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 The November 1, 2016, unpublished opinion was issued by a three-judge panel in the case of *Markel v Mackley*, Case No. 327617.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 public bodies must act with great care to avoid group communications that may constitute an impermissible "meeting" under the OMA. 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.