

A Q&A with Maryland's new Attorney General Douglas Gansler, highlighting his views on the state of open government in Maryland.

Voters in November selected Democrat Douglas Gansler to succeed Democrat J. Joseph Curran Jr., who served as Maryland's Attorney General from 1987 to 2006, after Curran decided to not seek re-election. Recently Gansler talked with Carroll County Times Editor Jim Lee about his views on open government in Maryland.

Q: What are your personal thoughts on open records and open meetings?

A: The Attorney General's Office has long been a proponent of open government laws. We plan to continue that effort. The public's right to information about the activities of its government is essential to a healthy democracy.

Q: What is your general opinion of the current open records/open meetings laws?

A: See answer to question 1.

Q: Is there anything you would like to change?

A: I do not have any specific proposals at present.

During the next few months, we will be studying the public security exemption that was added to the [Public Information Act] in 2002 after the 9/11 attacks and will make a report to the Legislature later this year. That report may include some recommendations, but it is too early to say what, if any, we will make. We would welcome any input from members of the public or the press - in particular, whether that exemption has been invoked to deny access to records and the circumstances under which those denials were made.

In my former office, I had little involvement with Open Meetings Act issues. My understanding is that the law itself reflects a reasonable compromise and that the Open Meetings Compliance Board has earned a reputation for careful and fair interpretations of the Act. For now at least, I have no suggestions for change.

Q: Currently there is an Open Meetings Compliance Board for public meeting violation complaints. But there is no body that oversees the open records law. Should there be?

A: It is an idea that may be worth a look. The one difficulty may be that, in contrast to the Open Meetings Compliance Board, a PIA compliance board would be a labor intensive venture.

In the Open Meetings context, the underlying facts and the issue to be decided by the Board are sketched out in the written complaint and in the public body's written response to that complaint. This process usually does not call for fact-finding or review of voluminous documents. I understand that the Compliance Board has never been given any appropriation.

In the PIA context, a compliance board will have to confront questions such as what records actually exist - which may call for some kind of investigation - and whether records claimed to be exempt are indeed exempt - which will require that an agent of such a board review those records in detail. The General Assembly would have to commit sufficient funds and resources to support such an effort. In a tough budgetary climate, I doubt whether this is feasible.

Q: Compliance Board opinions are non-binding. Do you think their opinions are sufficient motivation to prompt government bodies to change their ways if they operate in secret or to make open government a priority for those government bodies?

A: I understand that the experience under the Compliance Board has been positive. Many violations are unintentional, the result of carelessness or sloppy procedures, so an advisory opinion pointing out the

problems can result in positive change. Making Compliance Board opinions binding would turn the Board into an enforcement agency and require significant additional resources.

Q: Do you think there should be stronger penalties for public bodies or individuals that fail to comply with the law?

A: I assume that this question refers to penalties imposed by a court for non-compliance with the PIA and Open Meetings Act. In the context of the PIA, the law already includes criminal penalties and, in some contexts, an award of actual damages. (The Legislature last reviewed and modified the penalties associated with the PIA in 2002). The Open Meetings Act includes a civil penalty provision. However, the courts have usually not resorted to those remedies. Generally, if an agency is wrong, the court will issue an injunction against the agency. If the agency's position did not have some basis in the law, the court will also require the agency to pay the requester's attorney's fees. The courts have rarely, if ever, granted damages or imposed civil or criminal penalties with respect to these statutes.

One should also keep in mind that the criminal and civil penalties under the PIA also apply to wrongful disclosure, as well as a failure to make records available for inspection. An enhancement of those penalties, even if they are never invoked, might well make public employees more cautious about disclosing records.

In the end, the best prescription for improving compliance with Open Government laws is (1) education - both of agency employees and members of the public - and (2) communication between requesters and agencies.

Q: Some states have created ombudsman positions as an independent agency outside normal government channels to oversee open records and open meetings compliance. Is this something you think is needed or would recommend our Legislature do?

A: The Open Meetings Compliance Board already serves this function in Maryland for open meetings issues. I have not studied the experience of other states with an independent ombudsman agency for PIA issues, but my preliminary thoughts would be the same as with the PIA compliance board posed in question 4 above.

Q: Do you have any advice for citizens who continually encounter resistance in their attempts to get public records or attend public meetings?

A: PIA: Educate yourselves as to your rights under the statutes - and to the limits of those rights. Study the Public Information Act manual and the other educational materials available on our Web site. Check the Web site of the agency from which you will be requesting records. It could be that the material you want is already posted on that Web site - or the Web site will have information on how to get the specific information you want.

Make your PIA requests as clear and as sharply focused as possible. Be willing to modify or clarify the request if that helps the agency get you the information you want without having to review a lot of other records to respond to an overbroad request. Be flexible when an overworked agency employee is doing his or her best to get you the records you are entitled to in a timely manner.

If you are denied access to records, insist on a written response that spells out the reason for the denial, as well as the legal basis. If you believe that reason for the denial is incorrect or mistaken, communicate the reason for that belief to the agency. The agency may end up agreeing with you or clarifying why it does not.

Open Meetings Act: After reading the Open Meetings Act manual and the relevant opinions of the Open Meetings Compliance Board to see whether what's bothering you might be a violation, file a complaint with the Board.

Q: Do you think the current training programs offered to public officials by the Attorney General's office are sufficient, or is there something more you'd like to see done?

A: The current training programs were developed in conjunction with the Press Association, the Maryland Association of Counties, and the Maryland Municipal League. I understand that they have generally been well-received. I also understand that they are designed for a general audience of public employees and provide an overview of the Public Information Act and Open Meetings Act.

I think we should continue that effort. New officials and employees enter public service every day and there will always be a need for basic training in the PIA and Open Meetings Act. What we might look to do in the future is enhance that training in areas where we, or our partners in this effort, perceive a shortfall. For example, if, as the recent audit has suggested, there is confusion about whether various types of emergency response plans are open to the public, we can review the relevant laws in greater detail and make that a part of future training.