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RECEIVED
C: Council/RA
DEC - 3 1999
ROCHESTER HILLS
CITY COUNCIL

December 1, 1999

City Council
City of Rochester Hills
1000 Rochester Hills Drive
Rochester Hills, MI 48309

Re: Open Meetings Act/E-Mail Usage

Dear City Councilmembers:

Councilmember Golden has asked about the applicability of the Open Meetings Act to e-mail communications among Councilmembers. I have elected to advise the entire Council on the subject because the answer to Ms. Golden's question applies to all Councilmembers.

Specifically, Councilmember Golden asks whether communication and debate among Councilmembers by e-mail complies with the Open Meetings Act. In response, I am enclosing several pages from the Michigan Association of School Boards' Open Meetings Act Guide (7th Edition) discussing the subject and explaining the "dos and don'ts." In general, telephone or e-mail messages cannot lawfully substitute for public deliberation of the issues at open City council meeting. Such "round-robinning," has never been permitted by telephone, and it is unlikely that it can lawfully be done by e-mail either. This does not mean Councilmembers may never communicate with each other by e-mail. Councilmembers should be able to contact each other one-at-a-time - - in person, by telephone or by e-mail - - to lobby one another. However, Councilmembers must exercise caution. As the enclosed pages indicate, when the e-mail sender or recipient makes "courtesy" copies of e-mail messages available to other members, this practice could be considered to be a group discussion or deliberation in violation of the

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Clerk
Liaison/RA

Open Meetings Act. Bottom line: E-mail communications should not be used as a substitute for public deliberation of issues at an open meeting.

Very truly yours,

BEIER HOWLETT, P.C.

John D. Staran

JDS/srk
Enclosure
cc: Mayor Pat Somerville (w/enc)
Mr. Marc A. Ott, City Administrator (w/enc)

Roch/Corr/12.01.99 Ltr to City Council re E-Mail

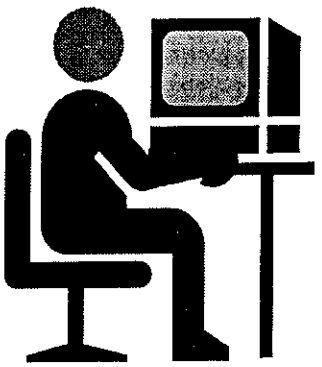
Staff Reports. Although members of a public body constituting a quorum may attend a conference and may listen to the concerns of the public or speakers with special knowledge, a public body cannot hold a closed session for purposes of receiving staff reports. 1979 OAG 5433.

Conference Telephone Calls. A school board cannot conduct a meeting by means of a conference telephone call. 1977 OAG 5183.

E-Mail

Although no appellate rulings have yet been made in Michigan, courts in other states have concluded members of a school board cannot use e-mail communications to decide issues in advance of a meeting or as a means of avoiding open meeting requirements.

School board members should be especially careful to avoid sequential e-mail communications with one another. If one board member sends a message to a second board member, who then adds his or her thoughts and relays the message to a third member, who does the same and forwards the message on to a fourth board member, the question is whether the public officials are making a decision or deliberating towards a decision in violation of open meeting requirements. Because Michigan's Open Meetings Act requires school boards to conduct their meetings in open session (unless a specific exemption applies), sequential e-mail messages cannot be used as a substitute for public deliberation of the issues at a board meeting.



Open meeting requirements do not prohibit school board members or superintendents from distributing e-mail information for which no response is required. A superintendent or the board secretary may use e-mail as a means of sending information to all members of the board, according to a California court, because one-way transmission and solitary review of information does not constitute a meeting.

There is also a presumption that two-way, e-mail communications between board members are not a violation of the Open Meetings Act, if limited to only two people. In Michigan, the Court of Appeals has ruled that a board member may contact other members of the board one at a time to lobby one another. (See "Decision v Lobbying" page 9.) Thus, the assumption is that this ruling also would apply to e-mail. But board members must exercise caution when contacting one another via e-mail. For example, if one board member sends an e-mail message to another board member, the recipient may respond to the sender because this is merely an electronic conversation between two board members, exchanging their opinions or information. However, if either the sender or recipient makes "courtesy" copies of their e-mail messages available to other

board members, they may well be conducting a group discussion in violation of the Open Meetings Act.

As a rule of thumb, board members using e-mail should be aware of the restraints applicable to telephonic, printed, and direct verbal communications. Because e-mail is nothing more than a substitute for such communications, the same restrictions applicable to those means of communication also apply to e-mail. None of these ways of communicating can be used as a substitute for official board meetings, nor as a way of avoiding open debates and votes. The primary purpose of the Open Meetings Act is to enable the public to attend meetings and observe not only the decisions being made, but also the deliberations leading to those decisions.

Interactive Television

Section 624 of the Revised School Code directs intermediate school boards to submit an annual general fund operating budget to a meeting of representatives of its constituent local school boards within the intermediate school district or educational service agency. The representatives attending this meeting determine the maximum amount of the intermediate district's general fund operating budget, but cannot make any decisions about line items within the budget. MCL 380.624. The Attorney General has ruled that if this meeting is held subject to certain conditions, it may be conducted with the use of interactive television. To be in compliance with the Open Meetings Act: (1) the central site must be open to the public; (2) at least some of the constituent district representatives must be present in person at the central site; and (3) the central site must be set up so that interaction among all the constituent district representatives, whether on or off the central site, and interested members of the public is possible. 1995 OAG 6835.

There are no rulings suggesting interactive television may be used for school board meetings.

Decision

Definition. Decisions of a public body may be made only at open meetings. The word "decision" is defined by Section 2 of the Open Meetings Act to mean a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, ordinance, bill, or measure on which a vote is required and by which public policy is formulated. 1977 OAG 5183. To understand the meaning of a decision, public officers must take care to distinguish between the general practice, which requires both deliberations and decisions to take place in open session, and the exceptional circumstance, which may permit some deliberation on certain issues in a closed session.

For example, in 1997, the Court of Appeals ruled a public body violated the Open Meetings Act when it used an informal voting procedure in a closed meeting. Letting a public body make a decision in a closed meeting, the court reasoned, is contrary to the purpose of providing full disclosure of the acts of government officials. *In re Parole of Glover*, 226 Mich App 655 (1997).

Decision v Deliberation. The distinction between "decision" and "deliberation" matters little when a public body is required to hold an open meeting. Under Section 2, decisions must be made at an open meeting. Under Section 3 (3), all deliberations of a public body at which a quorum of the members is present must take place in an open meeting, unless a Section 8 closed meeting exception applies. Thus, if a closed meeting is not permitted, the public body must not only make its decision at the open meeting, but also conduct its deliberations towards reaching that decision at a meeting open to the public.

In contrast, the distinction is very important when a school board or other public body is permitted to convene in a closed meeting. While in closed session, the school board may engage in "deliberations" about the closed meeting topic, but it cannot make a "decision" during the closed meeting. Any decision related to the topic must be made in open session.

General guidance is found in a 1994 Attorney General's opinion. Decisions of a public body may be made only at open meetings. Sections 7 and 8 of the Open Meetings Act, which permit closed sessions for certain enumerated topics, apply only to deliberations on those specific topics. Deliberations on topics not covered by Sections 7 and 8 must take place in open session. In addition, Section 3 requires that all decisions must be made at a meeting open to the public. 1994 OAG 6817. While the meaning of this opinion is clear, it leaves unresolved the question of the difference between a decision and deliberations.

In 1997, the Michigan Court of Appeals considered the issue. A school board went into closed session, as permitted by Section 8 (c) of the Open Meetings Act, to discuss collective bargaining strategy connected to the negotiation of a contract with the teachers' union. During the discussion, the board president solicited the board members' opinions on a pending proposal by asking each board member to indicate where he or she stood. When a lawsuit challenging this procedure developed, the Court of Appeals held there was no violation of the Open Meetings Act. Although Section 3 requires all decisions to be made in a public meeting, Sections 7 and 8 permit closed sessions for specific purposes. Section 3 of the act requires all deliberations of a public body to take place at a meeting open to the public, unless one of the exceptions listed in Section 8 applies. Thus, when a public body meets in closed session, as permitted by the exception for collective bargaining negotiations, deliberations are permitted during that closed session. To reach this conclusion, the Court of Appeals interpreted the word "deliberation" to permit the school board to establish a consensus and develop a course of action relative to the board's desire to hold firm on a particular offer for purposes of collective bargaining strategy. Moreover, the appellate court

emphasized that the closed session deliberations in this case did not, in the court's view, produce a decision because the closed-door discussion was not a final determination affecting public policy. *Moore* v *Fennville Public Schools Board of Education*, 223 Mich App 196 (1997).

School board members can appreciate how limited this decision is by comparing a contrasting opinion by the same court made in 1992 and affirmed by the Michigan Supreme Court a year later. In 1992, the Court of Appeals ruled that even though no actual voting occurs, it is illegal for a public body to reach a general consensus in a closed meeting. The Supreme Court agreed in a decision stating the "plain meaning" of the requirement clearly applies to "all decisions" made by public bodies. The Supreme Court also rejected the idea that a consensus building process can take place in a closed meeting. *Booth Newspapers, Inc* v *Board of Regents of the University of Michigan*, 192 Mich App 574 (1992); 444 Mich 211 (1993).

Finally, it must be remembered that deliberations on a public issue must take place in an open meeting, except when Section 8 of the Open Meetings Act permits a closed meeting. If Section 8 does not apply, every meeting of a public body with a quorum of its members present to deliberate on a matter must be held as a public meeting. This is true even if there is no intention that the deliberations will lead to a rendering of a decision at that particular meeting. 1977 OAG 5183. Closed meeting deliberations are permitted only for legitimate closed meeting purposes.

Decision v Lobbying. While courts consistently have ruled that all decisions of a public body must be made at an open meeting, those interpretations of the law do not prohibit school board members from lobbying one another on issues that may come before the board. A school board member may contact other members of the board in an effort to persuade them to vote a particular way. If an individual board member wishes to discuss an issue with his or her fellow board members, the best way to avoid violating the Open Meetings Act is to contact other board members one at a time. For example, the Court of Appeals has ruled one member of a public body may conduct an informal canvas of his or her colleagues serving on the public body to find out where the votes will be on a particular issue. *St. Aubin* v *Ishpeming City Council*, 197 Mich App 100 (1992).

CHAPTER 2 - QUICK REVIEW

1. The purpose of the Open Meetings Act is to promote open government so that citizens can fulfill their democratic responsibilities.

2. All decisions of a school board must be made in an open meeting.

3. An advance, informal meeting of a school board to decide what will be done later at an open meeting is illegal.

4. A school board cannot conduct a meeting by means of a conference telephone call or two-way e-mail communications.