

Complying with FOIA and OMA

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Presentation Outline

- Recent Headlines
- Open Meetings Act
- Public Records Implications
 - FOIA
 - Records Retention
- Policy Considerations
- Questions?



Recent Headlines

“Lawyers see ‘Highly Suspicious’ Open Meetings Issue in Redford Superintendent Appointment”

www.hometownlife.com, March 29, 2018

“Pair of Cryptic Closed Session Items Approved by the City Council”

www.mlive.com, April 2, 2018

Recent Headlines

“Judge Orders U of M to Comply with Freep FOIA”

www.michiganradio.org, March 17, 2018

“Judge Orders U of M to tell Free Press How it Pays Top Endowment Official”

www.freep.com, March 16, 2018

“See [] School Board Members’ Texts Violating OMA”



I talked [REDACTED] and he feels we should give [REDACTED] a couple of months to find another job. I have a call in to [REDACTED] since I'm not sure how that would work. [REDACTED] has spoken to [REDACTED] attorney. \$100,000 is currently on the table.

“See [] School Board Members’ Texts Violating OMA”

No. Too much damage already.

“See [] School Board Members’ Texts Violating OMA”

Learned that if I txt 4 or more, I'm in violation of open mtgs act so I will be texting 2 or 3 at a time. Also, if anyone meets with administration, I need to know. That's policy. Thanks

The Open Meetings Act

- The intent of the Open Meetings Act (OMA) is to provide openness and accountability in government and is interpreted to accomplish this goal.

Booth Newspapers v Wyoming City Council
168 Mich App 459 (1988)

- The OMA is construed liberally in favor of openness.

Wexford County Prosecutor v Pranger
83 Mich App 197 (1978)

- Attempts to avoid the OMA are regularly met with disapproval by the courts.

Booth Newspapers v Wyoming City Council
168 Mich App 459 (1988)

The Open Meetings Act

- All meetings of a public body shall be open to the public.
- 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.

MCL 15.263(1); MCL 15.263(2); MCL 15.263(3).

**Subquorum deliberations will be discussed later.*

The Open Meetings Act

- **Public Body** - means any State or Local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered by State constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function, or a lessee thereof performing an essential public purpose and function pursuant to the lease agreement.

MCL 15.262.

The Open Meetings Act

- **Meeting** - means 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** - means a meeting or part of a meeting of a public body which is closed to the public.

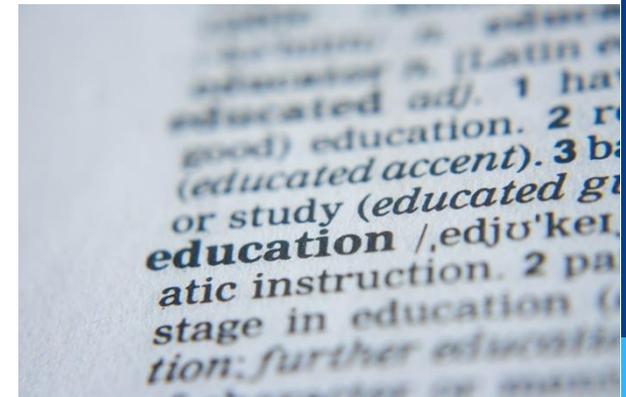
MCL 15.262.

**Subquorum meetings will be discussed later.*

The Open Meetings Act

- **Decision** - means a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.

MCL 15.262.



The Open Meetings Act

- **Deliberation** – While the act does not define deliberation, the courts have provided guidance:
 - “deliberation” includes “discussing,” which, in turn, is defined as “the act of exchanging views on something”
 - *Hoff v Spoolstra*, unpublished, 2008 (COA No. 272898)
 - Black's Law Dictionary . . . defines this word as “the act of *carefully considering* issues and options *before making a decision or taking some action*; esp., the process by which a jury reaches a verdict; as by analyzing, *discussing*, and weighing the evidence”. The word “discussion” is defined as the act of *exchanging views* on something; a *debate*.
 - *Ryant v Cleveland Twp.*, 239 Mich. App. 430 (2000).

The Open Meetings Act

Trial Court Holds Email Deliberations Violates the OMA; Court of Appeals Vacates for Other Reasons

Citizens for a Better Algonac Community Schools v Algonac Community Schools, 317 Mich. App. 171 (Sept. 8, 2016)

- Early 2014 – Board undertakes search for Superintendent
- Apr. 1, 2014 – Board votes to offer position to neighboring Superintendent and “begin contract development [asap]”
- President and members exchange a series of emails over the next few weeks regarding contract negotiations, drafts of proposed contracts, working out details and settling on a final contract.

The Open Meetings Act

Trial Court Holds Email Deliberations Violates the OMA; Court of Appeals Vacates for Other Reasons

Citizens for a Better Algonac Community Schools v Algonac Community Schools, 317 Mich. App. 171 (Sept. 8, 2016)

- Apr. 28, 2014 – Board approves contract “unanimously, swiftly, and without discussion”
- May 2014 – P files suit alleging emails constitute deliberations of a public body in violation of OMA
- P sought declaratory judgment finding a violation of OMA, an order compelling compliance and enjoining further non-compliance, and attorney fees and costs

The Open Meetings Act

Trial Court Holds Email Deliberations Violates the OMA; Court of Appeals Vacates for Other Reasons

Citizens for a Better Algonac Community Schools v Algonac Community Schools, 317 Mich. App. 171 (Sept. 8, 2016)

- T/C: Board “violated the [OMA] by conducting deliberations...outside of a public meeting”
- T/C: No injunction as P failed to show practice occurred in the past, continued at the present time, or would persist in the future

The Open Meetings Act

Citizens for a Better Algonac Community Schools v Algonac Community Schools, 317 Mich. App. 171 (Sept. 8, 2016)

- T/C: No injunction = no attorney fees or costs
- COA
 - A complaint seeking pure declaratory relief, as an independent remedy standing on its own, is unsustainable in regard to alleged OMA violations.
 - OMA provides 3-tiered enforcement scheme for private litigants
 - An action to invalidate a decision made in violation of the OMA. MCL 15.270
 - An action for injunctive relief enjoining ongoing OMA violation and compelling compliance. MCL 15.271
 - An action for damages for intentional OMA violation. MCL 15.273
 - P's not entitled to injunction = no sustainable cause of action. Vacated the T/C's granting of declaratory relief.

The Open Meetings Act

Court of Appeals Holds Email Deliberations Among a "Quorum" of a Public Body Violates the OMA

Markel v Mackley, Case No. 327617 (Mich. Ct. App., Nov. 1, 2016)(Unpublished)

- 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 Open Meetings Act

Court of Appeals Holds Email Deliberations Among a "Quorum" of a Public Body Violates the OMA

Markel v Mackley, Case No. 327617 (Mich. Ct. App., Nov. 1, 2016)(Unpublished)

- 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 Open Meetings Act

Court of Appeals Holds Email Deliberations Among a “Quorum” of a Public Body Violates the OMA

Markel v Mackley, Case No. 327617 (Mich. Ct. App., Nov. 1, 2016)(Unpublished)

- 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.
- “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 Open Meetings Act

What about subquorum meetings or communications?

- These cases were held to be in violation of the OMA:
 - *Booth v Wyoming*, 168 Mich.App. 459, 425 N.W.2d 695 (1988)(subquorum deliberations of a city council over two day period violated the OMA).
 - *Booth Newspapers, Inc. v. Univ. of Michigan Bd of Regents*, 192 Mich.App. 574, 481 N.W.2d 778 (1992) aff'd in part and rev'd in part on other grounds 444 Mich. 211 (1993) (sub-quorum committee given the authority to act regarding the selection of a university president violated the OMA; “round-the-horn” telephone calls and conferences resulted in “decisions” required to be made at an open meeting).

The Open Meetings Act

- *Federated Publications, Inc. d/b/a Lansing State Journal v Michigan State University*, 221 Mich App 103; 561 N.W.2d 433 (1997), rev'd on other grounds 460 Mich 755 (1999) (sub-quorum committee given the authority to act regarding the selection of a university president violated the OMA – note – reversed on unrelated constitutional grounds).
- *Schmiedecke v Clare School Bd*, 228 Mich App 259; 577 N.W.2d 706 (1998), (sub-quorum committee given the authority to make only a recommendation on policy regarding evaluation of administrators violated the OMA).
- *Hoff v Spoelstra, et al*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2008, (Docket No. 272898) (subquorum discussions on termination of city attorney violated OMA.)

General Provisions of FOIA

- *Legislative Intent*
 - *Public Access to Government Information*
 - *Access to the affairs of government and official acts of public officials*
 - *Participate in the democratic process*
- *FOIA is a pro-disclosure statute*
- *Exemptions are narrowly construed*
- *Duty to provide access to non-exempt records*

Records Subject to Disclosure

- All public records are subject to full disclosure under the act unless the material is specifically exempt under an express statutory exemption. *Swickard v. Wayne County Medical Examiner*, 438 Mich 536, 544 (1991).

What is a Public Record?

- *A public record is a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software.*

MCL 15.232

What is a Writing?

- *A “Writing” means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.*

MCL 15.232(h)

Electronic Records

Text messages satisfy the statutory definition of a public record if they capture communications by public officials in the performance of an official function.

- Flagg v City of Detroit, 252 F.R.D. 346 (E.D. MI 2008)



Records Retention

- “A record that is required to be kept by a public officer in the discharge of duties imposed by law, that is required to be filed in a public office, or that is a memorial of a transaction of a public officer made in the discharge of a duty is the property of this state and shall not be disposed of, mutilated, or destroyed except as provided by law.”

MCL 399.811 (Michigan Historical Center Act governing record retention).

Records Retention

- “All official books, papers or records created by or received in any office or agency of this state or its political subdivisions, are public property belonging to the people of this state. All such books, papers, or records shall be disposed of only as provided in...[Record Retention Laws MCL 399.811]...”

MCL 750.491 (Michigan Penal Code).

Records Retention

- “A person shall not willfully carry away, mutilate, or destroy the books, papers, records, or any part of a book, paper, or record described in subsection (1) and shall not retain and continue to hold the possession of those books, papers, or records, or parts of those books, papers, or records and refuse to deliver up those books, papers, records, or parts of those books, papers, or records to the proper officer having charge of the office to which those books, papers, or records belong upon demand being made by that officer or, if the office is defunct, the Michigan history center created in the Michigan history center act, 2016 PA 470, MCL 399.801 to 399.812. A person who violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$1,000.00.”

MCL 750.491 (Michigan Penal Code).

Policy Considerations

Applicable to email, text messaging and social media platforms

- Recognize record retention requirements
 - Practical challenges of retention, reproducing, disclosing
- Recognize OMA/FOIA Concerns
 - Discourage discussions or deliberations by board members
 - Have media/management staff post and respond on social media, not board members
- Discourage use of personal accounts for public business
- Consult with your legal counsel regarding policies

Questions?



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Steven Mann is a senior principal with Miller, Canfield, Paddock and Stone, P.L.C. practicing in the area of public finance and municipal law. Steve specializes in the area of municipal finance, representing public agencies as bond counsel. His practice covers all facets of tax increment financing, special assessments, and economic development. Steve also specializes in complex issues related to the Freedom of Information Act (FOIA) and the Open Meetings Act (OMA).

Steve co-authored the *Sunshine Laws and Local Government* (OMA/FOIA) chapter of the *Michigan Municipal Law* handbook published by the Institute for Continued Legal Education.

Steve has authored several *amicus curiae* briefs in both the Michigan Court of Appeals and the Michigan Supreme Court arguing on behalf of the Michigan Municipal League, the Michigan Townships Association, the Public Corporations Section of the State Bar of Michigan, and other municipal associations and their constituents.

Steve served twelve years elective office on the Charter Township of Plymouth Board of Trustees (2000-2012), including one term as Township Supervisor and two terms as Trustee, and one additional year as an appointed trustee (2015-2016). He received his law degree, *cum laude*, from Thomas M. Cooley Law School in Lansing, and his B.B.A., *summa cum laude*, from Cleary University.