

Written Comments of
J.H. Snider
President, iSolon.org
On House Bill 48
Open Meetings Act; Notice and Complaints
Submitted to the Subcommittee on Government Operations
Maryland House of Delegates
February 17, 2011

Although at first glance it would appear hard to oppose the innocuous sounding provisions of HB48, which are quite popular with government agencies and are written in such a way that they would appear to enhance government transparency, this bill should be opposed by those who genuinely care about enhancing government transparency.

The underlying failure of HB48 is that it confuses the purpose of the Open Meetings Act and the right-to-know laws more generally. The purpose of reforming the Open Meetings Act should not be to reduce the burden on public agencies but to enhance open government. The popularity of this bill among government agencies can be attributed to the fact that it does the former but not the latter.

The culture of fakery regarding open meetings in Maryland government is touched on in my essay, [Deterring Fake Public Participation](#), *The International Journal of Public Participation*, Winter 2010, and in my op-ed, [Maryland's Fake Open Government](#), *Washington Post*, April 18, 2010.

In my judgment, this bill weakens Maryland's already very weak Open Meetings Act. By codifying bad practice into law, it will also weaken the already very weak presumption that public bodies should take the spirit as well as the letter of the Open Meetings Act seriously when it is not in their political self interest to do so.

This bill has two major provisions:

- 1) A new government agency exemption from liability for violating the Open Meetings Act if a complaint is filed with the State Open Meetings Law Compliance Board more than 1 year after the action that is the basis for the complaint.**

Unfortunately, Maryland's Open Meetings Compliance Board is often as much a part of the problem as it is part of the solution. Indeed, if I had my druthers, I'd change its name to reflect the fact that it has been largely, if not completely, captured by the public bodies it was supposed to hold accountable. An innocent member of the public looking at the

Open Meetings Compliance Board website might actually think it is designed to represent the public's interest when there are Open Meeting Act complaints.

The restriction of one year on public complaints is surely a proposal appealing to the Open Meetings Compliance Board as well as local government agencies. But if I were to address any one problem with the Open Meetings Compliance Board, providing them one more excuse to allow local public bodies to violate both the spirit and letter of the Open Meetings Act would not be one.

To compel citizens but not the Open Meetings Compliance Board or public bodies to follow Open Meetings Act deadlines reeks of a double standard. Why not penalize the public bodies that often don't respond to notices of violations sent to the Open Meetings Compliance Board within the required 30 days? Why not penalize the Open Meetings Compliance Board when it doesn't issue opinions within the required 30 days and may take many months to? Why does the Open Meetings Compliance Board take the factual claims of public bodies at face value, with no attempt (or powers) to verify claims, but requires authoritative and often impossible standards of evidence from citizens trying to bring Open Meetings Act violations to the attention of the Open Meetings Compliance Board? In short, why is there such solicitous concern for the convenience of the Open Meetings Compliance Board and local public bodies but not average citizens?

Let's assume that a public body has held a secret meeting in violation of the Open Meetings Act and that it has successfully hid this fact for more than a year. Moreover, let's assume that no average citizen would have any reasonable method of discovering the violation at the time it occurred because of the simple rule of reason that you cannot know information that has been hidden from you. This law would reward rather than punish this wifully secretive and illegal public meeting behavior.

Alternatively, let's assume that the citizen is pretty unsophisticated (as many are) about filing an Open Meetings Act complaint and that the public body and Open Meetings Compliance Board, for whatever reasons, delay their responses so the citizen receives feedback near or after the one-year mark. Let's further assume that the Open Meetings Compliance Board denies the complaint on a technicality and that the citizen has learned a lot about filing an effective complaint in the intervening months since filing the original complaint. If after receiving feedback the citizen discovers her mistake in arguing the complaint, should she no longer have time to recast the complaint? Based on my reading of this law, I would say it says "no." The law is also vague on what might be construed as the same or a new complaint, with presumably only a new complaint covered by this law.

The one year limitation contained in HB48 should be eliminated because it will be abused and used to hinder the public's right to know how its government operates.

- 2) **A codification and thus legitimization in the Open Meetings Act of the current archaic and citizen-unfriendly public notice practices, including public notice by posting notice on a website regularly used by a public body (unless the public body does not regularly use or have access to a website); posting notice at a location accessible to the public and regularly used by the public body for posting notices; or posting notice by delivery to a representative of a favored member of the news media.**

Such a public notice requirement makes it very easy for obscure public bodies that irregularly hold public meetings to evade the intent of the law. Consider the adequacy of the website notice and physical location requirements. Who, other than high priced lobbyists and other insiders, have time to routinely visit such websites or physical locations to learn about public meetings?

Consider the adequacy of the newspaper requirement. Newspapers are under no obligation to publish the public notices or, if they do publish them, to publish them in a newspaper section that the public will actually read. Even if the public body is willing to spend a fortune to advertise the public notices (one recent study estimated that up to 10% of local newspaper revenue comes from various types of legally required public notices), the notices will still most likely be placed in a newspaper section that few people actually read.

The presumption of the newspaper option is that the newspaper receives notice as a representative and substitute for the general public. But most public meeting notices sent to the local newspaper (often there is just one) do not result in a reporter attending and covering the noticed meetings, let alone reporting about them in accordance with the highest standards of journalism. Sometimes the newspaper and public body will also have a quid pro quo relationship, where in return for receiving exclusive access to public notices the newspaper provides favorable coverage and withholds public notice from competitors (such as bloggers) less favored by the public body.

The private sector, such as the think tank community of which I'm a part, as well as some progressive local governments, now routinely provides email notice of events that they would like the public to attend. Indeed, it is hard to imagine a more ubiquitous, trivial, and affordable technology than automated public notice via email. There is thus really no excuse why, in the year 2011, local public bodies cannot provide this option for citizens, even if only by using Facebook's free and widely used system for doing so.

Similarly, there should be a new requirement that public bodies send out an email notice when they *cancel* public meetings, especially when the cancelation is at the last minute and is not weather related. When a member of the public experiences such a cancelation, it can serve as a great deterrent to future public participation.

In contrast, note that government insiders, such as members of public bodies and their staff, are almost always on government provided email lists that inform them of both

upcoming and canceled meetings. Note, too, that local governments also now use email notice for many purposes not involving democratic accountability, such as notice to public school parents of student tardiness, weather alerts, and PTA fundraisers.

I applaud HB48's requirement that the date of a public notice be affixed on the notice. This is a genuine improvement. But given that there is no requirement that obscure public bodies either archive or widely distribute such notices (by widely I mean distribute to more than one person such as a single news outlet), and no credible method to prevent them from subsequently changing a date on an electronic record of a public notice, the requirement is not what it appears to be at first glance. Moreover, the Open Meetings Compliance Board has no authority or incentive to verify the public notice claims of public bodies. Consequently, small and obscure public bodies have an incentive to lie or fudge when confronted with a claim that they have violated the public notice provision of the Open Meetings Act.

If you are interested in examples of the assertions above, I recommend that you consult my various correspondence with Maryland's Open Meetings Compliance Board.

Unlike HB37, which I thought enhanced open government, albeit ever so slightly, and thus could endorse tepidly, HB48 shifts the balance to more government secrecy, so I cannot endorse it. But the core criticism of HB37 remains valid for HB48: you are seeking to tinker with a horse and buggy contraption when that contraption has long since become obsolete. Let's put the old model to bed and create a new model that would better achieve the stated purposes of the Open Meetings Act.

#