

Staff: Ann MacNeille, Counsel; Deborah Spence, Administrator

Members of the Public: Barbara Schnackenberg (League of Women Voters of Maryland); Craig O'Donnell

Jonathan Hodgson, Chair, called the meeting to order at 1:00 p.m., introduced Ms. Grasmick and Ms. Ishak, and welcomed those in attendance.

1. The Board members discussed whether to comment on the “merits and feasibility of merging” the Board with the Public Information Act (“PIA”) Compliance Board for purposes of the interim report, on PIA topics, that the Office of the Attorney General is to submit to the legislature by the end of 2016. Mr. Hodgson asked counsel whether such a proposal had ever been made. Counsel stated her recollection that there had been a proposal several years ago, before the PIA Compliance Board was created, to add the resolution of PIA fee complaints to the Open Meeting Compliance Board’s duties. The chair of the Open Meeting Compliance Board at the time, Elizabeth Nilson, had opposed the concept because she did not think that the Open Meeting Compliance Board could handle an increased workload. The members variously asked counsel about the operations and membership of the PIA Compliance Board, discussed whether a merger would serve a purpose, stated that the PIA Compliance Board addresses a different body of law that does not overlap with the Open Meetings Act, wondered whether it would be difficult to find people to serve on the board, and questioned whether merging the boards would cause Open Meetings Act issues to be subsumed by PIA issues. Mr. Hodgson stated that it was difficult to comment without a precise proposal. The Board decided not to submit comments until such time as there was a proposal.

2. Referring to a memorandum written by Anthony Jankosky, a former intern in the Office of the Attorney General, on how other states’ open meetings laws address electronic communications, the members discussed whether legislation was needed.

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Ms. Ishak noted the spectrum of ways in which other states' laws address the question, some very expressly and others very broadly with room for interpretation, and stated that the initial question was what approach should be taken. Ms. Grasmick noted the conclusion in the memo that the laws should be towards the specific end of the spectrum. Mr. Hodgson referred to 81 *Opinions of the Attorney General* 140 (1996), where the use of email was discussed. He wondered whether the Act as written was broadly worded enough to enable the Board to address whether electronic communications in a particular case violated the open-meeting requirement and whether an updated opinion of the Attorney General should be sought. He also raised the question of how to enforce provisions that would apply to communications on personal devices and stated that such communications can be sought by PIA request. Counsel explained for the group that the Board had stated the principles applicable to electronic communications in one of its opinions and had adopted the Wisconsin Attorney General's guidance on the subject.¹ Ms. Ishak noted that an email that merely transmitted a document might be permissible, while an email that attached a document and asked for the recipient's comment might not, and that perhaps there could be a rebuttable presumption for the second category of emails. She stated that some public bodies use emails to avoid meetings and noted also that some states' laws seemed too restrictive in that they seemed to prohibit email communications altogether.

Mr. Hodgson noted that communications among members both at in-person meetings and through email occur as a series of communications over a space of time and that the Board may discern whether the public body is using email as a means of conducting business and interpret the Act accordingly. While he disagreed with some parts of the memorandum, he felt that Mr. Jankosky had done a fine job on it.

After further discussion, the Board concurred that the Act gave it the flexibility to address the issue on a case-by-case basis and that legislation was not needed at this time.

¹ 9 OMCB *Opinions* 259 (2015).

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Mr. Hodgson asked the members of the public whether they had comments. Ms. Schnackenberg thanked the Board for considering the issue. Mr. O'Donnell stated that a town council member had complained to him that the council frequently decided matters by replying, by email, to questions that the town manager emailed to them. Mr. Hodgson suggested that members of public bodies may complain to the Board about such practices.

3. Referring to the draft annual report that was distributed to those present, Mr. Hodgson asked counsel to summarize it. The Board directed staff to add the statement that the Board was not proposing legislation for the 2017 session and, otherwise, to submit it as drafted.

4. As new business, Mr. Hodgson referred to a proposal from a member of the public, Craig O'Donnell, that school entities be included in the Act's definition of "public body." Mr. O'Donnell explained his proposal. After a brief discussion about the varying structures of the county school boards, the members decided to review the proposal for discussion at another time if any member thought further discussion was indicated. Mr. O'Donnell also commented on his difficulties in the past in getting public bodies to send him minutes and closing statements without a PIA request. Counsel noted that the Open Meetings Act was amended this year to require the posting of minutes online if feasible. Counsel was asked whether she had heard of new legislative proposals for 2017 and when she might hear of any. Counsel stated that she had not heard of any yet and that the timing of new legislation was unpredictable.

At approximately 2:00 p.m., Mr. Hodgson thanked everyone for attending the meeting and adjourned it.