Technology's role in governing continues to raise questions about transparency

A reporter in the state sent an email in to the hotline during January questioning whether conversations one-on-one among members of the public body can constitute a violation of the law. She was clear that these were not conversations among a quorum of the public body but involved only a small portion of the entity.

Still, of course, the concern arises that such a conversation can lead to the formation of a majority opinion, fostered by these small-group meetings, and cemented by word that others are supportive of a position that has never been discussed by the public body members at a public meeting. An under-the-table consortium created and cemented by actions out of sight of the public.

One early example of this situation arose in 1995, when a group of school board members of the Center School District (a Kansas City suburb) arrived at a board meeting and announced they had the votes to terminate the superintendent, even though no meeting on that subject had been held. Instead, they had held a series of individual discussions and garnered enough support to know they would be successful if a motion was introduced at a board meeting.

In deciding that lawsuit, the Court recognized that individual members alone did not have the power to act and therefore, unless a quorum was present, a "meeting" of the body did not occur. At the same time, that Court held that Courts are not so naive as to be blind to the fact that those inclined to violate the Open Meetings Law could do so using the quorum requirement as a shield. This could be done by conducting, in effect, the equivalent of a "public meeting" in a series of "closed meetings" with numbers of less than a quorum in each such meeting but totaling a quorum or more when taken together.

In such closed meetings with less than a quorum, deliberations could be conducted and votes taken with a public meeting then being held to ratify publicly that which had already been done in private. This would violate the spirit of our Sunshine Law and would render an unreasonable result that was not intended by our legislature."

> *"Discussions that used to take place in corner coffee shops now occur on ... phones. There was a clear need for the Sunshine Law to catch up to reality."*

Fast forward to 2004, nine years later. Cell phones proliferate, all of which are getting text messages. Sending an email is antiquated. And every governmental employee wants one, supplied, of course, by his or her employer. Discussions that used to take place in corner coffee shops now occur on those phones. There was a clear need for the Sunshine Law to catch up to reality.

So, in the course of some tinkering with the statues in chapter 610, this new section (Section 610.025) was added: "Any member of a public governmental body who transmits any message relating to public business by electronic means shall also concurrently transmit that message to either the member's public office computer or the custodian of records in the same format. The provisions of this section shall only apply to messages sent to two or more members of that body so that, when counting the sender, a majority of the body's members are copied. Any such message received by the custodian or at the member's office computer shall be a public record subject to the exceptions of section 610.021."

The new section ensured emails or text messages sent on privately-owned phones, if sent to a quorum of the body, would also be sent to the custodian of the body. And the same year, the definition of "public record" was expanded to cover electronic records retained by a public body, so that any record on a publicly-owned device (computer, phone, or otherwise) was considered a public record.

Sixteen years later, there are still members of public bodies that struggle with this. Questions arise.

If Governor Parson had a private Twitter account, like former President Trump, would it be subject to the Sunshine Law? Are official Facebook accounts of public officials considered public records? To what extent is a public body responsible for retaining comments made on an official account, whether Facebook, Twitter, or otherwise?

The point of this column is not, fortunately, to give you definitive answers to these questions. That takes a more intensive analysis of the facts in each situation. But much of the journalism being done in the last couple of years has clearly arisen around these issues. I am sure we haven't heard the last of this with the change in Presidency.

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