

Special Report IASB Commentary on Education Issues

E-Mails and the Open Meetings and Public Records Law

With the advent and increasing use of e-mail by boards and school employees, a number of questions have arisen regarding Iowa's sunshine laws – the open meetings law and the public records law. Neither law has been amended to reflect the use of e-mail nor is there any case law to assist us in determining how either law may be impacted by the use of e-mail. The main issues are related to the use, storage and retrieval of e-mails. This *Special Report* is broken down into two sections – what we know based upon current law and some guidance in the gray areas.

What we know

The open meetings law, *Iowa Code* Chapter 21, has two provisions that address the use of technology in meetings. First, it states that members of the public may use cameras or recording devices at board meetings so long as they don't disrupt the board meeting. *Iowa Code* § 21.7. The second section allows boards to hold electronic meetings when it is "impossible or impractical" to meet in person so long as everyone can hear the absent board member and vice versa, the meeting is still accessible to the general public and minutes are kept of the meeting including an explanation of why the in-person meeting was impossible or impractical.

The public records law has a few items related to technology but they mainly address exceptions to public records and access to government-developed software, neither of which are relevant to this discussion.

The definition of "public records" is all "records, documents, tape or other information, stored or preserved in any medium, of or belonging to this state

or any county, city, township, school corporation, political subdivision, nonprofit corporation . . ." Just about every record in a school district is a public record unless it qualifies as a confidential record under either state or federal law. The most common confidential records are certain employee and student records.

Common Q&A

Can our board communicate via e-mail?

Yes. The question is whether you invoke the open meetings law by doing so and to what extent, if at all, the public records law also kicks in. The definition of a "meeting" is "a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is a deliberation or action upon any matter within the scope of the governmental body's policy-making duties." *Iowa Code* § 21.2(2). So, if a majority of the board gets together and engages in a discussion about any policy issue, no matter where they are – café, co-op, or courthouse, it is arguably a meeting in violation of the law.

The question is whether the same type of gathering electronically via e-mail is also a meeting subject to the open meetings law. While Iowa law is currently silent with no cases having been decided, other jurisdictions have determined that certain e-mail discussions are considered meetings subject to the open meetings law. It doesn't matter that the discussion takes place over the span of a couple of days. See *Del Papa v. Board of Regents of the University and Community College System*, 956 P.2d 770 (Nev., 1998) and *Wood v. Battle Ground School District*, 27 P.3rd 1208 (Wa., 2001). What matters is that a majority of the board is

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discussing a policy issue and all members can see the comments and respond. It's really no different than a conference call where board members aren't physically together but they are communicating back and forth. Courts in other states have determined that even though a majority of the board members were not simultaneously communicating, that didn't mean a quorum wasn't present. They've determined quorums were present for the entirety of the discussions.

If, however, a board member e-mails the rest of the board to notify fellow board members of a new item on the IASB Web site, and it's strictly an informational e-mail with no ensuing discussion, the open meetings law probably hasn't kicked in as policy issues haven't been discussed.

It's recommended that boards limit their on-line communication to merely informational items and keep the discussion for the board table. The citizens have a right to hear the board's discussions and they should have that opportunity at every board meeting.

Are e-mails are a public record?

As addressed above, public records are those stored or preserved by a school corporation. But, the law is silent as to whether e-mails on a board member's individual computer are or are not a public record. Arguably, they aren't a public record since they are being kept by an individual board member on his or her personal computer and are not "of or belonging to" the school district. That's not to say an attorney couldn't get copies of those through a discovery process if a lawsuit is brought. All the attorney has to do is to make a public records request and it's then the school district's burden to prove the e-mails on an individual board member's computer aren't a public record. Board members need to recognize a clever attorney could make an argument that board members are public officials conducting official business via e-mail so therefore, the e-mails are public even though written and stored on a personal computer.

The e-mails sitting in the superintendent's computer are a different story. If the superintendent has a practice of regularly deleting e-mails, then the e-mails won't be "stored" on his or her computer. That's not to say they don't exist, however, as they are probably still stored on the main system. Unless the school district has the practice of regularly purging e-mails off the main computer, the e-mails probably still exist at the

school district and must be made accessible to anyone who asks for them since they would still be considered a public record. Also, even though the system may regularly purge e-mails, if an employee has stored e-mails in a separate system or file, they will not be purged and still accessible.

What should we do?

Boards and superintendents should avoid using e-mail as a communication piece unless the e-mail is strictly informational. The open meetings law tells us we must err on the side of openness so in this arena where the law is unclear, avoiding e-mail discussions is wise. Citizens have a right to hear the board discussion at the board meeting. If issues are settled or tabled before the board ever meets, the citizens have lost that opportunity.

Superintendents and other school employees especially, need to be careful about the content of their e-mails since they are likely public records someplace within the school district. Plus, as we tell our students everyday, we can never make the assumption that e-mail is protected so employees need to be very careful before including confidential information in an e-mail. Boards should review their record retention policies and determine whether the policy still works with current technology.

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