

## **Recent Developments Under the Open Meeting Law: E-Mail**

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The Open Meeting Law, M.G.L. Ch. 39, 23A and 23B, was passed to ensure that government business would take place in the open. Recently, issues have arisen relative to the Open Meeting Law in the areas of electronic mail use and the comprehensive permit process. Also, the Legislature has passed an act to allow municipal board members to vote on a matter even when a session has been missed.

The prevalence of the use of electronic mail among municipal board and commission members has raised a question as to whether serial e-mail messages among a quorum of a board, regarding a pending matter, could constitute a violation of the Open Meeting Law. The problem does not arise when there are individual e-mails between the members of separate boards, but when there are serial e-mails among a quorum of the same board. The Middlesex District Attorneys office has published guidelines that prohibit any substantive discussion by a quorum of members of a governmental body about public business by electronic mail. Opinions among the various district attorneys have differed and the Attorney Generals office is attempting to bring the district attorneys together in order to obtain a consensus so that a consistent policy can be developed on this issue.

No Massachusetts appellate court has ruled on this matter. The Supreme Court of Virginia, however, has done so. That court issued a decision on an appeal from a lower court ruling that had held that e-mail communications among and between the mayor and various councilmen, constituted a meeting subject to and in violation of, the open meeting requirement of the Virginia Freedom of Information Act (FOIA). The lower court decision was overturned in part (there were several allegations of meetings in violation of the FOIA) and in so doing, the court made a distinction based upon the nature of e-mail communications. The court ruled that the e-mails were the functional equivalent of letters or facsimile transmissions, specifically noting that in some cases, there was a significant delay between the sending of the e-mail and its receipt. However, the court also stated that its decision would have been different had the discussions occurred via instant messaging or in a chat room.

A number of towns have adopted email policies to make certain that officials use of e-mail complies with the Open Meeting Law. These guidelines should direct all members of town boards, departments and committees to refrain from discussing any substantive matters by way of e-mail. E-mail exchanges should be limited to procedural discussions regarding agendas and scheduling.

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