

Governmental Law Update

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Challenges of E-mail Communication and the Responsibilities for Compliance with the Freedom of Information Act

By Charles B. Judson, Attorney

Michigan's Freedom of Information Act (FOIA) went into effect on April 13, 1977, long before the world experienced rapid internet connectivity and communication by e-mail. Compliance with public access laws such as FOIA has placed a strain on municipalities trying to produce information within the expectations of an increasingly demanding public. Perhaps a more subtle intrusion of an internet world on public bodies is the manner in which their boards utilize e-mail, and the difficulties such use can place upon the FOIA coordinator.

Since 1977, there have been few amendments to Michigan's FOIA which recognize e-mail communication and other electronic data. Other than confirming that the response time required by law begins the day after receipt of an e-mail, our state legislature has done little to analyze the impact that internet access to information and e-mail has placed upon required open disclosure by public entities. This lack of legislative attention was highlighted in the recent case of *Howell Education Association et al v Howell Board of Education, Howell Public Schools, and Chetley Zarko*. In providing social commentary relative to e-mail, the Court of Appeals stated:

The issue before us requires us to consider the application of the FOIA statute, adopted in 1977 and last amended in 1997, in the context of today's ubiquitous e-mail technology. This is a challenging question

and one which, as we noted at the outset, we believe is best left to the legislature as it is plainly an issue of social policy. Unfortunately, until the legislature makes its intention clear by adopting statutory language that takes this technology into account, we must attempt to discern, as best we can and given the tools available to us, what the intent of the legislature would have been under the circumstances of this technology that it could not have foreseen... we find ourselves in a situation akin to that of a court being asked to apply the laws governing transportation adopted in a horse and buggy world to the world of automobiles and air transport.

In recent months, we have advised public bodies regarding unique applications of Freedom of Information requests related to e-mails in the following contexts:

1. A request for e-mail communications related to the official function of the public body where the public body did not have sufficient software to identify a subject matter review that would permit a timely response;
2. A request for e-mail communication between members of a public body related to the official function of the business of that public body; however, the e-mails

requested were all maintained on private e-mail accounts; and

3. E-mail communication between members of a public body which address preliminary matters which had not yet been formalized in an official position of that public body.

The challenge in responding to all three inquiries had little to do with any effort to keep information secreted away from public interests. In the first instance, the length of time required for an experienced staff member to coordinate and open thousands of e-mails in order to even determine whether the subject matter fell within the scope of the FOIA was estimated to be hundreds of hours.

The second inquiry is one common to rural areas. Small voluntary boards appointed or elected to these public bodies do not often have an official procedure to document information and maintain it for public records. As a consequence, the challenge in responding to this FOIA was a determination of whether communication maintained on private e-mail accounts with a non-governmental server could in any manner constitute a public record. The issue is further complicated by the fact that, although the relevant documents were anticipated to exist with only two or three board members, the scope of the inquiry required potential review of dozens of board members' private accounts. In addition, this public body did not have paid staff or office space which complicated the management of official record keeping.

The third example is a common one: e-mails exchanged between board members without a thought that each creates a potential public record, and the possibility that forwarding comments to multiple board members could be interpreted to be deliberations under the Open Meetings Act.

Handling requests for e-mail communications under FOIA is complicated by the manner in which that communication is utilized by participants. In the course of several years of reviewing complicated situations relative to FOIA requests, we have come to believe that all e-mail communication is not necessarily intended to serve the same purpose. For instance, some e-mail communication handled between board members is akin to a telephone conversation where no written record would ordinarily be maintained. A typical format for e-mail communication involving public bodies and their board members may involve the use of e-mail communication as a replacement to written letters. However, on controversial items, it is common for those e-mail "written letters" to be sent and revised between board members on a number of occasions over a short span of time, which also maintains a similarity to a telephone or face-to-face conversation. Lastly, some e-mail communications have documents attached to expedite committee review and processing of policy for public entities. While there are more uses for e-mail communication, these three represent types of e-mail communications common among public bodies.

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The *Howell Education* case in 2010 provided confirmation of the fact that all e-mail communication is not necessarily subject to FOIA because all e-mail will not necessarily be defined as a "public record." In fact, upon receipt of a FOIA request, the public body must first determine whether the e-mail still exists. Assuming its existence, the public body is then required to determine whether the e-mail constitutes a public record. As defined by Michigan law, a public record "means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function..." If the public body determines that the e-mail does exist, and it constitutes a public record, inquiry can then be made whether or not an exemption to production

of that e-mail exists within the requirements established by law.

Legitimate administrative expenses to determine whether the e-mail exists, and whether or not it constitutes a public record, can be legally billed to the requesting party. However, the costs of producing the e-mails or evaluating whether or not exemptions to production apply are not recoverable costs under FOIA.

Many public bodies do not have software that permits an efficient review of the subject matter or content of e-mail communication requested under a FOIA. Significant staff effort to review whether public records requested even exist may be required. In addition, rural municipalities often do not establish a governmental e-mail account for board members, which raises the possibility that a court may well require private e-mail accounts to be reviewed if board member communications could be construed to be a public record as defined by FOIA.

Public bodies must be diligent in developing policies and keeping them up to date in order to assist in both defining the categories of e-mails that may fall within the access of a public body, as well as complying with requests under the FOIA. Updated record retention policies which provide some definition as to which e-mails will

be considered public records of that public body can be helpful. In addition, establishing a policy which defines the manner in which all public records will be preserved and processed can avoid headaches for public bodies in addressing overly-broad e-mail FOIA requests.

In the end, these steps serve only to limit exposure to liability and costs, and do not truly serve to advance the public's right to access to public records as originally identified when the Act was created in 1977. In a time of diminishing budgets, a prospective review of current e-mail policies in place could eliminate unnecessary legal action and the resulting expense. Smith Haughey represents a diverse group of governmental entities and can assist in developing a strategy to minimize potential costs in responding to FOIA, and making the process more efficient for all concerned.

Chuck assists municipalities and nonprofit organizations with the preparation and understanding of administrative policies, and advises on how to conduct public meetings in confrontational settings. He is very experienced in board governance, the Open Meetings Act, and the Freedom of Information Act. Chuck can be reached directly at cjudson@shrr.com or 231-486-4519.

Super Immunity

By Karl W. Butterer, Jr., Attorney

If you are the highest elected or appointed executive official in government, a judge or a legislator, then you may have a power perhaps even greater than the ability to leap tall buildings or run faster than a speeding train; well, in the courtroom anyway. You have the power to defeat nasty civil lawsuits based on things you do while exercising your governmental authority. In some cases, this "super immunity" is so powerful that you can get dismissed from a lawsuit almost immediately after it is filed: no depositions; no interrogatories; no trial. What is the nature of this

super immunity, and how do you know if you have it?

All government employees and officers enjoy some form of immunity from lawsuits. For example, public works employees, police officers, and secretaries have the power of (what this article will call) "regular immunity" when they are acting in the course of their employment. This means that as long as those employees are acting within the scope of their governmental authority (usually the case), and the agency for

which they work is engaged in the exercise or discharge of a governmental function (almost always the case), then they cannot be sued in tort for injury to a person or property, unless they were grossly negligent. Gross negligence is a pretty high standard under the law. Moreover, the employee's gross negligence would have to be *the* – not just *a* – cause of the plaintiff's injury.

As great as regular immunity is, super immunity is better. A person with super immunity is totally immune from tort lawsuits as long as they are “acting within the scope of his or her judicial, legislative, or executive authority.” A person with super immunity is immune even where his acts were grossly negligent. That is no small protection in light of the fact that what is or is not gross negligence often depends on the outcome of disputed facts, the judgment of a judge or jury, and the creativity of the plaintiff's attorney. It is not unusual for a defendant to litigate for a year or more before she is in a position to even make an argument that she was not grossly negligent. A person with super immunity can bypass that part of the litigation altogether.

So who has this super immunity? Anyone who wears a black robe at work and is called “your honor” is almost certain to have super immunity. Someone who was elected by constituents to pass legislation in the state legislature, a member of a municipality's primary board of commissioners, or a member of the local school board is very likely to have super immunity. Someone who

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does not fit into one of these categories may or may not have super immunity. In those situations, it is less clear and may depend on whether the official is the “elective or highest appointive executive official of a level of government.”

For example, in the case of *Grahovac v Munising Township*, the township fire chief was found not to have super immunity because the township fire department was not a “level of government.” The court found that the department was at the complete disposal of the township board, and could not exist nor act without the board's authorization. However, in *Davis v City of Detroit*, the court found that the fire commissioner did have super immunity, because the city charter and the city code gave him enough “autonomous authority” which the fire chief in the *Grahovac* case did not have. Accordingly, the City of Detroit fire department was a “level of government” and the commissioner had super immunity. Case dismissed.

The highest elective or appointed official of a level of government still might not have super immunity if they acted **outside the scope of their judicial, legislative or executive authority**.

Anyone with questions about their immunity power can contact the author. Karl has focused his practice on the representation of governmental agencies and their officials for the last 17 years. He can be reached directly at 616-458-9294 or kbutterer@shrr.com.

Guidelines for Elected or Appointed Officials Regarding Legal Matters and Lawsuits

By Robert C. Stone, Attorney

Although lawsuits generally are filed against governmental units as entities and not against individual elected or appointed officials, it is important that those officials understand their obligations with regard to legal issues faced by

governmental units. The individual actions of government officials may have an unintended impact on those legal issues. Although not all-inclusive, these guidelines are offered to help elected/appointed officials avoid complications

associated with potential or existing litigation. Some officials may feel these guidelines are somewhat restrictive with regard to interaction with the public, but their primary purpose is to provide advice on how to avoid negatively influencing lawsuits against the governmental unit.

1. Avoid discussions of specific operational or management issues or actions taken or planned by the governmental unit with individuals outside of the governmental unit or with individuals within the governmental unit other than (1) the primary management employee, (2) other members of your governmental commission or board or (3) legal counsel. Although governmental boards act collectively, your individual actions and/or comments might have adverse legal consequences later for the governmental unit. If a lawsuit or other legal proceeding is filed, your individual actions or comments could be considered an admission or result in your being included as a witness by a party adverse to the governmental unit.

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2. If approached or contacted by individuals about specific operational or management issues facing the governmental unit, whether those individuals are from outside of the governmental unit or the governmental unit's own employees, direct them to follow proper and established channels within the organization for their type of issue as required by policy and contractual obligations. Individual members of the board or commission should not try to solve specific operational or management issues, whether they are employment issues or other types of issues.

3. Private conversations about governmental unit issues with other board or commission members, the primary management employee or the governmental unit's legal counsel

should remain private unless disclosure is authorized by the governmental unit's legal counsel or otherwise required by law.

4. If a lawsuit is filed against you or the governmental unit, immediately notify the primary management employee of the lawsuit so that proper notice can be given to insurance carriers and other essential responses can be made. Remember, there are specific time deadlines for responses to lawsuits. Failure to respond in a timely manner may result in a default judgment against you and/or the governmental unit.

5. If a lawsuit is filed involving you and/or the governmental unit, DO NOT talk with anyone about it other than other members of the board or commission, the primary management employee, or the governmental unit's legal counsel. Remember, conversations with legal counsel are privileged from disclosure and officials should protect the confidentiality of those discussions.

6. Do not send emails about the lawsuit within the governmental unit or to any third parties except to the governmental unit's legal counsel. Those emails may be discoverable and could impact the governmental unit's legal position. Do not destroy anything or allow a document management process that deletes information to continue unabated. From the moment you receive a lawsuit, or even a notice of the possibility of a lawsuit, you have obligations concerning retention of documents, electronic data, and the like. "Spoliation" of evidence can have serious consequences.

7. The Open Meetings Act allows discussion of certain types of government business in closed session, including discussions with legal counsel regarding pending litigation. The content of those closed session

discussions is confidential and should not be shared with anyone else unless disclosure is authorized by the governmental unit's legal counsel or otherwise required by law.

8. Do not call, contact, or talk to the opposing party or opposing party's attorney about a lawsuit or potential lawsuit, even if you are asked to do so. If the opposing party or the opposing party's attorney attempts to discuss the lawsuit with you, refer them to the governmental unit's attorney. If a lawsuit has been filed, you have to consider the opposing party and his or her attorney as adversaries. The job of the opposing party's attorney is to help the opposing party win his or her case against the governmental unit, and anything you say might be turned against you or the governmental unit.
9. Do not speak with the media about specific operational or management issues, legal issues or lawsuits. Any and all media contact regarding legal issues and lawsuits should be handled through the governmental unit's legal

counsel. Any and all media contact regarding operational or management issues should be handled through the primary management employee.

10. Work closely with the governmental unit's insurance carrier (if there is coverage) and/or the governmental unit's legal counsel. The governmental unit's legal counsel needs all of the facts regarding the lawsuit. Not giving the governmental unit's attorney all of the facts from the start handicaps his or her ability to handle the case. Remember, conversations with legal counsel are privileged, so be completely open and honest.
11. Finally, do not panic. Lawsuits are a fact of life in today's world. The governmental unit will defend itself and the operations of the governmental unit will continue.

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The Michigan State Ethics Act and How it Affects Local Officials

By Karl W. Butterer, Attorney

City councilman Michael Carrigan probably did not expect to find himself fighting ethics charges in front of the United States Supreme Court for voting in favor of a local casino development project in Sparks, Nevada. After all, he had disclosed on the record that one of the developers was a longtime friend and his campaign manager. He was even so careful as to get a green light from the city attorney before the vote. What could go wrong?

According to opponents of the project, his vote violated the Nevada state code of ethics, and they filed a successful complaint against him with the state ethics commission. Carrigan, a former Navy pilot, was

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outraged by the commission's decision, and took the matter up to the highest court in the land. In April, he argued that the state ethics code violates his First Amendment right to free speech.

Carrigan's journey from local municipal board room to the U.S. Supreme Court should remind every local official in Michigan that their decisions are subject to scrutiny under a general set of state statutory ethical standards.

The State Ethics Act

In the wake of the Watergate scandal, the State of Michigan passed a code of ethics for government

officials commonly known as the State Ethics Act. The Act originally only established an ethical code of conduct for state employees, and created a State Board of Ethics to investigate alleged ethical misconduct. The legislature later amended the Act to include protections for citizens who “blow the whistle” on unethical conduct. The Attorney General interpreted that amendment to subject all local officials to the code of ethics. But, unlike state employees, local government officials are not subject to the jurisdiction of the State Board of Ethics. This means that local officials must obey the code, but the State Board of Ethics itself will not pursue claims against local officials.

This article will not attempt to recite or summarize each portion of the entire ethical code, which is available on the web at <http://legislature.mi.gov/doc.aspx?mcl-15-341>.

Below is a list of some of the major activities which are prohibited by the State Ethics Act:

- Participating in a business transaction in which the official may profit from his official position or authority;
- Participating in a business transaction in which the official may benefit financially from confidential information obtained by reason of the official’s position or authority;
- Engaging in employment when that employment is incompatible or in conflict

with the discharge of the official’s official duties;

- Engaging in employment which may tend to impair her independence of judgment or action in performance of her official duties;
- Soliciting or accepting a gift or loan of money, goods, services or other things of value for the benefit of a person or organization other than the government which tends to influence the manner in which the official performs official duties;
- Negotiating contracts with, fixing rates for, issuing permits to, regulating or supervising a business entity in which the official has a financial or personal interest.

In addition to the State Ethics Act, government officials are also subject to a separate Act which governs contracts between officials and public entities.

If you have a question regarding either the state code of ethics or prohibitions on contracts with public entities, please feel free to contact the author. Karl has focused his practice on the representation of governmental agencies and their officials for the last 17 years. He can be reached directly at 616-458-9294 or kbutterer@shrr.com

News & Events

Karl Butterer recently obtained dismissal of all claims in the trial court against the Kalamazoo County Road Commission arising out of the Road Commission's decision to void portions of a local township's trucking ordinance. The matter is likely headed to the Michigan Court of Appeals, where the judges are expected to address the authority of a road commission to void a township traffic ordinance where a neighboring

township objects to the ordinance on the grounds that it diverts traffic onto a roadway which borders the adjacent township.

Todd Millar was recently successful in two governmental cases. The first, the plaintiff sued the City of Boyne City for alleged takings violation and other constitutional claims when the City redesigned and repaved the road in front of

the plaintiff's home. The Federal District Court dismissed the plaintiff's lawsuit as to the City when the plaintiff failed to abide by a court order regarding responses to the City's Motion to Dismiss. The case was remanded to State Court and the plaintiff asked the Circuit Court Judge to reverse the Federal Court Judge and reinstate the claims against the City. The Circuit Court Judge denied plaintiff's motion concluding that the Circuit Court had no authority to reverse a Federal Court Order and the plaintiff should have appealed that dismissal to the Sixth Circuit Court of Appeals.

In the second case, the plaintiff sued Green Lake Township in circuit court more than 60 days after

the Township ZBA denied its variance request. The plaintiff attempted to argue that its suit was not an appeal of the ZBA decision and that the Township Planning Commission violated state law in requiring the plaintiff to use its property in a manner that would be unsafe for the general public. The circuit court dismissed the lawsuit as an untimely filed appeal of the ZBA decision.

Todd Millar gave a presentation to Benzonia County officials about the principles of zoning and zoning litigation.

Grand Traverse Metro Emergency Services Authority has recently retained Smith Haughey for an additional four years of legal service.

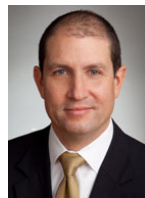
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