Coates' Canons Blog: Texting While Meeting: Is it Illegal for Local Government Officials?

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Texting, tweeting, emailing, blogging, posting: members of public boards are doing this during meetings using their private or publicly-issued electronic devices, and communicating with each other, with individuals or groups attending the meeting, and with individuals and groups anywhere in the world. Is this legal? Is it useful? Or is it just **rude**? Can the board restrict its own members from doing it? Can it restrict anyone else from doing it? Public agencies across the country are struggling with the answers to these questions. At least one **state** has considered modifying its open meetings law to prohibit it, and some **cities** have proposed to restrict it by board policy. This post analyzes the issue under North Carolina's open meetings and public records laws, and under the laws that govern the power of a board to restrict the behavior of its members.

Open Meetings Issues

There is no legal prohibition on individual board members communicating with each other or with others during a meeting, as long as 1) the meeting is not a quasi-judicial hearing; and 2) the number of board members communicating with each other about a matter of public business does not add up to a majority of the board. The following hypothetical communications during a public meeting are examples of things that *do not* violate the open meetings law:

1. A board member tweets that it's time for the mayor to stop her incessant whining about the police chief.
2. A lobbyist sitting in the audience texts a board member about a matter currently under discussion.
3. A lobbyist sitting in the audience texts the entire board about a matter currently under discussion.
4. A majority of the members of the board are texting about where to go for beers after the meeting. (Note that as long as the beer drinking remains entirely social with no discussion of public business, that gathering does not violate the open meetings law either.)
5. One member emails another board member suggesting that she make a motion to table the matter currently under discussion (assuming that two is not a majority on the particular board).
6. A citizen in the audience posts a message on Facebook telling a group that has attended the meeting to "Stand up now and hold up your signs," which say, "Occupy the City Council" and "Take Back Our Government."

In contrast, the following hypothetical communications during a board meeting are examples of things that *could* violate either the open meetings law or due process.

1. Three of the five board members are emailing back and forth about the text message they just got from the lobbyist sitting in the audience.
2. A citizen in the audience (or elsewhere) emails or texts one or more board members with information about the past, unmet promises of the developer whose permit application is currently being discussed in a quasi-judicial hearing.
3. Three of the five board members are commenting on the Occupy the City Council Facebook page, defending the recent actions of the city in removing the protestors who appeared at the last meeting.

The outcomes in the two sets of examples are based on two bodies of law. The first is the **open meetings law,** which requires official meetings of public bodies to be open to the public (unless a closed session is authorized). An official meeting occurs when a majority of the public body gathers simultaneously, in person or electronically, to transact the public business of the body. (See my earlier blog post **here** about how to calculate majorities.) This law applies to both elected and appointed boards. Given the right of public access to meetings of public bodies, it seems clear that a majority of the body cannot conduct business in secret, even during a meeting that has been properly noticed and is otherwise open to the public.

The law does not, however, prohibit an individual board member from consulting with a member of the audience or even whispering to another board member. Whether the communications are electronic or in person, the right of access under the open meetings law is to actions of a majority of the board, communicating simultaneously about public business.

The second body of law applies when a board is meeting in a quasi judicial capacity. In that case, the constitutional guarantees of due process apply, such as the opportunity to know and respond to facts and information upon which decisions are based (again, whether in person or electronic) and the right to a neutral and unbiased decision maker. Secret (unshared) or unsubstantiated information received by board members could run afoul of these requirements. For more about the requirements in quasi-judicial settings, read David Owens' blog post **here**.

Public Records

It is entirely possible that a "secret" electronic communication that is permissible during a meeting under the open meetings law might constitute a public record subject to public access under the public records law. Any record made or received in the transaction of public business is subject to public access under the North Carolina **public records law**. Under this broad standard, I would say that from the first list of hypothetical communications, numbers 2, 3, and 5 are public records. (It's possible that number 1 is as well, although I tend to think that snarky comments about public officials may not rise to the level of the transaction of public business.) All three of the examples in the second list would be public records.

Board Policies

Legal requirements aside, does a governmental board have the authority to prohibit its members from texting, tweeting, blogging or emailing during a meeting? Shouldn't board members be focusing on the business at hand? I suppose reasonable minds may differ about what types of communications or activities should be allowed during a meeting. In terms of board policies, I think the board can adopt policies, guidelines, and agreed upon best practices for their behavior and communications during meetings. These could be adopted as part of the board's rules of procedure, ethics policy, or just by separate motion or resolution.

How would such policies be enforced? Elected boards have no specific authority to remove, fine, or take any other punitive action against their members. This means that, in effect, an elected board would have to rely on voluntary compliance with any policy, no matter how or in what form it is adopted. Elected boards probably have implicit authority to censure a member, since that action is simply a public expression of dissatisfaction by the board (or at least a majority of the board) regarding the actions of one or more if its members.

For appointed boards, the appointing authority probably has authority to impose these types of limitations on appointees and, depending upon the type of board involved, may be able to remove members who fail to comply with them.

Finally, I think a board has very limited authority to control communications by members of the public. Communications that cause significant disruption of a meeting might be within the board's ability to control, but even then it would be the actual disruption and perhaps not the communication that could be restricted. First Amendment issues abound in any policy that limits communications, whether by members of the public, the board, or even employees of the unit.

Developing a policy on texting while meeting might well be described as a process that requires finding the right balance between free speech rights, public engagement, personal convenience, and etiquette. Apparently, there's no app for that…yet.

For more on the status of text messages as public records see: **Text Messages as Public Records.**

Links

- canons.sog.unc.edu/wp-content/uploads/2011/11/texting.png
- lifehacker.com/5540578/texting-during-meetings-is-definitely-noticed-seen-as-rude
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