

Chapter 7: Guidance, Judicial Enforcement, and Training

Chapter 7: What roles does the Act assign to the Compliance Board, the courts, and the Office of the Attorney General?

(Index Topic 7)

Chapter summary: The Act assigns separate roles to the Compliance Board, the courts, and the Office of the Attorney General. The Compliance Board is an independent State agency and is not a division of either the Office of the Attorney General or any other unit of State government. The Act spells out the Compliance Board's duties. Broadly described, those duties are to issue advisory opinions in response to complaints that the Act has been violated, to recommend legislation to improve the Act, to receive certain documents, and to develop and conduct educational programs, in conjunction with the Office of the Attorney General, for public bodies' attorneys and staff. Although the Compliance Board may request certain documents from public bodies, it does not have the power to compel compliance with the Act, to subpoena documents, to administer oaths, or to issue orders.

Only courts may enforce the provisions of the Open Meetings Act. To seek judicial enforcement of the Act, a person must file a lawsuit in the circuit court for the county in which the public body is located. During that process, a person may request that representatives of the public body give sworn testimony and produce documents. The Compliance Board and its staff from the Attorney General's Office have no role in this process.

The Office of the Attorney General shares the Compliance Board's educational duties and provides staff and counsel for the Compliance Board. The Attorney General is the legal advisor of the State, charged with performing the legal work for State officers and State government units. The lawyers in the Attorney General's Office are not authorized to either advise or represent individual members of the public.

A. *The Compliance Board*

The Act creates the Compliance Board as a three-member public body comprised of members who are appointed by the Governor. They serve as volunteers. The Compliance Board has no budget of its own. Its duties include: issuing advisory opinions in response to complaints that a public body has violated the Act; recommending legislation; submitting an annual report to the Governor and the General Assembly; receiving copies of certain documents; and developing and conducting training, in conjunction with the Office of the Attorney General and others, for the “staffs and attorneys” of public bodies, the Maryland Municipal League, the Maryland Association of Counties, and the Maryland Association of Boards of Education. §§ 3-204 through 213. The Compliance Board may also attempt to resolve a prospective complaint that a meeting that the Act requires to be open will be closed. § 3-212. The Office of the Attorney General provides the Compliance Board with counsel and administrative assistance.

1. **The complaint process**

The Compliance Board complaint process provides the public with a way to raise concerns about a possible violation with regard to a particular meeting without hiring a lawyer and without waiting for the matter to make its way through the courts. The process also provides public bodies with relatively quick guidance on how to comply with the Act. The process is streamlined by design. When the Act was amended to create the Compliance Board, the Act had been in effect for 14 years, and it had become apparent both that public bodies needed educational programs and guidance on compliance and that members of the public needed a way to submit complaints without having to sue.

The trade-off for the State’s provision of a free and straightforward complaint mechanism is that the Compliance Board’s opinions are “advisory only.” § 3-209. Although the Act authorizes the Compliance Board to request certain documents and requires public bodies to comply with those requests, the Act does not empower the Compliance Board to issue orders enforceable by a court. § 3-210. Also, the Compliance Board does not conduct investigations in the usual sense of the word; it cannot subpoena documents, summon witnesses, or administer oaths, and it is not set up to take testimony. *See* 3-210; *see also* 8 *OMCB Opinions* 170, 171 (2013) (explaining that the Board is “an advisory board, not a fact-finding tribunal”).

The complaint process is simple and much more informal than litigation. As described in the “Complaint Procedures” posted on the Open Meetings page of the Attorney General’s website, any person may submit to the Compliance Board a written complaint that a public body has violated the Act on a particular occasion. *See* § 3-205.

Complaints must “identify the public body,” and “describe the action of the public body” and the date and circumstances of the action. § 3-205(b)(1), (2). Complaints must also be signed and therefore may not be submitted anonymously. *See* § 3-205(b)(3).

The Compliance Board has not expected complaints to recite all the facts that would prove a violation. “After all,” the Compliance Board has explained, “it normally is the public body, not the complainant, that has the information, including the actual date a specific action might have taken place, that is necessary to allow us to fully evaluate whether or not a violation occurred.” 6 *OMCB Opinions* 69, 72 (2009). And in contrast to a plaintiff who files suit in court, a complainant in the Compliance Board process “need not satisfy any particular burden of proof.” *Id.* Nonetheless, the Compliance Board expects complaints to be founded on a “good-faith belief that the Act was indeed violated, based on a reasonable inquiry into the available facts.” 8 *OMCB Opinions* 99, 101 (2012). There, the Compliance Board declined to address a “speculative allegation” and “mere surmise” that the public body “probably discussed public business during the lunch recess disclosed in its minutes.” Noting that there was no evidence that the members of the public body were even together during the recess, the Compliance Board stated that it did not “construe the Act to require us to address complaints that mention no indicia of the alleged violation – indicia such as errors in documents required to be kept under the Act, comments or actions by members of the public body or staff evidencing improper conduct, or an apparently rubber-stamped decision suggesting an improper closed meeting, to name a few.” *Id.*

The Compliance Board also encourages complainants to contact the public body with questions before filing a complaint. In 8 *OMCB Opinions* 170, 172 (2013), for example, the complainant alleged, apparently without looking into the matter, that a county council had not given any notice of a meeting. The response showed that notice had been given by several methods. The Compliance Board, finding that the “allegations had no basis in fact,” stated: “A ‘reasonable inquiry’ often yields the citizen a faster answer than we can provide, sometimes serves to avoid an unnecessary complaint and unnecessary expenditure of the public body’s resources, and, otherwise, enables the complainant to provide us with more information.” *Id.*

The Act requires the Compliance Board to send the complaint to the public body, which then must respond within 30 days of its receipt of the complaint. § 3-206.¹ Just as

¹ Occasionally, people submit complaints about matters that clearly do not lie within the Compliance Board’s authority, as when a person has only alleged violations of other laws. When no reading of the complaint would bring it within the Compliance Board’s authority, the complainant is informed by letter that the Compliance Board will not address it.

there is no set format for a complaint, a response may take the form of a simple letter to the Compliance Board. The response should include the relevant meeting documents and explains any relevant circumstances. The Act does not require public bodies to submit sworn testimony, but they may. When the matter involves a complaint that a meeting was improperly closed, the Compliance Board may ask the public body to include the sealed minutes of the closed session. § 3-206(b)(2). The Compliance Board keeps the contents of those minutes confidential. § 3-206(b)(3).² A public body's failure to respond to the Compliance Board's request for documents "is itself a violation" of the Act. 5 *OMCB Opinions* 14, 21 (2006).

Although the Act contemplates no role for a complainant beyond the filing of the complaint, *see* § 3-207, the Compliance Board permits the complainant to reply to the public body's response when the reply would add factual information. The public body may then have the last word. Replies that merely reiterate the complaint are discouraged, because they delay the Compliance Board's issuance of guidance on whether the public body has violated the Act and what it should do to comply. *See* Complaint Procedures.

Usually, the submissions and the meeting documents—written notice, closing statement, minutes, sealed minutes—provide the Compliance Board with the information it needs to resolve the complaint quickly so that the public body can correct any practices that violate the Act. Sometimes, however, the written submissions of a complainant and a public body reflect factual disputes that are not resolved by the meeting documents, such as a dispute over whether the public body unreasonably delayed giving notice of a meeting or adopting minutes. The Act accounts for this possibility in two ways: first, the Compliance Board may state its inability to resolve an issue, § 3-207(c)(2); and second, the Compliance Board may conduct an "informal conference" with the public body or anyone else if more information is needed. § 3-207(b)(1). In the interest of providing prompt advice, the Compliance Board has usually found it most useful to give guidance on the most likely scenarios. In 9 *OMCB Opinions* 171, 173 (2014), for example, where the meeting in question had occurred over two years earlier and differing inferences about a closed-meeting discussion could be drawn from the available information, the Compliance Board addressed "some possibilities in the alternative."

² In addressing allegations that a public body's discussion strayed beyond the scope of the claimed exception, the Compliance Board preserves the confidentiality of the closed-session minutes by referring to the events of the session only generically and then only as needed to resolve the complaint. *See, e.g.*, 9 *OMCB Opinions* 44 (2013).

After considering the submissions, the Compliance Board issues a written advisory opinion within 30 days, or, if it has stated its inability to meet that target, within 90 days. § 3-207(a), (c). Staff then send copies of the opinion to the public body and the complainant and post it online with headnotes keyed to the online index to the Compliance Board's opinions. From July 1, 2017 on, the list of opinions for each volume identifies the opinions in which the Compliance Board found a violation.

2. Announcement and acknowledgment of violations

If the Compliance Board has found a violation, a member of the public body must summarize the opinion at the public body's next open meeting, and a majority of the members of the public body must sign a copy of the complaint and submit it to the Compliance Board. § 3-211(a), (b). The members' signatures signify their acknowledgment that they have received the opinion, not an admission that they have violated the Act. § 3-211(c). Compliance Board opinions are potentially admissible in court; in 2013, the General Assembly repealed the Act's broad prohibition on the admission of a Compliance Board opinion in a case brought under the Act to enforce the Act. *See* 2013 Md. Laws ch. 612. However, the evidentiary rules applicable to actions in circuit court do not apply to submissions to the Compliance Board, and a Compliance Board opinion would not necessarily be admissible in circuit court as proof that a violation did or did not occur.

3. The Compliance Board's annual reports to the Governor and General Assembly, and its meetings

The Act requires the Compliance Board to report annually to the Governor and General Assembly on its activities, its opinions, the violations it found, and the complaints it received that a public body failed to give reasonable notice of a meeting. The annual report must also "recommend any improvements" to the Act. § 3-204(e). The report is due by October 1 of each year. The Compliance Board usually meets in late summer to discuss the activities of the year and to hear and consider comments from the public, representatives of the media, public bodies, and representatives from the Maryland Association of Counties and the Maryland Municipal League. When the Compliance Board decides at an annual meeting to propose legislative changes, those are included in the annual report.

The Compliance Board sometimes meets during the General Assembly's session to consider commenting on pending Open Meetings Act legislation. The Compliance Board members gather as needed to deliberate on complaints. Section 3-101(i) of the Act defines

those deliberations as a quasi-judicial function that is exempt from the Act under § 3-103(a).

4. The Board's receipt of documents; the training requirement

In addition to responding to complaints, public bodies must submit two types of documents to the Compliance Board: closing statements, when a member of the public has objected to the closing of a session (*see* Chapters 5, Part A and 6, Part C) and a signed copy of the Compliance Board's opinion, if the Compliance Board has found that the public body violated the Act (*see* Part 2 of this Chapter). §§ 3-305(d)(3), 3-211.

Regarding training, generally, each public body must designate an employee, officer, or member to "receive training on the requirements of the meeting law." § 3-213. However, as of October 1, 2017, public bodies that wish to conduct closed sessions must designate at least one *member* to take the training. *See* Chapter 5, Part A. As of July 1, 2017, public bodies are no longer required to submit to the Compliance Board the names of the individuals whom they have designated to take training on the Act; those records remain with the particular public body. 2017 Laws of Md., ch. 525 (repealing former § 3-213(a)(2)). Details on complying with the requirement are posted on the Open Meetings page of the Attorney General's website.

The training must be taken in one of three ways: the online class "offered by the Office of the Attorney General and the University of Maryland's Institute for Governmental Service and Research"; an open meetings class "offered by the Maryland Association of Boards of Education through the Boardsmanship Academy Program"; or an open meetings class "offered by the Maryland Association of Counties or the Maryland Municipal League through the Academy for Excellence in Local Governance." *Id.* The online class is free and available to the general public. The organizations generally offer their classes at their conferences, so the designees of most State public bodies take the online class. The Compliance Board does not have the authority to approve other forms of training. Training received before October 1, 2013, does not satisfy the requirement. Newly-created public bodies need not designate a trainee before their first meeting, 9 *OMCB Opinions* 268 (2015), so long as that meeting will not include a closed session.

The Compliance Board does not monitor compliance with the requirement, which applies to every entity in the State that meets the Act's definition of a public body. The Act applies, for example, to temporary task forces appointed by local and State government executives and by people "subject to the control" of those officials. § 3-101(h)(2). The Compliance Board, a body of three volunteers with no budget of its own, has noted that it would not be able to monitor compliance and that identifying every public body in existence at any given time would be difficult. *See, e.g.*, Minutes of January 29, 2013 meeting of Compliance Board. The Compliance Board, working with seven other entities,

must report on the “cost-benefit” of “tracking the names” of designees who have taken training. 2017 Laws of Md., ch. 525, § 2.

5. Members of the Compliance Board

The Compliance Board members are appointed by the Governor to three-year terms on a staggered basis. Although they may not serve more than two consecutive terms, their service continues until a successor has been appointed. As of the date of this Manual, the Compliance Board has had only four chairs: Walter Sondheim, who served from 1992 until his death in 2007; Elizabeth L. Nilson, Esq., who served from February 2007 until June 1, 2014; Monica J. Johnson, Esq., who served as a recess appointee from June 1, 2014 to April 13, 2015; and the current chair, Jonathan A. Hodgson, Esq., who was appointed on August 14, 2015.

The longest-serving Compliance Board member, Courtney McKeldin, served from 1992 until May 2014. Other members of the public appointed to take on this volunteer work include past members Tyler G. Webb, Esq., Julio Morales, Esq., Wanda Martinez, Esq., and Mamata Poch, Esq. The current members are Rachel Grasmick Shapiro, Esq. and April Ishak, Esq., appointed in June 2015 and reappointed in 2016 and 2017, respectively.

B. The courts - judicial enforcement of the Act

The enforcement provisions of the Act are set forth in §§ 3-401 and 3-402. They do not apply to the actions of “appropriating public funds,” imposing a tax, “or providing for the issuance of bonds, notes, or other evidences of public obligation.” Otherwise, they apply when a public body has failed to comply with five provisions of the Act: § 3-301, which requires generally that public bodies meet in the open unless the Act expressly permits otherwise; § 3-302, which requires public bodies to give notice of their meetings; § 3-303, which states the public’s right to attend open meetings; § 3-305, which regulates closed sessions; and § 3-306(c), which addresses the contents of minutes. *See* § 3-401(b).

For those types of violations, any person may file in the appropriate circuit court a petition that asks the court to determine whether those provisions apply to the circumstances, to require the public body to comply with them, or, subject to § 3-401(d)(4), to “void the action of the public body.” The 45-day limitation period is triggered by various events, depending on the type of violation alleged, and is extended by the filing of a complaint with the Compliance Board. § 3-401(b). The petitioner need not file a complaint with the Compliance Board before filing suit. § 3-401(e).

Section 3-401 provides that the Act’s judicial enforcement provisions do “not affect or prevent the use of any other available remedies.” In applying that section, the Court of Special Appeals has held that Act’s judicial remedy is not exclusive and that the statute of limitations for actions under the Act does not apply to an open meetings claim in an action for judicial review brought under other laws. *Handley v. Ocean Downs, LLC*, 151 Md. App. 615, 636-39 (2003).

The enforcement provisions set a presumption “that the public body did not violate any provision of [the Act],” and they assign the burden of proof to the petitioner. § 3-401(c). A court may only declare void a final action of the public body “if the court finds that the public body willfully failed to comply with § 3-301, § 3-302, § 3-303, or § 3-306(c) [of the Act] and that no other remedy is adequate.” § 3-401(d)(4). The remedy thus is not available for violations of § 3-305 alone.

Courts may order other forms of relief, such as an injunction and counsel fees, without finding willfulness. *See* § 3-40(d) 1), (2), (3), and (5); *see also* *Armstrong v. Mayor & City Council of Baltimore*, 409 Md. 648, 694 (2009). Section 3-402 authorizes the court to impose a civil penalty on a “public body that willfully meets with knowledge that the meeting is being held in violation of [the Act].” After considering the public body’s financial resources and ability to pay the fine, the court may impose a fine of up to \$250 for the first violation and \$1,000 for each subsequent violation within three years. *Id.*

C. The Office of the Attorney General

The Office of the Attorney General is required to provide staff for the Compliance Board and to work “in conjunction” with the Compliance Board on training for the staffs and attorneys of public bodies and the two local government associations. §§ 3-203, 3-204(d). The Act does not confer any other authority on the Office of the Attorney General.

The duties of the Office of the Attorney General are set forth in the Maryland Constitution and the Maryland Code. As described on the Attorney General’s website, “The Attorney General's Office has general charge, supervision and direction of the legal business of the State, acting as legal advisors and representatives of the major agencies, various boards, commissions, officials and institutions of State Government.”³

The Office of the Attorney General provides the Compliance Board with administrative staff and counsel, both traditionally housed in the Opinions and Advice

³ <http://www.marylandattorneygeneral.gov/Pages/About.aspx>.

Division of the Attorney General's Office, and hosts an open meetings webpage, maintained with the assistance of Fritz Schantz, the Office's director of multimedia services. Since the Compliance Board was first constituted in 1992, it has had only two administrators: Kathy Izdebski, who served from 1992 to 2012, and Deborah Spence. Its counsel, and the authors of successive versions of this Manual, have been former Assistant Attorneys General Jack Schwartz and William Varga, and Assistant Attorney General Ann MacNeille, with the guidance of the Chief Counsel of Opinions and Advice at the time, variously Jack Schwartz, Robert N. McDonald, and Adam D. Snyder.

Open meetings resources on the Attorney General's website⁴ include the text of the Act, FAQs, a compliance checklist, various forms, instructions for the training requirement, and a link to the online course hosted by the Institute for Governmental Service and Research at the University of Maryland. Also posted there are the Compliance Board's meeting notices and documents, its complaint and response procedures, its opinions, and a topical index and search box for the opinions.

⁴ www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx.