

## Chapter Five Enforcement

### A. OPEN MEETINGS COMPLIANCE BOARD

The Open Meetings Compliance Board, which began its activities in 1992, has responsibility to educate public bodies about their duties under the Act, to provide a nonjudicial forum for resolving disputes about the Act's application, and to offer recommendations to the General Assembly about amending the Act. The Board consists of three members, appointed by the Governor, serving three-year terms. §10-502.2. The Attorney General's Office provides the staff for the Board.

The Compliance Board's primary duty is to "receive, review, and resolve complaints from any person alleging a violation of the provisions of this [Act] and issue a written opinion as to whether a violation has occurred." §10-502.4(a). The Board's procedures, as outlined in the Act, call for a written complaint stating the nature of the alleged violation; a written response by the public body within 30 days, including certain documentary material if requested by the Board, §10-502.5(c)(2)(ii); an "informal conference," if the Board wants more information or believes that oral presentations would be helpful;<sup>1</sup> and the issuance of a written opinion by the Board. §10-502.5.<sup>2</sup> One commentator has praised the Compliance

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<sup>1</sup> Interestingly, the Act does not apply to these informal conferences conducted by the Board. "[A] determination of ... a complaint by the Board" is defined as "quasi-judicial" and is therefore outside the scope of the Act. §§10-502(i)(3) and 10-503(a)(1)(iii).

<sup>2</sup> In 2007, legislation was enacted to provide an alternative process whereby the Compliance Board will send a complaint to the appointing authority if the public body no longer exists. See Chapter 643, Laws of Maryland 2007.

Board's "important role in promoting the public policy under the Open Meetings Act.... It is a public service in the best sense of the term."<sup>3</sup>

The Board is not set up to resolve disputed issues of fact. If key facts about a complaint are disputed, the Board will invoke its express authority to "state that the Board is unable to resolve the complaint." §10-502.5(f)(2).<sup>4</sup> The Board has prepared a summary of its complaint procedures, which are posted on our website and reprinted in Appendix E.<sup>5</sup>

The Board's opinions are "advisory only." §10-502.5(i)(1). The Board is prohibited from "requir[ing] or compel[ing] any specific actions by a public body." §10-502.5(i)(2).<sup>6</sup> Indeed, if a complainant brings a lawsuit about a public body's alleged violation of the Act after the Board has issued its opinion, the opinion may not even be introduced into evidence in court. §10-502.5(j).

In addition to receiving complaints of alleged prior violations of the Act, the Board on occasion seeks to resolve disputes prospectively. Anyone who believes that a public body is about to hold a closed meeting when the Act requires the meeting to be open may complain, orally or in writing, to a member of the Board (or, under authorization by the Board, to its counsel in the Attorney General's Office). The person who receives the complaint is to look into the situation and advise the Board, following up later with a written report. If the Board concludes that a violation of the Act would occur if the meeting were not open, the Board's representative is to counsel the public body in an effort to achieve compliance with the Act. §10-502.6.

Finally, the Board is responsible for studying "ongoing compliance" with the Act by public bodies and is to "make recommendations to the General Assembly for

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<sup>3</sup> Robert H. Drummer, *May I Watch? Complying with the Open Meetings Act*, 39 Md. Bar J. no 1, at 27 (January/February 2006).

<sup>4</sup> See, e.g., 1 OMCB Opinions 56 (1994) (Opinion 94-1); and 1 OMCB Opinions 38 (1993) (93-7).

<sup>5</sup> The current procedures were developed and posted as part of a settlement in a declaratory judgment action brought against the Compliance Board in the Circuit Court for Howard County.

<sup>6</sup> See, e.g., 3 OMCB Opinions 182, 187 (2002) (Opinion 02-3).

improvements in [the Act].” §10-502.4(c). The vehicle for any recommendations is an annual report to the Governor and the General Assembly, which is to contain any recommended amendments as well as a discussion of the Board’s activities.<sup>7</sup>

## B. JUDICIAL ENFORCEMENT

Any person who believes that a public body has failed to comply with the Open Meetings Act may file suit against the public body in circuit court. §10-510(b)(1).<sup>8</sup> The suit is to be filed within 45 days of the alleged violation. §10-510(b)(2) and (3). If the person has chosen to file a complaint with the Open Meetings Compliance Board, the 45-day statute of limitations is tolled while the Board considers the matter. §10-510(b)(4).<sup>9</sup>

If a person files suit, he or she must overcome a presumption that the public body did not violate the Act. §10-510(c).<sup>10</sup> But if the person succeeds in carrying that burden, the court has broad authority to issue injunctive or declaratory relief. In particular, “if the court finds that a public body willfully failed to comply with §§10-505, 10-506, 10-507 or 10-509(c) of this [Act] and that no other remedy is adequate, [the court may] declare void the final action of the public body.” §10-510(d)(4).<sup>11</sup> In a decision later vacated, the Court of Special Appeals held that the

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<sup>7</sup> The Board’s most recent annual report is available on our website. Visit [www.oag.state.md.us](http://www.oag.state.md.us), then click on “Open Government,” then on “About the Maryland Open Meetings Act.”

<sup>8</sup> This provision previously required a plaintiff to have been “adversely affected.” This limiting language was removed from the Act when the General Assembly overrode the Governor’s veto of House Bill 73 and Senate Bill 87 of 2004. See Chapters 1 and 6, Special Session, Laws of Maryland 2004.

<sup>9</sup> The 45-day limitations period does not apply to a claim about an Open Meetings Act violation that is included in a petition for judicial review of a government agency’s action. *Handley v. Ocean Downs, LLC*, 151 Md. App. 615, 827 A.2d 961 (2003).

<sup>10</sup> This provision is not applicable to complaints to the Compliance Board. See, e.g., 1 OMCB Opinions 180-81 (1996) (Opinion 96-9).

<sup>11</sup> Although Article 8 of the Maryland Declaration of Rights bars legislation that would vest in the courts power to void governmental actions on broad public policy grounds, the standards in §10-510(d)(4) are constitutionally sufficient. See *Sugarloaf Citizens Ass’n v. Gudis*, 319 Md. 558, 569, 573 A.2d 1325 (1990).

term “willfully,” as used in §10-510(d)(4), “does not require knowledge that the meeting actually violates the Open Meetings Act but instead refers to intentional conduct.”<sup>12</sup>

In addition, the court may award attorneys fees and other litigation expenses to the prevailing party. §10-510(d)(5)(i). The award of fees is not automatic,<sup>13</sup> and there is no presumption that a party who prevails on the merits is entitled to attorneys fees.<sup>14</sup> Fees may be awarded, however, even if the public body acted in good faith.<sup>15</sup>

Three types of actions are excluded from judicial review: appropriating public funds, levying a tax, or issuing bonds or other debt obligations. §10-510(a)(1). The exclusion regarding appropriations encompasses “[t]he entire budgetary process.”<sup>16</sup>

#### C. CIVIL PENALTY

The 1991 amendments to the Open Meetings Act added a civil (not criminal) penalty provision for knowing and willful violations of the Act. Specifically: “A member of a public body who willfully participates in a meeting of the body with knowledge that the meeting is being held in violation of the [Act] is subject to a civil penalty not to exceed \$100.” §10-511. Only a court may impose a civil penalty;

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<sup>12</sup> *Suburban Hospital, Inc. v. Maryland Health Resources Planning Comm’n*, 125 Md. App. 579, 596, 726 A.2d 807 (1999), vacated as moot, 364 Md. 353 (2001).

<sup>13</sup> *Wesley Chapel Bluemount Ass’n v. Baltimore County*, 347 Md. 125, 699 A.2d 434 (1997) (identifying factors for courts to consider).

<sup>14</sup> *Baltimore County v. Wesley Chapel Bluemount Ass’n*, 128 Md. App. 180, 736 A.2d 1177 (1999). See also *Malamis v. Stein*, 69 Md. App. 221, 516 A.2d 1039 (1986) (award of fees within trial court’s discretion).

<sup>15</sup> *Baltimore County*, 128 Md. App. at 189.

<sup>16</sup> *Board of County Commissioners v. Landmark Community Newspapers*, 293 Md. 595, 607, 446 A.2d 63 (1982).

the Compliance Board may not.<sup>17</sup> The civil penalty provision would not be applicable if the violation of the Act were the result of mere carelessness, a good-faith mistake, or reliance on incorrect legal advice.

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<sup>17</sup> OMCB Opinions 201, 205 (1997) (Opinion 97-1).