A CALL FOR MORE MICHIGAN SUNSHINE: UPDATING THE OPEN MEETINGS ACT

by Jack Dempsey

Keeping Michigan law current is, as a certain business magnate might say, "a good thing." Periodically ridding the Michigan Compiled Laws of antiquated statutes is no doubt a good practice. At least as good is the practice of amending laws that have vital impact on our society in order to take advantage of technological evolution. It is high time, for example, to update the Michigan Open Meetings Act ("Act").[1]

According to legislative documents available via the internet,[2] the 1976[3] law, as its popular name denotes, was designed to foster open government and transparent administrative processes in Michigan: "The basic intent of the Open Meetings Act is to strengthen the right of all Michigan citizens to know what goes on in government by requiring public bodies to conduct nearly all business at open meetings."[4] A closed government is, generally speaking, anathema to the proper functioning of a democracy:

> The ideal of a democratic government is too often thwarted by bureaucratic secrecy and unresponsive officials. Citizens frequently find it difficult to discover what decisions are being made and what facts lie behind those decisions.[5]

"Accordingly," says this web resource, the Act "protects [citizens'] right to know what's going on in government by opening to full public view the processes by which elected and nonelected officials make decisions on your behalf."[6]

The Act fits within a body of public policy frequently referred to as "sunshine" statutes. The Michigan Supreme Court initially referred to the Act as such in *In re "Sunshine Law" 1976 PA 267*, 400 Mich 660; 255 NW2d 635 (1977). The federal government must similarly follow the "Government in the Sunshine Act," 5 U.S.C. § 552b, requiring (with certain exceptions) "every portion of every meeting of an agency" to be open to public observation.[7] According to one internet website:

> State sunshine laws are the laws in each state that govern public access to governmental records. These laws are sometimes known as open records laws or public records laws, and are also collectively referred to as FOIA laws, after the federal Freedom of Information Act.[8]

---

[1] MCL 15.261 et seq.
[2] The reader will note the irony in this reference.
[3] America's bicentennial year.
[4] http://www.legislature.mi.gov/documents/publications/OpenMtgsFreedom.pdf, p. 21.
[5] *Id.* at second unnumbered page.
[6] *Id.*
[7] 5 U.S.C 552b(b).
[8] See http://sunshinereview.org/index.php/State_sunshine_laws. Records, of course, are but one aspect of this doctrine.

One web resource from Michigan echoes the description: "The designation was an attempt to characterize government under the statute as government operating in the sunshine of public scrutiny rather than the shadows of bureaucratic society."[9] The Act falls within this "sunshine" sphere.

The courts have interpreted Michigan's Act to encompass certain advances in technology that increase the feasibility of public attendance and observation. As one example, a hearing or meeting that is conducted by use of teleconferencing over speaker phones where all interested persons (i.e., the public) are allowed to attend has been held to comply with the requirements of the Act. *Goode v DSS*, 143 Mich App 756, 373 N.W.2d 210 (1985), *lv den*. The *Goode* court actually lauded the use of such "modern" technology:

> Persons who wish to attend the hearing are allowed to do so and may attend at either location. The conference call set-up actually increases the accessibility of the public to attend, as now more than one location is open to the public. 143 Mich App at 759-760

Increasing accessibility to government is, beyond dispute, one of the major public benefits associated with technological change that has revolutionized the communications world over the past decade or so. One need only consider how elected officials use such tools to reach voters to grasp how government, when it wants to, will take advantage of such changes.

Several provisions of the Act, however, suggest limitations on the rights of citizens to make use of current technology to observe or attend meetings:

1. Section 3 authorizes a person to "tape-record, to videotape, to broadcast live on radio, and to telecast live on television" the body's proceedings
2. Section 4 requires public notice of meetings via posting at the body's principal office (and other geographical locations) and that "[c]able television may also be utilized for purposes of posting public notice"
3. Section 5 permits meetings in a residential dwelling under certain circumstances, so long as notice is "published as a display advertisement in a newspaper of general circulation" in the locale of the meeting
4. Section 6 authorizes providing of notices "to any newspaper published in the state and to any radio and television station located in the state, free of charge"
5. Section 9 mandates availability of minutes of body meetings with a presumption that they will be in paper format: "Minutes are public records open to public inspection, and a public body shall make the minutes available at the address designated" for "posted public notices"

When first embodied in the Act and later amended, the language of these provisions was likely viewed as keeping pace with changes in communications technology. Videotaping an agency meeting would not have been possible in the first half of the 20th century, before the advent of personal video equipment. Cable television first became available in this country in the 1940s and more widespread after the 1960s. Yet, the minimal requirement of providing notice to newspapers, radio, and television outlets fails to reflect the current state of online accessibility.

[9] http://www.mml.org/events/annual_convention/cv08/pdf/rules_procedure.pdf

Much else has happened since the beginning of the 21st century. A communications medium commonly called "the internet" has spread ubiquitously across all spectrums of life in these United States. Government has, to some extent, taken advantage of the "world wide web" to modernize its operations, conduct commerce, and provide information to the public about its dealings.

It is also an indisputable phenomenon that Generation X-ers and Millenials (those born after the 1950s) are more attuned to what is termed "social media." They are completely comfortable with – even dependent upon – the sharing and dissemination of information by use of internet-based social interaction tools. Current vehicles such as Facebook, Linked-In, Twitter, YouTube, and Reddit have become part of the fabric of their daily lives. A function available to all web users known as "really simple syndication" ("RSS" for short) enables readers to subscribe to timely updates from favored websites or links and to aggregate information feeds from various websites into one centralized communiqué. Such a practice used to require clipping services; today, technology much more complex than a scissors is employed as such a tool – and with better results.

Video recording and broadcast, which once required expensive camera equipment and access to cable television, can now be accomplished with a cell phone and internet video services. Inexpensive videoconferencing software has made remote communication more effective than ever, eliminating the barrier of distance. And more governmental bodies now maintain websites, providing the public with accessible channels to get information about meetings subject to the Open Meetings Act. Amending the Act to take advantage of these modern technologies will increase accessibility to meetings at little or no cost to the public body, clearly serving the goals of the Act.

While the Act currently requires that public bodies make the minutes of their meetings available for public inspection, there is no requirement for their proceedings to be recorded in video or audio form. Despite this, some Michigan localities now provide online video recordings or live streaming of their public meetings. Three of Michigan's 10 most populous municipalities (Lansing, Livonia, and Detroit) have made an effort to provide regular streams of their city council meetings.[10] Both the Michigan House and Senate also provide regular streams of their proceedings.[11] These recordings make public meetings accessible to those who are unable to physically attend, clearly in keeping with the goals of the Act.

Aside from its passage in 1976, the Act has been altered on only a few occasions. In 2004, language was added to safeguard certain personally identifiable information that should not be

[10] See City of Detroit, Watch Council Sessions, <http://www.detroitmi.gov/CityCouncil/WatchCouncilSessions.aspx> (accessed December 1, 2013); City of Lansing, City TV <http://citytv.pegcentral.com/> (accessed December 1, 2013); City of Livonia, Video Communications Center, <http://www.ci.livonia.mi.us/Departments/CableLivoniaTelevision/VideoCommunicationsCenter.aspx> (accessed December 1, 2013).

[11] See Michigan House of Representatives, House TV <http://house.michigan.gov/htv.asp> (accessed December 1, 2013); Michigan Senate, Senate TV <http://www.senate.michigan.gov/default.html> (accessed December 1, 2013).

disclosed under federal law[12] and, in 2001, the Act was amended to include certain municipal corporations within the definition of a public body.[13] The most recent amendment was in 2012, requiring public bodies that maintain a regularly updated website for meeting agendas or minutes to post notice of rescheduled regular or special meetings on the public body's website.[14]

It's high time for Michigan to update its Open Meetings Act to make full use of webpages and other technology, opening the processes of Michigan governmental units and administrative agencies to full public view.[15] For example, live internet streaming broadcasts could be required, updating the use of "cable TV." Broadcasting by the public itself should also be permitted, as the practice could increase public participation and enhance the service provided by franchised radio and television stations to keep up with the State departments that administer laws passed by the Legislature.

Expanding the permissible uses of technology should cost public bodies nothing in terms of budgets and, if anything, may actually reduce costs. A further benefit of using new technology is the capability it provides for observation on a delayed basis, enabling the citizenry to become informed at a time of their own choosing. Imagine a Michigan where any citizen could hop onto the web and watch – live or later – an administrative hearing. Such a process would open up to the public the backroom processes by which so much policy is made in a way much more in keeping with the 1976 origin of the Act.

State government recently has sought to adopt a business approach in its delivery of products and services. This is likely a "good thing" – but it requires greater administrative openness via today's (and tomorrow's) communication tools – and ought to become a high priority.

[12] See 2004 PA 305, amending MCL 15.269(4).
[13] See 2001 PA 38, amending MCL 15.262(a).
[14] See 2012 PA 528, amending MCL 15.265(4).
[15] It should also be of interest that the penalties for violation of the Act have not been touched since original passage nearly a quarter-century ago.

RECOMMENDATIONS

I. Recording Public Meetings Using Any Non-Disruptive Technology

A. Background and Recommendation

In 1976, the drafters of the Open Meetings Act included the right of people attending public meetings to make recordings using the state-of-the-art technology of that day: tape-recording, videotape, live radio broadcasts, and live telecasts. Tape recorders are now a thing of the past; recordings are more likely to be made on digital recorders, cameras, or phones. Video recordings can now be easily saved or broadcast through the Internet, including through "streaming" technology. Web companies like YouTube, Ustream, and Livestream have developed these technologies into a sophisticated market for video content. These websites combine the ability to stream a video feed to the web in real time and to save that video for later viewing. Amending the OMA to permit recording by any non-disruptive means will encourage greater openness and modernize the OMA for years to come.

B. Proposed Amendment

Recording by the public and OMA-covered public body 15.263 Meetings, decisions, and deliberations of public body; requirements; attending or addressing meeting of public body; recording, broadcasting, and telecasting proceedings; rules and regulations; exclusion from meeting; exemptions.

Sec. 3. (1) All meetings of a public body shall be open to the public and shall be held in a place available to the general public. All persons shall be permitted to attend any meeting except as otherwise provided in this act. The right of a person to attend a meeting of a public body includes the right to record or broadcast the proceedings of a public body at a public meeting by any means which does not disrupt the meeting. The exercise of this right shall not be dependent upon the prior approval of the public body. A public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting.

II. Posting Notice on the Public Body's Website

A. Recommendation

In addition to other methods, notice of public meetings must be posted on the public body's website, and notices must contain the web address of the public body. See MCL 15.264.

B. Proposed Amendment

15.264 Public notice of meetings generally; contents; places of posting.

Sec. 4. The following provisions shall apply with respect to public notice of meetings:

a) A public notice shall always contain the name of the public body to which the notice applies, its telephone number if such exists, its email address if such exists, and its address.

b) A public notice for a public body shall always be posted at its principal office and any other locations considered appropriate by the public body. If the public body directly or indirectly maintains an official Internet presence, a public notice must also be posted on a portion of the website that is fully accessible to the public. Cable television may also be utilized for purposes of posting public notice.

III. Posting Minutes on the Public Body's Website

A. Recommendation

In addition to other methods, minutes of public meetings must be posted on the public body's website. See MCL 15.269.

B. Proposed Amendment

15.269 Minutes.
Sec. 9 ... (2) Minutes are public records open to public inspection, and a public body shall make the minutes available at the address designated on posted public notices pursuant to section 4. If the public body directly or indirectly maintains an official Internet presence, it shall also make its minutes available on a portion of the website that is fully accessible to the public. The public body shall make copies of the minutes available to the public at the reasonable estimated cost for printing and copying.

IV. Providing Documents to the Public on the Public Body's Website

A. Recommendation

Minutes of meetings, records that are the subject of agenda items, and copies of any documents that must be provided to the public would have to be posted on the public body's website, and may be provided electronically. See MCL 15.266; MCL 15.269(2).

V. Consider the Circumstances in Which a Public Meeting May Be Conducted Using New Technologies such as Videoconferencing, Teleconferencing, and Webcasting.

A. Recommendation

Modern technologies can enhance public access to open meetings and further the goals of the Open Meetings Act. It is time to clarify the circumstances in which a public body may conduct a meeting using new technologies such as videoconferencing, teleconferencing, and webcasting.

VI. Increase the Act's Penalty Provisions

A. Recommendation

The Act provides that a public official who intentionally violates the Act is guilty of a misdemeanor, punishable by a fine of not more than $1,000. A public official convicted of violating the Act a second time in the same term is guilty of a misdemeanor and is subject to a fine of not more than $2,000, imprisonment for not more than one year, or both. The penalty provisions have not been amended since the Act was passed. The impact of the penalty provisions is not as great as it should be. Accordingly, the penalties should be increased. See MCL 15.272.

SURVEY OF OTHER STATES' STATUTES

All fifty states have implemented some form of an open meetings act, though there is substantial variation among the provisions. A survey of some of these states, with a focus on the level to which each state: (i) requires public bodies to record and broadcast their activities; and (ii) permits the use of new technologies, including teleconferencing, may help assess the direction Michigan should take.

Recording and broadcasting activities.

Nearly all states permit citizens to record public meetings by any means that does not disturb the meeting.[1]

And some states, such as New York, for example, require that all meetings subject to their open meetings act be video recorded and posted on state websites.[2]

Use of New Technologies, including Teleconferencing and Videoconferencing

Many states permit public bodies to "meet" using new technologies, but impose a variety of conditions and requirements on its use.

New York permits meetings to be conducted by videoconference.[3] However, public bodies in New York may not act through videoconference unless a majority of the members are "gathered together in the presence of each other or through the use of videoconferencing," and all of the body's members are given notice of the meeting.[4]

Ohio[5] and Indiana[6] prohibit public body members from remotely participating in OMA-covered meetings except where statutorily permitted on an agency-by-agency basis. Minutes of

---

[1] See, e.g., New York Public Officers Law, Article 7 § 103(d)(1)-(2); McVey v. Carthage Twp. Trs., 2005- Ohio- 2869, ¶ 14 (4th Dist.) (Ohio appellate court affirms that it is impermissible to wholly prohibit the video recording of meetings subject to the Ohio OMA); Indiana IC 5-14-1.5-3 Sec. 3(a); Wis. Stat. § 19.90 (requiring reasonable accommodations for anyone wishing to record a meeting); Kan. Stat. Ann. § 75-4318(e); Cal. Gov't Code § 11124.1(a)-(c) (providing that "any person ... shall have the right to record the proceedings with an audio or video recorder ... no state body shall prohibit or otherwise restrict the broadcast of its open and public meetings); Florida Attorney General Opinion, AGO 91-28 (1991) <http://myfloridalegal.com/ago.nsf/Opinions/F4352A5280A644D4852562A80052BD79> (accessed December 1, 2013).

[2] See New York, Executive Order No 3 (Spitzer). <http://www.governor.ny.gov/archive/spitzer/executiveorders/eo_3.html> (accessed December 1, 2013). Governor Spitzer's 2007 executive order mandating the video recording and posting of all meetings subject to the New York open meetings act.

[3] See N.Y. Public Officers Law, Article 7 §§ 102(1), 103(c).

[4] New York State Committee on Open Government, OML-AO-4744 <http://docs.dos.ny.gov/coog/otext/o4744.html> (accessed December 1, 2013).

[5] See Ohio Sunshine Laws, An Open Government Resource Manual 2013 <http://www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/31/316d7da7-cbb3-47ac-8dba-2bb9d5bb7ab6.pdf> (accessed December 1, 2013), p. 84. Citing to OH R.C. 3316.05(K), which permits certain school district officials to participate in meetings remotely.

[6] See IC 5-14-1.5-3.5.

public meetings must be made available for public inspection. Neither state requires video or audio recordings of such meetings.[7]

A large number of states permit teleconferencing, provided that the public is permitted to listen to all meeting participants. Wisconsin permits meetings to be conducted via teleconference provided that the public and media can readily monitor the meeting and provided that the public can attend the meeting at one or more of its locations.[8] Minnesota permits teleconferencing, but also requires that "to the extent practical, [the public body] shall allow a person to monitor the meeting electronically from a remote location."[9] Kansas similarly permits teleconferencing, but requires that the public be provided with a means of listening to the discussion.[10] California permits teleconferencing provided at least one member of the public body is present at the location specified in the meeting notice, and the public is permitted to view the teleconference from all locations used by the public body members.[11] Each of these states treats teleconference meetings in the same manner as traditional meetings for the purpose of voting and conducting business.

Tennessee permits teleconferencing only when a physical quorum is present at the meeting location or in cases of necessity.[12] If a physical quorum cannot be assembled and the public body must take a timely action before a physical quorum can be assembled, teleconferencing may be used.[13] The public must be able to hear all meeting participants from the primary meeting location.[14] Tennessee law also makes special provision for the use of text-based Internet forums as a means of communication between public body members.[15] However, any such discussions must be made available to the public, archives must be kept for a minimum of one year, and these discussions may not act as a substitute for decision-making through traditional meetings.[16]

Thus, a substantial number of states have chosen to permit public bodies to perform their duties through teleconferencing. Various conditions have been imposed to ensure that the public retains access to these meetings, including permitting the public to appear at the main meeting location where the audio of remote meeting participants is broadcast and permitting the public to listen in via telephone or internet. While some states have evinced skepticism of teleconferencing and permit its use only by certain agencies or in cases of necessity, the trend is to permit the use of new technologies to conduct meetings.

---

[7] See OH R.C. 121.22(C); IC 5-14-1.5-4.
[8] See Wisconsin Attorney General Opinion, 69 Op. Att'y Gen. 143 (1980) <http://www.wisfoic.org/agopinions/FOIC%20OAG_69_143_lindner.pdf> (accessed December 1, 2013). The opinion notes that teleconferencing is disfavored because it makes public comment more difficult.
[9] See Minn. Stat. Ann. § 13D.015
[10] See State of Kansas, ATTORNEY GENERAL OPINION NO. 2011- 023 <http://ksag.washburnlaw.edu/opinions/2011/2011-023.pdf> (accessed December 1, 2013).
[11] See Cal. Gov't Code § 11123.
[12] See Tenn. Code Ann. § 8-44-108.
[13] Id.
[14] See Tenn. Code Ann. § 8-44-108; § 8-44-109.
[15] See Tenn. Code Ann. § 8-44-109.
[16] See Tenn. Code Ann. § 8-44-111.