# J.H. Snider’s Testimony before the Maryland House of Delegate’s Committee on Health and Government Operations

# Concerning House Bill 140, Open Meetings Act -- Penalty

# Thursday, February 7, 2013

Good afternoon. My name is J.H. (“Jim”) Snider. I am the President of iSolon.org and a Fellow at the Edmond J. Safra Center for Ethics at Harvard University. I have written extensively about open government issues, including an op-ed in the *Washington Post* on the incentives in Maryland for [Fake Open Government](http://www.washingtonpost.com/wp-dyn/content/article/2010/04/17/AR2010041702662.html). I have also testified extensively before various General Assembly committees, including the Joint Committee on Transparency and Open Government, on right-to-know issues.

I applaud House Bill 140 for seeking to create effective incentives for public bodies in Maryland to comply with the Open Meetings Act.  As I hope you are aware, the current legal enforcement mechanisms for the Open Meetings Act are largely a joke. Please note that I qualify the word enforcement with the word legal because the primary current enforcement mechanism for Maryland’s Open Meetings Act is the court of public opinion rather than the law courts.

The court of public opinion can be a very effective enforcer, especially for relatively high visibility and partisan public bodies such as county councils. For more obscure yet important public bodies, however, it can be highly ineffective. Most local public bodies in Maryland fit in this category of the nonpartisan and obscure.

With the general decline in local newspaper profitability and investigative reporting, the court of public opinion has unfortunately become an increasingly ineffective enforcement mechanism. So a bill to enforce the legal part of the enforcement mechanism is both needed and timely.

There are parts of the bill that I could quibble with. For example, I’d like to see higher penalties for repeat offenders.

But I’d like to focus here on some basic conceptual problems. Merely adding penalties for non-compliance, even the tiny ones contemplated here, is not only inadequate; it may backfire. The consequence may just be more fraudulent statements by representatives of local public bodies, as they would have an even greater incentive to defend illegal practices.

To see how this could be, you must understand that the Open Meetings Compliance Board has no meaningful legal or financial resources to verify the veracity of the claims made by local public bodies. Moreover, as a practical matter, the Open Meetings Compliance Board bends over backwards to give local public officials the benefit of the doubt. This gives local public bodies a strong incentive to fudge the facts. As the penalties increase, the incentive to fudge also increases.

Its public interested rhetoric aside, the Open Meetings Compliance Board also tends to see the world through the eyes of the local public officials it is supposed to regulate. If there ever was a government body where the phrase “regulatory capture” was apropos, it is the Open Meetings Compliance Board. So if you give such a body the power to impose a penalty, you aren’t going to accomplish much.

In addition to monetary incentives, there should be bad publicity incentives that strengthen the court of public opinion. For example, when the Open Meetings Compliance Board rules that a public body has met illegally, that information should be displayed—and displayed prominently—in the official minutes of that meeting. The public body shouldn’t be able to post the minutes as though nothing happened.

More generally, media outlets and the general public ought to be able to sign up for email alerts by jurisdiction so that when the Open Meetings Compliance Board rules that a public body within a particular jurisdiction has violated the Open Meetings Act, notice to the interested publics is automatically generated.

But the best way that you could ensure compliance is to take compliance out of the hands of both the public body and the Open Meetings Compliance Board. Better checks & balances in the design of the Open Meetings Act is needed. The current system is analogous to giving the cashier control of the cash box accounting. No business serious about accountability would ever do that. But like businesses before the advent of the cash register machine in the early 20th century, the technology hasn’t existed until recently to make such checks & balances viable. But with the advent of both the Internet and cloud computing, they have become trivial, as well as a cost savings, to implement.

For example, the way notice should be handled is to take it out of the hands of the local public body. By this I mean that all notices should be submitted via the cloud to a central body, such as the Maryland State Archives. The Maryland State Archives would verify that notice was provided and also provide a simple email signup system so interested publics could sign up to receive customized notices. With such a system there is no room for debate and most of the shenanigans that routinely go on between public bodies and the Open Meetings Compliance Board with respect to such issues would become obsolete.

More generally, the management of public meeting documents should be taken out of the hands of local public bodies, just as employers have increasingly taken the management of company documents out of the hands of their employees. Needless to say, the employees like to maintain as much control as possible over their documents. And the powerful employee lobbies invariably make the case for such control to you. But for the sake of accountability, the local public bodies must give up this control.

I’d encourage you to look at the U.S. Government Printing Office and the U.S. National Archives for some state-of-the-art document controls that are desperately needed to update Maryland’s Open Meetings Act and provide an effective enforcement mechanism that wouldn’t have to rely on the Open Meetings Compliance Board. You need to hardwire compliance into the DNA of the Open Meetings Act, which would have the additional benefit of vastly lowering document management and enforcement costs. Tacking new compliance powers onto the flawed Open Meetings Compliance Board is like trying to compete with the advent of the car by adding more horses to the horse and buggy. It might be an improvement over the status quo, but it’s not the improvement that the march of progress demands.

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