Lessons from Lane County

How a recent lawsuit in Lane County might just change the way cities conduct business.

At the beginning of 2010, two citizens sued Lane County and three of its commissioners, alleging violations of Oregon's public meeting laws, (ORS 192.610 – 192.710). The circuit court recently issued a 44-page written decision in the case holding two of the three commissioners personally liable for violations of the law. The circuit court's decision does not necessarily dictate how the issues litigated in this case will be decided if raised in a different case in the future. Nonetheless, the court's decision raises at least four issues to which city officials and employees should pay attention. Even though this article briefly summarizes these issues, city officials and employees are encouraged to read the court's decision and seek advice from their respective city attorneys about how best to comply with Oregon Public Meeting Laws.

Lesson #1 – Use of a personal computer and a private e-mail account to conduct city business may subject your personal computer or private e-mail account to disclosure under a public records request or in a litigation discovery request.

The League of Oregon Cities and city attorneys across the state have advised city officials and employees for several years that using a personal computer or a private e-mail account to conduct city business may subject the hard drive of the personal computer or the private e-mail account to disclosure under a public records request or in a litigation discovery request. This issue first arose several years ago in a litigation matter where the court required city councilors to have the hard drives of their personal computers searched as part of a litigation discovery request. In the Lane County case, once again, local government officials were asked about and required to produce documents sent from private e-mail accounts. While the issue of whether disclosure was required was not a significant issue in the case, the fact that it occurred is another reminder to city officials and employees that conducting city business on a personal computer or using a private e-mail account will not shield those communications from disclosure.

Lesson #2 – Use of e-mail by a quorum of a public body might constitute a meeting under Oregon's Public Meeting Laws.

It has long been an open question regarding whether a quorum of a governing body could violate the public meeting laws by communicating through the use of e-mail. (See the League's April 2009 edition of *Local Focus*, available at www.orcities.org, for a more in-depth article on this issue.) ORS 192.670(1) states that "[a]ny meeting, including an executive session, of a governing body of a public body which is held through the use of telephone or other electronic communication shall be conducted in accordance with [the public meeting laws]." In the Lane County case, the circuit court concluded that e-mail is an "electronic communication" as that term is used in ORS 192.670(1). (Slip Opinion at p. 33.) Thus, for the first time in Oregon, a court has concluded that a meeting can occur through the use of e-mail.

Notwithstanding that the court concluded that e-mail was an electronic communication for the purposes of the public meeting laws, the question remained whether the e-mail communications in question constituted a "meeting." ORS 192.610(5) defines a meeting as "the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate

toward a decision on any matter." The defendants argued that the e-mails in this case were more like a letter or short telephone message that didn't amount to making a decision or deliberating toward a decision. The court, however, rejected this argument, stating, "[b]ased on the evidence presented in the present case, this court rejects defendants' analogy to e-mail as the equivalent of a letter. As the various e-mails show, they are far more like the normal back and forth in conversation than correspondence in letter form. There is the opportunity for immediate viewing and response. That in fact occurred in several e-mails in this case." (Slip Op. at p. 34, n. 32.)

In the end, the court stated that its determination that the use of e-mail could result in a meeting was "probably of no consequence" to its final decision that a violation of the public meeting laws occurred. This is because e-mails in question were about a decision for which that statute of limitations period had expired. Nonetheless, the court's determination is the strongest warning yet for city officials and employees that communications made through e-mail involving a quorum of a governing body might constitute a meeting under the public meeting laws.

Lesson #3 – Serial meetings may violate Oregon's Public Meeting Laws

As discussed above, the public meeting laws define a meeting as "the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter" (ORS 192.610(5)). Historically in Oregon, this definition required the convening of a quorum of a governing body in the same place (or on the same conference call) before a meeting could occur. However, in the Lane County case, the court concluded for the first time in Oregon that a violation of the public meeting laws can occur even when a quorum of a public body never meets at the same time to make a decision or deliberate toward a decision.

The court set forth the following test to determine whether a meeting occurred:

(1) did at least a quorum of the governing body;

(2) make a decision or deliberate toward deciding a matter; and

(3) in any setting that was private and not open to the public. (Slip Op. p. 34.)

In this case, the court reached a factual conclusion that a quorum of the Lane County Board of Commissioners had private conversations and meetings in which they deliberated and reached a collective decision on what to include in a supplemental budget even though a quorum of the commission never discussed the issue together at the same time outside the scope of a public meeting. As explained by the court, "[t]he evidence did not show that any three [of the five] commissioners were ever in the same room at the same time talking about this matter. That does not mean that the continuing multiple conversations were not a deliberation. All involved knew that a quorum of the board was working towards a final decision outside of the public meeting context. . . . In effect, the public meeting vote on December 9 was a sham. It was orchestrated down to the timing and manner of the vote to avoid any public discussion." (Slip Op. at pp. 36-37.)

Although this is the first time in Oregon that a court has found that these types of communications constitute a meeting, courts and attorney generals in other states have reached similar conclusions for many years. (See, e.g., *Roberts v. City of Palmdale*, 20 Cal. Rptr. 2d 330, 337 (Cal. 1993), *Dewey v.*

Redevelopment Agency of the City of Reno, 119 Nev. 87, 64 P. 3d 1070 (2003), Fla. Atty. Gen. Op. 96-35 (1996), 2/23/94 Idaho Atty. Gen. Op. to Mike Wetherall.)

These types of meetings, often called "serial" or "seriatim" meetings, occur when deliberations or decisions of a quorum of a governing body take place through one-on-one meetings or in meetings with groups less than a quorum, outside of official public meetings, in a deliberate attempt to build a majority for or against a matter. As explained by the California Supreme Court in the *Roberts* case mentioned above, "[o]f course the intent of [California's open meeting laws] cannot be avoided by subterfuge; a concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement." (20 Cal. Rptr. 2d at 337.)

Thus, for example, in the *Dewey* case mentioned above, the Nevada Supreme Court analyzed whether a violation of that state's public meeting laws occurred when staff of a redevelopment agency met with the entire governing body of the agency outside the scope of a public meeting in separate groups of less than a quorum. The Nevada Supreme Court concluded that no violation occurred because staff did not share the thoughts, questions, or opinions of the members who attended one briefing with the members who attended another briefing. Further, the court stated that there was no evidence of polling by the staff to determine the opinions or votes of the members of the governing body. In addition, the court concluded that there was no evidence in the record that the briefings resulted in the governing body taking action or deliberating on the issue outside of a public meeting. *Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87, 64 P. 3d 1070 (2003)

Likewise, the Florida attorney general has advised that a school board member may prepare and circulate an informational memorandum or position paper to other board members without violating that state's open meeting laws. However, the attorney general cautioned that use of a memorandum to solicit comments from other board members or the circulation of responsive memoranda by other board members would violate the open meeting laws as such actions would constitute deliberations. (Fla. Atty. Gen. Op. 96-35 (1996); see also, Fla. Atty. Gen. Op. 01-20 (e-mail communication of factual background information from one council member to another is a public record but does not constitute a meeting subject to the Florida's open meeting laws when it does not result in the exchange of council members' comments or responses on subjects requiring council action).

Following in the footsteps of these other states, the Lane County decision provides the first instance in Oregon where a court has found a violation of the state's public meeting laws because of the use of serial meetings. Because of this, city officials and employees in Oregon should be careful not to engage in serial meetings where the thoughts, questions or views of a quorum of a governing body are shared. One-way communications are likely still permissible, but communications that could constitute deliberations or even worse reaching a decision should be avoided.

Lesson #4 – Knowledge of the requirements of the public meeting laws and failure to comply with those requirements might constitute willful misconduct that would subject individual city councilors to personal liability.

State law includes provisions that require a public body to pay the attorney fees of a plaintiff that is successful in proving a violation of Oregon's open meeting laws. (ORS 192.680(3).) The law further

provides that if the violation is the result of willful misconduct by any individual member or members of the governing body, that the member or members shall be jointly and severally liable to the public body for the amount required to be paid to the plaintiffs. (ORS 192.680(4).) The open meeting laws, however, do not define what constitutes "willful misconduct" for the purposes of determining the liability of individual members of a governing body.

In the Lane County decision, the court set forth two different tests that could be used to determine if a public official engaged in willful misconduct in the context of a violation of the public meeting laws. First, the court explained that willful misconduct could require that a public official act with "a conscious objective to violate those particular statutory provisions." In other words, it is conduct that is intended to cause a particular result – a violation of the law. Second, the court explained that, willful misconduct could occur if an official "had knowledge of the law's requirements and thereafter failed to follow those requirements." (Slip Op. at 39.) Because the court concluded that two of the commissioners engaged in willful misconduct under either standard, the court did not decide which standard the public meeting laws require to be proven before liability may be imposed on individual public officials. As part of its conclusion, however, the court specifically mentioned the fact that the commissioners ignored advice from the county counsel to cease engaging in deliberations outside the scope of a public meeting. (Slip. Op. at p. 41.)

As a consequence of the court's decision, city officials should be mindful that a court could very well apply the lesser standard – knowledge of the law's requirements and a failure to follow those requirements – to any violations of the public meeting laws. As such, city officials are encouraged to ask their city staff and city attorneys questions when there is uncertainty about what the public meeting laws require. Likewise, city officials should adhere to advice provided by their city staff members and city attorneys, as failure to do so might result in a finding of willful misconduct.

The Lane County decision may still be appealed to the Oregon Court of Appeals and the Oregon Supreme Court, either of which could reverse the decisions made by the circuit court. Nonetheless, until such time as a reversal occurs, city officials and employees should be mindful of the lessons learned from the Lane County decision.

A copy of the circuit court's decision in the Lane County case is available on the League's web site at: http://www.orcities.org/Portals/17/Publications/Newsletters/Weekly/dumdi-handy-openmeetingdecision-2011-01-18.pdf.

Editor's Note: Because of the complexities and nuances of the law in this area and of the court's opinion, this article is necessarily general and is not intended to provide legal advice. This article should not serve as a substitute for competent legal counsel. Please consult with your city attorney to ensure that that you fully comply with Oregon's public meeting laws.