

## **Open Meetings and Record Retention for Boards and Commissions**

City commissions<sup>1</sup> are expected to conduct themselves according to the procedures contained in the Michigan Open Meetings Act (“OMA”). Essentially, this means that City commissions should deliberate and make all their decisions during a public meeting, including a full discussion of the reasons for those decisions. Commissioners should avoid emailing, talking, or otherwise communicating with other members 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.

Sometimes, discussion between commissioners outside of a public meeting may be necessary (for example, when developing draft policy recommendations for presentation to the full commission). In such cases, the discussions should involve as few commissioners as possible and never involve a quorum. If the matter warrants substantial discussion with multiple commissioners outside of the regular meeting schedule, a subcommittee may be appropriate, the meetings of which would be posted and open to the public.

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. 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 are two one-page documents from the Michigan Municipal League discussing the basic requirements of the OMA, as 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 legal advice.

---

<sup>1</sup> There are a variety of names for City-created bodies, such as boards, commissions, committees, task forces, etc. This memo uses “commission” to mean any such body.

## Open Meetings Act—Definitions and Requirements

### Definitions

Public Body	Any local legislative or governing body, including a board, commission, committee, subcommittee, authority or council, empowered to exercise governmental or proprietary authority or function.
Meeting	The convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy.
Closed Session	A meeting or part of a meeting of a public body which is closed to the public.
Decision	A determination, action or vote on a motion, proposal, recommendation, resolution or ordinance, on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.
Person	An individual, corporation, partnership, organization, or association. This does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility.

### Requirements for Meetings

- All meetings of a public body shall be open to the public and shall be held in a place available to the general public. A person may tape record, video tape, broadcast live, and telecast live the proceedings. A public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting.
- All decisions of a public body shall be made at a meeting open to the public.
- All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public, except for closed sessions.
- A person shall be permitted to address a meeting of the public body under rules established by a public body; a person shall not be excluded from a public meeting except for breach of the peace at the meeting.
- The Act does not apply to a meeting which is a social or chance gathering or conference not designed to avoid the Act.
- Notice of regular meetings shall be posted within ten days after the first meeting in each calendar or fiscal year.
- For a rescheduled regular or a special meeting, a public notice stating the date, time, and place of the meeting shall be posted at least 18 hours before the meeting in a prominent and conspicuous place at both the public body's principal office and, if the public body directly or indirectly maintains an official internet presence that includes monthly or more frequent updates of public meeting agendas or minutes, on a portion of the website that is fully accessible to the public. See Fact Sheet: OMA—Posting Requirements for more details.
- Minutes must be taken.

# 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.