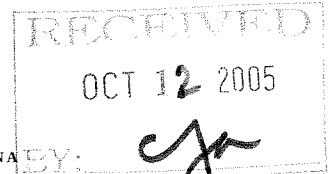




UNC
SCHOOL OF GOVERNMENT



THE UNIVERSITY
of NORTH CAROLINA
at CHAPEL HILL

KNAPP-SANDERS BUILDING
CAMPUS BOX 3330
CHAPEL HILL, NC 27599-3330

T 919.966.5381
F 919.962.0654
www.sog.unc.edu

October 10, 2005

Mr. W. Calvin Horton
Town Manager
405 Martin Luther King Jr. Blvd.
Chapel Hill, NC 27514-5705

Dear Cal:

In your letter of September 21, you asked my opinion of a proposal from the Chair of the Town's Technology Committee, under which the Committee, and perhaps other Town boards and commissions, could hold electronic meetings on line. Before dealing directly with the proposal, it will be useful to review the provisions of the open meetings law that are pertinent.

The open meetings law ("the law") has two basic requirements with respect to "official meetings". First, the public body in question must give notice of the meeting, and second, the public is entitled to attend and observe the meeting. The statute's definition of official meetings has always included electronic meetings, although when the definition was written the only way to conduct an electronic meeting was by conference telephone call. It may be today, with advances in technology, that an Internet conversation could meet the definition of electronic meeting. It seems to me clear that if the members of a public body communicated over the Internet in "chat-room" mode, they are clearly holding an electronic meeting under the statute. I also believe that if a member of a public body has a series of separate email exchanges with the other members of the public body, all of the messages one-on-one, no meeting has taken place. Such an exchange of email is no different than a series of two-person telephone calls, which are not a meeting. The open question is what about an exchange of emails among the members of a public body that takes advantage of the "Reply All" feature of email to send messages to all the members of the public body. There is some case law from other states that supports characterizing such an exchange as a meeting under an open meetings law. The only hesitancy I have under our statute is the statute's provision that an electronic meeting involve the "simultaneous communication" of the public body's members. I think that is met by the sending of the messages to all the members at the same time, but a court might require that the members all be participating at the same time, as would be true of chat-room.

Let's assume, though, that the email exchanges using Reply All are a meeting under the law. What practical meaning does that assumption have?

One possibility is to conclude that the law prohibits such exchanges, because there is no way to fit them within the law. The other possibility is to attempt to structure such exchanges in such a way that they do fit within the law, which would undercut the assumption on which the first possibility is based. I'm drawn to the second possibility for a couple of reasons. First, I understand that a number of state-level public bodies have used such email exchanges as a way of developing proposals between meetings. It's difficult for such boards to get together, given the distances in the state, and it would be useful if this sort of meeting could be structured in a way to permit such meetings to continue. Second, the statute clearly does permit public bodies to hold electronic meetings, if there is notice and some way for the public to observe the discussions.

It seems to me that the observation part of the law's requirements is the easier to comply with. It is possible to establish listservs under which a small group of people are entitled to participate but others are permitted to read the messages. I understand that this is the system that is available for the various public official listservs that we host on our server at the School of Government. (It may also be possible for outsiders to observe the exchanges taking place in a chatroom, but I don't know for sure, not understanding the technology.) Thus, a public body could establish a listserv that limits participation to the members of the public body but allows anyone to read the messages that have been posted. The Committee's proposed policy suggests use of such a listserv, and I think it meets this requirement of the law.

The more difficult requirement is notice. The law provides for two basic sorts of notice of official meetings. If the meeting is the public body's regular meeting, the notice requirement is met by filing the schedule of such regular meetings in a central location. In town government, that location is the office of the town clerk. Other meetings are special meetings, which require 48 hours' public notice. One way to meet the notice requirement would be to consider each email exchange on the listserv as a special meeting, which would require someone posting notice of the exchange at least 48 hours before it begins. I suspect this requirement might be sufficiently cumbersome as to make such meetings infrequent, but I also think it meets the law's notice requirements. A possible alternative is to consider any listserv meetings as a form of regular meeting, one that is essentially continuous. Under this alternative, the fact of the listserv's existence would be filed with the town clerk, and that would be the notice required by the law. Anyone interested in the work of the public body could access the listserv at any time, knowing that there might be some discussion represented there. It seems to me that the Committee's proposed policy follows this alternative method of providing notice, posting the notice with the town clerk, and then goes beyond the law's minimum requirements by attempting additional forms of notice on the Town's website and otherwise. (I don't believe the Committee's proposal expresses what it is doing in quite this way, but it seems to me the better way of understanding the proposal.)

So understood, I think the Committee's proposal does as good a job as can be done of fitting email conversations into the framework of the open meetings law. That said, I'm certainly not sure that a court would agree that it satisfies the law's requirements, although I think it probably does. Given the uncertainty, however, I would

be quite hesitant in suggesting that a public body such as the Town Council adopt and use the proposal for its own operations. There is simply too much risk for such a high-profile public body. The risk is obviously much lower for a group whose responsibilities are entirely advisory. The optimum, of course, would be for the General Assembly to recognize the utility of some form of Internet-based meeting and provide clear rules for how such a meeting could be conducted.

I would be happy to discuss this matter further with you.

With best regards,

A handwritten signature in black ink, appearing to read "David". The signature is written in a cursive style with a long, sweeping tail on the letter 'd'.

David M. Lawrence