

## MINUTES

Open Meetings Compliance Board

Special Meeting

February 12, 2016, 2:00 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; Anthony Jankosky and Alex Zarlensa, interns

Members of the public: Paul Bessel, Barbara Braswell, Jessica Campisi, Damon Effingham, Bridgette A. Greer, James Peck, J. Snider, Rebecca Snyder

Jonathan Hodgson, Chair, called the meeting to order at 2:00 p.m., introduced Ms. Grasmick and Ms. Ishak, and welcomed those in attendance. He explained that the Board was meeting so that the members could exchange their own views on legislation pending in the General Assembly and that although the Board might ask questions of those in attendance, the meeting was not a hearing. Indicating a recording device on the table, he said that the meeting would be recorded if it worked.

I. The Board discussed bills pending as of House Schedule 18 and Senate Schedule 21, with bill texts as posted during the week of February 8.

1. **HB 217** and **SB 529**, referring to the bill texts posted at <http://mgaleg.maryland.gov/2016RS/bills/hb/hb0217F.pdf> and <http://mgaleg.maryland.gov/2016RS/bills/sb/sb0529F.pdf>.

The Board discussed whether to support the bills' broad objective of requiring public bodies to make agendas available before their meetings. Ms. Ishak remarked that providing agendas was the open thing to do but that the concept of burdensomeness should be considered. Mr. Hodgson wondered whether the Board has a role in assessing burden, or whether that role more likely belonged to the General Assembly. Ms. Ishak noted that the General Assembly should be made aware if a requirement might bog the Compliance Board process down, as might happen with complaints about small public bodies not posting agendas. Ms. Grasmick stated that care should be taken not to impose requirements that might disincentivize public bodies from holding meetings. The board's consensus was to take a neutral position on the two bills' broad objective of requiring public bodies to post agendas before meetings.

The Board members also discussed language in HB 217. Questions were raised about the meaning of “available” information and about the scope of the requirement that “available documents” be provided before a meeting. Mr. Hodgson posed the example of a land use application, and he and Ms. Ishak wondered whether the public body would have to provide the entire application file and oversized documents such as plats. Mr. Hodgson commented that while the broad objective of providing documents was a good thing, the General Assembly, through the Public Information Act, has already addressed the availability of documents. He stated his view that it is not the Board’s role to decide what documents are to be made available for inspection. The members agreed that if an agenda requirement is enacted, the two bills should be reconciled. Also, in HB 217, the timing provision in proposed § 3-302.1(a)(3)(ii) should be reconciled with proposed § 3-302.1(a)(3)(i).

Mr. Bessel asked, as a procedural matter, whether the Board would offer testimony on its position on the various bills. Mr. Hodgson stated that the Board would submit oral or written testimony about its positions if asked but did not expect to seek to testify.

**Position:** Neutral on whether public bodies should be required to provide agendas before meetings; questions as to the definitions of terms used in HB 217.

2. **HB 250, cross-filed with SB 528**, referring to the bill text posted at: <http://mgaleg.maryland.gov/2016RS/bills/hb/hb0250F.pdf>

Ms. Ishak stated her support for ensuring that meetings will always be attended by someone trained in the requirements of the Act and for having public bodies post trainees’ names on their websites. She also stated that the 30-day deadline for new officials’ training was very short and that she thought 60 days would be more workable. Mr. Hodgson and Ms. Grasmick concurred. A question was posed as to how long the online training takes, and Mr. Hodgson asked who in the room had taken it. Most attendees had taken the online training. Mr. Peck and Mr. Bessel estimated two hours.

**Position:** Support, with the recommendation that training be completed within 60 days instead of 30.

(See also training requirement in HB 823/SB 598 and SB 754/ HB 1088).

3. **SB 598/HB 823**, referring to the bill text posted at <http://mgaleg.maryland.gov/2016RS/bills/sb/sb0598F.pdf>

The Board members discussed proposed § 3-211(a)(1), the provision of the bill that would authorize the Board to order public bodies to take corrective action and impose civil penalties. Mr. Hodgson wondered how the Board would collect fines, and he observed that any empty threat would be ineffective. Questions were raised as to whether the fines would even have a meaningful deterrent effect. Mr. Hodgson recognized Mr. Bessel, who had been designated by a sponsor to speak. Mr. Bessel stated that there seemed to be an attitude by some public bodies that they did not care if the Board had found them in violation and that if the Board had enforcement authority public bodies would pay attention. Ms. Ishak wondered whether a \$500 fine would be effective and whether it might be more effective to have courts defer to the Board's findings. Mr. Hodgson noted that the public officials originally were motivated to comply by not wanting the newspaper to report them in violation but that less reporting was being done. He questioned the effectiveness of a fine and noted that the members themselves would not pay it. He was not sure what a fine would accomplish and thought that hearings and appeals would result.

Mr. Bessel stated that public bodies that violate the Act ought to be ordered to re-do the meeting in question and that Board opinions should not be 'merely advisory.' Mr. Hodgson stated that it would be hard to define what a "corrective action" would be. Ms. Ishak stated that she had due process concerns with fines and orders and that the submissions that the Board receives sometimes do not have enough content for the board to determine whether a violation has occurred. She wondered whether there was a way to issue a finding that could be used in court to invalidate an action. Mr. Hodgson noted that open meeting violations can be raised now in court, as in an appeal of a zoning action. A question was raised on the current law about Board opinions. Counsel explained that, as of 2013, the Board's opinions are now potentially admissible in court. Mr. Hodgson recognized Mr. Peck, who explained that the Act contains a circuit court remedy. Mr. Snider gave his views on how public bodies should be required to publicize their violations. Mr. Bessel suggested that public bodies could be ordered to undergo re-training.

Ms. Grasmick stated her concern that the bill gave the Board too much discretion. Ms. Ishak stated that she supported the goal of adding weight to the Board's opinions but that she thought the bill was vague and problematic as to the Board's authority to order "corrective action," that the concept of a fine was misguided, and that the Board's complaint process could become tangled up in appeals. Mr. Hodgson said that the Board would look at the bill if it were amended. The members concurred on its position on the enforcement provisions in the bill.

Ms. Ishak suggested that the Board's authority might best be looked at as part of a bigger effort on reform. Ms. Snyder explained that the Public Information Act legislation that was enacted in 2015 included a provision to study the roles of the Board and the Public Information Act Compliance Board.

**Position:** Oppose, while supporting the goal of adding weight to the Board's opinions.

(See also enforcement provisions in SB 754/HB 1088).

4. **SB 17**, referring to the bill text posted at <http://mgaleg.maryland.gov/2016RS/bills/sb/sb0017f.pdf> (*first reader*)

Counsel summarized the bill, and the Board decided to support it. Mr. Snider handed to Mr. Hodgson "for the record" a copy of the testimony that Mr. Snider had submitted to a Maryland Senate committee for SB 17 and another bill. Mr. Hodgson noted that the Board's meeting was not a hearing and there was no record. Counsel noted that the record for the bill was the General Assembly's bill file and that the testimony that Mr. Snider had submitted to the committee would be kept there.

**Position:** Support.

5. **HB 413**, referring to the bill text posted at <http://mgaleg.maryland.gov/2016RS/bills/hb/hb0413F.pdf>

Counsel summarized the bill, and the Board concurred in taking a neutral position on public bodies' methods of keeping minutes. Mr. Snider stated his opinions on how public bodies should format them.

**Position:** Neutral.

6. **SB 467 and HB 316**, bill texts posted at <http://mgaleg.maryland.gov/2016RS/bills/sb/sb0467F.pdf> and <http://mgaleg.maryland.gov/2016RS/bills/hb/hb0316F.pdf>

Mr. Hodgson noted that these bills, applicable to the General Assembly, would amend provisions in the State Government Article and would not amend the Open Meetings Act. The members concurred that the Board would not comment on them.

**Position on both bills:** No comment.

7. **SB 754/HB 1088**, referring to bill text posted at <http://mgaleg.maryland.gov/2016RS/bills/sb/sb0754F.pdf>.

The bill was summarized as containing reporting requirements for the Board, enforcement powers for the Board, and training provisions. Mr. Hodgson turned first to the reporting requirements in proposed § 3-204(e)(2) (iv), (v), (bill p. 2, lines 11-16). He asked why there was a need to require the board to include in its annual report information on the “top issues” it had addressed and to identify the public bodies “whose actions were the basis of a high number of complaints,” and which the Board had found in violation. A question was raised as to what a “high number of complaints” meant, given the Board’s caseload. Ms. Snyder stated that while the language might be muddy, the goal was to determine the top violations so that those could be focused on. Counsel noted that the Board attaches to its annual report a summary of its opinions; the summary already identifies the public bodies that were complained of during the year and identifies the issues that the Board addressed in each opinion. Counsel stated that people can now read the opinions to determine whether the Board had found violations but that it would not be onerous to add an asterisk next to the opinions in which the Board had found a violation. The board decided to support the provision, with the proviso that the reference to “high number of complaints” be clarified.

Referring to proposed § 3-211(a) (bill p. 2, line 25, through p. 3, line 5), Mr. Hodgson turned next to the proposed enforcement provisions. The members agreed that the Board would take the same position on these proposed enforcement provisions that it had taken on the ones in SB 598/HB 823, which the Board had discussed as item 3 of its agenda. Ms. Ishak added that it can be hard for the Board to reach determinations on the basis of the information that it gets and that the bill’s enforcement provisions posed due process concerns. Ms. Grasmick noted that the Board was open to the idea of adding weight to its opinions through more narrow means than those proposed in the bills.

Mr. Hodgson referred next to the training provisions proposed as amendments to § 3-213 (bill p. 3, line 28, through p. 4, line 15). It was noted that the language in the three bills on training (HB250/SB528 and HB823/SB598) differed with respect to the people who should be required to take the training. Mr. Peck explained that extending the requirement to all of a public body’s “employees” would mean, for some public bodies, that people with no involvement in meetings would have to take the course. The Board concurred that the General Assembly

should determine the appropriate scope of the training requirement. It was also noted that the bills differed with respect to the deadlines for taking the training. Ms. Ishak stated that a 30-day deadline, as proposed in HB250/SB528 was too soon and that the bills should be reconciled.

**Positions:** As to the reporting requirement in proposed § 3-204(e)(2): Support, with the proviso that the reference to “high number of complaints” be clarified.

As to the enforcement provisions in proposed § 3-211(a): Same position as with item #3 above (“Oppose, while supporting the goal of adding weight to the Board’s opinions”).

As to the training provisions: No position as to which personnel should be required to take the training; recommendation that training bills be reconciled; support for 60-day training deadline as opposed to the 30-day deadline in HB250/SB528.

II. Mr. Hodgson introduced two interns from the Office of the Attorney General, Anthony Jankosky and Alex Zarlensa, both students at the University of Maryland, Baltimore County. Mr. Hodgson expressed the Board’s gratitude to them for keeping notes of the meeting. He explained that Mr. Jankosky has been researching the question of how other states’ open meetings laws treat public bodies’ use of electronic communications to conduct public business. Mr. Jankosky explained that the laws vary. He stated that some states’ laws explicitly regulate the practice, courts in some states have construed open meetings laws to apply to the practice, and some states have not addressed the issue. Mr. Hodgson thanked Mr. Jankosky for doing the research and stated that the Board might take up the issue at its annual meeting.

III. Mr. Hodgson asked whether there had been any legislative inquiries on subjects other than those that the Board had addressed so far. The other members and counsel indicated that they were not aware of any. At approximately 4 p.m., Mr. Hodgson adjourned the meeting.