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Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws

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SUNSHINE IN CYBERSPACE? ELECTRONIC DELIBERATION AND THE REACH OF OPEN MEETING LAWS

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.[1]

I. INTRODUCTION

From its inception, the American government has derived its power from the people.[2] Our republican form of government acknowledges the people as "the only legitimate fountain of power" from which the power of government is derived.[3] From these early principles, legislatures today provide the people access to observe and to participate in the decision making process of the government, a right not found in the common law.[4] To facilitate observation and participation in their government and to ensure that the government does not exert powers beyond those provided to it, the people have required public decision makers to deliberate and to act openly.

These decisions makers, however, can hide deliberation from the view of the public through the use of an array of tools. The ease of hidden deliberation has increased as the quality and quantity of these tools expanded with the progress of technology. Specifically, the recent proliferation of personal computers in government provides new ways for decision makers to communicate privately. Electronic mail (e-mail) is a message composed on one computer and transmitted electronically to another. Messages can be sent internally on a private network of computers (intranet) or through non-private

1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON, 1819–1836, at 103 (Gaillard Hunt ed., 1910). This quote is regularly invoked to show a historic connection to modern open meeting and open record laws. Despite its widespread use, the specific context of this particular quote indicates that Madison was writing about the importance of popular education, not openness of government. Paul H. Gates, Jr. & Bill F. Chamberlin, *Madison Misinterpreted: Historical Presentism Skews Scholarship*, 13 AM. JOURNALISM 38, 43 (1996) (discussed in Martin E. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794–98*, 7 COMM. L. & POL'Y 51, 56 (2002)).

2. THE FEDERALIST NO. 43 (James Madison) (arguing that the authority of the states to adopt the federal Constitution is legitimate because the people have provided it to the states).

3. THE FEDERALIST NO. 49, at 281-82 (James Madison) (Clinton Rossiter ed., 1999) (quoting Thomas Jefferson).

4. Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1203 (1962).

networks (internet). One leading technology research firm estimates that thirty-one billion e-mail messages were transmitted daily across the globe in 2002.[5] This count is expected to rise to sixty billion messages worldwide by 2006.[6] Computer users can also communicate by posting messages on electronic bulletin boards, common computers that permit other users to access their contents and post messages of their own. These messages may be read, and new messages may be posted in response. Bulletin boards also may be kept privately or publicly. Instant messaging, electronic communication occurring instantaneously between two or more people, combines elements of these technologies. As text is composed, all members of the chat session see the text and may respond to the message immediately. The same research firm estimated that sixty-five million business users worldwide participated in instant messaging in 2002, and that two hundred and seven million business users will participate in instant messaging in 2006.[7]

These new methods of communication affect the ability of decision makers to communicate with each other and with their constituents. For the constituents, this results in both an increased and decreased ability to observe their government. This Comment will explore recent application of open meeting laws to these new methods of communication. Part II explores the basic elements of open meeting laws—who is covered, what constitutes a meeting, where the laws apply, when a body must meet publicly, why open meetings are required, and how a body complies with the laws. Part III examines the application of the laws to exchanges of e-mail among members of public bodies when they act without the intention of meeting. Part IV addresses the proactive use of electronic communication by public bodies and the limitations imposed by open meeting laws. Part V examines the applications of open meeting laws and how the application varies depending on the level of deliberation involved and the means of communication chosen. Part VI expresses agreement with the strict treatment of electronic communication among members of a public body under open meeting laws, but suggests a modification of the current definition of meetings to exclude communication by public officials made to and with members of the public, a change that would permit more interaction under open meeting laws.

II. OPEN MEETING LAWS

Open meeting requirements date back to the beginning of the country, but these early laws focused on specific operations of government, controlling

5. *In Brief: Did You Know?*, P.C. WORLD, Dec. 2002, at 34.
6. *Id.*
7. Yudhijit Bhattacharjee, *A Swarm of Little Notes*, TIME, Sept. 16, 2002, at A4, A5.

specific meetings or specific deliberations.[8] The current generation of open meeting laws, however, has evolved over the past fifty years to cover the breadth of government operations.[9] Alabama is an exception to this recent development; it claims passage of the first expansive open meeting law in 1915, and its regulations essentially remain in effect today.[10]

To provide its citizens with access to the operations of the government, Florida is known for interpreting and applying its open meeting law more aggressively than other states.[11] Florida passed its current version of an open meeting law, entitled the Government in the Sunshine Act, in 1967.[12] Florida law requires public access to meetings of any agency or authority of the state or any municipal government at which the body will take official action.[13] Today, all states and the federal government have adopted open meeting requirements.[14] This section will highlight common provisions of open

8. ANN TAYLOR SCHWING, OPEN MEETING LAWS 2D § 1.1, at 2 (2000). As suggested by the title, this reference provides an in-depth discussion of all aspects of open meeting laws.

9. *Id*.

10. *Id*. at 3 (referencing Act Number 278, 1915 Ala. Acts 314 (codified as amended at ALA. CODE §§ 5254-5255 (1923))). *See also* Christopher W. Deering, *Closing the Door on the Public's Right to Know: Alabama's Open Meetings Law After* Dunn v. Alabama State University Board of Trustees, 28 CUMB. L. REV. 361, 367-68 (1997).

11. B. Mitchell Simpson, III, *The Open Meetings Law: Friend and Foe*, R.I. B.J., Oct. 1996, at 7, 29.

12. Ch. 67-356, 1967 Fla. Laws 1147. Some attribute the popular use of "Sunshine" to describe open meeting and record laws to a popular name for Florida, the "Sunshine State." JOHN J. WATKINS, THE MASS MEDIA AND THE LAW 215 n.1 (1990). Others however attribute its popular use to the statement by Justice Louis Brandeis that "[s]unlight is said to be the best of disinfectants" for social and industrial diseases. *Id.* (quoting LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 89 (Bedford Books of St. Martin's Press 1995) (1914)).

13. FLA. STAT. ANN. § 286.011(1) (West 2003) ("All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, . . . at which official acts are to be taken are declared to be public meetings open to the public at all times . . . .").

14. 5 U.S.C. § 552b(b) (2000); ALA. CODE § 11-43-49 (1989); ALA. CODE § 13A-14-2(a) (1994); ALASKA STAT. § 44.62.310(a) (Michie 2002); ARIZ. REV. STAT. ANN. § 38-431.01(A) (West 2001); ARK. CODE ANN. § 25-19-106(a) (Michie Supp. 2003); CAL. GOV'T CODE § 11123(a) (West Supp. 2002); CAL. GOV'T CODE § 54953(a) (West Supp. 2002); COLO. REV. STAT. § 24-6-402(2) (2002); CONN. GEN. STAT. ANN. § 1-225(a) (West 2000); DEL. CODE ANN. tit. 29, § 10004(a) (1997); FLA. STAT. ANN. § 286.011(1) (West 2003); GA. CODE ANN. § 50-14-1(b) (2002); HAW. REV. STAT. ANN. § 92-3 (Michie 2001); IDAHO CODE § 67-2342(1) (Michie Supp. 2003); 5 ILL. COMP. STAT. 120/2(a) (2002); IND. CODE ANN. § 5-14-1.5-3(a) (West 2002); IOWA CODE ANN. § 21.3 (West 2001); KAN. STAT. ANN. § 75-4318(a) (Supp. 2002); KY. REV. STAT. ANN. § 61.810(1) (Michie 1993); LA. REV. STAT. ANN. § 42:5(A) (West Supp. 2003); ME. REV. STAT. ANN. tit. 1, § 403 (West 1989); MD. CODE ANN., STATE GOV'T § 10-505 (1999); MASS. GEN. LAWS ch. 30A, § 11A½ (2002); MICH. COMP. LAWS § 15.263(1) (2001); MINN. STAT. ANN. § 13D.01 (West Supp. 2003); MISS. CODE ANN. § 25-41-5 (2003); MO. REV. STAT. § 610.011 (2000); MONT. CODE ANN. § 2-3-203 (2003); NEB. REV. STAT. § 84-1408 (1999); NEV. REV. STAT. 241.020(1) (2002); N.H. REV. STAT. ANN. § 91-A:2(II) (Supp.

meeting laws as well as variations inevitably found among the different jurisdictions.

A. Why require open meetings?

Legislators have explicitly enumerated purposes when enacting open meeting laws. California's open meeting laws state that the public is provided a right to remain informed of the action of public agencies, because the agencies "exist to aid in the conduct of the people's business."[15] They also express the right of access as an outgrowth of the legitimacy of the government.[16] New York's law provides its people with the ability to remain informed so that they may "retain control over those who are their public servants."[17] Maryland's law attributes an informed public as a means for the people to enhance their effective participation in a democratic society.[18]

In Florida, the law provides the public with the ability to advise the government, with the ultimate goal of a better government derived from citizen participation and suggestion.[19] In addition, the law states that the public has

2002); N.J. STAT. ANN. § 10:4-12(a) (West 2002); N.M. STAT. ANN. § 10-15-1(B) (Michie 2003); N.Y. PUB. OFF. LAW § 103(a) (McKinney 2001); N.C. GEN. STAT. § 143-318.10(a) (2001); N.D. CENT. CODE § 44-04-19 (2001); OHIO REV. CODE ANN. § 121.22(C) (West Supp. 2003); OKLA. STAT. ANN. tit. 25, § 303 (West Supp. 2003); OR. REV. STAT. § 192.630(1) (2001); 65 PA. CONS. STAT. ANN. § 704 (West 2000); R.I. GEN. LAWS § 42-46-3 (1993); S.C. CODE ANN. § 30-4-60 (Law. Co-op. 1991); S.D. CODIFIED LAWS § 1-25-1 (Michie 2003); TENN. CODE ANN. § 8-44-102(a) (2002); TEX. GOV'T CODE ANN. § 551.002 (Vernon 1994); UTAH CODE ANN. § 52-4-3 (2002); VT. STAT. ANN. tit. 1, § 312(a) (Supp. 2002); VA. CODE ANN. § 2.2-3707(A) (Michie 2001); WASH. REV. CODE ANN. § 42.30.030 (West 2000); W. VA. CODE ANN. § 6-9A-3 (Michie 2000); WIS. STAT. ANN. § 19.83(1) (West Supp. 2002); WYO. STAT. ANN. § 16-4-403(a) (Michie 2003). This Comment addresses federal and state law applicable to meetings of all bodies or general classes of public bodies. All local law, laws addressing open meetings of specific bodies, and laws addressing the requirement to provide access to the records of public bodies are not addressed. For an analysis of the impact of technology on the federal laws governing access to public records, especially in light of security concerns following September 11, 2001, see Paul M. Schoenhard, Note, *Disclosure of Government Information Online: A New Approach from an Existing Framework*, 15 HARV. J.L. & TECH. 497 (2002).

15. CAL. GOV'T CODE § 11120 (West 1992) (concerning state government); CAL. GOV'T CODE § 54950 (West 1997) (concerning municipal government).

16. CAL. GOV'T CODE § 11120 (West 1992); CAL. GOV'T CODE § 54950 (West 1997).

17. N.Y. PUB. OFF. LAW § 100 (McKinney 2001).

18. MD. CODE ANN., STATE GOV'T § 10-501(b)(2) (1999).

19. Town of Palm Beach v. Gradison, 296 So. 2d 473, 475 (Fla. 1974) (finding that a commission established by a town council of private citizens must meet publicly despite only advising the town council and the town zoning board). The court stated:

> No governmental board is infallible and it is foolish to assume that those who are elected or appointed to office have any superior knowledge concerning any governmental problem. Every person charged with the administration of any governmental activity must rely upon suggestions and ideas advanced by other knowledgeable and interested

greater confidence in the government when government meets in public and receives public comments.[20] Based on these purposes, the open meeting law is interpreted "so as to frustrate all evasive devices."[21]

Meeting these goals, however, relies upon the belief that requiring all meetings to be held publicly leads to a more informed public. It could be argued that open meeting requirements lead to a less informed public through less informed deliberation and decisions by the public body.[22] Arguments include the belief that the pressure of public opinion stifles the level of deliberation that might otherwise be achieved in private.[23] Open meetings might also discourage decision makers from openly gathering information because of a fear that the public or the media will attribute to the decision maker ignorance of important or well-known details.[24] A decision maker might also be unwilling to express public disagreement with a policy that the body will be responsible for enforcing.[25] Finally, a decision maker might not change an opinion as easily if the change would contradict a prior position taken.[26]

B. Who is covered?

The coverage of open meeting laws includes most bodies of the government. Florida's open meeting law, for example, extends its requirements to "any board or commission of any agency or authority" of the state as well as to the same organizations of "any county, municipal corporation, or political subdivision."[27] New York law includes any body "performing a governmental function for the state," a state agency, or a state department.[28] Missouri law defines a public governmental body to include "any legislative, administrative or governmental entity" and any judicial body "when operating in an administrative capacity."[29] This definition explicitly

> persons. As more people participate in governmental activities, the decisionmaking process will be improved.

Id. at 476.

20. *Id*. at 475.

21. *Id*. at 477.

22. For a recent analysis of the benefits and costs of open meeting laws, see James Bowen, *Behind Closed Doors: Re-Examining the Tennessee Open Meetings Act and Its Inapplicability to the Tennessee General Assembly*, 35 COLUM. J.L. & SOC. PROBS. 133 (2002) (beginning with the famous remark attributed to Otto Van Bismarck that those who like laws and sausages should never see either being made).

23. Note, *Open Meeting Statutes*, *supra* note 4, at 1202.

24. *Id*.

25. *Id*.

26. *Id*.

27. FLA. STAT. ANN. § 286.011(1) (West 2003).

28. N.Y. PUB. OFF. LAW § 102(2) (McKinney 2001).

29. MO. REV. STAT. § 610.010(4) (2000).

includes all departments, divisions, and political subdivisions of the state,[30] and includes, among others, governing bodies of any college receiving full or partial support from the state.[31]

Despite these broad definitions, governmental bodies that serve as advisory bodies without the ability to make decisions and those whose only connection to the government is one unrelated to its creation are typically not subject to open meeting laws.[32] In 1986, Northwestern University and the City of Evanston, Illinois, formed two for-profit corporations to develop a research park in the city on land owned by Northwestern.[33] The city and university each owned half of each corporation and appointed half of the directors to each corporation.[34] The Illinois Court of Appeals examined the organization using three criteria: the legal existence of the body independent of the government, the nature of the functions performed by the body, and the degree of control exerted by the government over the body.[35] Affirming the trial court's award of summary judgment, the court distinguished the ability of the city and the university to influence the corporation through their ownership from actual control of the corporation.[36] It held that the defendant corporations were not subject to the state open meeting laws because of the lack of control by the city over the operations of the corporations.[37]

In addition to control over the body, influence of a group created by a public body might trigger the application of open meeting laws. In Florida, a committee of school employees, created to review and rank applications for a job opening, was not subject to the open meeting laws because all applications were forwarded to the school board for review.[38] The court distinguished the recommendations of this committee from the elimination of potential candidates in another case where the committee was attributed decision-making authority and was required to meet publicly.[39]

Typically, a body containing only one member is not required to take public action under open meeting laws. For example, New York law exempts

30. *Id*. § 610.010(4)(c).

31. *Id*. § 610.010(4)(a).

32. EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 13.07.10 (3d ed. 2002).

33. Hopf v. Topcorp, Inc., 628 N.E.2d 311, 312-13 (Ill. App. Ct. 1993).

34. *Id*. at 313.

35. *Id*. at 314-15 (adopting the test laid out in *Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism and Drug Dependence*, 380 N.E.2d 1192 (Ill. App. Ct. 1978)).

36. *Id*. at 315.

37. *Id*. at 317.

38. Knox v. Dist. Sch. Bd. of Brevard, 821 So. 2d 311, 314-15 (Fla. Dist. Ct. App. 2002).

39. *Id*. at 314 (distinguishing Wood v. Marston, 442 So. 2d 934 (Fla. 1983)).

any body comprised of just one member.[40] Maryland law extends the same single-member exemption[41] to any multi-member body with no public officials or only one public official, such as groups comprised entirely of government employees or groups with only one non-employee.[42]

C. What is a meeting?

The application of open meeting laws has expanded as legislatures and courts have included more activities within the definition of a "meeting" to which the laws apply. The first definition of "meeting" under Kansas open meeting law focused on physical presence, requiring "any prearranged gathering or assembly by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency."[43] In *State ex rel. Stephan v. Board of County Commissioners*,[44] the Kansas Attorney General alleged that the discussion of official county business by three public officers over the telephone constituted a meeting governed by the Kansas Open Meetings Act.[45] The Kansas Supreme Court, however, focusing on the ordinary meaning of the words "gathering" and "assembly" in the statutory definition of "meeting," limited the Act to physical gatherings and found no violation in telephone conversations.[46] Months after the release of this opinion, the Kansas legislature amended the definition of "meeting" to include telephone calls and other means of interactive communication, indicating the legislature's desire to interpret open meeting laws broadly.[47]

Although meetings could occur in the form of telephone conversations, some government bodies might not meet by telephone even if done publicly or,

40. N.Y. PUB. OFF. LAW § 102(2) (McKinney 2001) ("'Public body' means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members . . . .").

41. MD. CODE ANN., STATE GOV'T § 10-502(h)(3)(i) (1999).

42. *Id*. § 10-502(h)(2)(i).

43. Act of Apr. 25, 1977, ch. 301, § 1, 1977 Kan. Sess. Laws 1024, 1024. The current definition covers "any gathering, assembly, *telephone call or any other means of interactive communication* by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency." KAN. STAT. ANN. § 75-4317a (1997) (emphasis added).

44. 866 P.2d 1024 (Kan. 1994).

45. *Id*. at 1025.

46. *Id*. at 1026, 1028.

47. Act of Mar. 30, 1994, ch. 64, 1994 Kan. Sess. Laws 242. The text of the current definition can be seen at note 43, *supra*. Similarly, New York amended its definition of meeting to mean "the official convening of a public body for the purpose of conducting public business, *including the use of videoconferencing for attendance and participation by the members of the public body*." Act of Aug. 23, 2000, ch. 289, 2000 N.Y. Laws 888 (codified as amended at N.Y. PUB. OFF. LAW § 102(1) (McKinney 2001)) (emphasis added).

if permitted, might meet over the telephone only when a quorum of the body would otherwise exist among the members physically present.[48] Virginia, for example, broadly prohibits public bodies from conducting a "meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled."[49] However, the law permits public bodies of the state government to meet by teleconference or videoconference if the number of members required for the body to make a decision is physically present at one location.[50] When permitted, the public must be provided access at all satellite locations equal to the access at the main location.[51] Further, the thirty-day notice to the public required for any meeting must identify all locations to be used.[52] The use of this technology for remote participation, however, is limited to one fourth of public meetings in a fiscal year.[53]

These restrictions on the frequency of telephone and videoconferences as well as the number of remote participants were enacted by the Virginia legislature in 1984,[54] shortly after the Virginia Supreme Court decision of *Roanoke City School Board v. Times-World Corp*.[55] Similar to the Kansas court, the Virginia court strictly read the statute and decided that

48. A quorum is the required number of members needed to take action. In Kansas, a quorum is a majority of the body and would be a number of members that is more than half of the total members. 27 Kan. Op. Att'y Gen. No. 93-140 (Oct. 29, 1993), 1993 WL 503034, at *1 (construing the quorum requirement set forth in KAN. STAT. ANN. § 75-4317a (1997)). For a discussion of how open meeting laws address the meetings of various numbers of people gathered, see *infra* text accompanying notes 94-110.

49. VA. CODE ANN. § 2.2-3708(A) (Michie Supp. 2003). This restriction does not extend to "the use of interactive audio or video means to expand public participation." *Id.*

50. *Id.* § 2.2-3708(B). "Where a quorum of a public body of the Commonwealth is physically assembled at one location for the purpose of conducting a meeting authorized under this section, additional members of such public body may participate in the meeting through telephonic means provided such participation is available to the public." *Id.* The exception is limited only to state bodies and does not extend to "any political subdivision [of a public body] or any governing body, authority, board, bureau, commission, district or agency of local government." *Id. Accord* NEB. REV. STAT. § 84-1411 (Supp. 2002) (allowing videoconferences for agencies with statewide jurisdictions or selected agencies with jurisdictions encompassing more than fifty counties; allowing teleconferences for selected multi-county agencies; in all cases, no more than half of the agency's meetings may be conducted electronically). In Virginia, the exception for state agencies has been expanded to include the Board of Visitors for the University of Virginia in which the trustees of the school are permitted to participate remotely in meetings of the full board or of a subcommittee if two thirds of the members of the full board or subcommittee are physically present. VA. CODE ANN. § 2.2-3709 (Michie Supp. 2003). This exception is not extended to other state colleges or universities.

51. VA. CODE ANN. § 2.2-3708(C) (Michie Supp. 2003).

52. *Id.*

53. *Id.* § 2.2-3708(E).

54. Act of Mar. 26, 1984, ch. 252, 1984 Va. Acts 461.

55. 307 S.E.2d 256 (Va. 1983).

teleconferences did not fall under the open meeting laws because members were not physically present for the meeting.[56] The new law prohibits the use of the telephone for the purpose of meeting, but not the use of technology in general among body members when not meeting.[57] The requirement that a portion of a public body meet together physically is believed to further the goals of public participation and observation of its official actions.[58]

Some states, however, allow any number of decision makers to meet remotely. The Michigan Department of Social Services conducted case hearings for disputed cases over the telephone.[59] The calls were broadcast through speakerphones, and those gathered for the hearing could hear the discussion.[60] The court that heard the challenge to the law did not emphasize the manner chosen to conduct the meeting, but instead focused on whether the hearing was actually open to the public as required by the law.[61] The court allowed the use of the telephone and found that its use actually furthered the goals of the law, because the use of multiple locations increased accessibility and the ability of the public to attend.[62]

The Nevada Board for the Regulation of Liquefied Petroleum Gas issued licenses between its three annual meetings by circulating petitions through the mail.[63] The Nevada Attorney General found that this method of decision-making violated the state open meeting laws because the group did not gather together so that the public could observe the action.[64] The Attorney General required that the group come together, but used a broad definition for the presence required for the board members.[65] He stated that a quorum could form when the attendant facts, circumstances, and conduct of the board indicated that they had gathered to conduct public business.[66] The board members did not need to be immediately at hand or in view of the public if the public could observe the meeting as required under the law.[67] The Attorney General then recommended that the Board hold special meetings in person or by teleconference to decide upon licenses instead of by mail.[68]

56. *Id*. at 259.

57. 1999 Va. Op. Att'y Gen. 12, 13 (1999).

58. VA. CODE ANN. § 2.2-3700(B) (Michie 2001).

59. Goode v. Dep't of Soc. Servs., 373 N.W.2d 210, 211 (Mich. Ct. App. 1985).

60. *Id*. at 212.

61. *Id*.

62. *Id*. *Accord* Freedom Oil Co. v. Ill. Pollution Control Bd., 655 N.E.2d 1184, 1190 (Ill. App. Ct. 1995) (explaining that meeting by teleconference is more accessible to the members of the public when they can participate at more than one location).

63. Opinion No. 85-19, 1985 Nev. Op. Att'y Gen. 90, 90 (1985).

64. *Id*. at 93.

65. *Id*. at 92.

66. *Id*.

67. *Id*.

68. Opinion No. 85-19, 1985 Nev. Op. Att'y Gen. 90, 93 (1985).

Idaho law does not distinguish attendance in person from attendance by telephone if two conditions are met.[69] The law requires that members of the public body and the public gathered at the meeting location be able to understand the remote participant and that one member of the public body be present at the meeting location "to ensure that the public may attend such meeting in person."[70]

In addition to issues raised by remote communication, a meeting can also be found from a series of successive or serial communications that would otherwise not be subject to the open meeting law. Nevada applies its open meeting law to gatherings of a quorum of members and to series of gatherings of fewer members that together constitute a quorum when such gatherings occurred with the specific intent of avoiding the requirements of the open meeting law.[71] The Nevada Attorney General brought suit against the Board of Regents for the University and Community College System of Nevada on behalf of one of its members over a non-public decision by the Board to issue a press release disavowing critical statements made by her against the Board.[72] The decision regarding the press release was made over the telephone through separate conversations between the chairman of the board and individual regents.[73] The Nevada Supreme Court held that because the open meeting laws would apply to the communication if made at a group meeting, the individual communication was deliberation.[74] While the lack of a quorum at any given time exempted the chairman's telephone calls from the first half of the law's definition, the individual conversations did fall under the second half of the definition as a series of gatherings.[75]

69. IDAHO CODE § 67-2342(5) (Michie Supp. 2003).

70. *Id*.

71. NEV. REV. STAT. 241.015(2)(a) (2002).

72. Del Papa v. Bd. of Regents of Univ. & Cmty. Coll. Sys. of Nev., 956 P.2d 770, 772 (Nev. 1998).

73. *Id*. at 773.

74. *Id*. at 779. The court explained:

> Because the Board utilized University resources, because the advisory was drafted as an attempted statement of University policy, and because the Board took action on the draft, we hold that the Board acted in its official capacity as a public body. Thus, insofar as a quorum of the Board chose to take a position on the advisory, yea or nay, via a non-public vote, it violated the Open Meeting Law.

Id.

75. *Id*. "[W]e hold that a quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law." *Id*. at 778.

D. When must a covered group meet publicly?

Open meeting laws directly address the need for public bodies to deliberate and to act in public meetings.[76] This mandate is not as clear when decision makers meet without official deliberation or meet without a quorum of the decision-making body.

1. Steps of the deliberative process

Open meeting laws in some states originally provided public bodies the ability to deliberate privately as long as they took all action publicly.[77] A local newspaper in Dayton, Ohio, for example, petitioned the court for admission to a meeting of city commissioners regarding an investigation of the termination of a city employee.[78] The newspaper claimed that it could not be denied access because the law governing the commission under the city charter and a related ordinance required that the meetings of the commission be held in public.[79] In interpreting the meaning of "meeting," the court restricted the scope of the law to the adoption of any resolution, rule, regulation, or formal action of any kind and held that a meeting limited to discussion and in which the members "confer together and with each other [and] collaborate in doing what may be called their 'homework'" fell outside the provisions of the law.[80] Despite locking out the public, the court believed that the public benefited from deliberation free of undue influence.[81] Private deliberation, the court stated, "is a needful and constructive process of government, even in a democracy. It is conducive to clear thinking, which could easily be stifled by permature [sic] publicity."[82]

No state currently follows this view that deliberations may be conducted privately if the decision is announced publicly.[83] Ohio now requires its government officials to deliberate publicly. Its open meeting law begins, "[t]his section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in

76. *E.g.*, CAL. GOV'T CODE § 11120 (West 1992) (concerning state government); CAL. GOV'T CODE § 54950 (West 1997) (concerning municipal government) ("[I]t is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.").

77. SCHWING, *supra* note 8, at § 6.18, at 275. Ms. Schwing labels these jurisdictions "action states." *Id*.

78. Dayton Newspapers, Inc. v. City of Dayton, 274 N.E.2d 766, 767 (Ohio Ct. App. 1971).

79. *Id*. at 768.

80. *Id*. at 768, 770. "Action is the distinguishing characteristic of a 'meeting' . . . ." *Id.* at 770.

81. *Id*. at 768. The court compared the private deliberation of the commission to the private deliberation of juries and grand juries, of the cabinet of the President or a governor, and of businessmen. *Id*. at 768-69.

82. *Id.* at 769.

83. SCHWING, *supra* note 8, at § 6.20.

open meetings unless the subject matter is specifically excepted by law."[84] The law invalidates any formal action of a public body if the action results from private deliberations of the body.[85] In 1994, a union representing school district bus drivers and bus mechanics invoked this invalidation provision of the Ohio open meeting law in an attempt to invalidate a decision of the school board employer to contract its busing services to an outside company and to eliminate the driver and mechanic positions.[86] The board met privately with the contractor during the selection process.[87] The court believed that, in general, deliberations included "more than information-gathering, investigation, or fact-finding" and thus affirmed that the open meeting law extended beyond the declaration of final decisions.[88] The court, however, failed to find that the meetings in question were deliberations because the school board members did not deliberate together.[89] The court held that the type of deliberation prohibited under the law required interaction between two or more members of the board and that an informational presentation by someone who is not part of a decision-making body to such body outside the view of the public did not qualify as deliberation.[90] Because the contractor was not a public official, the question-and-answer session between board members and the contractor could, therefore, not be deemed deliberation under the law.[91] The court warned, however, that this type of session would qualify

84. OHIO REV. CODE ANN. § 121.22(A) (West Supp. 2003). Open meeting laws permit private deliberations for specifically enumerated purposes in executive sessions. The scope of these exceptions vary among jurisdictions, but typically include deliberations of matters such as the purchase of real estate, which if discussed publicly would seriously hinder the efficient operation of government. Matters discussed in an executive session might be subject to later public release. For more information, consult SCHWING, *supra* note 8, at § 7. The scope and purposes of executive sessions are unrelated to the means of communication, the focus of this Comment, and will not be discussed in further detail.

85. OHIO REV. CODE ANN. § 121.22(H) (West Supp. 2003). "A resolution, rule, or formal action adopted in an open meeting *that results from deliberations in a meeting not open to the public is invalid* unless the deliberations were for a purpose specifically authorized [for executive sessions] and conducted at an executive session held in compliance with this section." *Id.* (emphasis added).

86. Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. Sch. Employees, Local 530, 667 N.E.2d 458, 462-63 (Ohio Ct. App. 1995).

87. *Id*. at 462.

88. *Id*. at 464 (citing Holeski v. Lawrence, 621 N.E.2d 802, 805 (Ohio Ct. App. 1993)).

89. *Id. Accord* Ryant v. Cleveland Township, 608 N.W.2d 101, 104 (Mich. Ct. App. 2000) (concluding that an address to a planning commission by a township board member in the presence of other board members was not a violation of the open meeting law because no deliberation occurred among the board members).

90. *Springfield Local*, 667 N.E.2d at 464.

91. *Id. But see* Johnson v. Neb. Envtl. Control Council, 509 N.W.2d 21, 32 (Neb. Ct. App. 1993) (holding that a private meeting in which council members received information from department staff was prohibited under the open meeting law). "[T]he fact that the Council may have received information triggers coverage under the public meeting law. The public meeting

as a violation of the open meeting law if the board members also discussed any official business among themselves.[92] That one decision-maker may meet with non-members of the public body in private flows from this view of deliberation and is a proposition supported on its own.[93]

2. Deliberation without a quorum

States disagree about the applicability of open meeting laws to meetings lacking the required number of people necessary to transact business (a quorum). In other words, states would reach different conclusions about whether a non-public meeting of three members of a seven-member governmental body to discuss official business would be a violation of the law if the body required a simple majority of four members to take an official action.

A majority of states would hold that this meeting would not fall under their open meeting laws.[94] In Buffalo, three members of the seven-member municipal housing authority met to conduct work sessions the day before the authority meeting so that they could discuss agenda items with the housing authority staff.[95] A local newspaper petitioned the court to require the members to hold these sessions in public.[96] The court refused to find a violation of the open meeting law because three members failed to meet the

law applies to meetings at which briefings or formation of tentative policy takes place. The law's application is not limited to meetings at which action is contemplated or taken." *Id*.

92. *Springfield Local*, 667 N.E.2d at 464. *Accord* Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 480, 487 (Cal. Ct. App. 1968) (finding that an informal lunch meeting designed for the discussion of public business was prohibited under the open meeting law). "There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors." *Id*.

93. Defino v. Civic Ctr. Corp., 780 S.W.2d 665, 671 (Mo. Ct. App. 1989) (upholding a city ordinance restricting street vendors outside Busch Stadium to stadium concessionaire despite non-public lobbying by stadium owners). "The Sunshine Law was never meant to require public notice of every meeting between a constituent and aldermen." *Id*. *See also* Fla. Parole and Prob. Comm'n v. Thomas, 364 So. 2d 480, 482 (Fla. Dist. Ct. App. 1978) (permitting discussion between commission legal staff and each of the commission members individually). The court stated:

> It would be unrealistic and intolerable to suggest that this and every other legal decision or legal act effected by counsel as representative of the Commission would have to be ratified at a formal public meeting. That result would, in our view, unduly hamper the efficient conduct of the Commission's business and make effective legal representation virtually impossible.

Id. at 481-82. *See also supra* text accompanying notes 40-42 for a discussion regarding the inapplicability of open meeting laws to single-member bodies.

94. SCHWING, *supra* note 8, at § 6.10.

95. Buffalo Evening News, Inc. v. Buffalo Mun. Hous. Auth., 510 N.Y.S.2d 422, 423 (N.Y. Sup. Ct. 1986).

96. *Id*.

requirements for a quorum of the housing authority.[97] Without a quorum, discussion and agreement among those in attendance could not lead to a decision binding on the body, and thus the meeting did not need to occur before the public.[98] If a fourth member of the seven-member authority were to participate and cause the group to reach a quorum, the court warned that a violation would be found.[99]

A minority of states, however, would find this three-person meeting in violation of their open meeting laws.[100] In its definition of "meeting," Virginia includes any informal gathering of a quorum or any gathering of three or more members of the public body.[101] All work sessions, however, are also included in the definition.[102] Thus, the exception for permissible private gatherings is limited to informal meetings of two members of a body comprised of four or more members where the two members are not themselves a subcommittee or participating in a formal work session.[103]

When a budget request of an eleven-member local sewer board could be defeated by four members of the board, the Wisconsin Supreme Court found that a meeting of four members to discuss the budget triggered the open meeting law and that the non-public meeting violated the law.[104] The lower court labeled the four members a "negative quorum."[105] The Wisconsin Supreme Court agreed with the classification and focused its decision to apply

97. *Id*. at 424.

98. The *Buffalo Evening News* court did not provide reasoning for its decision. One of the cases on which it relied to support its holding stated that "[t]he statutory requirement of a quorum is paramount because the existence of a quorum at an informal conference or agenda session 'permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance.'" Britt v. County of Niagara, 440 N.Y.S.2d 790, 793 (N.Y. App. Div. 1981) (quoting Orange County Publ'ns v. Council of Newburgh, 401 N.Y.S.2d 84, 90 (N.Y. App. Div. 1978), *aff'd* 383 N.E.2d 1157 (N.Y. 1978) (quoting James C. Adkins, Jr., *Government in the Sunshine*, 22 FED. B. NEWS 315, 317 (1975))).

99. *Buffalo Evening News*, 510 N.Y.S.2d at 424.

100. SCHWING, *supra* note 8, at § 6.12.

101. VA. CODE ANN. § 2.2-3701 (Michie Supp. 2003) (A meeting includes the "informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership.").

102. *Id*. ("'*Meeting'* or *'meetings'* means that meetings including work sessions . . . of any public body."); 1990 Va. Op. Att'y Gen. 8, 9 (1990) (requiring a gathering of two members of a seven-member county board to be held publicly because they met as delegates of the board for a specific purpose).

103. VA. CODE ANN. § 2.2-3701 (Michie Supp. 2003). Public bodies covered by the open meeting law include "any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body." *Id*.

104. State *ex rel*. Newspapers Inc. v. Showers, 398 N.W.2d 154, 165-66 (Wis. 1987). To be approved, the budget request required two thirds of the board's votes. *Id.* at 165.

105. *Id*. at 157.

the open meeting law on the ability of the four members to defeat and thus to decide the outcome of a proposal before the sewer board.[106] The power to decide the outcome in private prevented the public from participating in the deliberative process that the open meeting law sought to provide.[107]

Florida does not exempt meetings of any number of officials. After the election for the North Miami City Council, two members-elect met privately with an incumbent council member to discuss public matters related to the city council.[108] The court held that members-elect constituted decision-making public officials subject to the open meeting law and affirmed the finding of a violation of the law because two or more decision-making public officials met privately.[109] In including the members-elect, the court reasoned that they became decision-makers upon their election and that the law provided the public the same access to their discussion of public matters as would be provided to any gathering of current decision-makers.[110]

E. How does a body covered by the law comply with the open meeting requirements?

Maryland requires that public officials announce meetings to the public with adequate notice and hold them in locations that are reasonably accessible to the members of the public who would like to attend the meetings.[111] In New York, public bodies are directed to select a location that provides those who are *likely interested* in attending a reasonable opportunity to attend.[112] In addition, governments must make all reasonable efforts to meet in facilities open to the physically disabled.[113] Meetings may be required to be held within the geographic jurisdiction of the public body[114] and may not be held in locations that would require the public to make a payment or a purchase.[115]

106. *Id*. at 166.

107. *Id*.

108. Hough v. Stembridge, 278 So. 2d 288, 289 (Fla. Dist. Ct. App. 1973).

109. *Id*. A violation of the Sunshine Law requires that "a meeting between two or more public officials . . . take place which is violative of the statute's spirit, intent, and purpose." *Id*.

110. *Id*.

111. MD. CODE ANN., STATE GOV'T § 10-501(c) (1999).

112. 1998 N.Y. Op. Comm. Open Gov't No. 2831 (Feb. 12, 1998), *available at* http://www.dos.state.ny.us/coog/otext/o2831.txt (providing that a public body could meet on private property if held "in locations in which those likely interested in attending have a reasonable opportunity to do so").

113. *E.g.*, N.Y. PUB. OFF. LAW § 103(b) (McKinney 2001).

114. *E.g.*, DEL. CODE ANN. tit. 29, § 10004(g) (1997). *Accord* 16 Kan. Op. Att'y Gen. No. 82-133 (June 17, 1982), 1982 WL 187622, at *2. It was stated that:

> Without question, it would be inconvenient and expensive for those wishing to attend the meetings of the Lawrence City Commission to be forced to travel hundreds of miles to the Colorado mountains to attend such meetings. Such expense and inconvenience is an effective bar to attendance by most, if not all, Lawrence residents, the only class of

Some public bodies may not require observers to identify themselves. In Kentucky, for example, the statute explicitly states that public may participate anonymously.[116] In 1998, the City of Crescent Springs limited observers in the city council chambers to city residents in an effort to allow the greatest number of residents to address the council at the meeting.[117] While its use of an overflow room for observation of the council meeting met the feasibility requirement of the law, the Kentucky Attorney General stated that the requirement to identify a single piece of personal information, even city residence, violated the open meeting law because it required the public to identify information about themselves.[118]

III. INADVERTENT DELIBERATION BY ELECTRONIC COMMUNICATION

In their use of e-mail, public officials have transmitted information regarding official business with their public counterparts. While states have varied in classifying the communication as deliberation in violation of open meeting laws, they have consistently treated the use of e-mail in the same manner that they would treat communication by a written or printed document. This section will examine the application of open meetings law by states that have addressed whether deliberation inadvertently arose from the use of e-mail.

A. State of Washington

Washington requires that all meetings of the governing bodies of its public entities be held in the open.[119] In meeting publicly, these bodies must both act

> citizens of the 'public' at large keenly interested in the business and affairs of the city commission. . . . [F]or the public, in general, for whose benefit this law was enacted, such meeting would deny the access to government permitted by the Act.

Id.

115. CAL. GOV'T CODE § 11131 (West Supp. 2002); CAL. GOV'T CODE § 54961(a) (West 1997).

116. KY. REV. STAT. ANN. § 61.840 (Michie 1993). The provision states:

> No condition other than those required for the maintenance of order shall apply to the attendance of any member of the public at any meeting of a public agency. No person may be required to identify himself in order to attend any such meeting. All agencies shall provide meeting room conditions which insofar as is feasible allow effective public observation of the public meetings. All agencies shall permit news media coverage, including but not limited to recording and broadcasting.

Id.

117. Opinion No. 98-OMD-44, 1998 Ky. Op. Att'y Gen. 3-1, 3-1 (1998).

118. *Id.* at 3-3 to 3-4 ("Although this item of information, standing alone, reveals little about that person, we believe that the city's practice also contravenes [the law] by impermissibly requiring person [sic] who attend its meetings to provide identifying information.").

119. Open Public Meetings Act of 1971, WASH. REV. CODE ANN. § 42.30.030 (West 2000).

and deliberate openly.[120] The legislature explicitly included deliberations and discussions in its definition of "actions" under the Open Public Meetings Act.[121] Washington follows the majority rule and applies open meeting requirements only when a quorum of members gathers and takes official action.[122]

These aspects of the law recently were applied to an e-mail exchange among members of a school board. In 1997, three members were elected to the five-member Battle Ground School District school board.[123] As they took office, the new members set out to remove, among others, the district superintendent and his assistant, Jennifer Wood.[124] One new member, who would become the school board president, was rumored to have had a list of district employees that he wanted to terminate because he believed that they were overpaid, under-performing, and otherwise unqualified.[125] The district superintendent ultimately resigned.[126] Wood continued at the district until her contract expired in 1998, at which time the district terminated her.[127] Wood then sued the school district, the school board, and the three new members for violations of the Washington Public Disclosure Act and the Open Public Meetings Act.[128]

Wood claimed that the members violated the open meeting law when they communicated with each other via e-mail regarding her termination.[129] In one example, three or more board members exchanged e-mail messages over the course of six days.[130] No e-mail response, however, was sent to the group on the same day as the transmission of a prior message.[131] Based on these exchanges, Wood successfully moved for summary judgment at trial on her open meeting claim for two separate meetings of the three new members.[132]

Upon review, the Court of Appeals of Washington addressed whether the transmission of e-mail constituted a meeting under the language of the open

120. *Id.* § 42.30.010.

121. *Id.* § 42.30.020(3).

122. *In re* Recall of Roberts, 799 P.2d 734, 736 (Wash. 1990) (holding that city council members did not violate the open meeting law when evidence showed that only two of the five members met, not three of the five members, despite meeting as pairs to avoid the consequences of the open meeting law).

123. Wood v. Battle Ground Sch. Dist., 27 P.3d 1208, 1213 (Wash. Ct. App. 2001).

124. *Id*.

125. *Id*.

126. *Id*.

127. *Id*.

128. *Wood*, 27 P.3d at 1213.

129. *Id.* at 1216.

130. *Id*. at 1217-18.

131. *Id*.

132. *Id*. at 1213.

meeting law.[133] It broadly interpreted the vague statutory definition of meeting in compliance with the legislative mandate to construe the provisions of the law liberally.[134] In doing so, the court refused to find that the board members had to meet together physically in order to qualify their discussion as a meeting. The court stated that such a finding would be against the purposes of the open meeting law.[135]

The court held that the concurrent deliberation among a majority of members created a meeting among them that triggered the open meeting laws.[136] In doing so, the court distinguished this deliberation from the passive receipt of information by e-mail, an action it believed would not qualify as deliberation and thus as action under the law.[137] With this distinction between passive listening and active discussion, the court indicated its agreement with the California decision of *Roberts v. City of Palmdale*.[138] The *Roberts* court held that a summary prepared as a physical document by the city attorney and distributed to the city council was outside the definition of meeting under California's open meeting laws. City council members passively received the communication from a non-member; the action did not rise to the level of interaction.[139]

Thus, the court applied the same test to e-mail communication as it would apply to other communication means. To find that an official meeting occurred, the court did not require a quorum to meet physically together or a quorum to communicate contemporaneously. The court followed the goals of the open meeting laws to protect vigorously the public interest in observing the decision-making process.[140]

B. Florida

Florida's Sunshine Law requires public bodies to meet in public when taking "official acts."[141] Although not defined by the legislature, state courts

133. *Wood*, 27 P.3d at 1216.

134. *Id.* "The purposes of this chapter are hereby declared remedial and shall be liberally construed." WASH. REV. CODE ANN. § 42.30.910 (West 2000).

135. *Wood*, 27 P.3d at 1216.

136. *Id.* at 1218.

137. *Id.*

138. *Id.* at 1217.

139. Roberts v. City of Palmdale, 853 P.2d 496, 503 (Cal. 1993).

140. *Wood*, 27 P.3d at 1217. In a footnote, the *Wood* court included the following language from another California decision: "Requiring all discussion between members to be open and public would preclude normal living and working by officials. On [the] other hand, permitting secrecy unless there is formal convocation of a body invites evasion." *Id.* at 1217 n.6 (quoting Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 480, 487 n.8 (Cal. Ct. App. 1968) (prohibiting, under the open meeting laws, an informal lunch meeting designed for the discussion of public business)).

141. Government in the Sunshine Law, FLA. STAT. ANN. § 286.011(1) (West 2003).

have interpreted "official acts" to extend beyond the act of decision making to include all steps leading up to the decision.[142] Florida law does not require that a quorum of the decision-making body be present; a gathering of two members is sufficient to qualify as a meeting.[143] One member meeting with non-members, however, is not subject to the law.[144] Florida courts have given the law a broad, general construction,[145] but have also found limits to the application of the law. For example, decision-makers can meet individually with state employees for the purposes of gathering information.[146]

142. Times Publ'g Co. v. Williams, 222 So. 2d 470, 473 (Fla. Dist. Ct. App. 1969) (prohibiting a school board from meeting privately to discuss personnel matters) (disapproved on other grounds by Neu v. Miami Herald Publ'g Co., 462 So. 2d 821, 825 (Fla. 1985)). "Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an 'official act,' an indispensable requisite to 'formal action,' within the meaning of the act." *Id*.

143. Hough v. Stembridge, 278 So. 2d 288, 289 (Fla. Dist. Ct. App. 1973) (including members-elect of the North Miami City Council as members of the public body).

144. City of Sunrise v. News and Sun-Sentinel Co., 542 So. 2d 1354, 1356 (Fla. Dist. Ct. App. 1989) (permitting a mayor to meet privately with city employees because the meeting does not involve two or more members of a decision-making body); Fla. Parole and Prob. Comm'n v. Thomas, 364 So. 2d 480, 482 (Fla. Dist. Ct. App. 1978) (permitting the legal staff to meet individually with commissioners regarding a decision to appeal because the staff members assist the commissioners in the discharge of commission duties). The *Thomas* court explained:

> It would be unrealistic and intolerable to suggest that this and every other legal decision or legal act effected by counsel as representative of the Commission would have to be ratified at a formal public meeting. That result would, in our view, unduly hamper the efficient conduct of the Commission's business and make effective legal representation virtually impossible.

Id. at 481-82.

145. Wood v. Marston, 442 So. 2d 934, 940 (Fla. 1983) (holding that a search committee to fill a position must meet publicly despite only making recommendations to the university president who has full authority to make the decision); Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974) (finding that a commission established by town council of private citizens must meet publicly despite only advising the town council and the town zoning board); Canney v. Bd. of Pub. Instruction of Alachua County, 278 So. 2d 260, 263 (Fla. 1973) (ruling that a school board must meet publicly despite hearing and deciding upon the dismissal of a student); Bd. of Pub. Instruction of Broward County v. Doran, 224 So. 2d 693, 699 (Fla. 1969) (explaining that informal school board gatherings on the day before the meeting to gather information cannot include discussion that leads the board to a near-decision despite a lack of formal action or agreement).

146. Bennett v. Warden, 333 So. 2d 97, 100 (Fla. Dist. Ct. App. 1976) (allowing the president of a state junior college to meet privately with career employees of the college to discuss employee concerns outside the view of a union organizer so that the president could gather facts that would aid him in making decisions required as part of his job). The court said:

> It would be unrealistic, indeed intolerable, to require of such professionals that every meeting, every contact, and every discussion with anyone from whom they would seek counsel or consultation to assist in acquiring the necessary information, data or intelligence needed to advise or guide the authority by whom they are employed, be a

Open meeting law was recently applied to the transmission of e-mail to city council members. The city attorney for Port Orange requested an opinion from the Florida Attorney General regarding the use of e-mail by the city manager to distribute background information regarding agenda topics to city council members as a group.[147] The Attorney General determined that the use described was appropriate under the Sunshine Law and that the e-mail transmissions did not constitute a meeting.[148] His decision hinged on distinguishing the communication as a passive receipt of information, not deliberation among the members, stating that the communication would have violated the law only if council members discussed the contents of the e-mail sent by the city manager by further e-mail in response.[149]

The decision regarding electronic communication followed similar treatment of written communication.[150] In 1973, the Attorney General had declared that the circulation of a memorandum on which board members indicated their approval made the memorandum in effect an official action that qualified it as a violation of the Sunshine Law.[151] Also held to be a violation were individual meetings by the superintendent of a school district with each member of the board so that he could compile their opinions and report them back to the group.[152] The court found a violation even though a meeting between a board member and someone outside the board typically would not be subject to the meeting requirements under the law. The court found that the meetings in question were designed to evade the law.[153]

The communication from the Port Orange city manager, however, only involved passive receipt of information.[154] The Attorney General compared this to an opinion from 1996 that allowed a school board member to distribute his written intent to recommend issues before the board.[155] In that case, the Attorney General determined that the communication of opinion in writing without discussion or response from other board members did not constitute a violation of the law.[156]

> public meeting within the disciplines of the Sunshine Law. Neither the letter nor the spirit of the law require it.

Id.

147. 2001 Fla. Op. Att'y Gen. No. 2001-20, at 1 (Mar. 20, 2001).

148. *Id*. at 5.

149. *Id*.

150. *Id*. at 4.

151. Informal opinion to Mr. John J. Blair, 1973 Fla. Op. Att'y Gen. (May 29, 1973), *available at* http://myfloridalegal.com/85256236006EB5E1/informalprintview/E3B7B3490561AD9485256CBE00731B3D?OpenDocument.

152. Blackford v. Sch. Bd. of Orange County, 375 So. 2d 578, 580 (Fla. Dist. Ct. App. 1979).

153. *Id*.

154. 2001 Fla. Op. Att'y Gen. No. 2001-20, at 2 (Mar. 20, 2001).

155. *Id*. at 5.

156. Opinion No. 96-35, 1996 Fla. Op. Att'y Gen. 125, 127 (1996).

C. Maryland

Maryland's open meeting law requires that all public bodies meet in open session.[157] Enacted in 1977,[158] the law provides the public with the ability to monitor the deliberations and decisions made by public bodies but does not provide any right to speak.[159] Maryland follows the majority quorum rule. The law covers all aspects that lead to the decision, not just the decision itself.[160] Without a public body's gathering of a quorum, the law does not apply to a meeting.[161]

In 1996, the application of the law to electronic communication occurred when members of the Carroll County Planning Commission exchanged e-mail discussing outstanding problems facing the body as well as possible action for the commission to take.[162] In his response to the applicability of the open meeting law to this activity, the Maryland Attorney General stated that the law permitted the e-mail communication among the members of the commission.[163]

The Attorney General focused on the non-simultaneous exchange of the e-mail by the commissioners.[164] Because they read and responded to e-mails at separate times, the Attorney General found that the commissioners never formed the quorum of members required by the law.[165] The Attorney General distinguished the exchange of e-mail in this circumstance from simultaneous or nearly simultaneous communication.[166] He warned that discussion among a quorum could occur if the e-mail became near real-time communication.[167] Such communication would be seen more as a teleconference, to which the open meeting law applies, rather than the circulation of written memoranda, to which the open meeting law does not apply.[168]

157. MD. CODE ANN., STATE GOV'T § 10-505 (1999).

158. Act of May 26, 1977, ch. 863, 1977 Md. Laws 3339.

159. MD. CODE ANN., STATE GOV'T § 10-501(a)(2) (1999).

160. City of New Carrollton v. Rogers, 410 A.2d 1070, 1079 (Md. 1980) (subjecting workshop sessions of the city council to the open meeting law) (citing Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974), *supra* note 19).

161. MD. CODE ANN., STATE GOV'T § 10-502(g) (1999).

162. Opinion No. 96-016, 81 Md. Op. Att'y Gen. 140, 140-41 (1996).

163. *Id*. at 140.

164. *Id*. at 143-44.

165. *Id*.

166. *Id*. at 144.

167. Opinion No. 96-016, 81 Md. Op. Att'y Gen. 140, 144 (1996).

168. *Id.* "The Open Meetings Law sets out certain requirements that an agency must follow once a quorum is present for the consideration or the transaction of public business. . . . The Open Meetings Law does not prescribe the circumstances under which a quorum is required in the first place." *Id.* at 142 (quoting Opinion No. 86-024, 71 Md. Op. Att'y Gen. 26, 29 n.2 (1986)).

D. Kansas

The Kansas open meeting law requires that meetings for the conduct of governmental affairs and the transaction of governmental business be held publicly.[169] A meeting is any gathering of a majority of a quorum of members, including a physical gathering or the use of interactive communication.[170] A majority of a quorum indicates a majority of the minimum number of members needed to conduct official business at a meeting, not necessarily a majority of the membership of a public body.[171] The members must gather for the purpose of discussing the business of the body.[172]

The Kansas Attorney General held that a meeting could occur from a discussion of school board business through the computer.[173] She compared the use of electronic communication to the use of a calling tree.[174] Even though two members may meet without violation of the open meeting law, she stated that consecutive telephone conversations between pairs of members to gather the beliefs regarding a decision and possibly to encourage certain decisions would violate the spirit of the law. The decision would be reached before the public meeting, and the meeting would serve only to present to the public the final step of the decision.[175] This reciprocal nature of such an exchange translates otherwise-permissible communication into impermissible private discussion.[176]

169. KAN. STAT. ANN. § 75-4318(a) (Supp. 2002).

170. KAN. STAT. ANN. § 75-4317a (1997).

171. 27 Kan. Op. Att'y Gen. No. 93-140 (Oct. 29, 1993), 1993 WL 503034, at *1. A five-member board requires three members to form a quorum. A majority of those three members is two members. Two members would violate the open meeting law if they meet in private. *Id.* A majority is a number that is more than half. *Id*. at *2. Thus, a six-member board requires four members to form a quorum, and three members to form a majority of the quorum. Two, but not three, members could then meet in private under the Kansas law.

172. KAN. STAT. ANN. § 75-4317a (1997). In response to whether both members of a married couple could also serve on a five-member city council on which two people constitute a majority of a quorum, the Kansas Attorney General stated that the couple could serve as long as they did not discuss city business between themselves in private and did not plan their relationship in order to discuss city business in private. 21 Kan. Op. Att'y Gen. No. 87-45 (Mar. 12, 1987), 1987 WL 290442, at *2.

173. 1998 Kan. Op. Att'y Gen. No. 98-26 (Apr. 20, 1998), 1998 WL 190416, at *1.

174. *Id*.

175. *Id*.

176. *Id*. at *2. It was stated that:

> The members have, by any standard, discussed the issue. All that remains is for them to walk into the next meeting and vote. The public will never know why the members voted they [sic] way they did, and the purpose of the KOMA [Kansas Open Meetings Act] is defeated. We believe this violates both the spirit and letter of the KOMA since the public was excluded.

1998 Kan. Op. Att'y Gen. No. 98-49 (Sept. 16, 1998), 1998 WL 681234, at *3.

One e-mail message alone was not believed to be a meeting subject to the open meeting law because a single message, electronic or not, does not lead to interaction among the board members.[177] The open meeting law applies only when an indirect exchange of information rises to a level of discussion among a majority of the quorum of the body.[178] The timing of the exchanges is not a factor; the electronic discussion need not be in "real time."[179] The Attorney General, however, indicated that exchanges regarding topics to include on an agenda or related to the proceedings at a past meeting would fall outside the scope of discussion and the open meeting law.[180]

IV. PURPOSEFUL MEETING USING ELECTRONIC COMMUNICATION

Electronic communication not only facilitates interaction among members of public bodies but can also facilitate communication between bodies and their constituents. This section examines this distinction, the efforts of governments to provide public access to their proceedings, and the varying limitations placed upon this access by open meeting laws.

A. Posting past action taken on the Internet

California's open meeting law for municipal governments requires that all meetings be "open and public."[181] A meeting is defined as a gathering of a majority of members "to hear, discuss, or deliberate" public business.[182] When not meeting publicly, members are prohibited from employing the "use of direct communication, personal intermediaries, or technological devices" to reach agreement.[183] Members of the public are also provided the right to

177. 1998 Kan. Op. Att'y Gen. No. 98-49 (Sept. 16, 1998), 1998 WL 681234, at *3.

178. *Id*. It was stated that:

> Once an indirect interactive communication becomes a KOMA [Kansas Open Meetings Act] "meeting," then the interactive communication is subject to the KOMA requirements. For instance, if e-mail between members becomes extensive enough that it amounts to a discussion between a majority of a quorum of the business or affairs of the body, the KOMA's procedural safeguards are triggered.

Id.

179. 1998 Kan. Op. Att'y Gen. No. 98-26 (Apr. 20, 1998), 1998 WL 190416, at *2.

180. *Id*. at *4. *See also* 29 Kan. Op. Att'y Gen. No. 95-13 (Jan. 23, 1995), 1995 WL 40761, at *3. It was stated that:

> [S]chool board members [on a seven-member board] may be in violation of the KOMA, if three or more board members simultaneously engage in discussion of the board business through computer terminals. However, simply sending a message to other board members would not constitute an "interactive communication," within the meaning of the KOMA.

Id.

181. CAL. GOV'T CODE § 54953(a) (West Supp. 2002).

182. *Id*. § 54952.2(a).

183. *Id.* § 54952.2(b).

address a body before or during the body's consideration of an item of public business.[184]

The California Attorney General responded to the question of whether board members of a municipal governmental agency could reach a consensus on issues through e-mail if the e-mail messages were "also sent to the secretary and chairperson of the agency," were posted on the Internet, and were reported at the next public meeting of the agency.[185] He found that the open meeting law applied to the actual discussion involved because the discussion qualified as deliberation used to reach agreement.[186] He examined the means of communication and decided that the ban on the use of technological devices to reach agreement extended to e-mail communication.[187] The Attorney General decided that the exchange violated the open meeting law on its face.[188] He stated that an exchange of e-mail violated the purposes of the law because all debate concerning the matter of public business would not be completed before members of the public, thereby depriving them of the opportunity to observe and participate in the making of the decision.[189]

B. Taking formal action over the Internet

In 2001, the city attorney for Leesburg, Florida, asked the Florida Attorney General whether the Leesburg Regional Airport Authority could discuss matters or otherwise "meet" over the Internet.[190] The Attorney General stated that a meeting over the Internet did not necessarily violate the Sunshine Law.[191] The law requires that the public be provided "interactive access," which would require that the airport authority provide computers connected to the Internet at convenient locations in the jurisdiction to members of the public without Internet access.[192] An Internet meeting also was required to include the ability for the public to observe and to participate in the discussion at the remote location consistent with their ability to participate at meetings not held remotely.[193]

The Attorney General, however, did not excuse the requirement that the members of the authority physically meet together when taking formal

184. *Id*. § 54954.3.
185. 2001 Cal. Op. Att'y Gen. No. 00-906, at 1 (Feb. 20, 2001).
186. *Id*. at 3.
187. *Id*.
188. *Id*. at 4.
189. *Id*.
190. 2001 Fla. Op. Att'y Gen. No. 2001-66, at 1 (Sept. 19, 2001).
191. *Id*.
192. *Id*.
193. *Id*.

action.[194] The strict interpretation of this requirement follows prior opinions by the Attorney General regarding the use of teleconferences. In 1994, the Attorney General required that a quorum of the board of a public museum meet physically together when taking action that fell under the Sunshine Law.[195] A sick member unable to attend was permitted to participate remotely through a telephone only if a physical quorum had otherwise gathered together.[196] In requiring a physical quorum, Florida acts similarly to other states that place additional restrictions upon remote participation by public officials.[197] It also acts similarly to other states in that it exempts state agencies from this requirement.[198] State agencies in Florida may gather remotely if all interested persons are allowed to attend the meeting at all locations and use the technology linking the groups participating in the meeting.[199] The Attorney General has indicated that the convenience and cost savings of convening electronic meetings do not outweigh the negative impact on public participation for municipal government, unlike state government, for which its greater savings do outweigh the cost to the public.[200]

194. *Id*. *See also* 2002 Fla. Op. Att'y Gen. No. 2002-82, at 1 (Dec. 11, 2002) (permitting members of a city committee to participate and vote by video and voice conferencing if they were unable to attend the public meeting only if a quorum of the committee met physically at the meeting site); 1998 Fla. Op. Att'y Gen. No. 98-28, at 1 (Apr. 6, 1998) (permitting members of a school board to participate electronically when physically absent only if a quorum of the school board met physically at the meeting site).

195. Opinion No. 94-55, 1994 Fla. Op. Att'y Gen. 157, 157 (1994). Details of this opinion are also provided in Attorney General Opinion Number 2002-82, 2002 Fla. Op. Att'y Gen. No. 2002-82, at 2 (Dec. 11, 2002).

196. Opinion No. 94-55, 1994 Fla. Op. Att'y Gen. 157, 157 (1994).

197. *See* the discussion of Virginia, *supra* text accompanying notes 49-58.

198. FLA. ADMIN. CODE ANN. r. 28-109.004 (1998). *See also* the discussion of Virginia and Nebraska, *supra* note 50.

199. *Id*. The administrative code defines "communications media technology" as "the electronic transmission of printed matter, audio, full-motion video, freeze frame video, compressed video, and digital video by any method available." *Id*. r. 28-109.002(3). It defines "attend" as "having access to the communications media technology network being used to conduct a proceeding, or being used to take evidence, testimony, or argument relative to issues being considered at a proceeding." *Id*. r. 28-109.002(2).

200. 1998 Fla. Op. Att'y Gen. No. 98-28, at 1 (Apr. 6, 1998) (permitting members of a school board to participate electronically when physically absent only if a quorum of the school board met physically at the meeting site). It was stated that:

> Allowing state agencies and their boards and commissions to conduct meetings via communications media technology under specific guidelines recognizes the practicality of members from throughout the state participating in meetings of the board or commission. While the convenience and cost savings of allowing members from diverse geographical areas to meet electronically might be attractive to a local board or commission such as a school board, the representation on a school board is local and such factors would not by themselves appear to justify or allow the use of electronic media technology in order to assemble the members for a meeting.

The requirement for a physical quorum for municipal governmental agencies, however, did not extend to informal discussions and workshops where a quorum is not needed because they are unrelated to a formal decision of the airport authority.[201] In the same opinion to the Leesburg Airport Authority, the Attorney General indicated that remotely conducting these activities over the Internet would fall within the goals of the Sunshine Law if the authority provides notice that includes information regarding how the public may participate electronically in the activity and where public access points have been provided.[202]

C. Discussing public business through the Internet

Open meeting laws extend beyond formal action of a public body to deliberation and discussion made without the immediate purpose of forming a decision.[203]

1. Florida

In 2002, the Florida Attorney General indicated to the executive director of the Southwest Florida Water Management District that the use of electronic bulletin boards to facilitate and document discussion among members of one of its water basin boards violated the Sunshine Law.[204] The District established an electronic bulletin board for one of its water basin boards on which board members could post messages and responses.[205] Although the public could not participate, anyone could view the discussion over the Internet.[206] Access to the bulletin boards was provided at the basin board offices.[207] Notice of the discussion was provided and included details regarding access to it through personal Internet access, at the basin board access points, and at public libraries.[208] Despite the inability to participate electronically, the public could

Id.

201. 2001 Fla. Op. Att'y Gen. No. 2001-66, at 1 (Sept. 19, 2001).

202. *Id*.

203. *See supra* text accompanying notes 76-93.

204. 2002 Fla. Op. Att'y Gen. No. 2002-32, at 2 (Apr. 22, 2002). The District is a state agency concerned with the management of water resources within its ten-thousand square mile territory in west central Florida. SOUTHWEST FLA. WATER MGMT. DIST., FISCAL YEAR 2003 BUDGET IN BRIEF (2002), *available at* http://www.swfwmd.state.fl.us/busfin/budget/files/Budget2003Brochure.pdf. Eight of the District's watershed basins are co-administered by separate basin boards. *District Basin Boards*, http://www.swfwmd.state.fl.us/about/boards/basbrds/b_boards.htm (last updated Feb. 26, 2003).

205. 2002 Fla. Op. Att'y Gen. No. 2002-32, at 2 (Apr. 22, 2002).

206. *Id*.

207. *Id*. at 3.

208. *Id*.

submit comments to the members of the basin board before and during regular basin board meetings.[209]

The Attorney General concluded that the district violated the Sunshine Law based on the failure of the bulletin boards to provide adequate notice and access to the deliberations as required under the law.[210] The law covers all aspects of the decision-making process in Florida, including discussion and deliberation.[211] Thus, the content of the postings by members of the board constituted deliberation and fell within the requirements of the law.[212] The Attorney General determined that the public bore a burdensome responsibility of determining when matters of interest were discussed, because posting could occur at any time over the course of three weeks.[213] This required the public to monitor the postings constantly and was considered unreasonable when compared to the discussion of all topics at a specific time, during a regularly scheduled meeting.[214] The Attorney General did not find that the ability to comment at later times provided a meaningful opportunity to be involved in the decision-making process as required under the law.[215]

2. Kansas

The Kansas Attorney General affirmed her belief that e-mail communication could trigger the requirements of the open meeting law if it rises to the level of discussion[216] when addressing a list of open meeting issues presented to her by the governor.[217] She went on to indicate, however, that electronic communication could occur within the requirements of the law.[218] She called the use of a bulletin board that permitted public officials to read and

209. *Id*. at 2.

210. 2002 Fla. Op. Att'y Gen. No. 2002-32, at 4 (Apr. 22, 2002).

211. *See supra* text accompanying note 145.

212. 2002 Fla. Op. Att'y Gen. No. 2002-32, at 2 (Apr. 22, 2002).

213. *Id*. at 4.

214. *Id*. at 5. Although it does not operate an electronic bulletin board, the basin board currently hosts a current topics Web site at http://www.swfwmd.state.fl.us/about/boards/basbrds/curtops/peace.htm (last updated Jan. 6, 2004) that provides the public with links to various public documents such as newspaper articles.

215. 2002 Fla. Op. Att'y Gen. No. 2002-32, at 5 (Apr. 22, 2002). *See also* Rhea v. City of Gainesville, 574 So. 2d 221, 222 (Fla. Dist. Ct. App. 1991) (finding that the purposes, if not the words, of the open meeting law require more than ninety minutes notice to news media for holding a special meeting of the city commissioners); Bd. of Pub. Instruction of Broward County v. Doran, 224 So. 2d 693, 699 (Fla. 1969) (prohibiting discussion at informal gatherings of school board members one day before public meetings if it could lead them to a near-decision). "[T]hese specified boards and commissions . . . should not be allowed to deprive the public of this inalienable right to be present and to be heard at *all* deliberations wherein decisions affecting the public are being made." *Doran*, 224 So. 2d at 699 (emphasis added).

216. *See supra* text accompanying notes 169-180.

217. 1998 Kan Op. Att'y Gen. No. 98-49 (Sept. 16, 1998), 1998 WL 681234, at *3.

218. *Id*.

to post messages and that permitted the public to read those messages "technologically feasible and practical."[219] Such use would be permissible as "a perpetual, virtual meeting" if both notice of the ongoing discussion and access to either a computer or the printouts of the bulletin board were provided to the public.[220] If these and other protections under the open meeting laws could not be met, however, the bulletin board would be a meeting in violation of the law.[221]

V. ANALYSIS

Open meeting laws ensure that deliberation by public bodies occurs before the public. Technology can enable the deliberation to take place electronically in ways that hide the discussion from the public and in ways that expand the discussion to include more people. Electronic deliberation has been categorized under older classifications in the interpretation of the law, in which the definition of deliberation has been broadly construed in an effort to protect the access of the public to meetings.

A. Pre-deliberation

The belief that public bodies need only announce their decisions before the public has faded from the interpretation of open meeting laws in all jurisdictions.[222] Deliberation among the members of a public body includes all phases of the decision-making process.[223]

In all jurisdictions, some communication, however, falls short of deliberation. The scope of this "pre-deliberation" can vary. Deliberation under the open meeting laws requires two members of the body. Decision-makers, thus, may meet with constituents to exchange information without violating the law. Deliberation usually requires that body members discuss an issue of public business. Pre-deliberation may then encompass gatherings of the public body at which members merely receive information. In some jurisdictions, communication among members is permitted as long as a quorum, a negative quorum, or a majority of a quorum of the body has not gathered.[224] In the past, deliberation could only have occurred if the members came together physically. Remote discussion was permitted under the law because it was seen as activity leading up to deliberation that need not be taken

219. *Id*.

220. *Id*.

221. *Id*. at *4.

222. *See* discussion of early "action states" and the *Dayton Newspapers* case, *supra* text accompanying notes 77-85.

223. *See id. See also supra* note 145 and accompanying text.

224. *See supra* text accompanying notes 94-110.

publicly or that reasonably could be taken publicly.[225] Today, open meeting law covers all gatherings, physical or remote, and remote discussion is no longer considered pre-deliberation.[226]

This categorization of pre-deliberation stems from the restrictions and limitations imposed by open meeting laws that necessarily hamper the decision-making process through additional administrative burdens as well as a decreased ability for decision makers to confer informally about public business.[227] When the benefit to the operation of government greatly outweighs any harm to the public interest resulting from private deliberation, the activity has been categorized as occurring before deliberation and thus need not fall under the requirements of open meeting laws. In other words, activity thought to be acceptable might be classified as pre-deliberative as a means to permit the activity. For example, in Florida, a committee may rank candidates for a vacant position in private if all applications are delivered for review, but may not do so if some applications are discarded. The elimination of some candidates might be action deemed by the courts to trigger application of the open meeting law.

B. Inadvertent deliberation by electronic communication

Whether an e-mail exchanged among members of a public body necessarily constitutes deliberation and thus qualifies as an action that must be taken publicly under the open meeting laws varies among the jurisdictions that have addressed the topic. In Washington, the *Wood* court found that e-mail between school board members over a period of several days could constitute deliberation.[228] In Maryland, however, the Carroll County Planning Commission was permitted to exchange e-mail if the e-mail transmissions extended over the course of several days and did not amount to simultaneous communication among a quorum of the body.[229] Kansas allows e-mail unless the exchanges rise to a level of discussion among a majority of the quorum.[230] These differing results reflect the differing law in the jurisdictions as it applies to all forms of communication among officials, electronic, oral, or written. States have not treated electronic communication differently from other

225. *See supra* text accompanying notes 77-83.

226. *See supra* text accompanying notes 43-75.

227. *See* Joseph W. Little & Thomas Tompkins, *Open Government Laws: An Insider's View*, 53 N.C. L. REV. 451 (1975). If the definition of action under open meeting laws were provided the broadest possible definition, "the practicalities of doing the business of government would be totally lost, and the crucible of informal interchange and debate, which is the source of most ideas, would be quenched." *Id.* at 452.

228. Wood v. Battle Ground Sch. Dist., 27 P.3d 1208, 1218 (Wash. Ct. App. 2001).

229. Opinion No. 96-016, 81 Md. Op. Att'y Gen. 140, 144 (1996).

230. 1998 Kan. Op. Att'y Gen. No. 98-49 (Sept. 16, 1998), 1998 WL 681234, at *3.

communication media. While this treatment might not provide consistency among jurisdictions, it does provide consistency within each jurisdiction.

In these cases, members conversed privately with each other. The use of technology had no impact on the access of the public to private conversations.[231] Any benefit from the choice to use technology bore no impact on allowing deliberation where otherwise it is not allowed.

C. Purposeful deliberation using electronic communication

In Florida, Kansas, and other jurisdictions, technology could be used to broadcast a meeting of a public body to an audience in other rooms or through the Internet to a broad audience around the globe. The ability for *members* of a public body to participate in the meeting electronically and to count toward the required quorum for the meeting, however, was denied in Florida.[232] In Kansas, the Attorney General indicated her belief that electronic participation itself was not against the state's open meeting laws.[233] Like inadvertent deliberation, these differing approaches regarding purposeful deliberation reflect the differing law in the jurisdictions as it applies to other forms of participation, specifically participation by telephone or videoconference.[234]

Unlike inadvertent deliberation where the decision-makers intended their conversations to be private, these conversations are purposefully held before the public. Merely posting previous e-mail deliberation over the Internet does not provide the public the ability to observe and comment as required under the open meeting law of California.[235] Open meeting laws are focused on observing the decisions of the public body as the decisions take shape and are made. For the purposes of the open meeting law, the conversations, although shared, are still privately made. Distributing the records to the public after the fact, electronically or not, hinders public participation and influence and thus frustrates the purposes of the law.

The use of electronic communication by a public body can vary greatly depending on which features and technologies are employed for a meeting. At a minimum, it can closely resemble other forms of modern communication such as a teleconference or videoconference. Channeling a single audio

231. It could be argued that written communication provides the public with the ability to review prior communications, an action not available for oral communication such as those that occur in the office or over the telephone. Electronic documents further provide greater access than other written communications because they can be easily searched. This benefit of electronic communication to the public lies in the ability to review public documents, not in the ability to participate in and to influence the decision-making process, which is the focus of this Comment.

232. 2001 Fla. Op. Att'y Gen. No. 2001-66, at 1 (Sept. 19, 2001).

233. 1998 Kan. Op. Att'y Gen. No. 98-49 (Sept. 16, 1998), 1998 WL 681234, at *3.

234. *See supra* text accompanying notes 47-57.

235. 2001 Cal. Op. Att'y Gen. No. 00-906, at 4 (Feb. 20, 2001).

connection between two locations through the Internet presents the same challenges to public participation as does a similar connection through the telephone. Neither can easily replicate the type of exchange that occurs at a physical gathering of a body. With remote participation, conversations must be controlled to a greater extent to allow remote speakers, particularly if many are present, to identify themselves with each comment and to facilitate participation among them because many cannot speak at once. The greater use of ever-improving technology, however, has the potential to increase the ability of the public to participate to a greater degree in the decision-making process rather than traditional teleconferencing and videoconferencing.

D. Pre-deliberation using electronic communication

The use of electronic bulletin boards to communicate information to the public or to facilitate a conversation with the public has no real counterpart to non-electronic communication. In Florida, the efforts of the Southwest Florida Water Management District to post information over a period of time were seen as a constant meeting at which various topics were discussed at times unknown in advance. The Attorney General classified the communication as deliberation because it involved the participation of multiple board members.[236] He focused on the possibility of an exchange of ideas and of persuasion among the board members while ignoring the similarities between the use of the bulletin boards and the one-way dissemination of information, either from the board member to the public, or, when allowed, from the public to the board member.[237]

It thus appears that the use of technology to communicate with the public as an entire group is prohibited because other board members would be included in the public participating in the conversation. Conversations would then be among decision-makers. These conversations would not be exempt from the public deliberation requirements merely because they are available on the Internet and thus not private. As with the California opinion regarding posting e-mail messages, open meeting laws are meant to provide the public greater access than the ability to review prior deliberation.[238]

236. 2002 Fla. Op. Att'y Gen. No. 2002-32, at 2 (Apr. 22, 2002). Although the Attorney General did not address a different factual situation in which the public could post comments along with the public officials, this added ability, if seen as adequate access, would not affect the notice concerns stated by the Attorney General, and likely would not affect the recommendation given.

237. *Id.*

238. 2001 Cal. Op. Att'y Gen. No. 00-906, at 4 (Feb. 20, 2001).

VI. RECOMMENDATIONS

The efficiencies and other benefits of technology should be viewed in light of the type of communication for which they are used. For private conversations that inadvertently become deliberation among a body, electronic communication is rightly treated like other forms of communication even though the ability of technology to make internal government operation more efficient is lost. The benefits of public participation in government justify placing the same limitations on electronic communication as on other forms of communication.[239] The argument that prohibiting or limiting informal discussion does not promote the greatest public participation also supports an argument for a greater ability of decision makers to exchange e-mail informally. Again, states no longer support these arguments and have not made exceptions for electronic communication for these reasons.

In addition, developing separate rules for permitted communication for technology would likely introduce confusion to members seeking to follow the provisions of the law. Permitting private discussion among members only when certain means of communication are chosen might generate fear among officials in their choice and proper use of all communication. This could chill the use of any newly permitted discussion and thus limit officials to the traditional forms of discussion currently permitted and render any improvements ineffective.

But in areas of communication between the public body and its constituency, the restrictions on the use of technology for communication should be relaxed. The ultimate goal of open meeting laws is to promote public participation and accountability of government to the source of its power, the people.[240] Greater use of technology to facilitate communication furthers these goals. The use of an electronic bulletin board by board members would provide the public with a greater understanding of the issues before the board and any arguments behind them than would the current practice of posting a meeting agenda for public inspection before each meeting. Even without the ability to post responses directly on a bulletin board, decision-makers would be more likely to formulate reasoned decisions if they were to broadcast their opinions in print on the Internet. Even with no ability to post to a bulletin board, members of the public could contact the decision-makers to express their concerns or attend the meeting to express them directly.

239. "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ." INS v. Chadha, 462 U.S. 919, 944 (1983). The restrictions to free speech placed upon the members of a public body have been upheld because the restrictions are minimal in comparison to the benefits provided to the public from greater access. SCHWING, *supra* note 8, at § 2.20, at 20 n.64. This implies that the restrictions must have some minimal benefit.

240. *See supra* text accompanying notes 15-21.

The ability to post comments and responses directly to bulletin boards would increase public discussion of the issues and would benefit of the public. Currently, bulletin boards could be created by concerned citizens on non-public servers to discuss the issues before the public body. The ideas and conclusions generated, however, are not guaranteed to be seen by the decision-makers in government. Based on the current law, decision-makers would also be wary of participating in such forums.

Thus, the definition of meeting should be amended by legislatures to permit more forms of communication between decision-makers and the public, specifically the communication envisioned by the Southwest Florida Water Management District. Just as communication between one public official and a finite group of the public is exempt, communication between one public official and the whole world should be exempt, even if other decision-makers might be able to listen to or observe the conversation. While such communication could be used to circumvent the goals of open meeting laws, the exemption could be classified like other exemptions where the intent of the decision-makers is examined to determine whether a violation has occurred.[241]

Communication by decision-makers through an electronic bulletin board increases the decision-makers' knowledge and should be seen more as pre-deliberation, rather than as gathering information needed to make better decisions. The use of bulletin boards should not be seen as a tool for the decision-makers as a group to begin limiting options and coming to a decision. Two public officials looking to circumvent the requirements of the open meeting law would likely choose a less public way to violate the law. The public has an interest in all phases of the decision-making process and the access provided, although it could be seen as requiring a vigilant watch, is sufficient for this phase of the decision-making process because it is public by nature.

Greater access to participation by the public at meetings through technology would also further the goal of greater public participation in the decision-making of government. Often, public bodies discuss a variety of matters during the course of a meeting. A high level of dedication is required for someone concerned about a single issue to set aside the time to travel to the meeting and wait for that issue to be addressed by the body. Providing the ability to participate from home or from work would provide a lower expenditure of time and effort, which would encourage participation by more people. Also, electronic participation could consist of sample questions or simple polls during deliberation to which the public could respond without officially making a full set of comments or waiting for a turn to speak. Such

241. *E.g.*, NEV. REV. STAT. 241.015(2)(a) (2002) (applying open meeting requirements to gatherings of less than a quorum only when they occur with the specific intent of avoiding the requirements of the open meeting law).

technology is in use in expanded Internet "broadcasts" of professional sports events on television and in live talk shows incorporating feedback from remote participants through e-mail comments. In effect, many voices could be heard at one time in meetings deciding public business, allowing the decision-makers to be more responsive to those they represent.

Electronic participation for the public also allows for greater anonymity in meetings. While most jurisdictions bar public bodies from requiring identification,[242] physical presence of observer-speakers provides some ownership of comments made at meetings because physical presence is itself identification. Even this low threshold identification is lost with the Internet, further meeting the goal of anonymous participation. Decision-makers would, however, need to be aware that the same person could represent herself as multiple persons during the same meeting with the intent to indicate stronger approval for her opinion than might be warranted. Exact identities could only be identified by a thorough registration process as a prerequisite to electronic participation in the meeting. This would, however, likely be against the provisions of the law that seek to achieve true anonymity. This consequence of promoting full anonymity should not be of sufficient concern to prevent such participation.

Thus, technology should be further embraced so that the public can participate more fully in the public business. Because open meeting laws place restrictions only on public officials, the laws should not be used to hinder the ability of governments to respond to the desires of the public in participating in official meetings.

The need for physical presence of a quorum can also be erased by embracing technology. While the level of technology available to government bodies for remote participation of members today might not greatly differ from the use of the telephone or video, technology will expand. The costs to public participation by those refusing remote participation might decrease if a meeting over the Internet began to better recreate the natural chaos that occurs when members physically attend meetings. Already in Virginia and Florida, where restrictions exist for municipal governments, these costs are assumed to be outweighed for state agencies where body members might travel great distances and require overnight lodging. Some states permitting remote participation even believe that such participation itself increases the ability of the public to participate.[243]

Electronic participation in meetings, however, can lead to issues in maintaining order. Traditional rules of procedure effectively manage discussion and speakers so that one focused discussion occurs at a time. Technology would introduce new complexities to conducting orderly meetings,

242. *See supra* text accompanying notes 116-118.

243. *E.g.*, Goode v. Dep't of Soc. Servs., 373 N.W.2d 210, 211 (Mich. Ct. App. 1985).

but solutions are attainable if changes are allowed to develop into an improved electronic parliamentary procedure.[244]

Thus, states should identify a method for measuring the costs that they see imposed on public participation by remote participation of decision-makers. Clarifying why the nature of local representation differs from the nature of state government would lead to a better understanding of these costs and would permit the definition of the minimum threshold required to allow remote participation. Necessity has been called the mother of invention. This holds especially true with technology.

Another approach would be to eliminate the double standard itself and allow municipal governments to function under the same set of standards that state governments provide for themselves.

VII. CONCLUSION

Technology has impacted the way the world has communicated in the past ten years and will continue to impact the way communication is conducted in the future. Government has not been exempt from these changes and has found a set of unique challenges as it adopts new modes of communication. Specifically, open meeting laws require that government decision-makers conduct their deliberations before the public. This provides the public with information about the activities of its representatives and a chance to influence government decisions, which promote public trust in the government.

The interpretation of new forms of communication among members of public bodies under open meeting laws has followed the distinctions that existed for older forms of communication. If a conversation were permitted between two decision-makers meeting on the street or talking over the telephone, the decision-makers would be permitted to conduct the same conversation through e-mail. If, however, the conversation were prohibited under the open meeting laws, e-mail would not provide the ability to conduct the unlawful conversation.

Using the current distinctions for intra-member communication preserves the access of the public to the actions of the government. However, technology can be used to transform traditional means of communication between the government and its citizens. The use of public communication tools such as the electronic bulletin board could greatly enhance public participation in government. Open meeting laws, however, place restrictions on communication that could prohibit this type of activity. Legislatures should adjust their laws, redefining the terms deliberation and meetings to encourage

244. *See* Phil Reiman, *In Congress Electric: The Need for On-Line Parliamentary Procedure*, 18 J. MARSHALL J. COMPUTER & INFO L. 963 (2000).

public bodies to reach out to citizens through technology and to promote public participation in government, the ultimate goal of open meeting laws.

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