Think twice before hitting *Send*.

Open Meetings Law & Modern Technology

–Andrew T. Phillips and Ryan P. Heiden, von Briesen & Roper, s.c.

Given the vast technology at our disposal, the use of technology for purposes of efficient communication is commonplace and often preferred. Despite the efficient nature of technological communication, a county official's decision to communicate with other county officials via electronic means may cause problems under Wisconsin's Open Meetings Law. This article provides county officials with clarity as to what constitutes a meeting under Wisconsin law, when the use of technology for communication purposes may constitute a meeting, and other concerns about which county officials should be aware when communicating with other county officials via technology.

What is a "Meeting" under Wisconsin's Open Records Law?

Under the Open Meetings Law, a "meeting" is defined as:

> *[T]he convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter . . . . Wis. Stat. § 19.82(2).*

In *State ex rel. Newspapers, Inc. v. Showers*, the Wisconsin Supreme Court provided additional guidance as to the definition of a "meeting." 135 Wis. 2d 77, 97, 398 N.W.2d 154 (1987). Specifically, the court held that a "meeting" occurs whenever a convening member of a governmental body satisfies two requirements: (1) there is a purpose to engage in a "governmental business;" and, (2) the number of members present is sufficient to determine the governmental body's course of action.

"Governmental business" refers to any formal or informal action, including discussion, decision, or information gathering, on matters within the governmental body's realm of authority. In *State ex rel. Badke v. Vill. Bd. of Greendale*, the Wisconsin Supreme Court added further clarity by holding that a village board conducted a "meeting" when a quorum of the board regularly attended each plan commission meeting to observe the commission's proceedings on a develop-

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ment plan that was subject to the board's approval. 173 Wis. 2d 553, 570, 494 N.W.2d 408 (1993). The court stressed that a governmental body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority. The members need not actually discuss the matter or otherwise interact with one another to be engaged in governmental business.

The second part of the *Showers* test requires that the number of members present be sufficient to determine the governmental body's course of action on the business under consideration. Although many often assume this means the Open Meetings Law only applies to gatherings of a majority of members of a governmental body, i.e., a quorum, this is not the case. The power to control a body's course of action can refer either to the affirmative power to pass a proposal or the negative power to defeat a proposal, called a "negative quorum." Consequently, a gathering of one-half of the members of a body, or even fewer, may be enough to control a course of action if it is enough to block a proposal. Governmental bodies usually operate under a simple majority rule in which a margin of one vote is necessary for the body to pass a proposal. Under such an approach, exactly one-half of the members of the quorum constitutes a "negative quorum." However, on matters that require an even greater affirmative vote, such as budget amendments, even fewer members would constitute a "negative quorum." Therefore, it is important to understand what circumstances the "members present" requirement under the *Showers* test will be met.

When Does Communication via Technology Constitute a "Meeting"?

As mentioned above, the use of technology for purposes of communication is pervasive. Because of this, many county officials often ask whether they may utilize technological means, such as email, text messaging or video conferencing, to communicate with other county officials. While county officials may certainly do so, they should be wary of the implications communications via technological means can have under Wisconsin's Open Meetings Law.

The Wisconsin Attorney General has cautioned members of governmental bodies on the use of technological communications and the way in which Wisconsin's Open Meetings Law can come into play. For example, the Attorney General has indicated that written communications transmitted by electronic means, such as email, instant messaging, or text messages, may constitute a "convening of members," depending on how the communication medium is utilized. Although Wisconsin courts have yet to directly address this issue, the Attorney General has opined that if the communications closely resemble an in-person discussion (*e.g.*, a rapid back-and-forth exchange of viewpoints among multiple members), then such communications likely constitute a "meeting" if, of course, the communications involve enough members to control an action by the governmental body. *See* Krischan Correspondence (Oct. 3, 2000).

In addressing the question as to whether a series of electronic communications between county of-

ficials or employees constitutes a "meeting," courts are likely to consider the following factors: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.

Although the factors outlined above provide a general framework that county officials may utilize in an attempt to comply with Wisconsin's Open Meetings Law, because the applicability of the law to electronic communications heavily depends on the particular way in which the electronic communication is used, these technologies create special dangers for county officials trying to comply with the law. For example, although two members of a governmental body larger than four members may generally discuss the body's business without violating Wisconsin's Open Meetings Law, features such as "forward" or "reply all" common to email servers deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message.

Additionally, the use of electronic communications create the possibility that a quorum of the governmental body may receive information on a subject within the body's jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members. Such a situation could create what is called a "walking quorum," which is a series of gatherings among separate groups of members of a governmental body, each less than a quorum, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. Wisconsin courts have stated that, because a walking quorum may produce a predetermined outcome and, as a result, render the publicly-held meeting during which the respective topic was to be discussed a mere formality, walking quorums present a real danger to the public policy behind the Open Meetings Law.

Wisconsin's Open Meetings Law is Not the Only Concern Surrounding Electronic Communications

When using electronic communication, county officials must also be cognizant of Wisconsin's Public Records Law to ensure their communications are in compliance with the law's requirements. Electronic communications sent and received by county officials may very well constitute a "record" under Wisconsin's Public Records Law, even if such communications are sent or received on a county official's personal device, such as a cell phone or computer, or through personal email.

Wis. Stat. § 19.32(2) defines a record as "any material on which written, drawn, printed, spoken, visual, or electromagnetic information is recorded or preserved, regardless of the physical form or characteristics, which has been created or kept by an authority."

In correspondence to Ms. Gail A. Peckler-Dziki dated December 23, 2009, Attorney General J.B. Van Hollen discussed whether a private Google group website called "Making Salem Better," which was created and maintained by Salem Town Chair Linda Valentine, constituted a public record under Wisconsin law. Despite the website's private nature, content leaked from the site made it clear that Ms. Valentine made use of the website to discuss Town business.

Attorney General Van Hollen concluded that, although it could be debated as to whether the content of the website was a public record under Wisconsin law, he concluded that the information created and kept or received by Ms. Valentine on the website was

itself a public record. The Attorney General's conclusion arose because the website was operated by Salem's town chair, and included discussions of town business involving numerous other individuals; thus, the website had at least some relation to Ms. Valentine's office.

Attorney General Van Hollen concluded that constituents had a "right to inspect" the website's content. However, according to Attorney General Van Hollen, although the "right to inspect" entitled citizens to have access to and copies of information contained on the Google website, the "right to inspect" did not grant citizens the right to participate in the discussion as a member of the Google site.

The above example should serve as a strong cautionary note to county officials that electronic communications have the potential to run afoul of various State laws, not just the Open Meetings Law.

Conclusion

Given these dangers surrounding electronic communications, we strongly advise county officials to carefully and sparingly use electronic communications for purposes of conducting governmental business. Doing so without providing a proper notice and avenue for public observance is a surefire way to run afoul of Wisconsin's Open Meetings Law. Thus, counties should be sure to educate all county officials, regardless of their tenure, on the importance of lawfully conducting governmental business through electronic means of communication.

If you have any questions surrounding the subject matter discussed within this article, please contact the article's authors or any member of von Briesen & Roper, s.c.'s Government Law Group.