OCOG to join in appeal of meetings case on secret email deliberations

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By Dennis Hetzel, Executive Director

Hetzel

How would you answer these questions?

1. Should a quorum of a public body in Ohio that is covered by the open meetings law be able to use e-mail for deliberations?
2. Is it OK if they don't include everyone on the board in those discussions before taking a final vote?
3. Should there be no obligation to provide notice to the public or allow the public to witness or contribute to those deliberations?

Answering "yes" to those three questions sounds like awful public policy – at least to us, and I hope to you. Unfortunately, that could be the message elected officials receive statewide if the Ohio Supreme Court rules in favor of the Olentangy School District Board of Education just north of Columbus.

And that is why the board of the Ohio Coalition for Open Government has voted to fund an amicus, "friend-of-the-court" brief in support of Adam White, the school board member who was excluded from e-mail deliberations and has sued the district, claiming that the e-mail deliberations were illegal and violated the open meetings law.

OCOG general counsel Dave Marburger, perhaps the state's leading expert on open meetings and open records laws, will lead the amicus effort in support of White, who is appealing an adverse ruling from the Delaware County Court of Appeals. (Marburger did not participate in the OCOG board voting.)

The basic facts of the case, as reported by The Columbus Dispatch and This Week newspapers are this:

White sued in April, 2013, claiming that four other board members deliberated via e-mail regarding a response to an editorial in The Dispatch. The e-mail string reportedly sprung from White's investigation into allegations of improper spending by two district athletic directors. One director later resigned and both reimbursed the district, This Week reported.

The Dispatch's critical editorial was prompted by a board vote in September, 2012, to require communications between board members and district employees to pass through the district's administration. White voted against the measure. The e-mail discussion that excluded White focused on how the district should respond to The Dispatch. The board voted to ratify the letter they sent to the Dispatch on the same day White filed suit.

Last month, the Fifth District Court of Appeals affirmed a local court ruling that unsolicited e-mails did not constitute a "prearranged meeting," which is one of the requirements of the open meetings law.

Officials have to have some latitude to share ideas, and few would complain about a quick email exchange between two public officials. However, we think this case crossed the line. A quorum of an elected body was dealing with a matter of public interest and importance. Ohio law says the only way an elected board can make a decision, with only rare exceptions, is by meeting in person following adequate public notice.

As we are seeing all too often these days, the courts seem inclined to view the open government laws as very narrow despite their expansive – and stated — purpose. For example, the appeals court ruled that a letter to the editor from a board of education was not "official business" even though the board itself voted to officially ratify the letter at a board meeting.

And consider this statement in Judge John Wise's written opinion: "The mere discussion of an issue of public concern does not mean there were deliberations under the statute," Wise wrote. The fine distinction between "discussion" and "deliberation" seems tortured, at least to me as a non-lawyer.

Now this case is at the Ohio Supreme Court, where a ruling will set a statewide precedent.

Common Cause and the League of Women Voters of Ohio supported White's appeal, and we are hoping that they and other groups will join in OCOG's appeal to the Supreme Court.

"Unless the judgment entry is reversed, all public bodies throughout the state of Ohio will be allowed to conduct all public business in private, provided they later ratify such private deliberations at a public meeting," Common Cause and the League wrote in their brief, filed in April. "That outcome would eviscerate the clear language and legislative intent of the statute."

Postscript: Please consider a donation to OCOG

OCOG's resources truly are limited to carry out legal battles such as this. If you or your organization would like to make a tax-deductible contribution to support its work, please contact me at 614-486-6677 or dhetzel@ohionews.org. OCOG is a 501(c)3 organization administered through the Ohio Newspapers Foundation.

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