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February 12, 2017

via email:

Stephen Giesbrecht
Borough Manager
Petersburg Borough
PO Box 329
Petersburg, Alaska 98833

Re: Open Meetings Act - email communications between Assembly Members

Dear Steve:

This is in response to a question regarding email communications between Assembly Members, and whether such communications run counter to the Open Meetings Act (OMA), Alaska Statute 44.62.310-.319. Specifically here, an email from one Assembly Member, initially sent to you, questioning the manner in which an agenda item was brought forth before the Assembly at the preceding meeting and proposing that affected employees be surveyed, was forwarded on to the other Assembly Members for the purpose of suggesting that the Assembly Member's concerns be added to the next meeting's agenda. At least one Assembly Member responded directly to the objecting Assembly Member. The underlying specifics or details of the matter to which that agenda item ultimately related (the potential reorganization of the electric utility to eliminate the electric superintendent position, create a utility director to oversee the electric, water and sewer utilities, and eliminate the assistant Public Works director position) do not appear to have been substantively discussed between the two Assembly Members or by a majority of the Assembly collectively.

In my opinion, the email communications described above would not in and of themselves constitute a violation of A.S. 44.62.310. Your email appears to have been received by a majority of the Assembly for informational purposes and not responded to; and the topic, whether viewed as substantive or merely procedural or administrative, was not deliberated collectively by a majority of the members to reach a decision (i.e. the type of reciprocal debate and attempts at persuasion or advocacy regarding policy-related issues that would be expected to occur at a public meeting are not present). Mere passive electronic receipt of information by a governing body, without "collective consideration" of the matter, has not been considered an open meetings violation by the Alaska Supreme Court to date, and based upon case law from other states, as well as case law from the Alaska Supreme Court addressing the OMA in general (but not specifically addressing email communications), I do not believe it is likely that a court would find that the Act was violated here.

With that being said, email exchanges involving all or a majority of Assembly members, either as a group or serially, can be problematic as they could easily and inadvertently lead to open meetings act violations, especially where emails are further responded to or shared, and substantive, collective discussion occurs between multiple members of the Assembly. I believe the Alaska Supreme Court would, if presented with the question, hold that an exchange of emails by members of a governing body could constitute a 'meeting' under the OMA under certain circumstances, and thus email communications to and between Assembly members should occur only when exercising due care. In order to prevent potential OMA violations from inadvertently occurring, further information and analysis is provided below.

Under A.S. 44.62.310(a), all meetings of a governmental body of a public entity, including political subdivisions of the State, shall be open to the public. The term "meeting" is defined, in relevant part here, in paragraph .310(h)(2) as follows (emphasis added):

> "meeting" means a gathering of members of a governmental body when
> (A) more than three members or a majority of the members, whichever is less, are present, **a matter upon which the governmental body is empowered to act is considered by the members collectively**, and the governmental body has the authority to establish policies or make decisions for a public entity;

Most U.S. case law regarding email communications has been developed only within the last dozen years or so, and tends to be specific to the language of the particular open meetings act under consideration. Several states have amended their open meetings laws to include provisions regarding electronic communications. Alaska, however, has not. Additionally, there is no case law from the Alaska Supreme Court addressing this specific issue, and only one lower court case that I am aware of, which is discussed further below.

The term 'meeting' in open meetings laws is defined differently from state to state, and the varying definitions make application of a general rule from cases outside of Alaska not feasible. I have set out a number of examples below, from different states, to provide to you an idea as to how other courts have addressed questions regarding electronic communications between members of a governing body, under a variety of different statutes.

- In Tennessee, the open meetings statute contained language which provided for a potential violation when "electronic communication ... [is] used to decide or deliberate public business in circumvention of the spirit or requirements" of the statute. See, Johnston v. Metro. Gov't of Nashville & Davidson County, 320 S.W.3d 299, 310 (Tenn. App. 2009). In that case, extensive email exchanges, some of which included all members of the Council and which discussed substantively the matter under discussion (a Conservation Overlay zoning district) were not deemed a "meeting" under that statute; however, it was determined that some of the emails were deliberations used to circumvent open meetings requirements. ("In several email exchanges, ... Council

members are clearly weighing arguments for and against the Overlay....").[1] In Nevada, the open meetings law at that time contained similar language which specifically prohibited use of electronic communications "to circumvent the spirit or letter" of the law. In Del Papa v. Board of Regents, 956 P.2d 770 (Nev. 1998), the court found a violation of the act when a majority of a Board communicated by serial facsimiles and telephone calls to draft, review and approve a media advisory statement.

- On the other hand, in Virginia, the open meetings act did not contain specific language regarding electronic communications, and the Virginia Supreme Court determined, in Beck v. Shelton, 593 S.E.2d 195, 199 (Va. 2004) (holding confirmed in Hill v. Fairfax County Sch. Bd., 727 S.E.2d 75 (Va. 2012)), that email exchanges between City Council members were written communications and did not constitute a "meeting", as the statute prohibited only "simultaneous interaction" between the members. The court determined that the "quality of simultaneity" was not present when email was used "as the functional equivalent of letter communication." In Ohio, an open meetings statute similarly did not contain specific language addressing electronic communications, however a court determined that a series of emails between a majority of a school board, by which a response to an editorial was discussed, drafted and approved, was the functional equivalent of a meeting and violated the Act. White v. King, 60 N.E.3d 1234 (Ohio 2016).

- In Colorado, the open meetings act defined a meeting as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communications." See, Intermountain Rural Elec. Ass'n v. Colo. PUC, 298 P.3d 1027, 1029-030 (Colo. App. 2012). The Court held that no open meetings violation had occurred there since the topic discussed did not address the policy-making function of the Commission.

- In Minnesota, the open meetings statute contained no definition of the term "meeting". In O'Keefe v. Carter, 2012 Minn. App. Unpub. LEXIS 1248, pp. 17-20, email exchanges between a majority of a Township Board were found to be written communications outside the scope of the statute, noting that a "flexible" test had been adopted for

[1] This case was also cited by an Alabama appeals court in Lambert v. McPherson, 98 So.3d 30, 33-34 (Ala. App. 2012), emphasis included, which held as follows:

> A single e-mail sent by one board member to the other board members, without more, does not constitute a 'meeting' as defined [under the open meetings act]. That definition includes three elements: (1) a meeting must involve 'a quorum of a governmental body or a quorum of a committee or a subcommittee of a governmental body,' (2) 'during ... which the members of the governmental body deliberate' (3) about 'specific matters that, at the time of the exchange, the participating members expect to come before the body, committee, or subcommittee at a later date.' [The board member's] e-mail message satisfies the first and third elements, but not the second element. The 'deliberation' component of a 'meeting' is missing because Keenum's e-mail message was a unilateral declaration of his ideas or opinions, not '[a]n exchange of information or ideas among' a quorum of board members concerning a specific matter that the members expected to be presented to the board for a decision.

determining whether a "meeting" had occurred; in the alternative, the court determined that even if a meeting had occurred, the matters discussed within the emails were non-controversial "operational matters" and that no decisions were reached in the exchange.

- In Washington, the open meetings law defined a meeting as simply "meetings at which action is taken." See, Wood v. Battle Ground Sch. Dist., 27 P.3d 1208, 1217 (Wash. App. 2001) The court rejected a requirement of physical face-to-face presence, and held that the exchange of emails could constitute a meeting under the Act under certain circumstances, noting that determinations would need to be made on a case-by-case basis:

  > [W]e ... recognize the need for balance between the right of the public to have its business conducted in the open and the need for members of governing bodies to obtain information and communicate in order to function effectively. Thus, we emphasize that the mere use or passive receipt of e-mail does not automatically constitute a 'meeting.'

  In that case, rather than mere passive receipt of information, a majority of school board members had actively exchanged substantive information and opinions in emails regarding the performance of the superintendent, and were thereby found to have demonstrated a collective intent to meet.

- In Massachusetts, the open meetings law defined "deliberations" as "a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction." See, DA for the N. Dist. v. Sch. Comm. of Wayland, 918 N.E.2d 796, 803 (Mass. 2009). In that case, the chair of a five member school committee sent out an email to all of the other members, requesting that they send him written comments pertaining to a superintendent's performance evaluation. Two members replied directly to the chair, one member replied to all of the other members, and one member did not reply. The comments submitted were compiled into a draft evaluation, which was then circulated by the chair prior to the meeting. While the statute did not specifically address electronic forms of communications, the court ruled that deliberations under the open meetings act could occur electronically or over the telephone, and that the email exchanges were "deliberations" concerning the performance of the superintendent, used to avoid a public discussion of the competence of the superintendent, and thus violated the law. Since the decision in that case, the Massachusetts open meetings law has been amended to change "verbal exchange", as previously found in the definition of "deliberations", to "an oral or written communication through any medium, including electronic mail...." See, Boelter v. Wayland Bd. of Selectmen, 2016 Mass. Super. LEXIS 83, p.4.

The discussion of the above cases is not intended to be a cumulative listing of all cases from other states on this issue, but is to provide some examples of decisions issued by other courts, based upon the individual state's open meetings laws.

In Alaska, the Open Meetings Act has been broadly construed to ensure that its purposes are effectuated. AS 44.62.312(a)(2) and (5) state that not only government action but also government deliberations must be conducted in public, in order to maintain the "people's right to remain informed." The Alaska Supreme Court, in Brookwood Area Homeowners Ass'n v. Municipality of Anchorage, 702 P.2d 1317, 1323 (Alaska 1985), held that a "meeting" under the OMA "include[d] every step of the deliberative and decision-making process when a governmental unit meets to transact public business", and that a privately held meeting between a quorum of the Anchorage Municipal Assembly and a developer, to discuss in detail the developer's application for rezoning, violated the OMA.

Based upon the broad purpose of the Alaska Open Meetings Act and prior constructions of the Act by courts, I believe that the Alaska Supreme Court would find that email communications in which a majority of a body, either as a group or serially, deliberates a matter collectively could constitute a meeting under the Act, even in the absence of specific language in the Act regarding email communications, and that therefore the OMA does not apply only to a physical gathering in a single place and time. While this matter has not been definitively decided by the Court, there is at least one lower court (superior court) decision which has considered this question, and which determined that email exchanges between members of a redistricting board violated the OMA. See, In re 2001 Redistricting Cases, Superior Court Case No. 3AN-01-8914 CI. In that case, emails were exchanged by a majority of a redistricting board which discussed the location of public hearings which were to be held on a redistricting plan as well as several other matters.[2] The lower court ultimately decided that some violations had occurred, but that no remedy was available under the particular circumstances. The Alaska Supreme Court, when reviewing that lower court ruling, did not decide the correctness of the finding of the OMA violation and left the question open -- it found that the question did not need to be decided as no remedy would be appropriate even if a violation was found to have occurred. In re 2001 Redistricting Cases, 44 P.3d 141, 147 (Alaska 2002) ("Because we hold that the superior court permissibly refused to grant any remedy for the particular e-mail exchanges it found to violate the Open Meetings Act, we need not address whether these e-mail exchanges actually violated the Act".)

I realize that the lack of case law in this area in Alaska creates uncertainty, but I believe that the following general rules can be surmised from the various cases:

- a unilateral email from staff to the entire Assembly, or from one member to the other members, and passive receipt by those other members, is likely not a violation of the OMA; however,

- a violation could arise thereafter if a member were to respond with "Reply All" and a matter was deliberated, or if the original email generates deliberative side emails between members, even if each side exchange involved less than a quorum.

[2] There was no evidence that a majority of the board addressed the redistricting plan itself -- there was evidence that two of the five board members discussed the substance of the redistricting, but that was held not to violate the OMA.

Please note that the intent of the Act is that the collective process of decision-making, and the active exchange of information and opinions on substantive matters, is to take place at a public meeting, to promote public access and participation at such meetings.

Accordingly, I recommend that electronic communications (which includes not only emails, but also telephone, facsimile, text, or other messaging systems) to or between Assembly members be limited to the greatest extent possible without interfering with the administration of procedural matters or the provision of necessary information to the Assembly. Information can be sent to Assembly members between meetings about upcoming issues without violation of the OMA, however any response by an Assembly member should generally not be sent to all or a majority of the other Assembly members. Great care should be taken by a member when communicating with or replying to even one or two other members, since cumulative communications by several members may also result in an open meetings violation. No discussion of substantive matters which may come before the body should be had by electronic communications which implicates a majority of members, either as a group or serially.

I hope this answers your questions. Please let me know if you would like to discuss this further, or have additional questions.

Sincerely,

Sara E. Heideman

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