

Communicating in an Electronic Age

LAW

WITH EVERY TECHNOLOGICAL ADVANCE COME NEW QUESTIONS about appropriate use. Electronic communications such as e-mails, text messages, and social media posts have opened up new possibilities for planning commission members to communicate with each other and the public about pending developments and projects in a timely and cost-effective manner. However, the benefits of these new communication technologies must be weighed against the potential drawbacks to their use, including the creation of new legal and ethics issues.

Open meetings laws

Electronic communications could trigger compliance issues with open meetings laws. As members of government bodies are finding new ways of communicating outside the formal meeting process, the media and citizens have complained that public business is being conducted in secret, rather than in the public eye. As a result, the concept of "gathering" has greatly expanded to encompass all types of modern communications, including e-mails, text messages, social media, and other forms of contemporaneous communications.

Unfortunately, there are very few legal cases that apply open meeting laws to electronic communications. Those cases typically considered whether the government officials (1) deliberated or discussed public business, (2) exchanged messages with each other contemporaneously, and (3) gave proper notice and access. As a general rule, the quicker the response, the more likely a court will find an electronic communication (e-mail, text, social media post) to be a "contemporaneous" communication subject to compliance with open meetings requirements.

There are a number of common-sense measures that an official should take to ensure compliance with open meeting requirements. First, check applicable state laws to see if electronic communication is covered (it most likely is). Second, see if the state attorney general or any courts have issued opinions that provide guidance on the use of electronic communications. Third—and this is absolutely critical for officials—if you use electronic devices or social media to communicate with other members of your commission, make sure you are not using these devices or sites to deliberate, ask questions of one other, or engage in simultaneous exchanges with one other regarding government business. Finally, pause for at least a few minutes or hours before responding to a newly arrived e-mail or text message from a fellow member.

Are you subject to public release rules?

Freedom of information laws must also adjust to the influence of electronic communications on government. However, just what is considered a "public record" can become complicated for governments, particularly in the social media arena. Comments, posts, tweets, "friending," and chats may all be subject to freedom of information acts, even where the government has no control over the creation of a particular "record."

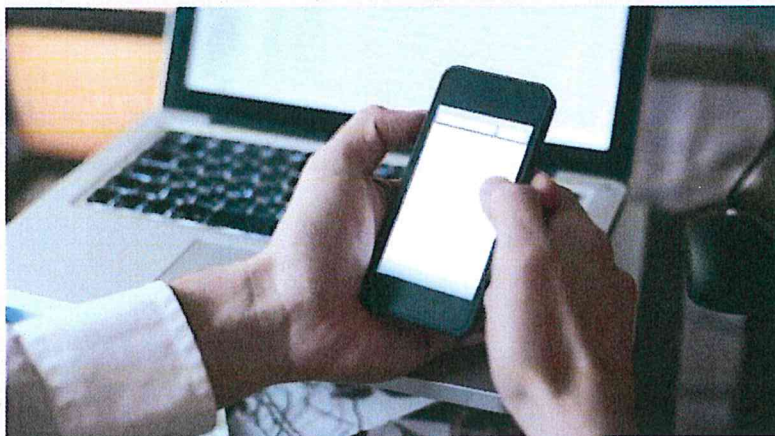
Planning commissioners should under-

stand that the device used to transmit an electronic record is probably irrelevant because courts usually look to the content of the communication and not the device used to transmit the communication in determining whether a record is a "public record" required to be released and retained.

For example, an Illinois court ruled that text messages between members of a city council were subject to release under the state FOIA law even though the messages were transmitted on private cell phones rather than city equipment. That means that text messages sent between planning commissioners on private devices could be subject to public view and inspection if the communications relate to public business. Because of the difficulty in enforcing these laws on government officials, some government bodies have enacted policies prohibiting members from discussing public business on private devices.

Ethics and electronic communications

Ethics rules do apply to electronic communications. Many states and local governments have enacted codes of ethics for elected and appointed officials to ensure that their duties are executed in an independent and unbiased manner. These codes will likely apply to electronic com-



Commissioners should text and tweet with caution, as electronic and social media communications may become part of the official record.

munications by these officials.

Government officials who serve in a quasi-judicial or administrative role such as a planning commission must be able to perform their duties without having their independent judgment compromised. Several cases have found that government officials demonstrated a disqualifying bias by communicating with someone who was interested in the upcoming proceeding or by making comments before or during the proceeding. Planning commissioners should be cautious, therefore, in commenting or communicating in any way that might illustrate prejudgment bias.

Planning commissioners should also be particularly wary of actual and perceived conflicts of interest. For example, members who "friend" or communicate with parties who appear, or may in the future appear, before them could raise issues of impropriety, or even the appearance of impropriety, and should be avoided in order to maintain the integrity of the quasi-judicial board and the process. Also, planning commission members should not favor or appear to favor one party over another in a matter merely because of a personal relationship through a social media site. Activities such as "friending" or "liking" on Facebook, or making comments that could be interpreted as advocating for a particular project or party, could result in a real or apparent conflict of interest.

Consider an e-communications policy

Since the law rarely keeps up with technology, there is still very little guidance from the courts or state legislatures on legal and ethics issues with government electronic communications. As a result, governments should consider enacting local electronic communication policies to provide guidance to their elected and appointed government officials on open meeting and records compliance as well as ethics rules in their use of electronic communications.

—Julie Tappendorf

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CINCINNATI AND THE FIRST COMPREHENSIVE PLAN. The 1920s were a busy time for city plan creation in America. One plan achieved authoritative and historic status for its formal adoption by the city planning commission. The Official Plan of the City of Cincinnati was not the first city plan in the U.S., but it was one of the most comprehensive, expanding beyond the core six elements such as zoning to include schools and play yards, garbage and refuse disposal, a means of financing improvements, and other municipal issues. The Technical Advisory Group created the plan over three years, and its principal authors, George B. Ford and E. P. Goodrich, integrated innovative legislation and suggestions such as a program for a citizens committee on planning.

—Carolyn Torma

Torma is APA's director of education and citizen engagement.

SOLAR ENERGY. Planners must tackle the issue of solar energy from multiple perspectives. Learn more about how planning and solar energy are intertwined with these publications and products.

RESEARCH

Sunshot Solar Outreach Program
www.planning.org/research/solar

Planning and Zoning for Solar Energy
 PAS Essential Info Packet #30
www.planning.org/store/product/?ProductCode=EIP_E_IP30

Other Solar Energy Resources
www.planning.org/research/solar/resources.htm

STREAMING MEDIA

Planning for Solar Energy
 2011
www.planning.org/store/product/?ProductCode=STR_TPSE

Renewable Local Energy
 2008
www.planning.org/store/product/?ProductCode=STR_TRLE

Promoting Solar Energy Use Through Local Planning Webinar Series
 2013
www.planning.org/research/solar/webinar.htm

ARTICLES

"Let the Sun Shine In"
 Corry Berkooz
Planning, June 2008
www.planning.org/planning/2008/jun/letthesun.htm

"Solar Power's Friends and Enemies"
 Allen Best
Planning, October 2008
www.planning.org/planning/2008/oct/puttingwindside.htm

"Developing a Solar Energy Potential Map"
 Lyle Leitelt and Todd BenDor
PAS Memo, November/December 2010
www.planning.org/pas/memo/2010/nov

"The ABCs of Solar"
 Jeffrey Spivak
Planning, July 2012
www.planning.org/planning/2012/jul/solar.htm

—Ryan Daudelin

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