How do the open meeting and public records laws affect the use of e-mail by board members?

All 50 states have some version of open meeting and public records laws. The object of such laws is to assure that public business is conducted under the scrutiny of the voters and taxpayers as much as possible. The courts generally interpret such laws in favor of openness and access to proceedings.

The Vermont Supreme Court has said that:

- The public meeting law protects not only a "right-to-know" but also a right to be present, to be heard and to participate;
- Exemptions to public meeting laws must be strictly construed; and
- Policy considerations clearly favor the right of access to public documents and public records.

The development of e-mail has created a new, efficient way for board members to communicate on a one-to-one basis or in a "chat room" mode with everyone participating. The chairperson can poll the members regarding a matter, opinions and information may be exchanged in a matter of minutes, and decisions about important public matters may be reached with no public oversight or knowledge.

Legally, when a quorum of a board exchanges information and opinions, a meeting occurs. Thus, when two members of a three-person board exchange e-mail about a town matter, a meeting may be deemed to have occurred, whether the members had that intention or not. The Attorney General of Florida has given the opinion that merely sending information to other committee members is a legitimate use of computers and e-mail, but when information is sent and opinions about it are solicited or there is e-mail discussion back and forth, an illegal meeting has occurred.

Similarly, in a matter where board members communicated by telephone and fax and arrived at a decision, the Nevada Supreme Court said, "If a quorum is present, or is 'gathered by electronic communication,' the body must abide by the public meeting requirements." Utah law requires that any electronic meeting of a public body must have been given proper notice by either posting notice or providing notice to the local media.

Vermont defines "public records" to include "all papers, documents, machine readable materials or any other written or recorded matters, regardless of their physical form or characteristics, that are produced or acquired in the course of agency business" with certain specific exceptions. 1 V.S.A. § 317(b). Our legislature and courts have not yet spoken on whether that includes e-mail messages. However, officials in other states that have similar definitions have opined that if the information would be subject to public access if it were in another form, it will be subject to public access if it exists in electronic form.

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