



The Court of Appeals Provides Guidance for Utilizing Emails Under the Open Meetings Act

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In the recent case of *Markel, Rogers and Schmidt v Mackley, Barkham, Tombouljian and Peruzzi*, Michigan Court of Appeals, unpublished (November 1, 2016) (Docket No. 327617), the Michigan Court of Appeals reaffirmed the rule that emails that constitute deliberations regarding a public body’s actions violate the Open Meetings Act. The Open Meetings Act, Public Act No. 267 of 1976, (“OMA”) was enacted by the Michigan Legislature to protect a citizen’s right to know what is going on in government by opening to full public view the processes by which elected and nonelected officials make decisions. The courts have held previously that when emails between a number of persons that constitute a quorum of a public body are on the chain of emails where deliberations occur toward a particular resolution, it violates the OMA. However, this decision analyzes and clarifies three different scenarios involving emails to which the OMA applies.

Specifically at issue on appeal were emails sent between the commissioners regarding certain Parks and Recreation Commission (“PRC”) matters that plaintiffs allege violated the OMA. The Court looked at multiple scenarios involving emails, including a quorum of board commissioners and emails of a subcommittee. Specifically, the Court looked at three scenarios: emails involving a quorum of members where deliberations were held, emails involving a quorum where only a fact

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The Court reiterated the definition of “deliberations,” stating that it constitutes the act of carefully considering issues and options before making a decision or taking some action such as by analyzing, discussing and weighing the evidence. Further, the Court concluded that it is a discussion of a public question in an assembly involving opposing viewpoints. Based on the Court’s decision in this case, it is clear that deliberations of a quorum of a public body must be held in an open meeting.

was discussed, and emails between subcommittee members. Plaintiffs alleged that defendants used email communications to discuss and decide how to address PRC matters and would then carry out those decisions at the public PRC meetings as a united front. The Court of Appeals ultimately decided that in two of the instances there were violations of the OMA.

To constitute a meeting under the OMA, the following elements must be present: (1) a quorum, (2) the deliberation or rendering of a decision, (3) on a matter of public policy. The Court reiterated the definition of deliberations stating that it constitutes the act of carefully considering issues and options before making a decision or taking some action such as by analyzing, discussing and weighing the evidence. Further, the Court concluded that the deliberations included a discussion of a public question in an assembly involving opposing viewpoints.

The Court clearly held that when there are deliberations toward a decision over email where a quorum is present, this violates the Open Meetings Act. Each alleged violation must be reviewed on a case-by-case basis and any decision will be driven by the facts.

The Court acknowledged that there must be some level of balance “because it would be improper to be able to have an OMA violation foisted upon a quorum of individuals simply by including them all in an email.” Therefore, in order to avoid a violation of the OMA, there should be no discourse on the issue of public policy that is being presented. Even if one person speaks on the issue over email with the intent of deliberating the issue, this may violate the OMA.

In order to determine whether a violation of the OMA occurred, the Court reviewed the emails against what actually transpired at the meeting and determined that it was consistent with those discussions contained in the emails. The Court found it apparent that deliberations over email took place, when at the actual open meeting, the conversations followed the exact path of the email conversations.

In the first instance, the Court held that deliberations took place when the commissioners orchestrated the manner in how to handle a legal opinion. It was determined that a request for the opinion should be made and a draft position statement and strategy were developed for what was to take place at the meeting. They determined who would move to adopt, who would second, and the vote was predicted. The Court did make a distinction that “deliberations” did not occur when an email string was held between four members strictly to determine who was in charge of Parks and Recreation employees.

The Court further reviewed emails by a subcommittee wherein only three persons were included on the string of emails. The Court ruled that because they were meeting as a subcommittee (via email and in person), which is less than a quorum, there was no violation as they were only meeting to make a recommendation to the public body as a whole.

The Court of Appeals in this case has confirmed and elaborated on its previous rulings that it is a violation of the OMA to deliberate regarding a decision over email where a quorum is present on

the group email. Deliberations and/or those conversations that advance a public body toward a decision should only be had at a public meeting; however, factual items may be discussed and subcommittees may have discussions over email. In this case, an injunction was issued to prevent the members from violating the OMA, and no damages were awarded.

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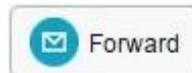
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