STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL July 25, 2005	No. I05-004 (R05-010) Re: Open Meeting Law Requirements and E-mail to and from Members of a Public Body

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Pursuant to Arizona Revised Statutes ("A.R.S.") §15-253(B), you submitted for review your opinion to the president of the Washington Elementary School District ("District") Governing Board ("Board") regarding electronic mail ("e-mail") communications to and from members of the Board and Arizona's Open Meeting Law ("OML").

This Opinion revises your analysis to set forth some parameters regarding e-mail to and from members of a public body and is intended to provide guidance to public bodies throughout the State that are subject to the OML. *See* Ariz. Att'y Gen. Op. I98-006 at 2, n.2.

Question Presented

What are the circumstances under which the OML permits e-mail to and from members of a public body?

Summary Answer

Board members must ensure that the board's business is conducted at public meetings and may not use e-mail to circumvent the OML requirements. When members of the public body are parties to an exchange of e-mail communications that involve discussions, deliberations or taking legal action by a quorum of the public body concerning a matter that may foreseeably come before the public body for action, the communications constitute a meeting through technological devices under the OML. While some one-way communications from one board member to enough members to constitute a quorum would not violate the OML, an e-mail by a member of a public body to other members of the public body that proposes legal action would constitute a violation of the OML.

Analysis

The OML is intended to open the conduct of government business to public scrutiny and prevent public bodies from making decisions in secret. *See Karol v. Bd. of Educ. Trs.*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979). "[A]ny person or entity charged with the interpretation [of the OML] shall construe any provision [of the OML] in favor of open and public meetings." A.R.S. § 38-431.09. In addition, devices used to circumvent the OML and its purposes violate the OML and will subject the members of

the public body and others to sanctions.[1] *See e.g.* Ariz. Att'y. Gen. Ops. I99-022, n. 7; I75-7. These principles guide the analysis of the use of e-mails by members of a public body. E-mail communications to or from members of the public body are analyzed like any other form of communication, written or verbal, in person or through technological means.

A. An Exchange of E-mails Can Constitute a Meeting.

1. A Meeting Can Occur Through Serial Communications between a Quorum of the Members of the Public Body.

All meetings of public bodies must comply with the OML.[2] The OML defines a "meeting" as:

> the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action.

A.R.S. § 38-431(4).

The OML does not specifically address whether all members of the body must participate simultaneously to constitute a "gathering" or meeting. However, the requirement that the OML be construed in favor of open and public meetings leads to the conclusion that simultaneous interaction is not required for a "meeting" or "gathering"

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[1] A.R.S. § 38-431-.07 (A) provides for penalties for violating the OML against not only members of the public body, but also against "[a person] who knowingly aids, agrees to aid or attempts to aid another person in violating [the OML]."

[2] A "public body" subject to the OML includes:

> the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivisions. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, such public body.

A.R.S. § 38-431(6).

within the OML. "Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions. . . .. Splintering the quorum can be done by meeting in person, by telephone, electronically, or through other means to discuss a topic that is or may be presented to the public body for a decision." *Arizona Agency Handbook* § 7.5.2. (Ariz. Att'y Gen. 2001) Thus, even if communications on a particular subject between members of a public body do not take place at the same time or place, the communications can nonetheless constitute a "meeting." *See Del Papa v. Board of Regents*, 114 Nev. 388, 393, 956 P. 2d 770, 774 (1998) (rejecting the argument that a meeting did not occur because the board members were not together at the same time and place)[3]; *Roberts v. City of Palmdale*, 20 Cal. Rptr. 2d 330, 337, 853 P. 2d 496, 503 (1993) ("[A] concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement.")[4]

2. Discussion, Proposals and Deliberations Among a Quorum of a Public Body Must Occur at a Public Meeting.

A "meeting" includes four types of activities by a quorum of the members of the public body: discussing legal action, proposing legal action, taking legal action, and deliberating "with respect to such action[s]." A.R.S. § 38-431(4). Three of these activities necessarily involve more than a one-way exchange between a quorum of members of a public body.

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[3] Like the OML, Nevada's open meeting law defines a "meeting" as a gathering of a quorum of members of the public body. Nev. Rev. Stat. 241.015(2).

[4] This Office declines to follow *Beck v. Shelton,* 267 Va. 482, 491, 593 S.E.2d 195, 199 (2004) because of differences between Arizona's law and Virginia's. In *Beck*, the court concluded that "the term ['assemble'] inherently entails the quality of simultaneity." Further, the court observed that "[w]hile such simultaneity may be present when e-mail technology is used in a 'chat room' or as 'instant messaging,' it is not present

For example, the ordinary meaning of the word "discuss" suggests that a discussion of possible legal action requires more than a one-way communication. *See Webster's II New College Dictionary* 385 (1994) (defining "discuss" as "to speak together about.") Likewise, the term "deliberations" requires some collective activity. *See* Ariz. Att'y Gen. Op. I97-012, *citing Sacramento Newspaper Guild v. Sacramento Bd. of Supervisors,* 69 Cal. Rptr. 480, 485 (App. 1968) (reversed on other grounds). "Deliberations" and "discussions" involve an exchange between members of the public body, which denotes more than unilateral activity. *See* Ariz. Att'y Gen. Op. I75-8; *Webster's* at 390 ("exchange" means "to take or give up for another"; "to give up one thing for another"; "to provide in return for something of equal value.") Finally, "taking legal action" in the context of the OML requires a "collective decision, commitment or promise" by a majority of the members of a public body. A.R.S. § 38-431(3); Ariz. Att'y Gen. Op. I75-7.

Unlike discussions and deliberations, the word "propose" does not imply or require collective action. Webster's defines "propose" as "to put forward for consideration, discussion, or adoption." *Webster's II New College Dictionary* at 944. A single board member may "propose" legal action by recommending a course of action for the board to consider. For example, the statement, "Councilperson Smith was admitted to the hospital last night" is not a proposal, but "We should install a crosswalk at First and Main" is a proposal. Thus, an e-mail from a board member to enough other members to constitute a quorum that *proposes* legal action would be a meeting within the OML, even

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when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission." *Id.,* 267 Va. at 490, 593 S.E. 2d at 199.

if there is only a one-way communication, and no other board members reply to the e-mail.[5]

3. An Exchange of Facts, as Well as Opinions, Among a Quorum of Members of a Public Body Constitutes a Meeting within the OML, if it is Reasonably Foreseeable that the Topic May Come Before the Public Body for Action in the Future.

Arizona's OML does not distinguish between communication of facts or opinions. An exchange of facts, as well as opinion, may constitute deliberations under the OML. *See* Ariz. Att'y Gen. Ops. I97-012, I79-4; I75-8.[6] The term "deliberations" as used in A.R.S. § 38-431 means "any exchange of facts that relate to a matter which foreseeably might require some final action . . .." Ariz. Att'y Gen. Op. I75-78; *see also Sacramento Newspaper Guild,* 69 Cal. Rptr. at 485 (deliberation connotes not only collective discussion, but also the collective acquisition and exchange of facts preliminary to the final decision).

Of course, the OML applies only to an exchange of facts or opinions if it is foreseeable that the topic may come before the public body for action. *See Valencia v. Cata,* 126 Ariz. 555, 556-57, 617 P.2d 63, 64-5 (App. 1980); Ariz. Att'y Gen. Op. 75-8. The scope of what may foreseeably come before the public body for action is determined

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[5] It might be argued that because the definition of meeting refers to a gathering of a quorum at which *they* discuss, propose or take legal action, the definition only applies to proposals made by a quorum or circumstances in which more than one person actually makes a proposal. That interpretation, however, is inconsistent with the ordinary meaning of the word "propose" and with the process for proposing legal action for consideration by public bodies. It is also contrary to the directive that the OML be construed broadly to achieve its purposes.

[6] Unlike Arizona, some states permit exchanges of information among a quorum of a public body outside of public meetings. *See* Fla. AGO 2001-20, 2001 WL 276605 (Fla. A.G.) ("[C]ommunication of information, when it does not result in the exchange of council members' comments or responses on subjects requiring council action, does not constitute a meeting subject to [Florida's sunshine law]). As in many other states, Florida's open meeting law is known as its "sunshine law."

by the statutes or ordinances that establish the powers and duties of the body. *See* Ariz. Att'y Gen. Op. I00-009.

4. Applying OML Principles to E-mail.

Few reported decisions discuss when the use of e-mail violates a state's open meeting law. In *Wood v. Battle Ground School District*, 107 Wash. App. 550, 564, 27 P. 3d 1208, 1217 (2001), the Washington Court of Appeals held that the exchange of e-mail messages may constitute a meeting within Washington's Open Public Meetings Act. While the court held that "the mere use or passive receipt of e-mail does not automatically constitute a 'meeting'," it concluded that the plaintiff established a *prima facie* case of "meeting" by e-mails because the members of the school board exchanged e-mails about a matter, copying at least a quorum and sometimes all of the other members. The court said, "[T]he active exchange of information and opinions in these e-mails, as opposed to the mere passive receipt of information, suggests a collective intent to deliberate and/or to discuss Board business." 107 Wash. App. at 566, 27 P. 3d at 1218.

Although the Washington Open Public Meetings Act is not identical to the OML, like the OML, it broadly defines "meeting" and "action," and includes the directive that the law be liberally construed in favor of open and public meetings. 107 Wash. App. at 562, 27 P. 3d at 1216. The holding of the court in *Wood* and its attendant analysis are, therefore, persuasive.

The available case law and Arizona's statutory language indicate that a one-way communication by one board member to other members that form a quorum, with no further exchanges between members, is not a *per se* violation of the OML. Additional facts and circumstances must be evaluated to determine if the communication is being

used to circumvent the OML. A communication that proposes legal action to a quorum of the board would, however, violate the OML, even if there is no exchange among the members concerning the proposal. In addition, passive receipt of information from a member of the staff, with nothing more, does not violate the OML. *See Roberts,* 20 Cal. Rptr. 2d at 337, 853 P. 2d at 503 (receipt of a legal opinion by members of a public body does not result in a meeting.); *Frazer v. Dixon Unified Sch. Dist.*, 18 Cal. App. 4th 781, 797, 22 Cal. Rptr. 2d 641, 657 (1993) (passive receipt by board members of information from school district staff is not a violation of the open meeting law).[7]

There are risks whenever board members send e-mails to a quorum of other board members. Even if the first e-mail does not violate the open meeting law, if enough board members to constitute a quorum respond to the e-mail, there may be a violation of the OML. In addition, a quorum of the members might independently e-mail other board members on the same subject, without knowing that fellow board members are also doing so. This exchange of e-mails might result in discussion or deliberations by a quorum that could violate the OML. Because of these potential problems, I strongly recommend that board members communicate with a quorum about board business at open public meetings, not through e-mails.

B. Hypotheticals Illustrating the Use of E-mail.

The analysis of the OML and e-mail is theoretically no different than analyzing other types of communications. To provide additional guidance, this Opinion will address

[7] This office has also opined that, in the context of a Call to the Public, passive receipt of information does not constitute a meeting. Ariz. Att'y Gen. Op. I99-006.

OML applications to specific factual scenarios.[8]

a. E-mail discussions between less than a quorum of the members that are forwarded to a quorum by a board member or at the direction of a board member would violate the OML.

b. If a staff member or a member of the public e-mails a quorum of members of the public body, and there are no further e-mails among board members, there is no OML violation.

c. Board member A on a five-member board may not e-mail board members B and C on a particular subject within the scope of the board's responsibilities and include what other board members D and E have previously communicated to board member A. This e-mail would be part of a chain of improper serial communications between a quorum on a subject for potential legal action.

d. A board member may e-mail staff and a quorum of the board proposing that a matter be placed on a future agenda. Proposing that the board have the opportunity to consider a subject at a future public meeting, without more, does not propose legal action, and, therefore, would not violate the OML.

e. An e-mail from the superintendent of the school district to a quorum of the board members would not violate the OML. However, if board members reply to the superintendent, they must not send copies to enough other members to constitute a quorum. Similarly, the superintendent must not forward replies to the other board members.

f. One board member on a three-member board may e-mail a unilateral communication to another board member concerning facts or opinions relating to board business, but board members may not respond to the e-mail because an exchange between two members would be a discussion by a quorum.

g. A board member may copy other board members on an e-mailed response to a constituent inquiry without violating the OML because this unilateral communication would not constitute discussions, deliberations or taking legal action by a quorum of the board members.

h. An e-mail request by a board member to staff for specific information does not violate the OML, even if the other board members are copied on the e-mail. The superintendent may reply to all without violating the OML as long as that response does not communicate opinions of other board members. However, if board members reply in a communication that includes a quorum, that would constitute a discussion or deliberation and therefore violate the OML.

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[8] These hypotheticals assume that the e-mails are not sent by board members or at a board member's direction with the purpose of circumventing the OML and that any unilateral communications do not propose legal action.

i. A board member may use e-mail to send an article, report or other factual information to the other board members or to the superintendent or staff member with a request to include this type of document in the board's agenda packet. The agenda packet may be distributed to board members via e-mail. Board members may not discuss the factual information with a quorum of the board through e-mail.

C. Measures to Help Ensure that the Public Body Conducts Its Business in Public.

Although it is not legally required, I recommend that any e-mail include a notice advising board members of potential OML consequences of responding to the e-mail. Possible language for a notice for e-mails from the superintendent or staff is as follows:

> To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other members of the public body. Members of the public body may reply to this message, but they should not send a copy of the reply to other members.

Language for e-mails from board members could be the following:

> To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other board members and board members should not reply to this message.

Although the OML does not require the above notice, such notification may serve as a helpful reminder to board members that they should not discuss or deliberate through e-mail.

It is also important to remember that e-mail among board members implicates the public records law, as well as the OML. E-mails that board members or staff generate pertaining to the business of the public body are public records. *See Star Publ'g Co. v. Pima County Attorney's Office,* 181 Ariz. 432, 891 P.2d 899 (App. 1994); *see also Arizona Agency Handbook* § 6.2.1.1 (Ariz. Att'y Gen. 2001). Therefore, the e-mails must be preserved according to a records retention program and generally be made available

for public inspection. A.R.S. §§ 39-121, 41-1436. Although the OML focuses on e-mails involving a quorum of the members of the public body, the public records law applies to any e-mail communication between board members or board members and staff. Public bodies might consider maintaining a file that is available for public inspection and contains any e-mails sent to and from board members. Ready access to this type of information helps ensure compliance with the legislative mandates favoring open government.

I encourage all public bodies to educate board members and staff concerning the parameters of the OML and the public records law to ensure compliance with these laws. E-mail is a useful technological tool, but it must be used in a manner that follows the OML's mandate that all public bodies propose legal action, discuss, deliberate, and make decisions in public.

Conclusion

E-mail communications among a quorum of the board are subject to the same restrictions that apply to all other forms of communications among a quorum of the board. E-mails exchanged among a quorum of a board that involve discussions, deliberations or taking legal action on matters that may reasonably be expected to come before the board constitute a meeting through technological means. While some unilateral e-mail communications from a board member to a quorum would not violate the OML, a board member may not propose legal action in an e-mail. Finally, a quorum of the board cannot use e-mail as a device to circumvent the requirements in the OML.

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