Ohio Library Council

E-MAIL AND COMPLIANCE WITH THE OHIO OPEN MEETINGS LAW

Issue

The lure of E-mail correspondence can be very strong for a member of a board of library trustees. But, as a public entity, a board must comply with a seemingly unending list of rules and regulations. Many public libraries have asked to what extent this new technology can be used to facilitate discussion among trustees. The pertinent question is to what extent the use of E-mail among board members is permissible, and what hidden dangers are associated with permissible uses of electronic correspondence.

Requirements of the Ohio Open Meetings Law

As a public entity, a governmental library board* is subject to the Ohio Open Meetings Law ("OML"). Ohio Rev. Code §121.22. The law mandates that all decisions and deliberations among public bodies occur in a meeting that is open to the public. The purpose of this law is to provide the general public with access to their government and ensure that decision making bodies are basing actions on valid and responsible grounds. The preamble of the law states that it is to be liberally construed, thus a court is likely to find impermissible any action that is violative of the spirit and purpose of the legislation.

The OML defines a meeting as a prearranged discussion among a majority of a decision making body that is engaged in conducting public business. When any such meeting occurs, there are three requirements: (1) there must be notice to the public in advance of the meeting; (2) the public must be allowed to attend; and (3) minutes outlining the general subjects discussed must be published. For reasons outlined below, the use of E-mail to discuss possible board actions could violate these statutory requirements.

In its statutory language, the OML does not mention E-mail specifically, and there may be some question as to whether the OML applies to electronic correspondence. In Ohio, there is only one case from the First Appellate District that has addressed the use of E-mail among members of a public body. The court found that E-mail is beyond the purview of the OML. Because of the paucity of opinions and the threat of another Ohio court viewing the matter differently, library boards should proceed under the assumption that electronic correspondence falls under the same category as forbidden communications. This cautious approach may be especially appropriate because there is currently legislation pending in the Ohio House that would explicitly fold E-mail into the restrictions of the OML.

For a violation of the OML to occur, a closed meeting must be prearranged. The Ohio Appeals Court decision that stated that E-mail does not apply to the statute based its

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* The discussion in this article relates to governmental public libraries. The Open Meetings Law, and the concerns about E-mail described herein, will only apply to those Association Libraries that have agreed (contractually or otherwise) to follow the Open Meetings Law.
decision partly on the fact that an E-mail message is not prearranged, but rather spontaneous. This decision dealt with a situation where there was a single E-mail with no responses. Thus, if the factual basis was a back-and-forth between members, the decision may have differed. Again, this decision is not dispositive on how another court outside of the First Appellate District may view E-mail messages with respect to the OML.

The OML’s ban on discussing “public business” in non-open meeting forums applies to discussions or comments that invite deliberation. As a general rule, a member cannot vouch a particular point of view regarding a matter to be decided at an upcoming meeting. Interpreting an open meeting law similar to Ohio’s, the Massachusetts Attorney General defined forbidden discussions as those that “can be considered invitations to reply in any medium.” This can be contrasted to administrative and factual statements which do not fall under the OML. Examples of these include meeting agendas or public record information pertaining to an upcoming debate. If E-mail correspondence discusses or debates an issue, and therefore supplants the deliberation of an open meeting, the threat of violating the OML increases.

An important requirement of the law is the quorum rule, which states a meeting, as defined under the OML, consists of a majority of the members of a decision making body. Therefore, the OML applies only to discussions between a majority of a board or committee’s members. If a board or committee is made up of more than three members, a closed discussion in any form between two members would not violate the rule because it would not constitute a majority. With this in mind, it is permissible to discuss anything, including an upcoming vote or decision, with a group that does not comprise a majority. Seeing as the law is liberally construed, however, the Ohio Supreme Court has stated that a string of discussions, each one not comprised of a majority, but taken together constitute a quorum, is the same as a one time majority meeting. These “serial” discussions are especially applicable to E-mail correspondence due to the ease in which E-mails can be forwarded.

**Complying with the Law’s Requirements**

There are two main methods for ensuring compliance with the OML without abandoning E-mail correspondence. The first approach, limiting electronic correspondence only to administrative matters, may be the best course of action. By only sending E-mail relating to procedural matters, such as agenda items and reminders of meeting times, the risk of a topically forbidden E-mail is reduced. While it is permissible to disseminate facts about upcoming debates, doing so can be particularly dangerous if it incites discussion. Otherwise, permissible E-mails can invite replies that could violate the OML. To prevent discussion, when factual information must be distributed, another form of media may be preferred, such as paper copies (or the ability to download pertinent materials from a private portion of the library’s website).

It is also possible to comply with the OML by sending topically forbidden correspondences such that a non-quorum of board members are involved in the interaction. This approach is highly problematic, however, because of the ease in which E-mail can be forwarded. When one board member E-mails another suggesting a certain board decision or resolution, potential problems are avoided as long as the two
members do not make up a majority of the board. If, however, this E-mail is forwarded to more members, a violation can occur if a quorum eventually receives the message. One cannot control the destiny of an E-mail after clicking send, therefore it is wise not to release an E-mail into the ether of cyberspace that would violate the OML if every board member viewed it.

Educating fellow board members is an integral component in staying compliant with the law’s requirements. Even when one limits one’s own correspondence to administrative matters, such a message can incite a fellow board member to “reply-all” with his substantive thoughts on the agenda item. By establishing a clear E-mail policy and educating board members on this policy, the chance of violative E-mails can be minimized. If education or a simple warning would not be sufficient, a board member who must send an E-mail can do so via blind carbon copies, preventing a recipient from easily replying to all with the click of a button.

E-mail is an immensely useful tool for conducting business. The ease of the medium, however, increases the likelihood that the Ohio Open Meetings Law would be violated. A board member must take extra care not only in looking at the subject matter of an E-mail to be sent, but also in the responses that may be invoked. If there is any doubt that an E-mail correspondence could lead to a violation of the OML, another form of communication should be adopted, be it over telephone, a formal letter, or in person.

**Sanctions/Penalties**

The OML grants any member of the public the ability to initiate a suit against an offending governmental decision making body. Once litigation has commenced, depending on the nature of the violation, there are a number of different sanctions possible. The baseline of sanctions is an injunction that forces a public body to comply with the law and hold sessions available to the public. When an injunction is granted, the violating public body is ordered to pay the complaining party a civil forfeiture fee of $500. In addition to this relatively small fee is the potential for the offending body to pay costly plaintiff’s attorney fees and court costs.

The real threat of a OML violation, however, occurs if a resolution, rule, or formal action arises out of a statutory infringement. A court will likely strike any such enactment when it finds the OML has been violated. Even if the formal action is adopted in an open meeting, if there was any deliberation or discussion of the topic in violation of the OML, it can still be ruled invalid due to the closed nature of deliberations. The threat of these violations make compliance with the law imperative.

**Summary Recommendations:**

- Never send subjective, opinion based electronic correspondences to fellow board members regarding actual or potential upcoming agenda items.
- Minimize sending substantive E-mails about upcoming votes, such as facts about an upcoming agenda item. Such information can invite responses that may violate the law.
• If information must be disseminated, and there is concern that discussion will be incited, use a medium of communication that is less conducive to responses than E-mail. Voice mail or formal letters can be appropriate alternatives.
• Educate fellow board members that E-mail correspondence should never be used for facilitate the sharing of ideas that would normally be a necessary part of a meeting discussion.

As always, libraries should understand that this is not legal advice. Ohio's public libraries should seek the counsel of their statutory legal representative, their country prosecutor, and should follow their prosecutor's advice. The OLC’s legal counsel, Jonathan Iten, of Vorys, Sater, Seymour and Pease (614-464-5653), is available to discuss this memorandum with and to provide supplemental information to your county prosecutor.