

# FOIA and OMA Compliance in an Electronic Era

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# Presentation Outline

- Recent Headlines
- Open Meetings Act
- FOIA
- Records Retention
- Policy Considerations
- Questions?



# Recent Headlines

“Meridian Township Board will re-enact closed session to avoid Open Meetings Act violation”

Wlns Lansing, April 16, 2024

“School Board ends Dinner Meetings that ‘violate spirit’ of Open Meetings Act”

mlive.com, March 7, 2019

# Recent Headlines

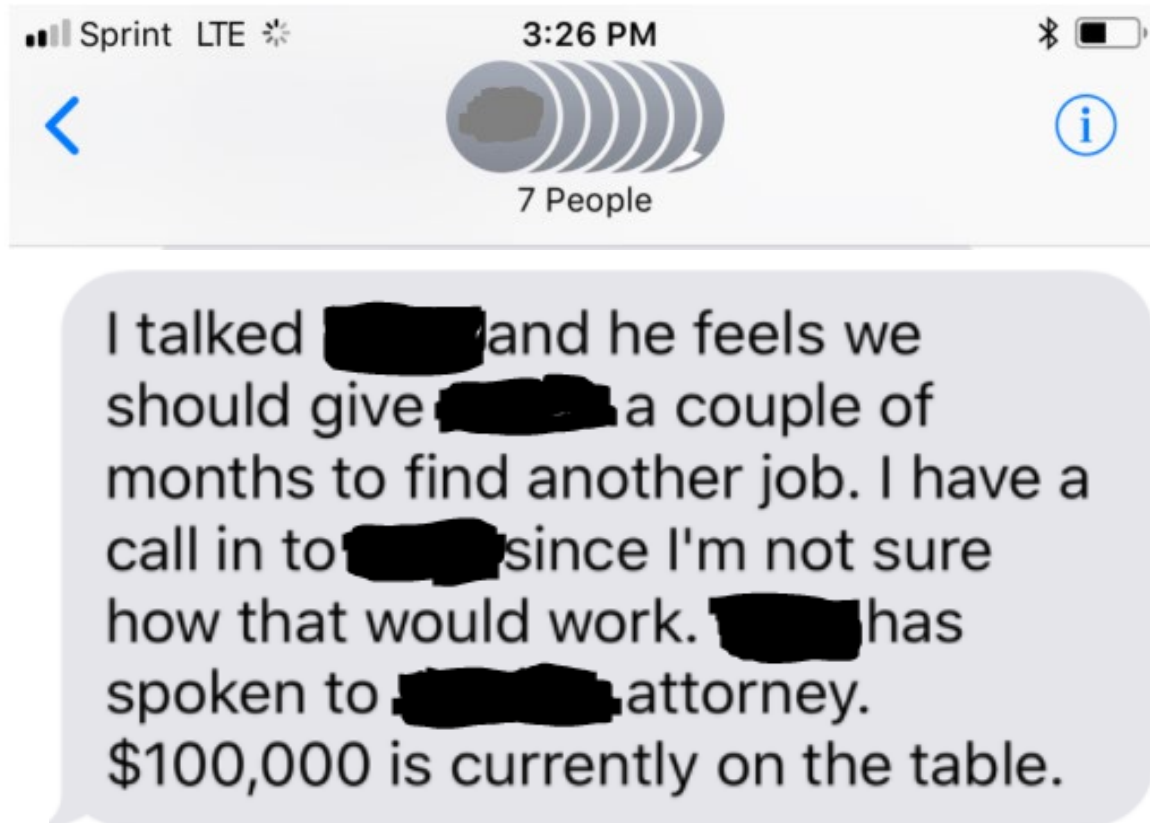
- **Free speech and public meetings: What do the rules for local governing bodies say?**

Port Huron Times Herald, December 31, 2023

**“Lawsuit claims Clawson City Council, attorney, violated open meetings act”**

[dailytribune.com](http://dailytribune.com), Jan. 22, 2019

# “See [ ] School Board Members’ Texts Violating OMA”



www.mlive.com April 10, 2018

# “See [ ] School Board Members’ Texts Violating OMA”

No. Too much damage already.

# “See [ ] School Board Members’ Texts Violating OMA”

Learned that if I txt 4 or more, I'm in violation of open mtgs act so I will be texting 2 or 3 at a time. Also, if anyone meets with administration, I need to know. That's policy. Thanks

# OMA



# OMA - Intent

- The intent of the Open Meetings Act (OMA) is to provide openness and accountability in government and is interpreted to accomplish this goal.

*Booth Newspapers v Wyoming City Council*  
168 Mich App 459 (1988)

- The OMA is construed liberally in favor of openness.

*Wexford County Prosecutor v Pranger*  
83 Mich App 197 (1978)

- Attempts to avoid the OMA are regularly met with disapproval by the courts.

*Booth Newspapers v Wyoming City Council*  
168 Mich App 459 (1988)

# OMA – Meeting Requirements

- All meetings of a public body shall be open to the public.
- All decisions of a public body shall be made at a meeting open to the public.
- All deliberations of a public body constituting a quorum\* of its members shall take place at a meeting open to the public, except for closed sessions.

MCL 15.263(1); MCL 15.263(2); MCL 15.263(3).

*\*Subquorum deliberations will be discussed later.*

# OMA - Definitions

- **Public Body** - means any State or Local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered by State constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function, or a lessee thereof performing an essential public purpose and function pursuant to the lease agreement.

MCL 15.262.

# OMA - Definitions

- **Meeting** - means the convening of a public body at which a quorum\* is present for the purpose of deliberating toward or rendering a decision on a public policy.
- **Closed Session** - means a meeting or part of a meeting of a public body which is closed to the public.

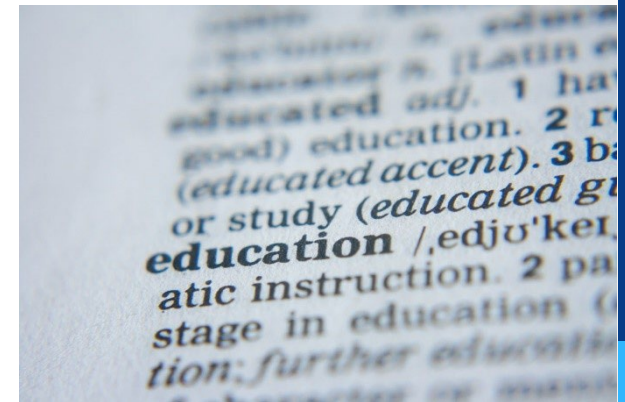
MCL 15.262.

*\*Subquorum meetings will be discussed later.*

# OMA - Definitions

- **Decision** - means a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.

MCL 15.262.



# OMA - Definitions

- **Deliberation** – While the act does not define deliberation, the courts have provided guidance:
  - “deliberation” includes “discussing,” which, in turn, is defined as “the act of exchanging views on something”
    - *Hoff v Spoolstra*, unpublished, 2008 (COA No. 272898)
  - Black's Law Dictionary . . . defines this word as “the act of carefully considering issues and options *before making a decision or taking some action*; esp., the process by which a jury reaches a verdict; as by analyzing, discussing, and weighing the evidence”. The word “discussion” is defined as the act of exchanging views on something; a *debate*.
    - *Ryant v Cleveland Twp.*, 239 Mich. App. 430 (2000).

# OMA – Deliberation by email

## **Trial Court Holds Email Deliberations Violates the OMA; Court of Appeals Vacates for Other Reasons**

*Citizens for a Better Algonac Community Schools v Algonac Community Schools*, 317 Mich. App. 171 (Sept. 8, 2016)

- Early 2014 – Board undertakes search for Superintendent
- Apr. 1, 2014 – Board votes to offer position to neighboring Superintendent and “begin contract development [asap]”
- President and members exchange a series of emails over the next few weeks regarding contract negotiations, drafts of proposed contracts, working out details and settling on a final contract.

# OMA – Deliberation by email

## **Trial Court Holds Email Deliberations Violates the OMA; Court of Appeals Vacates for Other Reasons**

*Citizens for a Better Algonac Community Schools v Algonac Community Schools*, 317 Mich. App. 171 (Sept. 8, 2016)

- Apr. 28, 2014 – Board approves contract “unanimously, swiftly, and without discussion”
- May 2014 – P files suit alleging emails constitute deliberations of a public body in violation of OMA
- P sought declaratory judgment finding a violation of OMA, an order compelling compliance and enjoining further non-compliance, and attorney fees and costs



# OMA – Deliberation by email

## **Trial Court Holds Email Deliberations Violates the OMA; Court of Appeals Vacates for Other Reasons**

*Citizens for a Better Algonac Community Schools v Algonac Community Schools*, 317 Mich. App. 171 (Sept. 8, 2016)

- T/C: Board “violated the [OMA] by conducting deliberations...outside of a public meeting”
- T/C: No injunction as P failed to show practice occurred in the past, continued at the present time, or would persist in the future

# OMA – Deliberation by email

*Citizens for a Better Algonac Community Schools v Algonac Community Schools*, 317 Mich. App. 171 (Sept. 8, 2016)

- T/C: No injunction = no attorney fees or costs
- COA
  - A complaint seeking pure declaratory relief, as an independent remedy standing on its own, is unsustainable in regard to alleged OMA violations.
  - OMA provides 3-tiered enforcement scheme for private litigants
    - An action to invalidate a decision made in violation of the OMA. MCL 15.270
    - An action for injunctive relief enjoining ongoing OMA violation and compelling compliance. MCL 15.271
    - An action for damages for intentional OMA violation. MCL 15.273
  - P's not entitled to injunction = no sustainable cause of action. Vacated the T/C's granting of declaratory relief.

# OMA – Deliberation by email

## **Court of Appeals Holds Email Deliberations Among a “Quorum” of a Public Body Violates the OMA**

*Markel v Mackley*, Case No. 327617 (Mich. Ct. App., Nov. 1, 2016)(Unpublished)

- 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.

# OMA – Deliberation by email

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*Markel v Mackley*, Case No. 327617 (Mich. Ct. App., Nov. 1, 2016)(Unpublished)

- 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.

# OMA – Deliberation by email

## **Court of Appeals Holds Email Deliberations Among a “Quorum” of a Public Body Violates the OMA**

*Markel v Mackley*, Case No. 327617 (Mich. Ct. App., Nov. 1, 2016)(Unpublished)

- 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.
- “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.”

# OMA – Subquorum Meetings

What about subquorum meetings or communications?

- These cases were held to be in violation of the OMA:
  - *Booth v Wyoming*, 168 Mich.App. 459, 425 N.W.2d 695 (1988)(subquorum deliberations of a city council over two day period violated the OMA).
  - *Booth Newspapers, Inc. v. Univ. of Michigan Bd of Regents*, 192 Mich.App. 574, 481 N.W.2d 778 (1992) aff'd in part and rev'd in part on other grounds 444 Mich. 211 (1993) (sub-quorum committee given the authority to act regarding the selection of a university president violated the OMA; “round-the-horn” telephone calls and conferences resulted in “decisions” required to be made at an open meeting).

# OMA – Subquorum Meetings

- *Federated Publications, Inc. d/b/a Lansing State Journal v Michigan State University*, 221 Mich App 103; 561 N.W.2d 433 (1997), rev'd on other grounds 460 Mich 755 (1999) (sub-quorum committee given the authority to act regarding the selection of a university president violated the OMA – note – reversed on unrelated constitutional grounds).
- *Schmiedecke v Clare School Bd*, 228 Mich App 259; 577 N.W.2d 706 (1998), (sub-quorum committee given the authority to make only a recommendation on policy regarding evaluation of administrators violated the OMA).
- *Hoff v Spoelstra, et al*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2008, (Docket No. 272898) (subquorum discussions on termination of city attorney violated OMA.)

# FOIA



# FOIA - Intent

- *Legislative Intent*
  - *Public Access to Government Information*
  - *Access to the affairs of government and official acts of public officials*
  - *Participate in the democratic process*
- *FOIA is a pro-disclosure statute*
- *Exemptions are narrowly construed*
- *Duty to provide access to non-exempt records*

# Records Subject to Disclosure

- All public records are subject to full disclosure under the act unless the material is specifically exempt under an express statutory exemption. *Swickard v. Wayne County Medical Examiner*, 438 Mich 536, 544 (1991).

# What is a Public Record?

- *A public record is a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software.*

*MCL 15.232*

# What is a Writing?

- *A “Writing” means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.*

*MCL 15.232(h)*

# Electronic Records

Text messages satisfy the statutory definition of a public record if they capture communications by public officials in the performance of an official function.

- Flagg v City of Detroit, 252 F.R.D. 346 (E.D. MI 2008)



# The FOIA Request

- How Specific must the FOIA Request be?
  - The request to inspect a public record need not describe the public record precisely or fully, but need only provide a sufficient description to enable the public body to identify it. *Coblentz v City of Novi*, 475 Mich 558, 572 (2006).
  - However, courts are unlikely to uphold requests for records which are “absurdly overboard.” *Capital Information Ass’n v Ann Arbor Police*, 138 Mich App 655, 658 (1984).

# Responding to a Request

- When is a Request Received?
  - A written request by fax, email, or other electronic communication is still considered received **1 business day** after the transmission is made.
  - If a request by email goes to the Public Body's **spam or junk mail** folder, the request is not considered received until 1 day after the Public Body first becomes **aware** of the request.
  - Must keep a **log** of when request is delivered to the junk mail folder and when the Public Body becomes aware of it.

# Time Limits to Respond

- Public body is required to respond within five business days.
- May give written notice extending response period by up to ten business days.
- Failure to respond constitutes a denial.

MCL 15.235(2) and (3)



# Time Limits to Respond

- The response must be by: (a) granting the request, (b) issuing a written notice to the requesting party denying the request, (c) granting the request in part and issuing a written notice to the requesting party denying part of the request.

MCL 15.235(2)

# Records on Website

## Written Requests (PA 563 of 2014; Effective July 1, 2015)

- If the requested documents are available on the public body's website at the time the request is made, the amendments prohibit the public body from charging for them.
- If the FOIA Coordinator knows or has reason to know that all or a portion of the requested information is available on the website, he or she must notify the requesting person in writing, including to the degree practical, reference to the specific webpage address.

# Records on Website

- On the detailed itemization, the public body shall separate the requested public records that are available on its website from those that are not available on the website and shall inform the requestor of the additional charge to receive copies of the public records that are available on its website.
- If the requestor subsequently requests the documents in a different format, the public body may charge for providing the documents and may charge more than the 50% fringe benefit multiplier (not to exceed actual cost).

# Records on Website

## Verbal Requests (PA 563 of 2014; Effective July 1, 2015)

- If a verbal request for information is for information that a public body believes is available on the public body's website, the public employee shall, where practicable and to the best of the public employee's knowledge, inform the requestor about the public body's pertinent website address.

# The Denial Letter

## Denials – The Requester’s FOIA Rights

### Notice of denial must include:

- Right to appeal to the head of the public body
- Right to judicial review in circuit court
- Right to receive attorney’s fees and damages
- Exempt material - Basis for exemption
- No public record - Certification that record doesn’t exist
- Redacted material - A description of a record or information that has been redacted

MCL 15.235(4)

# Records Retention

# Records Retention

- “A record that is required to be kept by a public officer in the discharge of duties imposed by law, that is required to be filed in a public office, or that is a memorial of a transaction of a public officer made in the discharge of a duty is the property of this state and shall not be disposed of, mutilated, or destroyed except as provided by law.”

MCL 399.811 (Michigan History Center Act governing record retention).

# Records Retention

(i) "Record" means any of the following:

(i) A document, paper, book, letter, or writing, including a document, paper, book, letter, or writing prepared by handwriting, typewriting, printing, photostating, photocopying, or electronic medium.

(ii) A photograph.

(iii) A film.

(iv) A map.

(v) A magnetic or paper tape.

(continued...)

MCL 399.802 (Michigan History Center Act governing record retention).



# Records Retention

- (v) A magnetic or paper tape.
- (vi) A microform.
- (vii) A magnetic or punch card.
- (viii) A disc, drum, sound, or video recording.
- (ix) An electronic data processing material.
- (x) Recorded information in any electronic or digital file format, including individual letters, words, pictures, sounds, impulses, or symbols.
- (xi) A combination of items listed in subparagraphs (i) to (x), regardless of physical form or characteristics.

MCL 399.802 (Michigan History Center Act governing record retention).

# Records Retention

- “All official books, papers or records created by or received in any office or agency of this state or its political subdivisions, are public property belonging to the people of this state. All such books, papers, or records shall be disposed of only as provided in...”[Record Retention Laws MCL 399.811]...”

MCL 750.491 (Michigan Penal Code).

# Records Retention

- “A person shall not willfully carry away, mutilate, or destroy the books, papers, records, or any part of a book, paper, or record described in subsection (1) and shall not retain and continue to hold the possession of those books, papers, or records, or parts of those books, papers, or records and refuse to deliver up those books, papers, records, or parts of those books, papers, or records to the proper officer having charge of the office to which those books, papers, or records belong upon demand being made by that officer or, if the office is defunct, the Michigan history center created in the Michigan history center act, 2016 PA 470, MCL 399.801 to 399.812. A person who violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$1,000.00.”

MCL 750.491 (Michigan Penal Code).

# Policy Considerations

## **Applicable to email, text messaging and social media platforms**

- Recognize record retention requirements
  - Practical challenges of retention, reproducing, disclosing
- Recognize OMA/FOIA Concerns
  - Discourage discussions or deliberations by board members
  - Have media/management staff post and respond on social media, not board members
- Discourage use of personal accounts for public business
- Consult with your legal counsel regarding policies

# Questions?



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