

The Open Meeting Law and Social Media — Potential Pitfalls

The Open Meeting Law (OML) prohibits a quorum of a public body from deliberating outside of a properly posted public meeting about matters within the jurisdiction of that body. When the OML was revised in 2010, “deliberation” was expressly defined to include exchanges by email. There is ample precedent from the Attorney General’s Division of Open Government (“Division”) that a violation of the OML occurs when a quorum emails about official business. It is less clear, however, how the OML applies to social media, such as Facebook, Twitter or Instagram, where communication is typically less direct. In fact, there are an ever increasing number of social media formats that leave a record of written posts or other communications that could lead to OML violations. While there is no clear answer, members of multiple member bodies should approach the issue proactively, exercising caution to avoid social media exchanges that could result in a written exchange between a quorum of members in violation of the OML.

The Division found a violation of the OML when one board member sent an email to the other members expressing her opinion on a matter within the jurisdiction of that board, even though none of the other members responded. See OML 2012-93. In that case, the Division concluded that a single member had violated the OML by sharing her opinion with a quorum outside of a posted meeting. Trying to anticipate how this ruling would apply to exchanges on social media, consider the result if a board member posts a comment on her Facebook page concerning a pending application for a permit, and a majority of her fellow board members are Facebook “friends”. Is the fact that a quorum may have read the post enough to violate the OML? In the only formal determination concerning a Facebook post, the Division found no violation when a board of selectmen chairman posted an opinion on a matter before the board on his Facebook page, but the Division also specifically noted that the other Selectmen did not follow the chairman on Facebook. See OML 2013-27. This holding suggests that the Division could have found a violation if the other board members had access to each other’s Facebook pages, and that such a finding would have been even more likely if the other members posted comments in response to the original post.

Community social media platforms are often a constructive means for residents to exchange opinions and share ideas, and elected or appointed municipal board members may wish to similarly share their expertise, insight, and opinions. The Division recognizes that certain action taken by members of a multiple-member body may be “political” in nature, and has concluded that discussions between members of a public body may not violate the OML if they relate to a political statement. See OML 2012-10. However, the Division cautions that members of a board or committee must be “conscious, when formulating such statements, of the need to limit discussion to the political statement and avoid discussing matters that are within the public body’s jurisdiction”. The repercussions for making a mistake in this regard are potentially severe, ranging from an order that all posts be made part of a meeting record, to invalidating a vote or decision made by a board, or even imposing a fine for repeat offenses.

While the Division has not yet issued much formal specific guidance on this topic, here are some issues members of a public body should consider when using social media:

1. The safest course is to avoid “friending” or “following” members of your board or committee, and further to refrain from commenting on “friends of friends” posts on other members’ pages or sites as to any matter within the jurisdiction of your board or committee.
2. If you do choose to “friend” or “follow” other members, avoid posting with respect to applications, hearings or other specific matters that are pending or likely to be pending before your board. Note that in addition to avoiding OML issues, this proactive approach will also protect the public body from a charge that the body has violated the due process rights of the applicant.
3. If you do choose to post concerning municipal matters, such posts should be made in a broad fashion so as to address the remarks to the public, i.e., all followers or “friends”, rather than targeting just fellow board members. We anticipate that the Division would look to whether the member’s comments were intended to reach the quorum, similar to an email addressed to a quorum, as opposed to reaching everyone with access to the social media site. In other words, while simply posting a comment may not violate the OML, even if a quorum of board members are “friends”, calling them out in the post, and/or sending a direct message, would be likely to do so.
4. If you see a post from a fellow board member on a specific pending matter, do not write a comment or reply in any way. If needed, you may request that the chair include the topic on the notice for a properly posted meeting.
5. Comments made to a closed listserve format, where the member is presumably aware that their fellow board members will “receive” the comments, if challenged, would likely pose a significant risk of a violation for improper deliberation.

In summary, members of boards and committees do not cede all of their first amendment rights when they take office. However, great caution should be exercised when using any social media platform to discuss matters within a board member’s official jurisdiction, particularly if the board member is “connected” with a quorum of members of their multiple-member body. Such “discussions” occurring in the context of a public hearing or other quasi-judicial process may also create a very real risk of due process claims. Finally, if social-media statements are made by elected or appointed officials concerning municipal matters, ensure that it is clear such statements are made in the political context, such as using a “campaign” page or the like.

Please contact Attorney Brian W. Riley (briley@k-plaw.com) or any member of the firm’s Government Access and Information Group at 617.556.0007 with further questions on the Open Meeting Law and social media.

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