by Richard Lorenz

Virtual public meetings

What you need to know and how to avoid them

Imagine the scenario where an administrative assistant for a municipal utility, PUD, or other similar governmental entity sends a group email to the entity's governing body that contains the agenda for an upcoming public meeting. The agenda clearly describes certain decisions to be made by the governing body at the meeting. Now imagine further that one of the board members has a thought or question about a board action-item on the agenda. The board member hits the Reply All button to share his or her thoughts. I think we all understand that, unless a specific exception applies, this email exchange would be a public record subject to disclosure upon a public records request.

However, according to a recent Oregon Court of Appeals decision, this seemingly harmless email exchange may actually be much more than a public record — it may actually constitute a public meeting. Moreover, to the extent that it is a public meeting, it is one that almost certainly fails to satisfy the statutory notice and other legal requirements applicable to such public meetings. This article presents a cautionary tale for board members of public bodies to avoid inadvertently (or intentionally) participating in a "virtual" public meeting via group texts, emails, or other private communications.

The case of *Handy v. Lane County* was decided by the Oregon Court of Appeals in November 2015. The case arose out of a spat between Lane County commissioners. One of the county commissioners, Handy, was being investigated for possible elections or ethics violations. The County received a public records request relevant to the investigation. The county administrator and three or more of the other sitting county commissioners engaged in a series of email and telephone communications concerning the possible production of certain records in response to the request. The communications culminated in the decision to call an emergency meeting of the county commissioners. At that emergency meeting, a majority of the county commissioners voted to release the documents in question.

Commission Handy brought legal action against the County and the three commissioners that participated in the emergency meeting. Handy's complaint was not only that the emergency meeting was improperly noticed, but also that the email and telephone communications between the other county commissioners discussing the disclosure of public records themselves constituted an improper public meeting. The essential question Hardy put before the court was whether the defendants, by engaging in the group email discussion, had "met" in private to deliberate toward a decision on county business in violation of ORS 192.630(2) (A "quorum of a governing body may not meet in private for the purpose of deciding on or deliberating toward a decision on any matter . . ."). In analyzing whether defendants had "met," plaintiff conceded that a quorum of county commissioners had never actually physically convened together in the same place at the same time to discuss the public records request. Instead, the plaintiff claims that the email string was a private meeting. Further complicating the plaintiff's claim, however, was the fact that none of the individual emails included three or more commissioners (which is required to constitute a quorum in this case). Instead, the separate emails in the string had to be aggregated together into a single "conversation" in order to implicate a quorum.

The Oregon Court of Appeals found that the defendants could be found to have "met" with each other through serial electronic and telephonic communications even if no single communication included a quorum of commissioners. The court explained:

> *In short, the text, structure, context purpose, and history of the Public Meetings Law indicate that the prohibition in ORS 192.630(2) contemplates something more than just a contemporaneous gathering of a quorum. A series of discussions may rise to the level of prohibited "deliberation" or "decision;" the determinative factors are whether a sufficient number of officials are involved, what they discuss, and the purpose for which they discuss it — not the time, place, or manner of the communications.*

In reaching this decision, the court emphasized that it was not finding that the defendants had violated ORS 192.630(2). It was finding only that plaintiff's legal theory was viable and that he should be afforded the opportunity to produce evidence in support of his claim at the lower court level (in other words, the lower court committed legal error by dismissing plaintiff's claims). The decision is currently on appeal to the Oregon Supreme Court.

The court also explained that its decision was not intended to discourage all private communications between board members about government business. The court emphasized the hallmark of any violation of ORS 192.630(2) was actually deliberating toward a decision on the matter: "The prohibition addresses not all private serial communications among members who constitute a quorum, but those conducted for the 'purpose' of deliberation or decision." In other words, "information gathering" behind the scenes would probably be acceptable, whereas shuttle diplomacy between board members to line up votes likely would not. The problem of course, is that it may be difficult to tell the difference between the two — and one may quickly morph into the other without warning.

So where does this decision leave board members of electric utilities that are subject to public records and public meetings laws? Here are a few practical tips to avoid the inadvertent, virtual public meeting:

- Exercise caution when sending emails to discuss official business with staff or other board members, particularly when the email string includes a quorum of the governing body.
- Add a disclaimer to any email discussing official business that the purpose of the email is for information gathering only and not for purposes of deliberating toward a decision on any matter.
- Strictly avoid discussing via email how you or other board members intend to vote on any upcoming decision by the governing body.
- Avoid expanding the number of participants in an email conversation so as to create a quorum where one previously did not exist. NWPPA

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