The Open Meetings Act

The Delicate Balance Between Transparency and a Public Body's Ability to Operate

By Christopher J. Johnson and Carlito H. Young

Similar to the recent overhaul of the Freedom of Information Act,[1] Michigan's other governmental transparency statute, the Open Meetings Act,[2] has received a lot of attention from the state legislature during the 2013–2014 and 2014–2015 legislative sessions. While the legislature did not pass several bills regarding the act that were pending in the 2013–2014 session, it is obvious there is a push to increase the statute's goal of transparency. The following is a brief overview of the act and recent activity regarding the statute in both the state legislature and court.

Overview of the Open Meetings Act

Since its enactment in 1977, the Open Meeting Act's primary purpose has been to promote government openness and accountability. To achieve its goal, the drafters broadly defined public bodies under its scope as well as governmental decisions affected by the statute. Per the act, a "public body" subject to regulation essentially encompasses any state or local legislative body, committee, or subcommittee that has the power or authority to perform a governmental function. A "decision" subject to the act's requirements generally includes any "determination, action, vote, or disposition" by members of a public body that effectuates or formulates public policy.[3]

Under the act, all covered public bodies must not only conduct most of their respective meetings in public, they must make all their public policy decisions openly as well.[4] To ensure the public's access, the act specifically requires that a public body provide notice of its meetings and any changes to its regular meeting schedule.[5] According to the statute, a public body's failure to adhere to the act's transparency requirements exposes it to both civil and criminal sanctions. As to the latter, a public official who "intentionally violates" the act is subject to a misdemeanor charge and fine up to $1,000.[6] If a public official is found to intentionally violate the act a second time during the same term as the first violation, he or she would be subject to a $2,000 fine, one year in jail, or both.[7]

With regard to civil sanctions, a person may begin a civil action to comply with the act or enjoin further noncompliance with the statute under MCL 15.271.[8] If the plaintiff is successful in obtaining injunctive relief, the trial court must award costs and attorney fees.[9] The Supreme Court clarified this issue in a subsequent decision, which is discussed later in this article.[10]

Despite its mandate for openness, the Open Meetings Act does permit a public body to conduct closed sessions under a limited number of circumstances. In particular, the statute permits a public body to conduct "closed session" meetings that involve strategy sessions pertaining to a collective bargaining agreement, real property purchases, pending litigation, applications for employment, or any material exempt from disclosure by statute or recognized privileges.[11] Consistent with the act's overall directives, however, a public body's ability to enter into closed sessions is extremely limited. In fact, as set forth in the Court of Appeals decision in *Wexford County Prosecuting Attorney v Prangerwell*,[12] courts are to "construe the closed session exceptions strictly to limit the situations that are not open to the public."[13]

Legislative activity

Legislative activity regarding the Open Meetings Act intensified in late 2012. Based on the bills presented at the

time, it became obvious that a push was in place to increase the public's access to public policy decisions and limit any nonpublic meetings conducted by government entities. The first significant revision to the act occurred when the legislature passed Public Act 528 in December 2012. In particular, PA 528 clearly instructed governmental entities that a public body must post notice of a "special meeting" or "rescheduled regular meeting" at least 18 hours before the meeting. Additionally, the public body must post the notice in a "prominent and conspicuous place" at its principle office. Lastly, the amendment required a public body to post notice on its home web page if it had an Internet presence.

The legislature's overall efforts to expand the act's scope continued in the 2013–2014 legislative session. In January 2013, the Senate introduced SB 103, which intended to broaden the statute's definitions of the terms "public body" and public "meeting" to include the Catastrophic Claims Association created in Section 3104 of the state's insurance code.[14] The House also presented several bills to address the act. For instance, during the 2013–2014 session, House representatives introduced HB 5194

Fast Facts

The Michigan legislature has made transparency for local units of government one of its obvious goals during its recent legislative sessions. For local units of government, there have been significant changes to the state's two "sunshine laws" to ensure the public right to access. Concerning the Open Meetings Act, the legislature's latest amendments to the statute as well as proposed changes to the law indicate that the public's right to access and transparency is more important than any operational or logistical concerns of a local government.

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to address the reenactment of a decision made in violation of the act. Specifically, the proposed bill reaffirmed the act's current language permitting a public body to "reenact" a decision it made contrary to the statute's requirements. However, it also added that the reenactment of the disputed decision would not constitute a defense for a public body or official in either a criminal or civil suit arising out of an improper decision. Simply put, under HB 5194, a public body's quick fix of an improper decision does not automatically preclude an Open Meetings Act lawsuit regarding the decision.[15]

The House also introduced HB 5580 during the 2013–2014 legislation session. With this bill, the legislature sought to increase a public body's record-keeping responsibility as it pertained to public meetings. In particular, the bill required public bodies to include all topics discussed in their minutes, eliminate anonymity in voting, and provide details about their discussions if a meeting was not electronically recorded.[16] Unlike the Open Meeting Act's current requirements for minutes, HB 5580 would have required a recording of a particular member's vote for any non-unanimous decisions.[17] Finally, the bill would essentially force all public bodies to record their meetings, since failure to do so would require their minutes to include the "main points of the discussion that supported and opposed each measure, including the name, subject matter, and summary of the remarks for each person who addressed the public body."[18–19]

In December 2013, the House also attempted to change a public body's ability to enter into closed session. With HB 5193, the House sought to limit a public body's reasons for entering a closed session to discuss matters with its legal counsel. Currently, the Open Meetings Act permits a public body to enter into a closed session to discuss pending litigation with its legal counsel under MCL 15.268(e). HB 5193, however, appears to prohibit any closed sessions involving "anticipated litigation." Clearly, the proposed bill may have caused problems for a public body seeking to resolve potential litigation before filing a lawsuit.

Another significant proposal was the House's February 2015 presentation of HB 4182.[20] Consistent with the legislature's previous activity, HB 4182 seeks to make significant changes to the Open Meetings Act's language. Currently, the act requires all decisions of a public body to be made at a meeting open to the public. With HB 4182, however, a meeting would no longer be considered open to the public if a member of the public body casts his or her vote on a decision without being physically present at the meeting.

The House introduced a similar bill, HB 4363, during the 2013–2014 session. That bill quickly passed the House, but did not have much activity in the Senate. In fact, it remained in a Senate committee for several months and did not pass during the lame-duck session. Presumably, the Senate was attempting to balance in its discussions the concerns of those wishing to prevent "absentee government" with the concerns of public bodies with large, remote geographical areas.

The fact that HB 4182 and HB 4363 appear to be on the wrong side of the technological advances may be a basis for the legislature's overall reluctance regarding

the respective proposals. While the requirement for a public official's physical presence may seem innocuous at first glance, its directive appears to arguably contravene the legal precedent regarding the matter. In particular, the proposed bills are inconsistent with the 1985 Court of Appeals decision in *Goode v Michigan Department of Social Services*.[21] In *Goode*, the defendant public body conducted several of its meetings through conference calls and planned to make telephone hearings its standard protocol.[22] The plaintiff objected to the use of telephone conferences and claimed the public body's permanent use of the procedure violated the Open Meetings Act. In its decision for the public body, the Court of Appeals determined physical presence was not "necessary" to carry out the governmental function of the entity and adhere to the act's overall intent.[23] Moreover, the Court found that the public body's use of the speaker phone not only protected the public's right to access, but increased the "accessibility of the public to attend" the meeting.[24]

HB 4182 would also set aside a 1995 attorney general opinion.[25] In that opinion, the attorney general analyzed whether a proposal to conduct a public body's annual budget meeting via "interaction television" violated the Open Meetings Act. Relying on the Court's rationale in *Goode*, the attorney general opined that the public body's use of interactive television did not violate the act. The attorney general further determined that the public body's use of the interactive television was superior to the telephone conferences endorsed in the *Goode* decision because all officials participating in the meeting would be "seen as well as heard."[26] Current technology, more advanced than that referenced in the *Goode* and attorney general opinions, should alleviate concerns that reliance on such technology would undermine the openness and accountability required under the act.

Caselaw

On the caselaw side, the Michigan Supreme Court recently ruled on an attorney fee issue in *Speicher v Columbia Township Board of Trustees*.[27] In that case, the township board of trustees had adopted a monthly schedule of planning commission meetings for the 2010–2011 year. However, during the regularly scheduled commission meeting in October 2010, it passed a resolution stating it would conduct quarterly, rather than monthly, meetings beginning January 2011. The township clerk then requested publication of the new meeting schedule in the *South Haven Tribune* and posted the revised version at the township hall entrance.

The plaintiff stated he had no notice of the revised schedule, and appeared for meetings in February and March 2011. He claimed the posted notice did not reflect the change and no notice was published in the paper before the previously scheduled meetings. The plaintiff sued the defendant board members, alleging that the decision to change the meeting schedule was not made at an open meeting and the February and March meetings were cancelled without proper notice, in violation of the Open Meetings Act. As a result, the plaintiff alleged that his right to present concerns to the planning commission was impaired. He wanted a declaration that the commission's cancellation of the regularly scheduled meetings was done in violation of the act and sought to enjoin both the commission and the township board from further noncompliance with the act. The plaintiff cited MCL 15.271(4) as requiring reimbursement of attorney fees and costs.

The trial court ruled in favor of the township, specifically holding that the plaintiff had not been denied access to any meetings. The trial court also ruled that, to the extent any notice may not have been posted in a timely fashion, the violations were technical in nature and did not impair the public's rights to have decisions made at a public meeting.

The plaintiff appealed to the Court of Appeals, which affirmed in part and reversed in part. The Court ruled that the schedule change was properly made at an open meeting, but the Open Meetings Act was violated by not posting the modified schedule in a timely fashion. The Court ruled that the trial court erred in failing to grant declaratory relief on that point. It also ruled that the trial court properly denied injunctive relief since there was no history of Open Meetings Act violations, nor was there

evidence that the violation was willful. Attorney fees and costs were not to be allowed on remand.

The plaintiff moved for reconsideration in the Court of Appeals, claiming he was entitled to attorney fees and costs since he was entitled to declaratory relief. In a published opinion, the Court granted reconsideration and held that, under existing caselaw, the plaintiff was entitled to attorney fees and costs.[28] The Court held that it was bound by *Ridenour v Dearborn Board of Education*,[29] although it disagreed with the analysis employed in *Ridenour* and its progeny.[30]

The Supreme Court ordered oral arguments on the defendants' application for review, specifically directing the parties to address whether MCL 15.271(4) authorizes an award of attorney fees and costs to a plaintiff who obtains declaratory relief, or whether a plaintiff must obtain injunctive relief as a required condition to recover attorney fees and costs.

The Supreme Court ruled that a plaintiff is required to obtain injunctive relief to recover attorney fees and costs.[31] In doing so, the Court overruled *Ridenour* and its progeny, to the extent it allowed plaintiffs to recover attorney fees and costs when injunctive relief was not obtained. This is significant because a minor mistake by a public body will not result in automatic attorney fees to a plaintiff.

Conclusion

As with the Freedom of Information Act, the legislature is keeping increased pressure on local units of government to be transparent under the Open Meetings Act. Per the activity referenced previously, it appears that local public bodies will have even more limited opportunities to conduct matters outside of the public's watchful eye. It might be an interesting concept if the legislature applied the same logic to partisan caucuses of the state legislature,[32] where the real decisions of the legislature are made. ■

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ENDNOTES

1. On January 11, 2015, Governor Snyder signed Public Act 563 of 2014, which institutes several changes to the current statute's fee structure and reimbursement mandate for public bodies. All public bodies were required to be compliant with the new changes by July 1, 2015.
2. MCL 15.261 *et seq.*
3. MCL 15.262(d).
4. MCL 15.263(1) and (2).
5. MCL 15.265.
6. MCL 15.272(1).
7. MCL 15.272(2).
8. The attorney general or county prosecutor could also bring a civil action against the public body under the Open Meetings Act.
9. MCL 15.271(4).
10. See *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125; 860 NW2d 51 (2014).
11. MCL 15.268.
12. *Wexford Co Prosecuting Attorney v Prangerwell*, 83 Mich App 197; 268 NW2d 344 (1978).
13. *Id.* at 201.
14. See MCL 500.3104. The Senate bill was referred to the Senate Committee on Insurance.
15. The House passed HB 5194 on May 21, 2014. The bill did not pass during the legislature's lame-duck session.
16. House Legislative Analysis, HB 5580, September 8, 2014.
17. *Id.* Currently, the Open Meetings Act requires that the minutes encompass everything a public body discussed, but not the recording of a particular member's vote for non-unanimous decisions.
18. *Id.*
19. HB 5580 was introduced in May 2014 and did not pass during the lame-duck session.
20. Rep. Amanda Price introduced the bill on February 11, 2015. The bill is currently in the House Committee on Oversight and Ethics.
21. *Goode v Michigan Dep't of Social Servs*, 143 Mich App 756; 373 NW2d 210 (1985).
22. *Id.*
23. *Id.*
24. *Id.* at 759–760.
25. See OAG, 1995, No. 6835 (February 13, 1995).
26. *Id.*
27. *Speicher*, 497 Mich 125.
28. *Id.*, citing *Speicher v Columbia Twp Bd of Trustees*, 303 Mich App 475, 476–477; 843 NW2d 770 (2013).
29. *Ridenour v Dearborn Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981).
30. *Speicher*, 497 Mich 125, citing *Speicher*, 303 Mich App at 476–482.
31. *Speicher*, 497 Mich 125.
32. See MCL 15.268(g).