Open Meetings and Record Retention for Boards and Commissions

By resolution of City Council, City of Ann Arbor commissions must conduct themselves according to the procedures contained in the Michigan Open Meetings Act ("OMA"). Essentially, this means that City commissions must deliberate and make all their decisions during a public meeting, including a full discussion of the reasons for those decisions. In general, commissioners should avoid emailing, talking, or otherwise communicating with other commissioners outside of a public meeting about how they will vote, reasons for voting a particular way, or the pros and cons of an issue or petition that may come before the commission.

Commissioners should also avoid emailing the entire commission (or a quorum of the commission) about commission business. If commissioners have factual information they wish to communicate to the entire body, they should send it to the staff liaison and request that it be provided to the body. Commissioners should never "reply to all" if they receive such an email.

Sometimes, discussion between small groups of commissioners outside of a public meeting may be appropriate (for example, when the full commission designates a small work group to report on or develop draft policy recommendations that will be considered by the full commission). In such cases, the discussions should involve as few commissioners as possible and must never involve a quorum. If the matter warrants discussion with a quorum of commissioners outside of the regular meeting schedule, a special meeting may be appropriate, which must be posted and open to the public consistent with the OMA. Formal subcommittees of a commission are also required to have open meetings with public notice, even if the subcommittee contains less than a quorum of the full commission.

Commissioners should also be aware that email communications about commission business are generally considered to be public records subject to disclosure under the Michigan Freedom of Information Act (FOIA). For this reason, email correspondence regarding the commission's business should generally copy the staff liaison so that the City has a record of the correspondence. Commissioners are otherwise responsible for retaining and producing emails and other records related to commission business upon request by the City. Note that email addresses used by commissioners may be subject to public disclosure, so

commissioners may wish to create a separate email address for commission business if they have privacy concerns.

Attached is a one-page document from the Michigan Municipal League illustrating well how deliberating via email could be construed as an OMA violation. Questions about this material or about specific situations should be submitted to your staff liaison, who if necessary, may forward it to the City Attorney for further guidance.

FACT SHEET

michigan municipal league

Open Meetings Act—Email Quorum Violation

Introduction

The Michigan Court of Appeals has ruled that email deliberations among a quorum of public body members violates the Open Meetings Act (OMA). The November 1, 2016, unpublished opinion was issued by a three-judge panel in the case of *Markel v Mackley,* Case No. 327617.

Meeting requirements

Section 3 of the Michigan Open Meetings Act, PA 267 of 1976, as amended (OMA), requires that:

- "All meetings of a public body shall be open to the public and shall be held in a place available to the general public," and
- "All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public."

Interpreting these provisions, the Court explained that, "[u]nder the OMA, public bodies must conduct their meetings, make all of their decisions, and conduct their deliberations (when a quorum is present) at meetings open to the public," (quoting *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 134-135 (2014).

Deliberations

In *Markel*, four members of a seven-member elected public body engaged in numerous email exchanges regarding matters of public policy which would soon come before the public body for consideration. Three of the members on the group emails actively exchanged thoughts and plans to handle the matters. The fourth member on the group emails simply received the emails but did not actively engage in the exchange. At subsequent public meetings, the matters were handled just as had been planned in the email exchanges. The Court found that the group emails constituted a "meeting" under the OMA because there was a quorum present and deliberations occurred on a matter of public policy. Furthermore, the Court found that, "Because the meeting was held privately via email, the four defendants violated [Section 3(3) of the OMA] which required such deliberations to be open to the public."

The Court acknowledged that the mere receipt of an email by a public body quorum does not, itself, constitute "deliberation" and that there must be some level of discussion on the issue of public policy being presented. While the Court ultimately ruled that such a finding is often fact-specific, in reaching its decision it relied on the facts that:

1) The members who received the emails were not "mere observers," and that their tacit agreement to the substance of the email was later demonstrated at public meetings by, "acting consistently with decisions made in the emails;"

2) None of the members objected to their inclusion on the emails; and

3) The response by members to some of the emails, but not all, could indicate participation on behalf of a member.

While the Court's ruling did not specifically address group text messages, the rationale applied in this case would apply equally to group text messages and other forms of electronic communications. Thus, members of Michigan public bodies must act with great care to avoid group communications that may constitute an impermissible "meeting" under the Open Meetings Act. See the following Fact Sheets: OMA—Definitions and Requirements, OMA—Posting Requirements, OMA—Calling Closed Meetings, and OMA—Closed Meeting Minutes.

This Fact Sheet was provided by the law firm of Miller Canfield.