

SOME ASSEMBLY REQUIRED: THE APPLICATION OF  
STATE OPEN MEETING LAWS TO EMAIL  
CORRESPONDENCE

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INTRODUCTION

One of the many outgrowths of the “good government” movement of the 1950s and 1960s was the proliferation of state Sunshine laws.<sup>1</sup> Every state in the Union has enacted Sunshine laws designed to make the inner workings of state and local government more accessible to the public at large.<sup>2</sup> State Sunshine laws generally have two components. First, state Sunshine laws typically contain “open records” provisions that allow citizens and the press to inspect and/or obtain copies of certain government records.<sup>3</sup> Second, state Sunshine laws contain “open meeting” provisions, which require state and/or local government bodies, subject to enumerated exceptions, to conduct their meetings in a manner open to the public.<sup>4</sup> This Article concerns the scope of the open meeting aspect of state Sunshine laws.

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<sup>1</sup> Teresa D. Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1167 (1993) (“However, state and local governing bodies were not required to open their doors under state open meeting statutes until the 1950s and 1960s.”).

<sup>2</sup> *Id.* (“Today all fifty states and the District of Columbia have open meeting statutes governing state and local legislative bodies.”).

<sup>3</sup> Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1161 (2002) (“Today, all fifty states have open records statutes, a majority of which are modeled after the [federal Freedom of Information Act].”).

<sup>4</sup> See *infra* Part II.A (discussing enactment and development of state open meeting statutes).

Most open meeting statutes prohibit the members of local government bodies not just from conducting official meetings in secret, but also from conducting informal, out-of-session “meetings” as well. This feature of open meeting statutes leaves public officials, and ultimately state attorneys general and the courts, with the sometimes difficult task of determining what types of informal communications among public officials constitute illegal “meetings,” and which types of communications are outside the scope of an open meeting statute altogether. This task is further complicated as the public’s typical modes of communication change over time. In essence, public officials, courts, and state attorneys general often are required to determine the legality of new and sophisticated methods of communication under statutes that were enacted before the public had ready access to personal computers or even telephones with conference call capabilities.

If a state statute prohibits informal “meetings” of a quorum of any public body, then the classic smoke-filled room where a quorum of the public body gathers to make the deals that later will be adopted at a properly-convened open meeting is the easy case. The issue becomes a bit murkier, however, when public officials communicate in other ways that may or may not be contrary to the literal terms of a state open meeting statute. For example, courts have grappled with whether communications that would constitute a meeting if conducted in person lose their character as a meeting when conducted by telephone conference call.<sup>5</sup> Similarly, enterprising public officials have at times sought to evade the strictures of a state open meeting statute by engaging in a pre-planned series of one-on-one conversations, and courts have had to determine whether such an evasion is permissible under state law.<sup>6</sup>

This Article considers whether the exchange of emails<sup>7</sup> among public officials can—or should—constitute an illegal “meeting” under state open meeting statutes. The manner of resolving this question also may shed light on whether other types of electronic communication—such as chat rooms or instant messaging—run afoul of state open meeting statutes. These are just some of the challenges courts face in applying statutes written thirty years ago to methods of communication that were not even conceived of at

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<sup>5</sup> See *infra* Part II.B.2.

<sup>6</sup> See *infra* Part II.B.1.

<sup>7</sup> One commentator has defined emails in the following manner:

E-mail is a service that two or more parties use to transmit words converted into digital form between two or more computer terminals through a service provider where the message is maintained in electronic storage until accessed by the recipient. E-mail is easy to use and time-saving, and, with a mouse-click, detailed messages can be sent to many parties simultaneously.

James G. Colvin, II, *E-Mail, Open Meetings, and Public Records*, COLO. LAW., Oct. 1996, at 99, 100.

that time.<sup>8</sup> Public officials face this same challenge in attempting to determine just what they can and cannot do in communicating with other members of the public body to which they belong.

On March 5, 2004, the Supreme Court of Virginia clarified some of these issues, at least under Virginia's Freedom of Information Act,<sup>9</sup> when the court issued its landmark opinion in *Beck v. Shelton*.<sup>10</sup> In *Beck*, the Virginia Supreme Court became the first state supreme court to decide whether the exchange of email correspondence by members of a public body can constitute an illegal closed "meeting" under a state open meeting statute. The *Beck* court held that the exchange of ordinary email correspondence by members of a public body could not constitute an illegal meeting for purposes of Virginia's FOIA statute.<sup>11</sup> Because the concept of a "meeting" connotes an assemblage or gathering of the members of the public body, the court held that the exchange of ordinary email correspondence, which does not involve simultaneous deliberation or discussion of any kind, was no more a "meeting" than is the exchange of letters through the mails.<sup>12</sup> As the first state high court to resolve this issue, the Virginia Supreme Court's reasoning in *Beck v. Shelton* may have significant implications for the manner in which open meeting statutes are construed under similar statutes across the country.

Part I of this Article provides some background into the development of state open meeting statutes. These provisions generally prohibit closed "meetings" of local government bodies in the absence of a statutory exception that permits a particular subject to be discussed in executive session. Of course, a requirement of open "meetings" raises the issue of whether particular interaction among public officials constitutes a "meeting" in the first instance, and Part II will discuss some of the ways in which courts have approached this question under a variety of factual scenarios.

Part III of this Article analyzes the Virginia Supreme Court's decision in *Beck v. Shelton*, in which the court held that the exchange of ordinary email correspondence among members of a public body is not tantamount

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<sup>8</sup> See Jessica M. Natale, *Exploring Virtual Legal Presence: The Present and the Promise*, 1 J. HIGH TECH. L. 157, 159 (2002) ("The major problem with virtual presence conforming to preexisting open-meeting laws, is the interpretation of what it means to be present for these meetings."); Brian J. Caveney, Comment, *More Sunshine in the Mountain State: The 1999 Amendments to the West Virginia Open Governmental Proceedings Act and Open Hospital Proceedings Act*, 102 W. VA. L. REV. 131, 174 (1999) (noting that West Virginia's open meeting statute "does not address electronic mail communications to discuss 'public business' between members of a governing body").

<sup>9</sup> Virginia Freedom of Information Act, VA. CODE ANN. § 2.2-3700 to 3714 (Michie 2001 & Supp. 2004).

<sup>10</sup> 593 S.E.2d 195 (Va. 2004).

<sup>11</sup> *Id.* at 200.

<sup>12</sup> *Id.* at 199.

to holding an illegal, informal “meeting” under Virginia’s FOIA statute.<sup>13</sup> In the authors’ estimation, the Virginia Supreme Court got it exactly right in *Beck*. An ordinary email is nothing more than a piece of written correspondence transmitted through an efficient and inexpensive means. Moreover, email correspondence is like letters—and unlike face-to-face meetings and telephone conference calls—in that the transmission of an email creates a perfect public record as to the substance of the communications, one that generally must be retained and made available to the public under state open records statutes.<sup>14</sup> Therefore, the public’s interest in overseeing the workings of local government is protected in the same way that it is for all other types of written correspondence—the public may review such correspondence by making a records request under the open records provisions of state law.

Beyond being correct as a matter of statutory construction, the authors believe that permitting the exchange of email correspondence among public officials makes sense from a public policy standpoint, and Part IV of this Article explains the basis for this conclusion. There is an inherent tension between open government on one hand, and government efficiency on the other. Government can become exceedingly efficient when not burdened by the requirements of state sunshine laws, but such efficiency can be both undemocratic and contrary to the public’s interest. At the other extreme, notions of open government for the sake of open government, while sounding nice in the abstract, can easily create paralysis in local government, with public officials unable to coordinate with each other in a way that promotes, not retards, the public’s interest in good government.<sup>15</sup> It makes little sense from a policy standpoint for a state’s open meeting statute to prohibit communications—such as emails—that are subject to disclosure under state open records laws. Prohibiting email communications under the auspices of an open meeting statute would hinder the efficiency of local government solely in the interest of creating public access to communications to which the public already has a right of access through state open records statutes. The public interest in open government

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<sup>13</sup> *Id.* at 200.

<sup>14</sup> *Id.* at 199 (“There is no question that e-mails fall within the definition of public records . . . .”); *see also* Op. Ark. Att’y Gen. No. 99-018, 1999 WL 182169, at \*2 (Mar. 22, 1999) (“The electronically stored e-mail message would be a ‘public record’ subject to disclosure . . . .”); Op. Md. Att’y Gen. No. 96-016, 1996 WL 305985, at \*3 (May 22, 1996) (“An e-mail message surely falls within this definition [of ‘public record’].”); Op. N.D. Att’y Gen. No. 98-O-05, 1998 WL 1057738, at \*4 n.8 (Mar. 3, 1998) (“[E]-mail messages or letters between Board members are records subject to the open records and records retention laws . . . .”).

<sup>15</sup> *See Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 517 (Minn. 1983) (“There is a point beyond which open discussion requirements may serve to immobilize a body and prevent the resolution of important problems.”).

is best served by encouraging the interaction and coordination of public officials in a manner that allows for efficient governance yet produces a record to which the public has a right of access.

## I. THE DEVELOPMENT AND STRUCTURE OF STATE OPEN MEETING LAWS

### A. *The Enactment of Open Meeting Statutes by the States*

At common law, the public had no right to attend the meetings of government bodies.<sup>16</sup> In seventeenth and eighteenth century England, publication of parliamentary debates was a punishable offense.<sup>17</sup> In the United States, our Constitution was crafted in large part through secret meetings of the Constitutional Convention,<sup>18</sup> and congressional committees historically conducted much of their business in closed session.<sup>19</sup> Indeed, as recently as 1950, Alabama was the only state with an open meeting statute on its books.<sup>20</sup> Over the next decade, however, due in large part to lobbying from

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<sup>16</sup> *City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971) (“We do not overlook the arguments that the right to attend meetings of government bodies did not exist at common law . . . .”); *State ex rel. Stephan v. Bd. of County Comm’rs*, 866 P.2d 1024, 1025 (Kan. 1994) (“Preliminarily, we note there is no common-law right of the public or press to attend meetings of governmental bodies, and any such right is created by statute and is governed by the statutory language employed.”); *Beacon Journal Publ’g. Co. v. City of Akron*, 209 N.E.2d 399, 404 (Ohio 1965) (“It is clear that the public has no common-law right to attend meetings of governmental bodies.”) (citation omitted); *Roanoke City Sch. Bd. v. Times-World Corp.*, 307 S.E.2d 256, 258 (Va. 1983) (“[T]here is no common-law right of the public or press to attend the meetings of governmental bodies.”); Note, *Open Meeting Statutes: The Press Fights for the “Right to Know,”* 75 HARV. L. REV. 1199, 1203 (1962) [hereinafter *Open Meeting Statutes*] (“It is clear that the public has no common law right to attend meetings of government bodies.”); David A. Barrett, Note, *Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act*, 66 TEX. L. REV. 1195, 1197 (1988) (“Neither the Constitution nor the common law, however, grants the public a right of access to the deliberative processes of government.” (footnotes omitted)).

<sup>17</sup> *Open Meeting Statutes*, *supra* note 16, at 1203.

<sup>18</sup> *Id.* at 1202 (“[T]he delegates to the Constitutional Convention, for example, felt constrained to work in secrecy.”); see also Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 889 (1986) (“The practice of withholding information when important public policies so require is nothing new; the Constitution’s framers themselves kept their deliberations secret.”); Pupillo, *supra* note 1, at 1166-67 (“Although the Founding Fathers recognized the importance of public participation in the democratic process, they closed the Constitutional Convention to the public.” (footnote omitted)).

<sup>19</sup> *Open Meeting Statutes*, *supra* note 16, at 1203 (noting that, as of 1962, approximately one-third of congressional committee meetings were closed to the public).

<sup>20</sup> Note, *Government in the Sunshine Act: Opening Federal Agency Meetings*, 26 AM. U. L. REV. 154, 154 n.3 (1976) [hereinafter *Government in the Sunshine Act*]; *Open Meeting Statutes*, *supra* note 16, at 1199-1200 & n.7.

press organizations and civic groups,<sup>21</sup> a number of states enacted open meeting statutes, to the point where twenty-six states had such statutes in effect by 1962.<sup>22</sup> By 1976, when New York enacted its open meeting statute, all fifty states and the District of Columbia had statutes in effect which prohibited most categories of closed meetings by state and local government bodies.<sup>23</sup>

The structure of most state open meeting statutes is relatively simple. The statutes generally identify the types of government bodies that are subject to the statute<sup>24</sup> and then provide that such public bodies must conduct their meetings in open session<sup>25</sup> unless the subject matter of the meet-

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<sup>21</sup> James Bowen, *Behind Closed Doors: Re-examining the Tennessee Open Meetings Act and Its Inapplicability to the Tennessee General Assembly*, 35 COLUM. J. L. & SOC. PROBS. 133, 140-41 (2002) (noting the role played by the Tennessee media in lobbying for enactment of Tennessee's Open Meetings Act and the role the press played nationally in the open meetings movement); Rick L. Duncan, *No More Secrets: How Recent Legislative Changes Will Allow the Public Greater Access to Information*, 1 TEX. TECH J. TEX. ADMIN. L. 115, 118 (2000) (noting that open meeting legislation "was spurred by media organizations who had become disgruntled by the frequency at which public officials were denying admittance to meetings of government bodies"); John J. Watkins, *Open Meetings Under the Arkansas Freedom of Information Act*, 38 ARK. L. REV. 268, 272-73 (1984) ("Various journalism organizations—notably the American Society of Newspaper Editors and Sigma Delta Chi, the national journalism fraternity—[by 1950] began to press for open meetings legislation at the state and federal levels."); *Open Meeting Statutes*, *supra* note 16, at 1199 (noting the role of the Freedom of Information Committee of the American Society of Newspaper Editors and other civic groups in campaigning for enactment of state open meeting laws).

<sup>22</sup> *Open Meeting Statutes*, *supra* note 16, at 1199-1200 ("Twenty-six states [as of 1962] have open meeting statutes applicable to state and local governmental bodies; ten years ago only one of these laws existed in its present form." (footnote omitted)).

<sup>23</sup> See *Government in the Sunshine Act*, *supra* note 20, at 154 n.3 (noting that, as of 1976, the District of Columbia and all states except for New York had an open meetings statute in effect); Timothy P. Whelan, *New York's Open Meetings Law: Revision of the Political Caucus Exemption and Its Implications for Local Government*, 60 BROOK. L. REV. 1483, 1483 (1995) (discussing New York's enactment of its Open Meetings Law in 1976).

<sup>24</sup> For example, Virginia's open meeting statute defines a "public body" subject to the statute's open meeting provisions as follows:

"Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include . . . any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.

VA. CODE ANN. § 2.2-3701 (Michie Supp. 2004).

<sup>25</sup> See, e.g., GA. CODE ANN. § 50-14-1(b) (2004) ("Except as otherwise provided by law, all meetings as defined in subsection (a) of this Code section shall be open to the public."); 5 ILL. COMP. STAT. ANN. 120/2(a) (West Supp. 2004) ("All meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a."); MD. CODE ANN., STATE

ing falls within an enumerated statutory exception.<sup>26</sup> Of course, providing by statute that meetings of public bodies shall be open to the public begs the question of what exactly constitutes a “meeting.”

As a general matter, states have dealt with defining the scope of the term “meeting” in three ways that are relevant to this Article. First, and by far the most common approach, state legislatures have enacted statutory definitions of the term “meeting” that include not only official sessions of a public body, but also situations where some defined portion of a public body is informally “gathered,” “assembled,” or “convened” together.<sup>27</sup> For example, Virginia’s FOIA statute defines the term “meetings” as follows:

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GOV’T § 10-505 (1999) (“Except as otherwise expressly provided in this subtitle, a public body shall meet in open session.”); N.Y. PUBLIC OFFICERS LAW § 103(a) (McKinney 2001) (“Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section ninety-five of this article.”); 65 PA. CONS. STAT. ANN. § 704 (West 2000) (“Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under section 707 (relating to exceptions to open meetings), 708 (relating to executive sessions) or 712 (relating to General Assembly meetings covered).”); VA. CODE ANN. § 2.2-3707(A) (Michie Supp. 2004) (“All meetings of public bodies shall be open, except as provided in § 2.2-3711.”).

<sup>26</sup> For example, Virginia’s FOIA statute requires public bodies to conduct their meetings in open session unless one of 33 statutory exemptions apply. VA. CODE ANN. § 2.2-3711 (Michie Supp. 2004) (authorizing closed meetings when any of 29 statutory exemptions applies).

<sup>27</sup> See ALASKA STAT. § 44.62.310(h)(2) (Michie 2002) (defining meeting as a “gathering” of three or more members of a governmental body, or a majority if less than three); ARIZ. REV. STAT. ANN. § 38-431 (West 2001) (“gathering” of a quorum of a public body); DEL. CODE ANN. tit. 29, § 10002(b) (2003) (“the formal or informal gathering of a quorum of the members of any public body”); GA. CODE ANN. § 50-14-1(a)(2) (1998) (“the gathering of a quorum of the members of the governing body of an agency”); HAW. REV. STAT. ANN. § 92-2(3) (Michie 2003) (“the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision”); IDAHO CODE § 67-2341(6) (Michie 2001) (“the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter”); 5 ILL. COMP. STAT. ANN. 120/1.02 (West Supp. 2004) (“any gathering of a majority of a quorum of the members of a public body”); IND. CODE ANN. § 5-14-1.5-2(c) (Michie Supp. 2001) (“a gathering of a majority of the governing body of a public agency”); IOWA CODE ANN. § 21.2(2) (West 2001) (“a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body”); KAN. STAT. ANN. § 75-4317a (1997) (“any gathering, assembly, telephone call or any other means of interactive communication” with the necessary quorum to discuss official business); KY. REV. STAT. ANN. § 61.805(1) (Michie Supp. 2003) (“informational or casual gatherings held in anticipation of or in conjunction with a regular or special meeting”); LA. REV. STAT. ANN. § 42:4.2 (West 1990) (“the convening of a quorum of a public body”); MD. CODE ANN., STATE GOV’T § 10-502(g) (1999) (“to convene a quorum of a public body”); MASS. GEN. LAWS, ch. 39 § 23A (West 1999) (“any corporal convening and deliberation of a governmental body for which a quorum is required”); MICH. COMP. LAWS ANN. § 15.2626(2)(a) (West Supp. 2004) (“convening of a public body at which a quorum is present”); MISS. CODE ANN. § 25-41-3(b) (Supp. 2003) (“an assemblage of members of a public body” or “any such assemblage through the use of video or teleconference devices”); MONT. CODE ANN. § 2-3-202 (2003) (“convening of a quorum of the constituent membership” of a public body “whether corporal or by

*“Meeting”* or *“meetings”* means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership . . . of any public body.<sup>28</sup>

The use of qualifying words such as “gathering” or “assemblage” is significant because this language suggests that not all communications among public officials would constitute a meeting under the statute. Taking perhaps the easiest example, a letter sent through the mails by one public official to other members of the same public body would not seem to involve a “gathering” or “assemblage” of the members, and therefore

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means of electronic equipment”); NEV. REV. STAT. ANN. § 241.015(2) (Michie Supp. 2003) (“gathering of members of a public body at which a quorum is present to deliberate toward a decision”); N.H. REV. STAT. ANN. § 91-A:2 (2004) (“convening of a quorum of the membership of a public body”); N.J. STAT. ANN. § 10:4-8(b) (West 2002) (“any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body”); N.M. STAT. ANN. § 10-15-2(c) (Michie 2003) (“a gathering of the members called by the presiding officer,” including a meeting of a quorum of members of any public body); N.Y. PUBLIC OFFICERS LAW § 102(1) (McKinney 2001) (“the official convening of a public body”); 65 PA. CONS. STAT. ANN. § 703 (West 2000) (“[a]ny prearranged gathering of an agency which is attended or participated in by a quorum of the members”); N.C. GEN. STAT. § 143-318.10(d) (2003) (defining meeting as a “meeting, assembly, or gathering together at any time or place, or the simultaneous communication by conference telephone or other electronic means of a majority of a public body to conduct public business”); N.D. CENT. CODE § 44-04-17.1(8) (2001) (“a formal or informal gathering, whether in person or through other means such as telephone or video conference” of a quorum of the members of the governing body); OKLA. STAT. ANN. tit. 25, § 304 (West Supp. 2004) (“conduct of business of a public body by a majority of its members being personally together” or as authorized by teleconference); OR. REV. STAT. § 192.610(5) (1999) (“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”); R.I. GEN. LAWS § 42-46-2(a) (Supp. 2003) (meeting means the convening of a public body and shall expressly include so-called workshops, working, or work sessions); S.C. CODE ANN. § 30-4-20(d) (Law. Co-op. 1991) (a means of convening a quorum of members of a public body, whether in person or by means of electronic equipment); TENN. CODE ANN. § 8-44-102(b)(2) (2002) (“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”); TEX. GOV’T CODE ANN. § 551.001(4)(A) (Vernon Supp. 2004) (“a deliberation between a quorum of a governmental body”); UTAH CODE ANN. § 52-4-2(2)(a) (2002) (“convening of a public body, with a quorum present, whether in person or by means of electronic equipment”); VT. STAT. ANN. tit. 1, § 310(2) (2003) (“a gathering of a quorum of the members of a public body”); W. VA. CODE ANN. § 6-9A-2(4) (Michie 2003) (“the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action”); WIS. STAT. ANN. § 19.82 (West Supp. 2002) (a meeting is rebuttably presumed when one-half or more of the members of a governmental body are present); WYO. STAT. ANN. § 16-4-402(a)(iii) (Michie 2003) (“an assembly of at least a quorum of the governing body”).

<sup>28</sup> VA. CODE ANN. § 2.2-3701 (Michie Supp. 2004).



would not appear to constitute a “meeting” under statutory definitions incorporating these concepts.<sup>29</sup>

By contrast, some state legislatures have enacted open meeting statutes that explicitly sweep within their scope informal contact among members of a public body even when such members are not “gathered,” “assembled,” or “convened” together. For example, the Connecticut Freedom of Information Act defines the term “meeting” as follows:

“Meeting” means any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, *and any communication by or to a quorum of a multimember public agency, whether in person or by means of electronic equipment*, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power . . .<sup>30</sup>

Under this statute, it would not be a defense to a claim of illegal conduct to admit communicating to a quorum of a public body but to deny that

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<sup>29</sup> See *Moberg v. Indep. Sch. Dist.* No. 281, 336 N.W.2d 510, 518 (Minn. 1983) (noting that Minnesota’s open meeting statutes “[do] not apply to letters, or to telephone conversations between fewer than a quorum”); *Beck v. Shelton*, 593 S.E.2d 193, 198-99 (Va. 2004) (noting that Virginia’s open meeting statute did not regulate the exchange of letters by public officials).

<sup>30</sup> CONN. GEN. STAT. ANN. § 1-200(2) (West Supp. 2004) (emphasis added). Similarly, some state statutes have a provision separate and apart from the definition of the term “meeting” that expressly provides that email communications are subject to open meeting requirements. See, e.g., CAL. GOV’T CODE § 54952.2 (West Supp. 2004) (“[A]ny use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body is prohibited.”); COLO. REV. STAT. ANN. § 24-6-402(2)(d)(III) (West Supp. 2003) (“If elected officials use electronic mail to discuss pending legislation or other public business among themselves, the electronic mail shall be subject to the requirements of this section. Electronic mail communication among elected officials that does not relate to pending legislation or other public business shall not be considered a ‘meeting’ within the meaning of this section.”). The Kansas Open Meetings Act includes within the definition of meetings any “means of interactive communication.” KAN. STAT. ANN. § 75-4317a (1997) (“As used in this act, ‘meeting’ means any gathering, assembly, telephone call or any other means of interactive communication by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency.”). However, the Kansas Attorney General has opined that this phrase includes emails only to the extent that there is simultaneous discussion by public officials via email. Op. Kan. Att’y Gen. No. 95-13, 1995 WL 40761, at \*3 (Jan. 23, 1995). Other states statutorily define meeting in terms of a discussion of its members without requiring an element of simultaneity. See, e.g., MO. ANN. STAT. § 610.010(5) (West 2000) (A “public meeting” is any meeting of a public body “at which any public business is discussed, decided, or public policy formulated, whether corporeal or by means of communication equipment.” While informal gatherings for social or ministerial purposes are excluded, the term meeting does include “a public vote of all or a majority of the members of a public governmental body, by electronic communication or any other means, conducted in lieu of holding a public meeting with the members of the public governmental body gathered at one location in order to conduct public business.”); OHIO REV. CODE ANN. § 121.22(B)(2) (Anderson Supp. 2003) (“any prearranged discussion of the public business of the public body by a majority of its members”).

the communication occurred while the members were gathered together, as the statute unambiguously prohibits any and all methods of communicating to a quorum.

The third way in which state open meeting statutes deal with the concept of “meeting” is essentially not to deal with the issue at all.<sup>31</sup> Some open meeting statutes—such as the Alabama Sunshine Law—do not define the term “meeting.”<sup>32</sup> Other state statutes—such as the Arkansas Freedom of Information Act—use a circular definition that defines “meeting” to include the “meetings” of a statutorily-defined number of the members of a public body, which essentially defines a “meeting” as a “meeting.”<sup>33</sup>

B. *Prior Controversies Over Which Modes of Communication Constitute a “Meeting”*

When states began enacting open meeting statutes in earnest in the 1950s and 1960s, there was little expectation that controversies would arise over whether a communication constituted a meeting. This is probably

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<sup>31</sup> One state, Maine, does not even treat informal communications among members of a public body as constituting meetings under its open meeting statute. *See* ME. REV. STAT. ANN. tit. 1, § 402 (West Supp. 2003) (defining “public proceedings” subject to open meeting provisions as “the transactions of any functions affecting any or all citizens of the State” by public bodies); *see also* Marxsen v. Bd. of Dir., M.S.A.D. No. 5, 591 A.2d 867, 870 (Me. 1991) (noting that “informal discussions among [school] board members are not unlawful” so long as official action is taken only at a public proceeding). Because this Article addresses whether the exchange of email communications violates open meeting statutes’ prohibition on informal meetings, and Maine’s statute does not prohibit informal meetings under any circumstance, the scope of Maine’s open meeting statute is irrelevant for purposes of this Article. Another state, South Dakota, does not define the term meeting; however, the state attorney general has opined that a meeting occurs when a majority or quorum of the body is present and official business within the jurisdiction of the board, commission, or agency is discussed. *See* OP. S.D. ATT’Y GEN. No. 89-08, 1989 WL 505659 (Apr. 3, 1989).

<sup>32</sup> ALA. CODE § 13A-14-2 (1975) (prohibiting closed meetings without defining the term “meeting”); *see also* D.C. CODE ANN. § 1-207.42(a) (2001) (requiring meetings to be conducted in open session without defining “meeting”); MINN. STAT. ANN. § 13D.01 (West Supp. 2004) (Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510, 516 (Minn. 1983) (noting that the Minnesota legislature did not define the term “meeting” in its open meeting statute)); NEB. REV. STAT. ANN. § 84-1409(2) (Michie 2003) (“[M]eeting shall mean all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body.”).

<sup>33</sup> ARK. CODE ANN. § 25-19-103 (Michie Supp. 2003) (“‘Public meetings’ means the meetings of any bureau, commission, or agency of the state, or any political subdivision of the state . . . supported wholly or in part by public funds or expending public funds . . .”). The Arkansas statute requires in another section that “all meetings, formal or informal” be conducted in open session, which leads to the circular result that a prohibited informal meeting is a contact that qualifies as a meeting. *Id.* § 25-19-106. Similarly, Washington state’s definition of a meeting is: “‘Meeting’ means meetings at which action is taken.” *See* WASH. REV. CODE § 42.30.020(4) (2004).

because the predominant methods of communicating in the 1950s and 1960s were easily categorized as meetings or non-meetings and the other relevant aspects of a statute's definition of meeting, such as the number of participants required, were easily applied. Indeed, the leading law review article published on the subject of open meeting statutes during this time period—a 1962 note in the *Harvard Law Review*—foresaw only four significant aspects of open meeting statutes that were likely to be subjects of dispute: (1) identification of government bodies to which the statutes would apply;<sup>34</sup> (2) establishment of provisions for providing notice of public meetings;<sup>35</sup> (3) determination of when the statutes would permit closed executive sessions;<sup>36</sup> and (4) development of a means for enforcing violations of the statutes.<sup>37</sup> Notably absent from that list is the determination of whether a particular contact among members of a public body would fall within a statute's definition of the term "meeting."

However, technological advances, changes in popular societal modes of communication, and the mischievous tendencies of the human mind soon created a number of controversies concerning whether particular communications qualified as "meetings" under the various state statutes, two of which merit mention here. First, in what often was an obvious effort to evade the strictures of state open meeting statutes, public officials sometimes had preplanned serial conversations among themselves for the purpose of discussing public business, and courts were left to consider whether state open meeting statutes could be construed to prohibit communications that appeared outside the statutes' literal definition of "meeting." Second, courts were called upon to decide whether a statutory prohibition on informal "meetings" applied to communications that were not face-to-face, such as telephonic conference calls. Consideration of the manner in which courts have approached these issues is instructive in considering the proper approach for considering the legality of email communications.

#### 1. Serial Communications.

As discussed above, most states' open meeting statutes provide that a meeting of members of a public body does not occur unless the number of participants surpasses a defined threshold, whether it be a majority of the members, a quorum, a majority of a quorum, or a statutorily-set number of

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<sup>34</sup> *Open Meeting Statutes*, *supra* note 16, at 1205-07.

<sup>35</sup> *Id.* at 1207-08.

<sup>36</sup> *Id.* at 1208-11.

<sup>37</sup> *Id.* at 1211-16.

the members.<sup>38</sup> This numerosity requirement gives rise to the question of whether the members of a public body can avoid a state's open meeting requirement by discussing public business in multiple sub-groups. For example, if a statute provided that an assemblage of three members of a public body constituted a "meeting,"<sup>39</sup> the chairman of a public body might shuttle back and forth among multiple members of the public body for the purpose of engaging in a group discussion without ever having three members talking to each other at the same time. This creates the classic, and difficult, question of whether an open meeting statute should be construed by the courts to prohibit conduct that does not fall within the literal prohibitions of the statute. Not surprisingly, courts have approached this issue in a myriad of ways.

Some courts have more or less ignored the literal language of an open meeting statute in order to find a violation. For example, in *Blackford v. School Board of Orange County*,<sup>40</sup> a county school board was faced with "a major redistricting problem" and sought to avoid public uproar over each and every possible redistricting alternative that might be discussed during the decision-making process.<sup>41</sup> However, Florida's open meeting statute required that "[a]ll meetings of any board . . . at which official acts are to be taken are declared to be public meetings open to the public at all times."<sup>42</sup> In an attempt to comply with Florida's open meeting statute while at the same time develop consensus on an open meeting plan with a minimum of public uproar, the board devised a plan by which the county schools superintendent conducted one-on-one meetings in "rapid-fire succession" with each school board member to discuss redistricting options.<sup>43</sup> In devising this plan, the board relied on prior Florida case law providing that conversations between a school board member and a member of the school board staff—such as the superintendent—did not constitute a "meeting" of the board.<sup>44</sup> Based on this case law, the board members believed that no prohibited "meeting" could occur because there would never be even two members of the school board having a conversation with each other on the subject of redistricting.<sup>45</sup>

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<sup>38</sup> See *supra* notes 27-33 and accompanying text.

<sup>39</sup> See, e.g., VA. CODE ANN. § 2.2-3701 (Michie Supp. 2004) (providing, for most public bodies, that an informal assemblage of three or more members constitutes a meeting for purposes of Virginia's open meetings statute).

<sup>40</sup> 375 So. 2d 578 (Fla. Dist. Ct. App. 1979).

<sup>41</sup> *Id.* at 579.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 580.

<sup>44</sup> *Id.* at 579-80.

<sup>45</sup> *Id.*

The Florida District Court of Appeal disagreed. Because the board's clear intent was to develop a group consensus through preplanned communications with the school superintendent, the court held that the series of one-on-one discussions in effect involved communications by board members with each other, albeit through a prearranged intermediary, in violation of Florida's open meeting statute:

While we agree that one swallow a summer cannot make, we are convinced that the scheduling of six sessions of secret discussions, repetitive in content, in rapid fire seriatim and of such obvious official portent, resulted in six de facto meetings by two or more members of the board at which official action was taken. As a consequence, the discussions were in contravention of the Sunshine Law. Further, the frank admission as to the reason for this modus operandi leads us to conclude that in effect "the (board) met in secret (and) used staff members as intermediaries in order to circumvent public meeting requirements."<sup>46</sup>

The Michigan Supreme Court used essentially the same analysis in dealing with efforts by the University of Michigan Board of Regents to narrow the pool of potential candidates for university president in a non-public manner.<sup>47</sup> In *Booth Newspapers, Inc. v. University of Michigan Board of Regents*, the university regents sought to avoid the requirements of Michigan's open meeting statute by authorizing a single regent to reduce the pool of potential candidates for university president "after numerous telephone calls and meetings with the advisory committees and informal subquorum groups of regents."<sup>48</sup> It was undisputed that this procedure was placed in effect in large part in order to avoid having to conduct these sensitive deliberations in an open meeting. As stated by the court:

The acknowledged purpose of the telephone calls and the subquorum meetings was to achieve the same intercommunication that could have been achieved in a full board meeting. During this process, the board avoided quorum meetings because it would have been required to conduct a public meeting under the OMA. In fact, Regent Roach told an Ann Arbor News reporter on November 15, 1987, that if it had not been for the OMA and the desire not to discuss these matters in public, "we would [have been] able to sit down with all the regents present, discuss the problems and talk about all the candidates at a much earlier point. [Instead], it [took] three or four hours to go around the horn on the telephones and find out what everybody is thinking."<sup>49</sup>

Armed with this candid, if ill-conceived, admission of an evasive purpose, the court had little difficulty concluding that the "around the horn" telephone calls and pre-planned subquorum meetings, taken together, were

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<sup>46</sup> *Blackford*, 375 So. 2d. at 580-81 (alterations in original) (quoting *Occidental Chem. Co. v. Mayo*, 351 So. 2d 336, 341 (Fla. 1977)).

<sup>47</sup> *Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents*, 507 N.W.2d 422 (Mich. 1993).

<sup>48</sup> *Id.* at 424-25.

<sup>49</sup> *Id.* at 425 (footnotes omitted) (alterations in original).

tantamount to a meeting of the entire Board of Regents.<sup>50</sup> Other courts similarly have held that preplanned serial gatherings designed to evade the requirements of an open meeting statute in fact constitute illegal meetings under such statutes.<sup>51</sup>

By contrast, other state courts have come to the opposite conclusion, holding that serial gatherings of groups smaller than the statutory requirement for a “meeting” do not run afoul of open meeting statutes. In *Moberg v. Independent School District No. 281*,<sup>52</sup> the Minnesota Supreme Court considered allegations that a school board had violated Minnesota’s open meeting statute by discussing school closures in closed meetings. Because Minnesota’s open meeting statute did not define the term “meeting,” the court first had to establish the circumstances in which informal communications could constitute a “meeting” under the statute.<sup>53</sup> Because a public body can act only through a quorum of its members, the court held that the types of contacts subject to Minnesota’s open meeting statute are “those gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body.”<sup>54</sup> In response to the argument that limiting meetings to quorum-sized gatherings would allow evasion of the statute, the court stated as follows:

Appellants correctly point out that this rule may be circumvented by serial face-to-face or telephone conversations between board members to marshal their votes on an issue before it is initially raised at a public hearing. It does not follow that two- or three-person conversations should be prohibited, however, because officials who are determined to act furtively

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<sup>50</sup> *Id.* at 430 (“Even members of the committee acknowledged that its ‘round-the-horn’ decisions and conferences achieved the same effect as if the entire board had met publicly, received the candidate ballots, and ‘formally’ cast their votes.”).

<sup>51</sup> See, e.g., *Roberts v. City of Palmdale*, 853 P.2d 496, 503 (Cal. 1993) (“[A] concerted plan to engage in collective deliberation on public business through a series of . . . telephone calls passing from one member of the governing body to the next would violate the open meeting requirement.”); *Stockton Newspapers, Inc. v. Members of the Redevelopment Agency*, 214 Cal. Rptr. 561, 565 (Cal. Ct. App. 1985) (“Thus a series of nonpublic contacts at which a quorum of a legislative body is lacking at any given time is proscribed by the Brown Act if the contacts are ‘planned by or held with the collective concurrence of a quorum of the body to privately discuss the public’s business’ either directly or indirectly through the agency of a nonmember.”); *State ex rel. Cincinnati Post v. City of Cincinnati*, 668 N.E.2d 903, 906 (Ohio 1996) (holding that a series of back-to-back meetings by subgroups of the city council in an attempt to evade open meeting requirements in fact constituted an illegal meeting under the Ohio open meeting statute); *McComas v. Bd. of Educ.*, 475 S.E.2d 280, 291 (W. Va. 1996) (citing with approval decisions from other jurisdictions holding that serial communications of subquorum groups can constitute an illegal meeting under appropriate circumstances).

<sup>52</sup> 336 N.W.2d 510 (Minn. 1983).

<sup>53</sup> *Id.* at 516.

<sup>54</sup> *Id.* at 518.

will hold such discussions anyway, or might simply use an outsider as an intermediary. There is a way to illegally circumvent any rule the court might fashion, and therefore it is important that the rule not be so restrictive as to lose the public benefit of personal discussion between public officials while gaining little assurance of openness. Of course, serial meetings in groups of less than a quorum for purposes of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute depending upon the facts of the individual case.<sup>55</sup>

Similarly, the Georgia Court of Appeals held in *Claxton Enterprise v. Evans County Board of Commissioners*<sup>56</sup> that no illegal meeting occurred when the administrator of a county board of commissioners called each commissioner seriatim to propose that the commissioners amend the record of a prior meeting in order to change the basis for their decision to go into closed session.<sup>57</sup> The court held that no illegal meeting occurred because a meeting under Georgia's open meeting statute takes place at a "designated time and place" and the serial telephone conversations at issue took place at different times and at no particular place.<sup>58</sup>

While finding that no illegal meeting occurred, the *Claxton Enterprise* court was careful to point out that telephonic meetings *could* violate the statute under certain circumstances:

Although a meeting is required to be open only when a quorum of a governing body or its agents have gathered at a designated time and place to take official action, such a gathering can be realized through virtual as well as actual means. The quorum does not have to be gathered in a physical space. In this digital age, we recognize that meetings may be held in ways that were not contemplated when the Act was initially drafted . . . . Thus, a "meeting," within the definition of the Act, may be conducted by written, telephonic, electronic, wireless, or other virtual means. A designated place may be a postal, Internet, or telephonic address. A designated time may be the date upon which requested responses are due.<sup>59</sup>

While the above-quoted caveat is hardly a model of judicial clarity, it does appear to support the notion that truly serial communications cannot constitute an illegal "meeting" because there is no unity of time involved in the communications. However, if the members of a public body were contacted serially, but asked to respond in some form or fashion at a common time, it appears that the *Claxton Enterprise* court would find the unity of time to exist that could support a finding of an illegal meeting.<sup>60</sup>

To the extent that the decisions addressing serial communications could inform the question of whether email communications can constitute

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<sup>55</sup> *Id.*

<sup>56</sup> 549 S.E.2d 830 (Ga. Ct. App. 2001).

<sup>57</sup> *Id.* at 835.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (citation omitted).

<sup>60</sup> *Id.*

an illegal “meeting,” there are a few general principles that appear to underlie the seemingly contradictory decisions discussed above. First, in dealing with serial communications, courts have treated the parties’ intent as being important. The cases finding serial communications to constitute an illegal meeting have done so in large part because the public officials involved conducted subquorum meetings for the specific purpose of achieving qualitatively the same result that they could achieve by conducting an illegal meeting.<sup>61</sup> Indeed, some of the cases involved admissions by the parties that they prearranged their subquorum gatherings for the express purpose of gaining all of the benefits of a meeting while evading the legal requirement that meetings be open to the public.<sup>62</sup> While the reasoning that would aggregate a series of individually-legal communications to find an illegal meeting seems a bit strained as a matter of literal statutory construction, it is not difficult to see why a court would find that justice and the public interest justified a broad construction of the statute in the face of open efforts at evasion.

Conversely, the decisions finding that serial communications did not constitute an illegal meeting generally have lacked these same egregious facts. Instead, they involved a series of gatherings that appeared much more attributable to happenstance or ignorance than evasive intent.<sup>63</sup> Indeed, the Texas Court of Appeals fastened on this distinction in *Harris County Emergency Service District No. 1 v. Harris County Emergency Corps*.<sup>64</sup> In *Harris County*, the court observed that precedent supported the notion that serial gatherings *could* constitute an illegal meeting, but found that such an analysis did not apply because “there is no evidence that the district members were attempting to circumvent the [Texas open meeting statute] by conducting telephone polls with each other.”<sup>65</sup>

Second, the differing results in the serial gathering cases appear attributable, at least in part, to simple philosophical differences among the deciding courts as to whether the role of filling gaps in an open meeting statute lies with the state legislature or with the courts. Courts holding that

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<sup>61</sup> *Stockton Newspapers, Inc. v. Members of the Redevelopment Agency*, 214 Cal. Rptr. 561, 565 (Cal. Ct. App. 1985); *Blackford v. Sch. Bd.*, 375 So.2d 578, 580-81 (Fla. Dist. Ct. App. 1979); *Booth Newspapers v. Univ. of Mich. Bd. of Regents*, 507 N.W.2d 422, 429 (Mich. 1993); *State ex rel. Cincinnati Post v City of Cincinnati*, 668 N.E.2d 903, 906-07 (Ohio 1996).

<sup>62</sup> *See, e.g., Blackford*, 375 So. 2d at 580; *Booth Newspapers*, 507 N.W.2d at 425.

<sup>63</sup> *See, e.g., Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 518 (Minn. 1983) (stating in dictum that serial gatherings could be illegal if the purpose were to subvert the purposes of Minnesota’s open meeting statute); *Harris County Emergency Serv. Dist. No. 1 v. Harris County Emergency Corps*, 999 S.W.2d 163, 169 (Tex. Ct. App. 1999) (noting that there had been no purpose to evade Texas’ open meeting statute).

<sup>64</sup> 999 S.W.2d at 163.

<sup>65</sup> *Id.* at 169.



pre-planned serial gatherings constitute an illegal meeting have largely justified their rulings on the basis that a finding of no illegal meeting would exalt form over substance and would countenance an intentional evasion of the statutes' provisions through exploitation of a loophole in the definition of "meeting."<sup>66</sup> On the other hand, the Georgia Court of Appeals decided in *Claxton Enterprise* that no illegal meeting occurred because the Georgia statute's definition of "meeting" included only those gatherings that took place at a single time and place, even if that allowed public officials to achieve precisely the same type of interaction through serial gatherings that would be permitted if a quorum gathered at a single time and place to discuss public business.<sup>67</sup> Presumably, the *Claxton Enterprise* court did not address whether its holding allowed the members of a public body to exploit a loophole in the law because the court's mission was to apply the law as written and leave it to the legislature to close any such loopholes.<sup>68</sup>

## 2. Telephone Conference Calls

Another instructive issue addressed by some courts in construing open meeting statutes' requirement of open meetings is whether members of a public body can avoid the requirements of such statutes by having their conversations over the telephone instead of in person. The issue of conference call communications differs from serial communications in at least one important respect. A telephonic conference call results in the same

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<sup>66</sup> *Roberts v. City of Palmdale*, 853 P.2d 496, 503 (Cal. 1993) (noting the public officials' "concerted plan" to evade California's open meeting statute through serial subquorum meetings); *Blackford*, 375 So. 2d at 580-81 (noting the defendants' "frank admission" that they conducted serial meetings in order to avoid application of Florida's Sunshine Law); *Booth Newspapers*, 507 N.W.2d at 425 (noting the defendants' admission that they conducted multiple subquorum deliberations in order to evade open meeting requirements); *State ex rel. Cincinnati Post*, 668 N.E.2d at 906 (noting evasive intent behind serial subquorum discussions).

<sup>67</sup> See *Claxton Enters. v. Evans County Bd. of Comm'rs*, 549 S.E.2d 830, 835 (Ga. Ct. App. 2001) ("It is clear to us that because the Board engaged in a deliberative process and voted on official business, a 'meeting,' as that term is used in common parlance, occurred. However, because that meeting did not fall within the Act's definition of a meeting, the Board did not violate the letter of the law.").

<sup>68</sup> *Id.* In an illustrative decision, the Nevada Supreme Court held in *Del Papa v. Bd. of Regents of the Univ. & Comty. Coll. Sys.*, 956 P.2d 770, 776-78 (Nev. 1998), that the serial responses by telephone or fax violated Nevada's open meeting statute not because such serial communications constituted a "meeting," but because the public officials' conduct violated another provision of the open meeting statute that explicitly prohibited use of electronic communications to evade the spirit or letter of the statute. By so holding, the court appears to have recognized that it is not its place to rewrite the legislature's definition of the term "meeting," but instead to enforce the legislature's command that evasion of open meeting requirements through electronic communications is equally prohibited. *Id.*

type of real-time communication and simultaneous deliberation that one could achieve by meeting in person. The only difference is the medium in which this real-time communication occurs. In this sense, telephone conference calls are fundamentally different from serial communications. The *quality* of the interaction in serial communications is different from that of a simultaneous discussion, as the participants in serial communications are not simply deliberating simultaneously through a slightly altered medium. For this reason, it seems at least an arguable position that serial communications are an attempt to *comply* with open meeting statutes rather than an effort to *evade* them.

By contrast, it is difficult to characterize a conscious decision to conduct joint discussions and deliberations by telephone instead of in person as anything other than an attempt to evade open meeting requirements through sharp practice. Despite the obviously evasive nature of telephone conference calls, courts have not uniformly found statutory prohibitions on secret meetings to extend to group conversations over the telephone. These differing results appear to stem largely from differences in state court philosophies as to the proper role, if any, of the judiciary in closing clear loopholes in state open meeting statutes, or in construing such statutes to avoid finding such self-defeating loopholes. Two cases illustrate the different ways that courts have dealt with this issue.

In *Stockton Newspapers, Inc. v. Members of the Redevelopment Agency of the City of Stockton*,<sup>69</sup> the California Court of Appeal considered whether a telephone conference among a quorum of a redevelopment agency could constitute an illegal closed “meeting.”<sup>70</sup> The California open meeting statute, as it existed at that time, defined “meeting” to include collective decisions made by a majority of the members of a public body, but did not specify the modes of communication that would qualify as a meeting.<sup>71</sup> After concluding that this definition was broad enough to encompass the informal exchange of facts,<sup>72</sup> the court held that the fact that the group discussion occurred over the telephone did not change that the conversations occurred as part of a meeting:

Considering the ease by which personal contact is established by use of the telephone and the common resort to that form of communication in the conduct of public business, no reason appears why the contemporaneous physical presence at a common site of the members

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<sup>69</sup> 214 Cal. Rptr. 561, 565 (Cal. Ct. App. 1985),

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 564.

<sup>72</sup> *Id.* (“Since deliberation connotes not only collective discussion but also the collective acquisition and exchange of facts preliminary to the ultimate decision, the Brown Act is applicable to collective investigation and consideration short of official action.” (citations and internal quotations omitted)).

of a legislative body is a requisite of such an informal meeting. Indeed if face-to-face contact of the members of a legislative body were necessary for a “meeting,” the objective of the open meeting requirement of the Brown Act could all too easily be evaded.<sup>73</sup>

The Virginia Supreme Court displayed a very different judicial philosophy in *Roanoke City School Board v. Times-World Corporation*,<sup>74</sup> a 1983 case in which the court considered whether a telephone conference among the members of a school board ran afoul of Virginia’s open meeting statute. In *Roanoke City*, the chairman of a city school board convened a telephonic conference call with the entire school board in order to convey information concerning the eligibility of a potential candidate for school superintendent.<sup>75</sup> Virginia’s open meeting statute, as it existed at the time, defined the term “meeting” to include a public body’s meetings when sitting as a body, as well as the “informal assemblage” of three or more members of a public body.<sup>76</sup>

Because the school board was not in actual session at the time of the conference call, the legality of the conference call hinged on whether it involved an “informal assemblage” of the members of the school board. In addressing this issue, the *Roanoke City* court held that the *physical* assemblage of the members in a single location was necessary to trigger Virginia’s open meeting requirements.<sup>77</sup> Of course, such a result essentially advises public officials that they can have exactly the type of conversations prohibited by Virginia’s open meeting statutes as long as they do it on the telephone instead of in person. The court had a ready response to this argument: “The appellees argue that if a telephone conference call is not prohibited by the Act, then the Act contains a ‘glaring loophole.’ This may be, but, if true, it is a loophole that must be closed and corrected by the General Assembly, not by the courts.”<sup>78</sup>

Whatever one might think of the *Roanoke City* court’s narrow conception of the term “assemblage,” there is little doubt that the appellees were correct about the impact of the court’s decision. Holding that members of a public body cannot meet in groups of three or more in person, but can do exactly that if they communicate by telephone, creates an enormous loophole in an open meeting statute, one that would have the effect of ren-

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<sup>73</sup> *Id.* at 565.

<sup>74</sup> 307 S.E.2d 256 (Va. 1983).

<sup>75</sup> *Id.* at 256-57.

<sup>76</sup> *Id.* at 257-58 (quoting the then-existing definition of “meeting” in Virginia’s Freedom of Information Act).

<sup>77</sup> *Id.* at 259 (“Irrespective of one’s preferred definition, whether it be coming together, assembling, gathering, or meeting, the *physical* presence of the participants is essential. A telephone conference call does not qualify.”).

<sup>78</sup> *Id.*

dering meaningless the statute's prohibition on secret meetings. Indeed, if left unchecked, a ruling that left telephone conference calls outside the reach of open meeting statutes would merely move the "smoke-filled room" that open meeting statutes were designed to eliminate from a den or back room to the phone wires, with members able to conduct precisely the type of secret, unverifiable meetings by telephone that are clearly prohibited in person.

Not surprisingly, the Virginia General Assembly recognized the grave threat posed to open meeting statutes by the *Roanoke City* decision and swiftly amended the Virginia Freedom of Information Act so that the definition of "meeting" included telephonic conference calls among three or more members of a public body.<sup>79</sup> The same scenario repeated itself a decade later in Kansas, as the Kansas Supreme Court, adopting the reasoning of *Roanoke City*, held that the Kansas Open Meetings Act did not prohibit group conference calls,<sup>80</sup> with the Kansas legislature quickly intervening to make explicit that an illegal meeting could occur by conference call.<sup>81</sup>

As a matter of policy, once a state legislature has decided to prohibit informal meetings, it necessarily follows that having the same type of interaction by telephone conference call should be prohibited as well. Otherwise, the prohibition of closed informal meetings is meaningless. For that reason, in states where the legality of telephone conferences has arisen as an issue, the end result generally has been that a telephone conference is subject to the same restrictions as a face-to-face conference. Such states have reached this common-sense result either through courts construing the state's open meeting statute to include telephone conferences within the definition of "meeting,"<sup>82</sup> or by the state legislature stepping in explicitly

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<sup>79</sup> See 1984 Va. Acts Ch. 252 (codified as amended at VA. CODE ANN. § 2.2-3701 (Michie Supp. 2004)).

<sup>80</sup> See *State ex rel. Stephan v. Bd. of County Comm'rs*, 866 P.2d 1024, 1028 (Kan. 1994) ("Telephone calls are not included in KOMA. The legislature recognized this fact in 1977 and declined to include them. If they are to be included, it is up to the legislature to do so.").

<sup>81</sup> See KAN. STAT. ANN. § 75-4317(a) (2004) (defining "meeting" to include "any gathering, assembly, telephone call or any other means of interactive communication" by a majority of a quorum of a public body); *Del Papa v. Bd. of Regents of the Univ. & Comty. Coll. Sys.*, 956 P.2d 770, 777 n.6 (Nev. 1998) (noting that the Kansas legislature amended the definition of "meeting" in response to the *Stephan* decision); Theresa M. Nuckolls, *Kansas Sunshine Law; How Bright Does It Shine Now? The Kansas Open Meetings Act (Part II—KOMA)*, 72:6 J. KAN. BAR. ASS'N 34, 37 (July 2003) ("The Kansas Legislature reacted to [*Stephan*] by deleting the requirement of prearrangement and adding to the definition [of 'meeting'] any 'telephone call or any other means of interactive communication.'").

<sup>82</sup> See, e.g., *Claxton Enter. v. Evans County Bd. of Comm'rs*, 549 S.E.2d 830, 835 (Ga. Ct. App. 2001) ("Thus, a 'meeting,' within the definition of the Act, may be conducted by written, telephonic, electronic, wireless, or other virtual means."); *Del Papa*, 956 P.2d at 776 (holding that the legislature's failure to override the state Attorney General's Opinion was evidence of the legislature's intent to preserve the interpretation that voting by telephone to make a public decision violates the Open Meet-

to provide that telephone conference were covered by provisions relating to open meetings.<sup>83</sup>

## II. THE VIRGINIA SUPREME COURT'S DECISION IN *BECK V. SHELTON*

An enduring feature of the American style of jurisprudence is that the most significant legal principles often flow from the smallest cases. Indeed, the United States Supreme Court first announced and applied the doctrine of judicial review in *Marbury v. Madison*,<sup>84</sup> a case dealing with the relatively inconsequential question of whether a single litigant would receive a commission to serve as a justice of the peace. So it is with *Beck v. Shelton*,<sup>85</sup> a case that dealt not with some grand policy question or government corruption, but rather whether it was legal for three part-time legislators from the Fredericksburg City Council to exchange emails discussing a potential candidate for appointment to a regional library board, with the nominee under discussion ultimately not even eligible for such an appointment.

### A. *The Facts of Beck v. Shelton*

The facts involved in *Beck* were largely undisputed. On July 1, 2002, three new members were sworn in as members of the Fredericksburg City Council.<sup>86</sup> In the summer of 2002, political opponents of Mayor Bill Beck served a request on the City of Fredericksburg pursuant to Virginia's Freedom of Information Act<sup>87</sup> for production of emails by and among members

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ing Law); Board of Trustees v Bd. of County Comm'rs, 606 P.2d 1069, 1073 (Mont. 1980) (concluding that a telephone conversation among members of the county commission was an impermissible meeting by means of electronic equipment).

<sup>83</sup> See, e.g., ARIZ. REV. STAT. ANN. § 38-431 (West 2001); CAL. GOV'T CODE § 54952.2(b) (West Supp. 2004); COLO. REV. STAT ANN. § 24-6-402(b) (West 2004); IOWA CODE ANN. § 21.2(2) (West 2004); KAN. STAT. ANN. § 75-4317(a) (2004); MISS. CODE ANN. § 25-41-3 (2004); N.J. STAT. ANN. § 10:4-8 (West 2002); N.C. GEN. STAT. § 143-318.10(d) (2003); N.D. CENT. CODE § 44-04-17.1 (2003); OKLA. STAT. ANN. tit. 25, § 304 (West 2004); W. VA. CODE ANN. § 6-9A-2(4) (Michie 2003).

<sup>84</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>85</sup> 593 S.E.2d 195 (Va. 2004).

<sup>86</sup> *Beck v. Shelton*, 593 S.E.2d 195, 197 (Va. 2004) (noting that Councilmembers Kelly, Fortune, and Withers took office on July 1, 2002).

<sup>87</sup> VA. CODE ANN. § 2.2-3704 (Michie 2001) (“[A]ll public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records.”).

of the Fredericksburg City Council.<sup>88</sup> The emails produced as a result of this request included a number of emails on various subjects between five members of the Fredericksburg City Council: Mayor Beck, Vice Mayor Howson, and the three newly-elected members of the City Council, Councilmembers Tom Fortune, Matt Kelly, and Billy Withers.<sup>89</sup>

Once they received these emails, Mayor Beck's political opponents filed suit in the Circuit Court for the City of Fredericksburg, Virginia, alleging that Mayor Beck, Vice Mayor Howson, and Councilmembers Kelly, Fortune, and Withers had violated Virginia's Freedom of Information Act by conducting illegal, secret "meetings" in violation of the statute.<sup>90</sup> For good measure, Mayor Beck's political opponents also quoted several of the emails in a full-page advertisement printed in the *Free Lance-Star*, Fredericksburg's local newspaper.<sup>91</sup>

Of the eighteen counts asserted in the Circuit Court petition, several alleged that illegal meetings had occurred through the Councilmembers' exchange of email correspondence amongst themselves on a variety of topics.<sup>92</sup> With one exception, all of the counts asserted against the Councilmembers were either voluntarily dismissed or resolved at or before trial in favor of the Councilmembers.<sup>93</sup> The one exception was a count alleging that the Councilmembers had conducted an illegal meeting by exchanging email correspondence on the requirement for the City Council to determine who should be named to a regional library board.<sup>94</sup> In the emails, the Councilmembers discussed the wisdom of appointing an apolitical "numbers cruncher" to the position, and discussed the potential appointment of the assistant city manager to the board.<sup>95</sup> In perhaps the greatest irony in a case full of them, the potential nominee under discussion was ineligible for

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<sup>88</sup> See Elizabeth Pezzullo, *City Plans to Archive E-Mail*, FREDERICKSBURG.COM, Aug. 7, 2003 (noting that the plaintiffs filed the *Beck* suit after receiving the relevant emails in response to a request for documents under the open records component of Virginia's FOIA statute), at <http://fredericksburg.com/News/FLS/2003/082003/08072003/1062215> (last visited July 29, 2004).

<sup>89</sup> *Beck*, 593 S.E.2d at 196-97.

<sup>90</sup> *Id.* at 197; see also Kiran Krishnamurthy, *E-Mails Don't Make a Meeting, Court Says; Political Opponents of the Fredericksburg Mayor Said E-Mail Sessions Were Illegal*, RICHMOND TIMES-DISPATCH, Mar. 6, 2004, at B1, 2004 WL 61898973 (noting that the Fredericksburg suit was filed by three political opponents of Mayor Beck).

<sup>91</sup> *Advertisement*, FREE LANCE-STAR, Sept. 28, 2002, at C12 (paid for by Gordon W. Shelton); *Advertisement*, FREE LANCE-STAR, Oct. 19, 2002, at F8 (paid for by Gordon W. Shelton).

<sup>92</sup> *Beck*, 593 S.E.2d at 197.

<sup>93</sup> *Id.* ("Defendants prevailed on demurrers or at trial on fourteen of the eighteen counts and Shelton voluntarily dismissed three other counts before trial.").

<sup>94</sup> See Br. of Appellants at 6, *Beck v. Shelton*, 593 S.E.2d 195 (Va. 2004) (No. 030723) (on file with authors).

<sup>95</sup> See *id.*

appointment to the library board because he did not reside within the Fredericksburg city limits.<sup>96</sup>

Prior to trial, the Councilmembers moved for summary judgment on the committee assignment count, arguing that the exchange of ordinary emails did not qualify as a “meeting” under Virginia’s FOIA statute and therefore was not prohibited.<sup>97</sup> In particular, the Councilmembers noted that the definition of “meeting” in the FOIA statute required an *assemblage* of three or more members of a public body.<sup>98</sup> Because the Councilmembers were merely exchanging written correspondence, and were not simultaneously discussing or deliberating on public business, the Councilmembers argued that they were not *assembled* and therefore were not engaging in a meeting by merely exchanging serial correspondence.<sup>99</sup> Indeed, the record demonstrated that the shortest interval between the transmission of an email and any response thereto was more than four hours,<sup>100</sup> further supporting the argument that the communications lacked the simultaneity normally associated with a meeting or assemblage.

The Circuit Court rejected the Councilmembers’ argument and held that the exchange of email correspondence constituted an illegal meeting under the FOIA statute whenever the communications were made for the purpose of developing consensus, regardless of the lack of simultaneous discussion or deliberation.<sup>101</sup> As a result, the Circuit Court entered summary judgment against the three Councilmembers—Mayor Beck, Vice Mayor Howson, and Councilmember Kelly—who had sent emails to the group on the subject of committee assignments.<sup>102</sup> Mayor Beck, Vice Mayor Howson, and Councilmember Kelly petitioned the Supreme Court of Virginia for review of this decision, and the court granted that petition on August 5, 2003.<sup>103</sup>

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<sup>96</sup> *See id.*

<sup>97</sup> *See* Mem. of Resp’ts Mayor Bill Beck, Vice-Mayor Scott Howson, Councilmember Dr. Tom Fortune, and Councilmember Matt Kelly In Supp. of Their Mot. for Summ. J., *Beck v. Shelton*, No. CH02-428 (Va. Cir. Ct. 2003) (filed Dec. 6, 2003 with the Fredericksburg City Circuit Court of Virginia; on file with authors).

<sup>98</sup> *See id.* at 4-9.

<sup>99</sup> *See id.*

<sup>100</sup> *Beck v. Shelton*, 593 S.E.2d 195, 198-99 (Va. 2004).

<sup>101</sup> *Id.* at 197.

<sup>102</sup> *See* Order of the Circuit Ct. of the City of Fredericksburg, Virginia Granting & Den. Summ. J., *Beck v. Shelton*, No. CH02-428 (Va. Cir. Ct. 2003) (decision issued Jan. 8, 2003; on file with authors).

<sup>103</sup> *See* Order of the Supreme Ct. of Virginia Granting Pet. and Cross-Pet. for Appeal, *Beck v. Shelton*, 593 S.E.2d 195 (Va. 2004) (order issued Aug. 5, 2003; on file with authors).

## B. *Legal Background*

The Virginia Supreme Court was not writing on an empty slate in deciding whether an exchange of emails constitutes the conduct of an illegal “meeting” under Virginia’s open meeting statute. For the most part, the Virginia authorities seemed to undermine the Circuit Court’s conclusion that the Councilmembers had violated FOIA by exchanging ordinary email correspondence. Most important, the statute’s definition of the term “meeting” provides that an informal meeting subject to the statute involves the *assemblage* of three or more members of a public body:

“Meeting” or “meetings” means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership . . . of any public body.<sup>104</sup>

Because there were significant time lags between the emails among the Councilmembers, there did not seem to be any *assemblage* of the Councilmembers such that Virginia’s open meeting requirements would be implicated. Indeed, in *Roanoke City School Board v. Times-World Corporation*,<sup>105</sup> the Virginia Supreme Court, in finding that telephone conferences were not subject to FOIA’s open meeting requirements as the statute then existed, strongly suggested that the term “meeting” connoted some sort of face-to-face gathering or assembling of persons for a particular common purpose.<sup>106</sup>

In discussing several alternative formulations of the concept of a meeting, the *Roanoke City* court had in each example included the concept that a meeting occurs only when the participants “assemble” or “come together,” something that literally does not occur when members merely exchange written email correspondence.

In addition, the Virginia Attorney General had addressed precisely this issue in 1999 and issued an opinion that the exchange of ordinary email correspondence did not constitute a “meeting” subject to Virginia’s open meeting requirements:

Transmitting messages through an electronic mail system is essentially a form of written communication and, in my opinion, does not constitute “conduct[ing] a meeting . . . through . . . electronic . . . means” as contemplated by [Virginia’s open meeting statute]. Accordingly, it is my opinion that [the statute] does not bar members of a local governing body from sending electronic mail communications to other members of the governing body. All

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<sup>104</sup> VA. CODE ANN. § 2.2-3701 (Michie Supp. 2004).

<sup>105</sup> 307 S.E.2d 256 (Va. 1983).

<sup>106</sup> *Id.* at 258-59.



official actions of the governing body must, however, take place at a meeting where the membership is physically present.<sup>107</sup>

The Attorney General's opinion on this matter had significance beyond being persuasive authority, as it is a settled doctrine of Virginia law that the construction of a Virginia statute by the Attorney General is entitled to deference by Virginia courts.<sup>108</sup> The reasoning behind this doctrine is that the General Assembly is presumed to be aware of Attorney General opinions, and the failure of the General Assembly to override the Attorney General's construction of a statute is viewed as strong evidence that the Attorney General's construction is in fact correct.<sup>109</sup>

Finally, if the Virginia Supreme Court were to conclude that the literal terms of the statute did not bring email communications within the scope of the provisions relating to open meetings, there was little reason to believe that the court would stretch the statute to serve some perceived policy objective. Even though the Virginia FOIA statute expressly provides that the statute is to be applied liberally to further the interests of open government,<sup>110</sup> the Virginia Supreme Court in *Roanoke City* had pointedly rejected the notion that this requirement of liberal construction gave the court license to extend the statute's reach beyond its literal terms in order to prevent evasion or to close loopholes:

The appellees argue that if a telephone conference call is not prohibited by the Act, then the Act contains a "glaring loophole." This may be but, if true, it is a loophole that must be closed and corrected by the General Assembly, not by the courts. We are not dealing here with the denial of a constitutional right but with a statute whose subject matter is one within the discretion of the legislature.<sup>111</sup>

Outside of Virginia, however, the precedent was decidedly mixed. Most significantly, the *only* published judicial decision on the subject unambiguously had held that email communications constituted a "meeting" and therefore were subject to state open meeting requirements. In *Wood v. Battle Ground School District*,<sup>112</sup> a recently-terminated school district employee filed a lawsuit alleging that several members of the local school

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<sup>107</sup> 1999 Op. Va. Att'y Gen. 12, 1999 WL 463384, at \*1-2 (Jan. 6, 1999) (footnotes omitted) (omissions in original).

<sup>108</sup> *Browning-Ferris, Inc. v. Commonwealth*, 300 S.E.2d 603, 605 (Va. 1983).

<sup>109</sup> *Id.*

<sup>110</sup> See VA. CODE ANN. § 2.2-3700(B) (Michie Supp. 2004) ("The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.").

<sup>111</sup> *Roanoke City*, 307 S.E.2d at 259.

<sup>112</sup> 27 P.3d 1208 (Wash. Ct. App. 2001).

board had violated Washington state's open meeting statute by holding illegal closed meetings.<sup>113</sup> One of the employee's claims asserted that members of the school board had violated the open meeting statute by exchanging emails concerning board business.<sup>114</sup> The trial court found that the exchange of emails concerning school board business constituted an illegal meeting under Washington's open meeting statute and therefore granted summary judgment in favor of the terminated employee.<sup>115</sup>

The Washington Court of Appeals affirmed. The court began its analysis by noting that the Washington statute's definition of "meeting" did not resolve whether emails were included, as the statute unhelpfully defined "meeting" as "meetings at which action is taken."<sup>116</sup> Because the *Wood* court did not view Washington's open meeting statute as explicitly addressing whether the exchange of emails qualified as a "meeting," the court searched for other indicia of the legislature's intent. The court noted the legislature's statutory command that the open meeting statute be construed liberally, and concluded that this instruction required that the court adopt a broad definition of the term "meeting."<sup>117</sup> The court then noted that restrictive interpretations of the statute could thwart the public's interest in open government and cited a series of out-of-state cases for the proposition that "courts have generally adopted a broad definition of 'meeting' to effectuate open meetings laws that state legislatures enacted for the public benefit."<sup>118</sup>

The *Wood* court allowed that some states had enacted specific provisions to render electronic communications subject to state open meeting statutes, but the court did not find the absence of such legislation in Washington dispositive.<sup>119</sup> Rather, the court intimated that such additional legislation was unnecessary in Washington because the Washington open meeting statute, unlike the statutes in states that had enacted more specific provisions dealing with electronic communications, "broadly defines 'meeting' as 'meetings at which action is taken,' regardless of the particular means used to conduct it."<sup>120</sup> The court also cited an open meetings desk-

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<sup>113</sup> *Id.* at 1213.

<sup>114</sup> *Id.* at 1216. The employee also asserted that certain school board members had held illegal face-to-face meetings. *Id.* at 1213 (noting that certain board members had engaged in a face-to-face meeting to discuss the employee's employment status). In considering this argument, the Washington Court of Appeals held that Washington's open meeting statute did not prohibit meetings among members-elect of public bodies. *Id.* at 1215.

<sup>115</sup> *Id.* at 1213.

<sup>116</sup> *Wood*, 27 P.3d at 1216 (citing WASH. REV. CODE § 42.30.020(4) (2004)).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (quoting WASH. REV. CODE § 42.30.020(4) (2004)).

book promulgated by the Washington Attorney General which opined that “[a] meeting occurs if a majority of the members of the governing body were to discuss or consider [agency business] no matter where that discussion or consideration might occur.”<sup>121</sup>

After considering all these factors, the *Wood* court came to the conclusion that “the exchange of e-mails can constitute a ‘meeting.’”<sup>122</sup> However, the court also announced its view that all email activity is not necessarily a meeting under the Washington statute. Because the Washington statute had been construed as requiring the participation of a majority of a governing body for a “meeting” to occur, the court stressed that email exchanges among less than a majority of a public body is not a meeting.<sup>123</sup> Moreover, the court held that the exchange of emails among a majority of a governing body would not constitute a meeting unless the participants “collectively intend to meet to transact the governing body’s official business.”<sup>124</sup> Finally, the court observed that there would be no illegal email “meeting” if the members discussed by email issues that would not come before the public body for a vote.<sup>125</sup> Applying these newly-announced standards, the court found that the terminated employee had made out a prima facie case that the board members had conducted an illegal meeting via email.<sup>126</sup>

Thus, at the time the Virginia Supreme Court decided *Beck v. Shelton*,<sup>127</sup> the only court to have issued a published opinion on the issue had held that emails exchanged by the requisite number of members of a public body constituted an illegal meeting under the Washington open meeting statute if there was an intent on the part of the participants to discuss public business or to reach a collective consensus on the business of the public body.<sup>128</sup> The *Wood* court gave no apparent consideration to the fact that email communications differ from orthodox meetings in that the participants are not deliberating at the same time or in the same place. Rather, the result depended entirely on the substance of the communications and whether the communications involved “the active exchange of information

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<sup>121</sup> *Id.* at 1216-17 (alteration in original) (quoting Attorney General’s *Open Records & Open Meetings Deskbook*, at 1.3B (July 12, 2001), <http://www.atg.wa.gov/records/chapter1.shtml> (last visited July 28, 2004)).

<sup>122</sup> *Wood*, 27 P.3d at 1216-17.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1217-18.

<sup>127</sup> 593 S.E.2d 195 (Va. 2004).

<sup>128</sup> *See Wood*, 27 P.3d at 1218.

and opinions” on a matter of public business—which would be illegal—or “the mere passive receipt of information”—which would not be illegal.<sup>129</sup>

Beyond the *Wood* decision, several state attorneys general—in addition to the Virginia Attorney General—had weighed in on the legality of email communications. The attorneys general of Arkansas, Maryland, and North Dakota employed essentially the same analysis as the Virginia Attorney General and opined that email communications were merely another form of written correspondence that was subject to open records requirements but not to open meeting requirements.<sup>130</sup> Notably, the Maryland Attorney General qualified his opinion by stating that email communications generally do not qualify as a “meeting” under Maryland law because, as with conventional written correspondence, the members of a public body are not “convened” at the time of the communication.<sup>131</sup> However, he went on to add that it was possible for members of a public body to be “convened” electronically through email communications if the method of email communication involved “‘real time’ simultaneous interchange,” analogizing real time email communication to a telephone conference call.<sup>132</sup>

A similar strain of analysis can be seen in the Kansas Attorney General’s 1995 opinion addressing the legality of email correspondence by public officials under the Kansas Open Meetings Act.<sup>133</sup> The Kansas Open Meetings Act differs in a significant respect from many other states’ open meeting statutes in that the statute specifically defines “meeting” to include not only “gatherings” of public officials, but also “any other means of interactive communication by a majority of a quorum of the membership of a body or agency subject to this act.”<sup>134</sup> Just as the Maryland Attorney Gen-

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<sup>129</sup> *Id.*

<sup>130</sup> See Op. Ark. Att’y Gen. No. 99-018, 1999 WL 182169, at \*2 (Mar. 22, 1999) (“In my view, [the exchange of email correspondence] would be analogous to written correspondence. The electronically stored e-mail message would be a ‘public record’ subject to disclosure . . . . The e-mail message itself would not, however, be a ‘meeting.’”); Op. Md. Att’y Gen. No. 96-016, 1996 WL 305985, at \*2-3 (May 22, 1996) (“We see no reason to reach a different conclusion when the medium of sequential exchange is electronic mail, rather than conventional writings.”); Op. N.D. Att’y Gen. No. O-05, 1998 WL 1057738, at \*4 n.8 (Mar. 3, 1998) (“Unlike telephone conversations, e-mail messages or letters between Board members are records subject to the open records and records retention laws, but are not a ‘gathering’ of Board members.”).

<sup>131</sup> Op. Md. Att’y Gen. No. 96-016, 1996 WL 305985, at \*3 (May 22, 1996) (“On the facts as we understand them, each member of the Carroll County Planning Commission opened the electronic folder containing his or her e-mail at a convenient time, much as the member would open an envelope containing writings. The member would then reply in writing, treating the previously received message no differently than if the communication had arrived in the mail.”).

<sup>132</sup> *Id.*

<sup>133</sup> Kansas Open Meetings Act, KAN. STAT. ANN. 75-4317a (2004).

<sup>134</sup> *Id.*

eral had found the concept of a “meeting” to require some form of simultaneous discussion, whether by email or otherwise, the Kansas Attorney General determined that a communication was not interactive without a similar degree of simultaneity.<sup>135</sup> The Kansas Attorney General observed, however, that public officials might be in violation of the statute “if three or more board members simultaneously engage in discussion of the board business through computer terminals.”<sup>136</sup>

On the other hand, other state attorneys general have been less concerned with the actual mode of communication—and the presence or absence of “simultaneity”—and instead have focused solely on the subject matter of the discussions. This analysis is more akin to that of the Washington Court of Appeals in *Wood*, where the legality of email communications depended on whether the emails merely disseminated information or involved a discussion of positions and development of consensus.<sup>137</sup> In a 2001 opinion, the Florida Attorney General agreed that email is analogous to other types of written correspondence, but found that both emails and written memoranda could violate Florida’s open meeting statute depending on the substance of the writings.<sup>138</sup> In explaining his conception of the line between legal written correspondence and illegal meetings through written correspondence, the Florida Attorney General applied the same distinction adopted by the Washington Court of Appeals in *Wood*, distinguishing between “informational” correspondence and correspondence designed to elicit substantive discussion:

[T]he use of a memorandum to solicit comment from other members of the board or commission by responsive memoranda would appear to violate the statute. Such action would amount to a discussion of public business through the use of memoranda without making provision for public input . . . . Based on the discussion above, it is my opinion that the e-mail communication of factual background information from one city council member to other city council members that does not result in the exchange of council members’ comments or responses on subjects requiring council action does not constitute a meeting subject to the Government in the Sunshine Law.<sup>139</sup>

In a 2003 opinion, the Delaware Attorney General’s office similarly found that the mode of communication was irrelevant to whether or not a meeting occurred, explicitly finding that serial email correspondence by

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<sup>135</sup> Op. Kan. Att’y Gen. 95-13, 1995 WL 40761, at \*3 (Jan. 23, 1995) (“If the sender of a message through the computer does not get a response immediately from a receiver, the communication is not ‘interactive.’ Simply sending a message through a computer to other board members is similar to sending a written memo, rather than carrying on a conversation or discussion on the telephone.”).

<sup>136</sup> *Id.*

<sup>137</sup> *Wood v. Battle Ground Sch. Dist.*, 27 P.3d 1208, 1217-18 (Wash. Ct. App. 2001).

<sup>138</sup> Op. Fla. Att’y Gen. 2001-20, 2001 WL 276605, at \*3 (Mar. 20, 2001).

<sup>139</sup> *Id.* at \*3-4.

members of a public body constituted a meeting if the subject of the emails was a matter of public business.<sup>140</sup> The opinion began with a rather long discussion of the analysis of and result reached by the Washington Court of Appeals in *Wood*.<sup>141</sup> The Delaware Attorney General's office essentially adopted the reasoning of *Wood* even though Delaware's open meeting statute defines a "meeting" in terms of a gathering of the members of a public body.<sup>142</sup> After acknowledging that "[h]istorically, the term 'gathering' in Delaware's FOIA has connoted a physical coming together of the members of a public body at one place and time,"<sup>143</sup> the opinion concluded that such a restrictive conception of the terms "meeting" and "gathering" was unwarranted in light of recent technological advances.<sup>144</sup> Indeed, the Delaware Attorney General's office specifically rejected the City of Newark's argument that the concepts of a "meeting" or a "gathering" required some sort of simultaneous deliberation, whether it be a physical gathering or real time electronic communications, finding instead that even serial emails can constitute a prohibited closed "meeting."<sup>145</sup>

Thus, the precedents outside of Virginia on the application of state open meeting statutes to email correspondence were more or less all over the map at the time the Virginia Supreme Court considered *Beck v. Shelton*.<sup>146</sup> Several state attorneys general had weighed in on the question, and had reached widely divergent conclusions on the question. Most important, the single published judicial opinion on the issue had found that the mode of communication was irrelevant to the analysis, and that a meeting occurred if the substance of the matters discussed went beyond the mere provision of information and extended to substantive discussion of the business of a public body.

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<sup>140</sup> Memorandum from W. Michael Tupman, Delaware Deputy Attorney General, to Albert G. Porach (May 19, 2003), available at [http://www.state.de.us/attgen/main\\_page/opinions/2003/03-ib11.htm](http://www.state.de.us/attgen/main_page/opinions/2003/03-ib11.htm) (last visited July 29, 2004).

<sup>141</sup> *Id.* at 2.

<sup>142</sup> *Id.* ("A "meeting" means the formal or informal gathering of a quorum of the members of a public body for the purpose of discussing or taking action on public business.") (quoting DEL. CODE ANN. tit. 29, § 10002(b) (2003)).

<sup>143</sup> *Id.* at 3.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* ("The City argues that FOIA applies only to electronic communications among the members of a public body in 'real time,' such as instant messaging, or . . . in a chat room, where the communications are similar to a telephone conference call. In light of FOIA's broad remedial purpose, we conclude that a 'meeting' can occur even without a simultaneous exchange of viewpoints . . . Serial e-mails allow each member of a public body to receive and comment on other member's [sic] opinions and thoughts, and reach consensus on action to take. We believe that under FOIA this can amount to a meeting of the public body, and that the open meeting law does not only apply to a physical gathering in a single place and time.")

<sup>146</sup> 593 S.E.2d 195 (Va. 2004).

C. *The Court's Opinion in Beck v. Shelton*

The *Beck* court began its analysis of the email issue by first noting that the relevant facts were not in dispute. The parties agreed that the three members of the Fredericksburg City Council whose appeals were before the court<sup>147</sup> had “corresponded with each other concerning specific items of public business by use of e-mail.”<sup>148</sup> Thus, to the court, the issue before it was a purely legal one: “[A]ssuming all other statutory requirements are met, does the exchange of e-mails between members of a public body constitute a ‘meeting’ subject to the provisions of FOIA?”<sup>149</sup>

The court next discussed the manner in which the Councilmembers had used email to discuss public business. While allowing that computers can be used for “virtually simultaneous” discussion among multiple participants in chat rooms or by instant messaging,<sup>150</sup> the court recognized that these modes of communication were not at issue in *Beck*. Rather, in *Beck*, the Councilmembers had not used email communications for the purpose of conducting virtually simultaneous discussions. To the contrary, the court noted that the shortest interval between the transmission of an email and any response thereto was more than four hours, while the longest such interval was more than two days.<sup>151</sup>

Against this undisputed factual backdrop, the court considered the appropriate construction of the open meeting provisions in Virginia’s FOIA statute. First, the court observed that Virginia’s FOIA statute had two separate components, an open meetings component and an open records component.<sup>152</sup> The court then noted that “[t]here is no question that e-mails fall within the definition of public records under Code § 2.2-3701,” with the key question being whether the exchange of these public records also constitutes the conduct of a “meeting” under the open meetings component of Virginia’s FOIA statute.<sup>153</sup>

Turning to the relevant provisions of Virginia’s FOIA statute, the *Beck* court recited the statute’s prohibition on the conduct of electronic

<sup>147</sup> Of the five Councilmembers who were parties below, only Mayor Beck, Vice Mayor Howson, and Councilmember Kelly sought review in the Virginia Supreme Court because they were the only Councilmembers against whom judgment had been entered by the trial court. *Id.* at 197 n.1 (noting that Councilmembers Fortune and Withers were not before the Virginia Supreme Court on the appeal).

<sup>148</sup> *Id.* at 198.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 199.

<sup>152</sup> *Beck*, 593 S.E.2d at 199 (“FOIA deals with public access to records and meetings of public bodies.”).

<sup>153</sup> *Id.* (citing VA. CODE ANN. § 2.2-3701 (Michie Supp. 2004)).

“meetings.”<sup>154</sup> Of course, whether there is an “electronic meeting” merely begs the question of whether a particular electronic interaction qualifies as a “meeting” in the first place. Accordingly, the court examined the statutory definition of the term “meeting.” FOIA defines a meeting as:

“Meeting” or “meetings” means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body.<sup>155</sup>

Because the emails in question were exchanged as informal communications, the *Beck* court recognized that its decision would hinge on whether the Councilmembers’ exchange of email communications constituted an informal “assemblage” of the senders and recipients of the email messages.<sup>156</sup>

Having distilled the case down to the applicability of the term “assemblage” to the email communications at issue, the court next explored the origin and common understanding of that term:

The term “assemble” means “to bring together” and comes from the Latin *simul*, meaning “together, at the same time.” The term inherently entails the quality of simultaneity. While such simultaneity may be present when e-mail technology is used in a “chat room” or as “instant messaging,” it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission.<sup>157</sup>

In further support of this construction, the *Beck* court pointed to two facts that supported its conclusion that the Virginia General Assembly intended the term “assemblage” to incorporate the concept of simultaneity in accord with its commonly understood meaning. First, the court noted that Virginia’s open meeting statute contained a provision that allowed members of public bodies to “separately contact[] the membership . . . of any

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<sup>154</sup> *Id.* (quoting VA. CODE ANN. § 2.2-3708 (Michie Supp. 2004)). Section 2.2-3708 provides as follows:

It shall be a violation of this chapter for any political subdivision or any governing body . . . to conduct a meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled.

VA. CODE ANN. § 2.2-3708 (Michie Supp. 2004).

<sup>155</sup> *Beck*, 593 S.E.2d at 199 (quoting VA. CODE ANN. § 2.2-3701 (Michie Supp. 2004)).

<sup>156</sup> *Id.* (“Consequently, the key to resolving the question before us is whether there was an ‘assemblage.’”).

<sup>157</sup> *Id.* (citation and footnote omitted). The court expressly declined to consider whether communications occurring via chat room or instant message would constitute an assemblage of the members of a public body. *Id.* at 199 n.5.



public body for the purpose of ascertaining a member's position with respect to the transaction of public business," even electronically, "provided the contact is done on a basis that does not constitute a meeting."<sup>158</sup> The court viewed this provision as proof that the General Assembly recognized that "some electronic communication may constitute a 'meeting' and some may not."<sup>159</sup> To the court, it seemed sensible that the distinction the General Assembly had in mind between permitted electronic communications and illegal electronic meetings depended on whether the communications were simultaneous or serial, a distinction that also flowed from the statute's use of the term "assemblage."

The second piece of evidence to which the court pointed was the Virginia Attorney General's 1999 opinion that email communications were not subject to the open meeting requirements of Virginia's FOIA statute, and the General Assembly's inaction in response to that opinion.<sup>160</sup> After allowing that an opinion of the Virginia Attorney General construing a Virginia statute is not binding on the courts, the court noted that such an opinion is "entitled to due consideration."<sup>161</sup> The court found that this deference to the Attorney General's construction of a statute is particularly appropriate in light of the General Assembly's failure to take corrective action in the five years after the Attorney General's 1999 opinion.<sup>162</sup> In particular, the *Beck* court relied on its prior precedent holding that "[t]he legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."<sup>163</sup> Thus, to the court, the plain meaning of Virginia's open meeting statute excluded emails from its reach, and the other relevant evidence supported such a commonsense construction of the statute.

Equally noteworthy was what the Virginia Supreme Court's decision in *Beck* did not contain. The decision contained no discussion of, or even citation to, the *Wood*<sup>164</sup> case. This was significant because *Wood* was the only reported judicial construction of an open meeting statute as applied to email communications at the time. The *Beck* decision also did not refer to any of the opinions by the attorneys general of other states on this issue.<sup>165</sup>

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<sup>158</sup> *Id.* at 199 (quoting VA. CODE ANN. § 2.2-3710(B) (Michie Supp. 2004)).

<sup>159</sup> *Id.*

<sup>160</sup> *Beck*, 593 S.E.2d at 199-200. For a detailed discussion of the Virginia Attorney General's 1999 opinion, see *supra* notes 107-09 and accompanying text.

<sup>161</sup> *Beck*, 593 S.E.2d at 200.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (quoting *Browning-Ferris, Inc. v. Commonwealth*, 300 S.E.2d 603, 605-06 (Va. 1983)).

<sup>164</sup> *Wood v. Battle Ground Sch. Dist.*, 27 P.3d 1208 (Wash. Ct. App. 2001). For a detailed discussion of the *Wood* decision, see *supra* notes 112-29 and accompanying text.

<sup>165</sup> For a discussion of attorney general opinions dealing with the applicability of state open meet-

Instead, the court's decision essentially rests on four types of authority: (1) the plain meaning of the terms "meeting" and "assemblage";<sup>166</sup> (2) the structure of Virginia's open meeting statute;<sup>167</sup> (3) the Virginia Attorney General's 1999 opinion on the subject;<sup>168</sup> and (4) cases holding that the court should accord a degree of deference to the Attorney General's construction of a statute.<sup>169</sup> The court's election not to discuss or rely on out-of-state precedent could be a product of the court's view that authorities interpreting other states' statutes are of limited value in construing Virginia's open meeting statute.<sup>170</sup> Or, perhaps even more likely, the Virginia Supreme Court saw little value in promulgating an exegesis on out-of-state precedent when the Virginia statute seemed fairly clear to the court, and the General Assembly had declined to take corrective action in response to the Virginia Attorney General opinion directly on point. In essence, perhaps the court thought that *Beck* was an easy case.

#### D. *Analysis of Beck v. Shelton*

All things considered, it is hard to quarrel with the Virginia Supreme Court's reasoning in *Beck*. Virginia's open meeting statute covers only the conduct of "meetings," which is in turn defined to include only those informal communications that occur during an "assemblage" of the members of a public body.<sup>171</sup> The undisputed facts of *Beck* had the Councilmembers sending emails at irregular times, with none of the instantaneous give-and-take normally associated with a meeting.<sup>172</sup> When one closes his or her eyes and thinks of terms such as "meeting" and "assemblage," one does not envision the mere transmittal of email messages that are not viewed for several hours and which might never elicit a response.

The concept of *simultaneity* is at the heart of the *Beck* court's decision, and appropriately so. As the court correctly observed, the term "as-

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ing statutes to email communications, see *supra* notes 130-46 and accompanying text.

<sup>166</sup> *Beck*, 593 S.E.2d at 199.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 200.

<sup>169</sup> *Id.*

<sup>170</sup> Indeed, as noted above, the Washington Court of Appeals decision in *Wood* is arguably distinguishable because the Washington statute does not include the concept of "gathering" or "assemblage" in its definition of "meeting," and the *Wood* court explicitly relied on the breadth of the Washington statute's "meeting" definition in reaching its conclusion. See *supra* notes 112-29 and accompanying text.

<sup>171</sup> VA. CODE ANN. § 2.2-3701 (Michie Supp. 2004).

<sup>172</sup> *Beck*, 593 S.E.2d at 199 (noting that the shortest period of time between emails was more than four hours).

semblage” connotes simultaneous interaction, something that simply does not occur in the context of serial email communications. Like Virginia, most state statutes define the term “meeting” by use of one term or another—such as “gathering” or “convening”—reaffirming that the concept of simultaneity is a necessary element of a “meeting” for open meeting purposes.<sup>173</sup> Because terms such as “gathering” and “convening” also seem to incorporate the notion of simultaneous discussion or deliberation, the reasoning employed by the court in *Beck* applies with equal force to statutes using such terms. Indeed, the simple use of the term “meeting” to define what must occur in public in and of itself seems to suggest a coming together of public officials at one point in time. For that reason, it is not surprising that *most* of the courts and state attorneys general weighing in on the email issue have found that ordinary email communications do not run afoul of open meeting statutes.<sup>174</sup> The *Beck* decision is essentially an analytical roadmap for construing statutes that define “meetings” as limited to “gatherings,” “assemblages,” or “convenings” of public officials.

In addition to being faithful to the plain meaning of Virginia’s FOIA statute, there is a certain practicality inherent in the *Beck* court’s decision. Under FOIA, all meetings must be open to the public and the public body must provide notice of the date, time, and location of any meeting.<sup>175</sup> There is no feasible way for any and all interested members of the public to “attend” an email communication. Email correspondence separated by hours or days simply does not have a single date, time, and location that is susceptible to being publicly noticed. Thus, a ruling that email communications were subject to open meeting provisions would not merely have *regulated* that method of communication, but would have *prohibited* it because of the impossibility of complying with statutory notice provisions. This feature of email communications is unlike other types of electronic communications—such as chat rooms, videoconferences, and telephone conferences. For those types of communication, notice can be provided to the general public and the general public can participate in or observe the communication. As a result, it makes sense from a practicality standpoint that emails would be regulated in the same manner as other types of written correspondence, while telephone conferences, chat rooms, and videoconferences are treated more like face-to-face meetings.<sup>176</sup>

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<sup>173</sup> See *supra* note 27 (detailing the relevant “meeting” definitions of many state open meeting statutes).

<sup>174</sup> For a discussion of other decisions by courts and state attorneys general concerning the applicability of state open meeting statutes to email communications, see *supra* notes 112-46 and accompanying text.

<sup>175</sup> VA. CODE ANN. § 2.2-3707(A), (C) (Michie Supp. 2004).

<sup>176</sup> Indeed, some attorney general opinions prior to the court’s decision in *Beck* had concluded that email correspondence was not subject to open meeting requirements because the emails are analogous

The analytical approach in *Beck* is principally literal, an approach that is consistent with Virginia Supreme Court precedent and which is particularly sensible under the facts involved in *Beck*. More than twenty years ago, the Virginia Supreme Court announced a philosophy that it was the place of the courts to apply Virginia's open meeting statute according to its literal terms, and that it was the place of the Virginia General Assembly to close any "loopholes" that might exist in the statute.<sup>177</sup> Thus, even if allowing public officials to communicate via email would create a loophole in Virginia's open meeting statute, it would be consistent with Virginia precedent for the court to leave corrective action to the legislature.<sup>178</sup> However, it must be stressed that the decision in *Beck* does not create a gap or loophole in the statute. The Virginia Supreme Court decision in *Roanoke*

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in all relevant respect to ordinary letters sent through the mail. Op. Ark. Att'y Gen. No. 99-018, 1999 WL 182169, at \*2 (Mar. 22, 1999) ("In my view, [e-mail between two public officials] would be analogous to written correspondence."); Op. Md. Att'y Gen. No. 96-016, 1996 WL 305985, at \*3 (May 22, 1996) ("We see no reason to reach a different conclusion when the medium of sequential exchange is electronic mail, rather than conventional writings."); Op. N.D. Att'y Gen. No. O-05, 1998 WL 1057738, at \*4 n.8 (Mar. 3, 1998) ("[E]-mail messages or letters between Board members are records subject to the open records and records retention laws, but are not a 'gathering' of Board members."); Op. Va. Att'y Gen. No. 1999-12, 1999 WL 463384, at \*1-2 (Jan. 6, 1999) ("Transmitting messages through an electronic mail system is essentially a form of written communication and, in my opinion, does not constitute 'conduct[ing] a meeting . . . through . . . electronic . . . means' as contemplated by [Virginia's open meeting statute]. Accordingly, it is my opinion that [the statute] does not bar members of a local governing body from sending electronic mail communications to other members of the governing body." (footnotes omitted) (omissions in original)).

<sup>177</sup> *Roanoke City Sch. Board v. Times-World Corp.*, 307 S.E.2d 256, 259 (Va. 1983) (noting that any loopholes that might exist in Virginia's FOIA statute "must be closed and corrected by the General Assembly, not by the courts"). Other courts and commentators have recognized that statutory construction must be informed primarily by the language of the statute itself. See *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . ."); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.01 (5th ed. 1992) (describing the "plain meaning" rule of statutory interpretation); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 401, at 296 (Thomas M. Cooley ed., 4th ed. 1873) ("Where the words are clear . . . there is generally no necessity to have recourse to other means of interpretation."); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947) ("*The text.*—Though we may not end with the words in construing a disputed statute, one certainly begins there."); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1986) ("In our system of government the framers of statutes and constitutions are the superiors of the judges. The framers communicate orders to the judges through legislative texts (including, of course, the Constitution). If the orders are clear, the judges must obey them."); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807 (1983) ("[I]n interpreting a statute you should begin, though maybe not end, with the words of the statute.").

<sup>178</sup> *Roanoke City*, 307 S.E.2d at 259.

*City*<sup>179</sup> unquestionably caused a glaring loophole in Virginia's FOIA statute in that the decision allowed public officials to conduct simultaneous group deliberations via telephone conference that the public would never have an ability to discover. By contrast, the *Beck* court noted that emails are subject to Virginia's open records requirements, meaning that the public can get a completely accurate written record of email communications by simply submitting an open records request.<sup>180</sup> Thus, the Councilmembers' victory in *Beck* did not deny the public access to public officials' email communications, but rather merely meant that the public's access was regulated by Virginia's open records requirements. Therefore, even for courts that have liberally applied state open meeting statutes in order to further the public's interest in open government, *Beck* would not have been a good candidate for a non-literal expansion of Virginia's open meeting statute because other aspects of Virginia law already guarantee public access to such communications.

Of course, some state legislatures have charted a different course and have explicitly declared that all communications are subject to open meeting prohibitions, or provided that email correspondence is subject to such a statute.<sup>181</sup> However, it seems clear that any effort by the courts to prohibit serial written communications under an open meeting statute that simply requires open "meetings"—or defines "meeting" with buzzwords such as "gathering," "assemblage," or "convening"—is little more than an exercise in judicial legislation. Moreover, such judicial misconstruction does considerable violence to the principle of separation of powers, with the judiciary in essence imposing upon the political branches of government restrictions that are not contained in the legislation those branches have enacted.

The *Beck* court was careful to announce that it was deciding only the issue before it—the legality of the exchange of serial emails—and was not deciding whether Virginia's open meeting statute applied to other types of computer-related communications, such as chat rooms.<sup>182</sup> The principles announced in *Beck*, however, make it difficult to conceive how chat room communications would not constitute a meeting, provided that the requisite number of public officials participated and the discussion involved public business. Given that the court's decision hinged on the absence of simulta-

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<sup>179</sup> *Id.*

<sup>180</sup> *Beck v. Shelton*, 593 S.E.2d 195, 199 (Va. 2004).

<sup>181</sup> Indeed, other states have chosen a different route. Some state statutes can be read to cover all informal contacts among members of a public body, regardless of whether the members are "gathered," "assembled," or "convened." See *supra* notes 27-33 and accompanying text.

<sup>182</sup> *Beck*, 593 S.E.2d at 199 n.5. A "chat room" is an area of the World Wide Web where multiple participants can exchange messages simultaneously. See *Internet Terminology Defined - What is a Chat Room?*, Happy Online Tutorial, at [http://www.happy-online.co.uk/tutorial/chat\\_rooms.htm](http://www.happy-online.co.uk/tutorial/chat_rooms.htm) (last visited July 30, 2004).

neity in the Councilmembers' email communications,<sup>183</sup> the reasoning in *Beck* supports the argument that virtually simultaneous communications such as chat room discussions would be considered "meetings."

Indeed, this result seems appropriate under the language of the Virginia open meeting statute as well as the statutes of other states that use terms such as "gathering," "assembling," or "convening" in the definition of a meeting. As the *Beck* court observed, these buzzwords connote a "feature of simultaneity," a feature that is lacking in ordinary email correspondence.<sup>184</sup> There is nothing inherent in these words that requires such "gatherings," "assemblages," or "convenings" to take place while all of the participants are in the same room. In that regard, the decision of the Georgia Court of Appeals in *Claxton Enterprise v. Evans County Board of Commissioners*<sup>185</sup> is instructive. While holding that the serial communications at issue in that case did not constitute an open meetings violation, the court aptly observed that "a gathering can be realized through virtual as well as actual means."<sup>186</sup> If that were not the case, telephone conferences and videoconferences logically would be outside the reach of open meeting statutes as well because such discussions, while simultaneous, do not occur face-to-face. This result seems not only contrary to the language of the statutes; it provides a recipe for evasion. Public officials could obtain all of the benefits of simultaneous deliberations outside of the public's view simply by having a conference call or chat room session instead of a face-to-face meeting.<sup>187</sup> For this reason, courts and state legislatures generally have found that telephone conference calls are subject to open meeting requirements. The same reasoning should apply to chat rooms.<sup>188</sup>

In many ways, the toughest test of the *Beck* holding is the case of rapid-fire email communications. In *Beck*, the emails were nothing close to simultaneous, with the shortest time between any single email and a response to that email being more than four hours.<sup>189</sup> Imagine a different set

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<sup>183</sup> *Beck*, 593 S.E.2d at 199-200.

<sup>184</sup> *Id.* at 199.

<sup>185</sup> 549 S.E.2d 830 (Ga. Ct. App. 2001).

<sup>186</sup> *Id.* at 835.

<sup>187</sup> See, e.g., *Stockton Newspapers, Inc. v. Members of the Redevelopment Agency*, 214 Cal. Rptr. 561, 565 (Cal. Ct. App. 1985) ("[N]o reason appears why the contemporaneous physical presence at a common site of the members of a legislative body is a requisite of such an informal meeting. Indeed, if face-to-face contact of the members of a legislative body were necessary for a 'meeting,' the objective of the open meeting requirement of the Brown Act could all too easily be evaded."); see also Nuckolls, *supra* note 81, at 37 ("A face-to-face discussion is not the only way an interactive communication can take place. Thus, members of a body subject to [the Kansas Open Meetings Act], who are aware that their comments will be shared with other members, should refrain from using some form of modern technology or third parties to evade the requirements of [the statute].").

<sup>188</sup> See *supra* Part II.B.2.

<sup>189</sup> *Beck*, 593 S.E.2d at 198-99.

of facts, where recipients to an email responded in one minute, or even where public officials agreed to log onto their home computers at 8:00 p.m. one evening so that they could discuss a burning issue of public policy together through rapid-fire emails. On one hand, even emails separated by a minute are not “virtually simultaneous,” and the quality of the exchange is not the same as that in a face-to-face conversation or even in a chat room. On the other hand, the line between serial emails and chat rooms becomes very blurry when a series of emails are exchanged in rapid-fire fashion. A preplanned effort seems an evasion of the spirit of the open meeting principle. In short, rapid-fire email discussions seem less and less like letter exchanges the shorter the time lag between responses and the more they are the product of preplanning by the participants.

The Virginia Supreme Court generally has evinced a judicial philosophy that it is the place of the legislature to close loopholes in Virginia’s open meeting statute,<sup>190</sup> and one could imagine the court resting on the principle that serial emails lack simultaneity even if the lag time between emails is very short. Other courts have been much more prone to a broader interpretation of open meeting statutes in an effort to further the purposes of such legislation, or at least the judiciary’s conception of those purposes.<sup>191</sup> It seems that the most that can be said is that a public official places himself or herself at risk of being found in violation of an open meeting statute by engaging in rapid-fire email exchanges with a critical mass of other officials. Indeed, one could imagine the result in such a case being heavily influenced by the court’s notion of the public officials’ intent, with a preplanned email communications being reviewed less forgivingly than the exchange of emails where public officials by happenstance were logged onto their computers at the same time. In that sense, the results could be similar to the experience with serial face-to-face meetings, with courts considerably more likely to find a violation where the serial discussions were orchestrated in an effort to evade open meeting require-

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<sup>190</sup> See *Roanoke City Sch. Bd. v. Times-World Corp.*, 307 S.E.2d 256, 259 (Va. 1983) (“The appellees argue that if a telephone conference call is not prohibited by the Act, then the Act contains a ‘glaring loophole.’ This may be but, if true, it is a loophole that must be closed and corrected by the General Assembly, not by the courts.”). For a more detailed discussion of the *Roanoke City* decision, see *supra* notes 105-06 and accompanying text. See also *Barr v. Town & Country Prop.*, 396 S.E.2d 672, 674 (Va. 1990) (“Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied. There can be no departure from the words used where the intention is clear.”) (quoting *Anderson v. Commonwealth*, 29 S.E.2d 838, 841 (Va. 1944)); *Virginia Ass’n of Ins. Agents, Corp. v. Virginia ex rel. Virginia Ins. Rating Bureau*, 47 S.E.2d 401, 404 (Va. 1948) (commenting that it is a court’s function “to interpret and not to rewrite the acts”).

<sup>191</sup> See *supra* note 51 and accompanying text.

ments.<sup>192</sup> In a rough justice sort of way, that might not be an inappropriate result.

Clearly, the Virginia Supreme Court's decision in *Beck* is not the last word on the line between legal correspondence and illegal "meetings" in the context of electronic communications, nor should it be. There undoubtedly will be factual variations as public officials undoubtedly push the "simultaneity" envelope, and as communications technology continues to advance. Nonetheless, the *Beck* decision provides a useful, and in the authors' view, correct, framework for determining whether electronic communications among public officials implicate state open meeting statutes.

### III. EMAILS, OPEN MEETINGS AND LEGISLATIVE POLICY

For the reasons discussed in the preceding section,<sup>193</sup> the authors believe that the Virginia Supreme Court was correct as a matter of statutory construction in holding in *Beck v. Shelton*<sup>194</sup> that the exchange of ordinary email correspondence is not tantamount to conducting a "meeting" under the Virginia Freedom of Information Act.<sup>195</sup> In the broader context, the very essence of a "meeting" involves the gathering or assemblage of the participants—whether in person, by telephone, or electronically—for simultaneous discussion and deliberation. As a result, statutes that merely prohibit open "meetings" should not be construed as reaching non-simultaneous communications such as ordinary email correspondence.

The next logical question is whether open meeting statutes should be amended to extend their scope to email communications. The Colorado legislature did just that, adding a provision to its open meeting statute that clearly and unambiguously sweeps email correspondence within its regulation of meetings among public officials:

If elected officials use electronic mail to discuss pending legislation or other public business among themselves, the electronic mail shall be subject to the requirements of this section. Electronic mail communication among elected officials that does not relate to pending legislation or other public business shall not be considered a 'meeting' within the meaning of this section.<sup>196</sup>

A few other states similarly have decided to amend their open meeting statutes to provide that email communications are subject to restrictions

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<sup>192</sup> See *supra* Part II.B.1.

<sup>193</sup> See *supra* Part III.D.

<sup>194</sup> 593 S.E.2d 195.

<sup>195</sup> VA. CODE ANN. § 2.2-3700 (Michie Supp. 2004).

<sup>196</sup> COLO. REV. STAT. ANN. § 24-6-402(2)(d)(III) (2004).



on closed meetings.<sup>197</sup> Thus, while it seems clear that a state legislature *can* enact legislation to bring email correspondence within the reach of a state's open meeting statute, a more fundamental question is whether a state legislature *should* enact such a provision. This question in turn requires consideration of the costs and benefits of open government as applied to email communications among public officials.

#### A. *The Benefits and the Costs of Open Government*

There is no question that openness in government fosters several important policy goals. Openness can create a better informed citizenry, which in turn makes public officials more accountable to the electorate for their actions.<sup>198</sup> Openness also allows the public to inject itself directly into the legislative decisionmaking process, as interested members of the public can express their views more easily and can correct what they perceive to be factual misconceptions of the public body.<sup>199</sup> Requiring the meetings—

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<sup>197</sup> See *supra* note 30.

<sup>198</sup> *Stockton Newspapers, Inc. v. Members of the Redevelopment Agency*, 214 Cal. Rptr. 561, 563 (Cal. Ct. App. 1985) (“The people insist on remaining informed so that they may retain control over the instruments [of government] they have created.”) (quoting CAL. GOV'T CODE § 54950 (West Supp. 2004)); *State ex rel. Cincinnati Enquirer v. Hamilton County Comm'rs*, No. C-010605, 2002 WL 727023, at \*1 (Ohio Ct. App. Apr. 26, 2002) (“[The purpose of Ohio's Sunshine Law] is to assure accountability of elected officials by prohibiting their secret deliberations on public issues.”); Bowen, *supra* note 21, at 134 (“On the one hand, democracy demands a well-informed electorate.”); Christopher W. Deering, *Closing the Door on the Public's Right to Know: Alabama's Open Meetings Law After Dunn v. Alabama State University Board of Trustees*, 28 CUMB. L. REV. 361, 368 (1997) (“Perhaps the most cogent rationale behind open meetings legislation is that such laws effectively enable the public to know exactly what its representatives in government are doing.”); Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 227 (2003) (“Behind this trend [of enacting open meeting statutes and open records statutes] is the powerful idea that in a democracy, good government requires transparency and greater access for citizens to the workings of their government.”); Joseph W. Little & Thomas Tompkins, *Open Government Laws: An Insider's View*, 53 N.C. L. REV. 451-469 (1975) (“Among the more important public interests advanced by open government laws are that . . . voters are enabled to evaluate their elected officials better [and] information about current public issues will be better disseminated . . . .”); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 182 (1997) (“[I]mmediate participation in the decisionmaking process before an agency takes action also serves as a type of informal oversight, ensuring that the agency is accountable to the public at large for its decisions.”); Eleanor B. Knoth, Note, *The Virginia Freedom of Information Act: Inadequate Enforcement*, 25 WM. & MARY L. REV. 487, 487 (1984) (“Recognizing that an informed citizenry is essential to democracy, all fifty states have enacted legislation requiring public officials to conduct public business in open meetings.”).

<sup>199</sup> Little & Tompkins, *supra* note 198, at 469 (noting that “public participation may supply information not otherwise available to the decision makers” in open meetings); *Open Meeting Statutes*, *supra* note 16, at 1201 (“Public meetings also may operate to provide officials with more accurate

formal and informal—of government officials to take place in the open also can help prevent corruption and temper the secret influence of special interests.<sup>200</sup> It also can eliminate a measure of the public's distrust of government, as the citizenry can see every step of the decisionmaking process.<sup>201</sup> These policy goals are in many ways the cornerstone of our system of government and, as a result, openness in government is often viewed as an essential component to a well-running democracy.<sup>202</sup>

Because notions of open government are rightly viewed as being a necessary feature of a democratic government, support for open government initiatives is generally widespread, making it politically disadvanta-

information; individual citizens will be able to correct factual misconceptions, particularly in local government where the public is apt to have greater knowledge of the issues involved.”)

<sup>200</sup> *Atlanta Journal v. Hill*, 359 S.E.2d 913, 914 (Ga. 1987) (“[Georgia’s Open Meetings statute] was enacted in the public interest to protect the public—both individuals and the public generally—from ‘closed door’ politics and the potential abuse of individuals and the misuse of power such policies entail.”); Charles N. Davis et al., *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 43 (1996) (“Sunshine laws also serve as a check on corruption, allowing the public to monitor closely the decisionmaking processes of government bodies.”); Deering, *supra* note 198, at 374 (“[S]uppression of information eventually leads to deception which, after the truth is ultimately discovered, contributes to a huge credibility gap between politicians and the electorate.”); Sunstein, *supra* note 18, at 897 (“If deliberations are conducted in secret, the participants may be less careful to ensure that their behavior is unaffected by illegitimate or irrelevant considerations.”); Pupillo, *supra* note 1, at 1166 (“Public meetings guard against corruption and deceit and promote public faith in government.”).

<sup>201</sup> Nuckolls, *supra* note 81, at 37 (“Access to information about the activities and decisionmaking processes of government allows voters the opportunity to make more intelligent decisions, to have more trust in government, and to curtail governmental corruption.”). As an illustration of the distrust of government held by some, and the suspicion of any decisionmaking activities that go on behind closed doors, one commentator offered the following remarkable quote from a local open meetings pamphlet: “Officials are a tricky bunch and you have to watch them all the time. They will disregard the law, disobey the law, look for loopholes, or push new laws that favor secrecy.” Lee E. Miller, *Open Meetings and Open Records Laws: A Primer for Colorado Water Conservancy Districts*, 3 U. DEN. WATER L. REV. 273, 274 (2000) (quoting T.B. KELLEY & J.R. MANN, TAPPING OFFICIALS’ SECRETS: THE DOOR TO OPEN GOVERNMENT IN THE 50 STATES AND D.C. iii (4th ed. Reporters’ Comm. for Freedom of the Press 1993)).

<sup>202</sup> Thomas J. Moyer, *Interpreting Ohio’s Sunshine Laws: A Judicial Perspective*, 59 N.Y.U. ANN. SURVEY AM. L. 247, 247 (2003) (“The public availability of government information has long been recognized as a fundamental tenet upon which democratic theory rests.”); Susan T. Stephenson, Comment, *Government in the Sunshine Act: Opening Federal Agency Meetings*, 26 AM. U. L. REV. 154, 156-57 (1976) (“The underlying premise of open meeting legislation is that public knowledge of governmental actions is essential to the democratic process.”); R. James Asaaf, Note, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 CASE W. RES. L. REV. 227, 228 (1989-90) (“To govern effectively, citizens must be guaranteed access to the deliberations of legislative bodies.”); *Open Meeting Statutes*, *supra* note 16, at 1200 (“The basic argument for open meetings is that public knowledge of the considerations upon which governmental action is based is essential to the democratic process.”).

geous to be viewed as being on the wrong side of an open government debate. Indeed, one commentator observes, with some justification, that the general lack of meaningful resistance to open meeting initiatives “is perhaps due to the almost religious sanctity of ‘openness’ in the political climate of the day rather than to the absence of real concerns about its impact on the government decisionmaking process.”<sup>203</sup>

Despite the power of rhetoric underlying the open meeting movement—after all, who could be against an open government?—the right of the public to observe the deliberations of its local government officials is not, and has never been, an absolute one even with the enactment of open meeting statutes.<sup>204</sup> Because there often are important governmental or personal interests that are in tension with unfettered public access to government deliberations, state open meeting statutes are often (and wisely) riddled with exceptions and limitations to reflect those instances where other important interests trump the public’s interest in access. As aptly stated by the Minnesota Supreme Court: “[I]n formulating a definition of ‘meetings’ that must be open, the public’s right to be informed must be balanced against the public’s right to the effective and efficient administration of public bodies.”<sup>205</sup> The legitimate public and private interests that

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<sup>203</sup> Thomas H. Tucker, “Sunshine”—*The Dubious New God*, 32 ADMIN. L. REV. 537, 538 (1980); see also Bowen, *supra* note 21, at 133 (“What began in the 1950s as a crusade to ensure that the government operate in public has become so engrained in the popular consciousness that, as one commentator has put it, an open meeting law is a little like motherhood; no one wants to express himself against it publicly.” (footnotes and internal quotations omitted)); Douglas Q. Wickham, *Tennessee’s Sunshine Law: A Need for Limited Shade and Clearer Focus*, 42 TENN. L. REV. 557, 557 (1975) (observing that public support for open government measures is attributable in large part to powerful rhetoric in favor of government openness). Indeed, Tucker sarcastically describes the federal Government in the Sunshine Act, 5 U.S.C. § 552b (2000), as being “warm and inviting and conjur[ing] up visions of a bright, clean, pleasant-smelling (politically as well as sensorially) assembly conducting its business on a summer lawn among its orderly, well-disposed citizenry.” Tucker, *supra*, at 537.

<sup>204</sup> Moyer, *supra* note 202, at 267 (noting that the public’s right to know of the conduct of its leaders “is by no means boundless or unconditional”); Steven L. Higgs, Comment, *The Marsh Trilogy: The Virginia Supreme Court Examines the Freedom of Information Act*, 17 U. RICH. L. REV. 153, 162 (1982) (“Although the Virginia Act specifically mandates ‘openness’ in government, commentators have recognized a variety of areas in which some secrecy is beneficial, even vital, to the protection of such legitimate public interests as attracting competent state employees and obtaining real property at reasonable process.”).

<sup>205</sup> *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 517 (Minn. 1983); see also *Sacramento Newspaper Guild v. Sacramento Bd. of Supervisors*, 69 Cal. Rptr. 480, 487 n.8 (Cal. Ct. App. 1968) (“There is a spectrum of gatherings of agency members that can be called a meeting, ranging from formal convocations to transact business to chance encounters where business is discussed. However, neither of these two extremes is an acceptable definition of the statutory word ‘meeting.’ Requiring all discussion between members to be open and public would preclude normal living and working by officials. On the other hand, permitting secrecy unless there is formal convocation of a body invites evasion.”); *Wood v. Battle Ground Sch. Dist.*, 27 P.3d 1208, 1217 (Wash. Ct. App. 2001) (“[W]e also recognize the need for balance between the right of the public to have its business conducted in the

sometimes are in tension with open government are in many cases substantial.

As an initial matter, it must be remembered that open meeting statutes infringe upon public officials' freedoms of speech and association.<sup>206</sup> Even where such restrictions are justified, the fact remains that an open meeting statute limits a public official's right to interact with other public officials, imposing restrictions that are not applicable to the ordinary citizen. Therefore, while the benefits of open government certainly justify some encroachment on the freedoms of association and speech for those who elect to enter public life, a rational open meeting statute should endeavor to avoid *unduly* restricting such rights. For example, some states have determined that elected members of political parties have an interest in caucusing together as a party that outweighs the public's interest in observing all of the interactions of a quorum or majority of a public body.<sup>207</sup> Such an exemption represents an effort to balance the public's right of access with the rights of elected officials to associate together to plan strategy in furtherance of their political agendas.<sup>208</sup>

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open and the need for members of governing bodies to obtain information and communicate in order to function effectively."); Bowen, *supra* note 21, at 134 ("Successful open meeting legislation involves the reconciliation of serious value conflicts.").

<sup>206</sup> See Little & Tompkins, *supra* note 198, at 452 ("[If public officials are prohibited from communicating with each other outside of public meetings], public officials would be set apart from other citizens as mere dummies with rights of free speech and free association suspended during their terms in office.").

<sup>207</sup> See, e.g., N.Y. PUBLIC OFFICERS LAW § 108 (McKinney 2001) ("Nothing contained in this article shall be construed as extending the provisions hereof to: . . . deliberations of political committees, conferences and caucuses."). See generally Timothy P. Whelan, *New York's Open Meetings Law: Revision of the Political Caucus Exemption and its Implications for Local Government*, 60 BROOK. L. REV. 1483 (1995) (discussing the development of the political caucus exemption to New York's open meeting statute). One danger of a political caucus exemption is that such an exception can very easily swallow the rule. Consider the case of a seven member city council with five Republicans and two Democrats. An overly broad political caucus exemption, or an overly expansive judicial construction of such an exemption, could allow the five-member Republican majority to conduct all of its debates and policy discussions in a political caucus, and then convene meetings merely to announce their decisions. Joseph Sluzar, *New York Abandons a Commitment to Open Meetings*, 50 ALB. L. REV. 613, 624-25 (1986) (arguing that amendments to New York's political caucus exemption to make clear that political caucuses were free to discuss potential legislative actions in a closed caucus session "vitiates the public's right to open government").

<sup>208</sup> See, e.g., ARIZ. REV. STAT. ANN. § 38-431.08 (West 2001) ("This article does not apply to: . . . [a]ny judicial proceeding of any court or any political caucus of the legislature."); 65 PA. CONS. STAT. ANN. § 712 (West 2000) ("Not included in the intent of this chapter are caucuses or meetings of any ethics committee created pursuant to the Rules of the Senate or the House of Representatives."); W. VA. CODE ANN. § 6-9A-2(4) (Michie 2003) ("The term meeting does not include . . . [a]ny political party caucus.").

Similarly, most open meeting statutes contain a laundry list of substantive subjects that may be discussed by public bodies in closed session. These exceptions tend to cover subjects that are of sufficient sensitivity that the public's interest in openness is outweighed by the interest of the local government entity—or of particular individuals—in conducting such discussions in private. For example, local government would be at a competitive disadvantage if it had to discuss litigation options or ongoing criminal investigations in open session, or had to make public its intentions with respect to government contracts or other business opportunities.<sup>209</sup> As a result, sensitive business opportunities,<sup>210</sup> criminal investigations,<sup>211</sup> and

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<sup>209</sup> See Davis et al., *supra* note 200, at 43 (“The most commonly cited disadvantages of open meetings include premature disclosure of information placing government at a competitive disadvantage . . . .”); Sunstein, *supra* note 18, at 894 (“Even if it is agreed that citizens should generally be able to deliberate about government action, the need for secrecy sometimes justifies government control of information.”); Ruth M. Barnes, Comment, *Government in the Sunshine: Promise of Placebo?*, 23 U. FLA. L. REV. 361, 365 (1971) (“It is conceivable that unlimited application of [Florida’s open meeting statute] could produce undesirable results. The goals of certain investigatory groups, such as those fighting organized crime, might be jeopardized by premature exposure of important procedures and information.”); Higgs, *supra* note 204, at 162 (“Although the Virginia Act specifically mandates ‘openness’ in government, commentators have recognized a variety of areas in which some secrecy is beneficial, even vital, to the protection of such legitimate public interests as attracting competent state employees and obtaining real property at reasonable prices.” (footnote omitted)).

<sup>210</sup> See, e.g., ARIZ. REV. STAT. ANN. § 38-431.03 (West 2001) (A public body may meet in executive session for “[d]iscussions or consultations with designated representatives of the public body in order to consider its position . . . regarding negotiations for the purchase, sale or lease of real property.”); DEL. CODE ANN. tit. 29, § 10004 (2003) (A public body may meet in executive session for “[p]reliminary discussions on site acquisitions for any publicly funded capital improvements.”); 5 ILL. COMP. STAT. ANN. 120/2(c) (West Supp. 2004) (“A public body may hold closed meetings to consider the following subjects: . . . [t]he purchase or lease of real property for the use of the public body, including meetings held for the purpose of discussing whether a particular parcel should be acquired.”); MD. CODE ANN., STATE GOV’T § 10-508 (1999) (“[A] public body may meet in closed session or adjourn an open session to a closed session only to: . . . consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State.”); N.Y. PUBLIC OFFICERS LAW § 105 (McKinney 2001) (A public body may meet in executive session to discuss “[t]he proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.”).

<sup>211</sup> See, e.g., DEL. CODE ANN. tit. 29, § 10004 (2003) (A public body may meet in executive session to discuss “[a]ctivities of any law-enforcement agency in its efforts to collect information leading to criminal apprehension.”); 5 ILL. COMP. STAT. ANN. 120/2(c) (West Supp. 2004) (“A public body may hold closed meetings to consider the following subjects: . . . [i]nformant sources, the hiring or assignment of undercover personnel or equipment, or ongoing, prior or future criminal investigations, when discussed by a public body with criminal investigatory responsibilities.”); MD. CODE ANN., STATE GOV’T § 10-508 (1999) (“[A] public body may meet in closed session or adjourn an open session to a closed session only to: . . . conduct or discuss an investigative proceeding on actual or possible criminal conduct.”); N.J. STAT. ANN. § 10:4-12 (West 2002) (“A public body may exclude the public only from that portion of a meeting at which the public body discusses: . . . [a]ny investigations of

litigation matters<sup>212</sup> are frequently among the subjects that public bodies may discuss in closed session without running afoul of a state's open meeting statute. By the same token, state open meeting statutes typically exempt discussion of personnel matters from open meeting requirements, an exception that sensibly places greater emphasis on the privacy rights of government employees than on the public's right to be present for every discussion of public business.<sup>213</sup> These exceptions to the general rule of open meetings represent a legislature's policy determination that some subjects are sufficiently sensitive that a public body should have some leeway to discuss them outside the public eye.

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violations or possible violations of the law.”); N.Y. PUBLIC OFFICERS LAW § 105 (McKinney 2001) (A public body may meet in executive session to discuss “[i]nformation relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed.”).

<sup>212</sup> See, e.g., ARIZ. REV. STAT. ANN. § 38-431.03 (West 2001) (A public body may meet in executive session for “[d]iscussion or consultation for legal advice with the attorney or attorneys of the public body.”); GA. CODE ANN. § 50-14-2 (2004) (“The attorney-client privilege recognized by state law to the extent that a meeting otherwise required to be open to the public under this chapter may be closed in order to consult and meet with legal counsel pertaining to pending or potential litigation, settlement, claims, administrative proceedings, or other judicial actions . . . .”); 5 ILL. COMP. STAT. ANN. 120/2(c) (West Supp. 2004) (“A public body may hold closed meetings to consider the following subjects: . . . [l]itigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.”); MD. CODE ANN., STATE GOV'T § 10-508 (1999) (“[A] public body may meet in closed session or adjourn an open session to a closed session only to: . . . consult with counsel to obtain legal advice.”); N.Y. PUBLIC OFFICERS LAW § 105 (McKinney 2001) (A public body may meet in executive session for “[d]iscussions regarding proposed, pending or current litigation.”).

<sup>213</sup> See, e.g., ARIZ. REV. STAT. ANN. § 38-431.03 (West 2001) (A public body may meet in executive session for discussions regarding “[n]egotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body.”); DEL. CODE ANN. tit. 29, § 10004 (2003) (A public body may meet in executive session for “[t]he hearing of employee disciplinary or dismissal cases unless the employee requests a public hearing.”); 5 ILL. COMP. STAT. ANN. 120/2(c) (West Supp. 2004) (“A public body may hold closed meetings to consider the following subjects: . . . [t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body to determine its validity.”); MD. CODE ANN., STATE GOV'T § 10-508 (1999) (“[A] public body may meet in closed session or adjourn an open session to a closed session only to: . . . [discuss] the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials over whom it has jurisdiction . . . .”); N.Y. PUBLIC OFFICERS LAW § 105 (McKinney 2001) (A public body may meet in executive session to discuss “[c]ollective negotiations pursuant to article fourteen of the civil service law.”).

The policy issues involved in deciding whether email communications among members of a public body should in effect be prohibited by rendering them subject to open meeting requirements<sup>214</sup> are of a different quality than those involved in statutory exceptions that permit certain matters to be discussed in closed session. For email communications—as with communications by letter, facsimile, telephone, chat room, or communications by less than a quorum of a public body—the policy decision is not one of weighing the public’s interests in openness versus the interests in keeping certain subject matters secret or private, but rather the interest of openness versus the vital public interest in the efficient operation of local government.

Open meeting requirements impact the efficiency of local government, as any restriction that limits a body’s choices necessarily make the body less efficient in meeting its goals.<sup>215</sup> That is not to say, however, that the public’s interest in openness should always yield when it affects government efficiency. To take an obvious example, a government body that is allowed to operate in total secrecy can be incredibly efficient yet at the same time incredibly corrupt or unresponsive. In such cases a modicum of sunshine serves the public well while at the same time restraining the public body’s ability to operate at maximum efficiency. Yet, any rational resolution between the interests of openness and efficiency must take into account the fact that an overly intrusive open meeting policy can disserve the

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<sup>214</sup> Rendering email communications subject to open meeting requirements would essentially prohibit such communications because it would be impossible as a practical matter to comply with the requirements that public “meetings” be noticed to the public, and that the public have a right to attend such “meetings.”

<sup>215</sup> As one commentator noted:

The open meetings requirement can and does hamper a legislature’s efficacy as a counterweight to the local executive. The requirement limits the legislature’s ability to strategize on important and complex matters and to allow its members to speak openly and freely on sensitive institutional issues, such as ongoing budget negotiations.

Whelan, *supra* note 23, at 1500. *See also* *McComas v. Bd. of Educ.*, 475 S.E.2d 280, 290 (W. Va. 1996) (“Still, an interpretation of the Sunshine Law that precludes any off-the-record discussion between board members about board business would be both undesirable and unworkable—and possibly unconstitutional.”); Davis, *supra* note 200, at 43 (noting that many observers believe that open meeting statutes cause “reduced efficiency of governmental bodies”); Deering, *supra* note 198, at 369 (“The ‘costs’ of open meetings—inefficiency, political grandstanding, and potential disruption by those in attendance—militate toward the idea that closing at least some government proceedings will ensure that the business of government moves forward without unnecessary delay.”); Randolph May, *Reforming the Sunshine Act*, 49 ADMIN. L. REV. 415, 417 (1997) (noting that open meeting requirements arguably hamper the effectiveness of public bodies because “[u]nable to deliberate together in private, agency members resort to communicating with each other in writing, through staff, or in one-on-one meetings with other members”); Barnes, *supra* note 209, at 365 (noting that an overly expansive open meeting statute “could create ineffectiveness or inefficiency to the disadvantage of the state”).

public by reducing government efficiency while not providing a commensurate benefit to the public through openness.

Many commentators have observed that a requirement for public deliberation can negatively impact the quality of a public body's decisions. Otto von Bismarck is credited with saying that "[n]o man should see how laws or sausages are made,"<sup>216</sup> and there is good reason for that sentiment. Elected officials are likely to temper the degree of candor with which they discuss public business if every comment they make is subject to public scrutiny.<sup>217</sup> Common experience also demonstrates that the best group deliberations occur in private, which undoubtedly is why juries and appellate courts conduct their deliberations in closed sessions.<sup>218</sup> A requirement for public deliberations also can cause debate within public bodies to devolve into grandstanding and saber-rattling by vote-seeking politicians instead of a serious effort to solve the community's problems.<sup>219</sup>

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<sup>216</sup> *Comty. Nutrition Inst. v. Block*, 749 F.2d 50, 51 (D.C. Cir. 1984); Bowen, *supra* note 21, at 133.

<sup>217</sup> Tucker, *supra* note 203, at 546 ("[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process." (emphasis in original) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)); Huefner, *supra* note 198, at 282 ("[Legislative openness] may prompt legislators to say what they believe the public or a key constituency wants to hear, and even to commit themselves to an ultimately inferior policy position, rather than allowing them carefully to develop a superior course of action and then go about marketing it to colleagues and constituents."); *see also* Peter H. Seed, *Florida's Sunshine Law: The Undecided Legal Issue*, 13 U. FLA. J.L. & PUB. POL'Y 209, 263 (2002) ("Any elected official who cares about an issue may well want to talk in private to other interested parties about the matter. It is the process by which 'dumb questions' are asked without embarrassment, differences are narrowed, and emotionally laden misunderstandings are sorted out.").

<sup>218</sup> Bowen, *supra* note 21, at 159 ("Per se publicity of legislative meetings may affect the quality of the decisions reached. Publicity may impact the efficiency and collegiality of informal processes."); Huefner, *supra* note 198, at 283 ("[T]he trade-off in preventing legislators from 'hiding' aspects of their legislative work would be a significant disruption of the deliberative process."); Little & Tompkins, *supra* note 198, at 452 ("[If public officials were prohibited from communicating outside of public meetings], the practicalities of doing the business of government would be totally lost, and the crucible of informal interchange and debate, which is the source of most ideas, would be quenched."); Rossi, *supra* note 198, at 232 ("[The requirement for open meetings] has created what has been described as a 'chilling effect' on agency members' willingness to engage in open and creative discussions of issues."); Seed, *supra* note 217, at 263 ("[O]ne-on-one, give and take consultation is a crucial component of governmental decision making, as any state legislator or appellate judge (who, of course, is not subject to the Sunshine Law) will readily admit. The art of 'reasoning together' cannot be exclusively practiced at a public meeting."); Tucker, *supra* note 203, at 546 ("But this unanimous agreement among all branches of the federal government that publicity inhibits candor and the free exchange of ideas and that these qualities are important to the effective functioning of the government and consequently are worth protecting has been abruptly discarded by Sunshine.").

<sup>219</sup> *See* Deering, *supra* note 198, at 369 ("The 'costs' of open meetings—inefficiency, political grandstanding, and potential disruption by those in attendance—militate toward the idea that closing at least some government proceedings will ensure that the business of government moves forward without



Apart from potentially inhibiting the substantive quality of legislative deliberation, unfettered openness unquestionably slows down the legislative process.<sup>220</sup> If legislators can discuss matters with each other only at publicly-noticed meetings, a public official with a creative idea or suggestion must either wait until the next scheduled meeting of his or her public body to disclose the idea to the rest of the body, or must attempt to comply with the notice requirements to convene a previously-unscheduled meeting, all in order to convey a thought that might be no more than a sentence or two.<sup>221</sup> Clearly, the benefits of quick governmental action sometimes outweigh the public's interest in being present for every single discussion of public business by its elected officials.<sup>222</sup>

Finally, a case can be made that requiring all discussions among public officials to occur in open meetings actually *increases* the influence of special interests on the legislative process.<sup>223</sup> A requirement that public officials deliberate matters among themselves in open meetings makes it difficult and unwieldy for officials to discuss issues among themselves, but easy to discuss them with non-public officials such as lobbyists and other special interests, which in turn can elevate the influence of those who have access to legislators as a result of their wealth, status, or political connec-

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unnecessary delay.”); *see also* Bowen, *supra* note 21, at 134 (“The fishbowl environment of the modern legislature may impede the free exchange of ideas about controversial issues as lawmakers focus on consistency and image amidst the constant presence of cameras and reporters.”).

<sup>220</sup> *See* Bowen, *supra* note 21, at 159 (“Enforcement may also involve costs and delays ultimately borne by the public.”); Tucker, *supra* note 203, at 548 (“First, additional procedural requirements lead to more delays in decision making. Agency members must schedule and publicly announce meetings in advance and check with their legal counsel as to any closed meetings.”).

<sup>221</sup> Little & Tompkins, *supra* note 198, at 478 (“Spontaneity of idea production and pre-fixed time schedules rarely coincide. Consequently, to insist rigidly upon one risks the loss of the other. Because the line between policy development and implementation is frequently thin, especially in local government where whether a tree is to be cut can sometimes be policy, some leeway is called for.”).

<sup>222</sup> *See* McComas v. Bd. of Educ., 475 S.E.2d 280, 291 (W. Va. 1996) (“Consideration of planning, duration, and setting takes into account, for example, that officials often have brief and unscheduled discussions, that these are necessary, and that permitting them to occur in private would not threaten the purposes of the Sunshine Law.”).

<sup>223</sup> *See* Davis et al., *supra* note 200, at 43 (“The most commonly cited disadvantages of open meetings include . . . undue public pressure on the free exchange of ideas.”); Huefner, *supra* note 198, at 283 (“Permitting open or easy access to legislators’ internal memoranda, legislative correspondence, recollections of caucus deliberations, and the like could quickly become a goldmine for disgruntled lobbyists and interest groups, as well as for political opponents.”); Sunstein, *supra* note 18, at 896 (“If deliberations are disclosed while they are in progress, organized groups with intense preferences may attempt to influence the outcome. Interest-group pressures could transform a deliberative process into an effort to trade off the interests of powerful, well-organized groups.”).

tions.<sup>224</sup> As the Minnesota Supreme Court observed in *Moberg v. Independent School District No. 281*:

[I]t is the duty of public officials to persuade each other in an attempt to resolve issues, and it makes little sense to suggest that they may listen to a group of non-members on important matters but not to their colleagues, who may be more expert on the subject than any other persons.<sup>225</sup>

The obvious benefits of open government, along with the more subtle, but equally weighty, costs of open government have led state legislatures to enact open meeting states that require some, but not all, forms of communication among public officials to occur in public. The issue is determining the side of that policy line upon which ordinary email correspondence falls.

#### B. *Email Communications and Public Policy*

The foregoing discussion of the deleterious effects of unfettered open government should not be viewed as an indictment of open meeting statutes. Rather, this discussion merely illustrates the weighty interests that counsel against *unfettered* openness in order to provide some context for the balancing that must be conducted between these interests and the public's vital interest in some modicum of open government. Indeed, every state legislature has recognized the necessity of this balancing exercise at least implicitly by enacting open meeting statutes that guarantee the public some right of access yet wisely including within such statutes limitations and exceptions to the public's right to open government.

For example, most state open meeting statutes apply only to meetings of some defined number of the members of a public body, often a quorum.<sup>226</sup> Limiting the open meeting requirement to quorum-sized groups makes sense. Subquorum meetings are inherently less dangerous than larger group meetings because subquorum groups necessarily lack the power to enact legislation.<sup>227</sup> Therefore, because subquorum meetings are at least

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<sup>224</sup> See Bowen, *supra* note 21, at 163 (“The vast procedural requirements of sunshine legislation . . . may actually discourage formal meetings, especially when the issues are sensitive or explosive and legislators’ actions and discussions will necessarily be exposed.” (footnote omitted)).

<sup>225</sup> *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 517 (Minn. 1983).

<sup>226</sup> See *supra* note 27 (detailing relevant “meeting” definitions of several states’ open meeting statutes).

<sup>227</sup> As the West Virginia Supreme Court of Appeals observed:

Numbers are also relevant; there is a difference between two members of a twenty-member public body having a conversation and fifteen of them having a cabal. At a certain point, the

one significant step removed from the decisionmaking process of a public body, most state legislatures have reached the conclusion that the public's right to observe the deliberative process cannot overcome the inefficiencies caused by prohibiting members of public bodies to consult with each other outside of publicly-noticed meetings.

Similarly, most state open meeting statutes prohibit *meetings* but not the exchange of letters by members of a public body.<sup>228</sup> Because the public can access such correspondence through state open records requests, most state legislatures have made the rational policy decision that the public's interest would be served marginally at best by rendering such correspondence subject to open meeting statutes as well, and this marginal-at-best interest cannot outweigh the public's interest in efficient communications among public officials.

In the context of email communications, how should a state legislature resolve the inherent tensions between the virtues of openness, on one hand, and the efficiencies that can result? In our view, state legislatures already have confronted and decided this issue. Given that the *relevant* characteristics of email communications are identical to those of more traditional modes of written communication, such as letters delivered through the mails, there is no reason why the balance struck for email correspondence should be any different from that of letters and other types of written correspondence. Under this reasoning, there is no rational reason to subject emails to open meeting requirements.

Like traditional written correspondence, ordinary email communications allow the participants to pass along their thoughts in a written format, and do not involve the type of simultaneous discussion or deliberation generally associated with face-to-face meetings, chat room discussions, telephone conferences or video conferences. Email correspondence, like more traditional forms of written correspondence, results in a written record that must be maintained and produced to the public under state open records statutes.<sup>229</sup> While forgetfulness or even dishonesty can deny the public a true account of the events transpiring in non-public meetings taking place in person, by telephone or via chat room, there is a perfect record of what was said (and by whom) in written correspondence such as letters or emails. Moreover, the debate over letters and emails is not *whether* the public can learn of the matters discussed, but rather *when* the public can

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number of members participating gives the discussion an importance that requires the invitation of the public.

McComas v. Bd. of Educ., 475 S.E.2d 280, 291 (W. Va. 1996).

<sup>228</sup> See *supra* note 27 (collecting state statutes that limit open meeting requirements to assemblies or gatherings of public officials).

<sup>229</sup> See *supra* note 14 and accompanying text.

obtain such information. In allowing public officials to correspond in writing, most state legislatures apparently have found the public interest adequately protected by the combination of a perfect record plus public access to that record.

There are two principal differences between emails and traditional forms of written correspondence, but neither of these differences supports prohibition of emails while other forms of written correspondence remain legal. The first of these differences is the ease by which public officials can communicate by email as opposed to correspondence exchanged by mail, messenger or facsimile. While users of traditional forms of written correspondence must separately address and/or transmit correspondence sent to multiple members of a public body, the user of email can simply select “reply all” to respond to a prior email or easily select email addresses so that multiple recipients can be sent the same message at the same time. Moreover, emails can reach their addressees much quicker than letters sent by the mail or by messenger. These are simply differences in efficiency, however, and it would make no sense to allow a form of communication only so long as it is done in a highly inefficient manner.<sup>230</sup> Simply put, if a state legislature has decided that the balance of public interests supports allowing government officials to send written correspondence to each other, the public interest can be furthered best by ensuring that such communications can occur in an optimally efficient manner.

A second difference worth mentioning is that there is actually a *better* record trail associated with emails than with traditional written correspondence. The recipient of a letter in the mail can discard the letter and there is essentially no way to prove that the letter existed absent an admission by the sender or the recipient. By contrast, an email never really disappears. The sender and recipient of an email can delete the email, but it remains stored on the computers’ hard drives and can be discovered by forensic computer experts.<sup>231</sup> Thus, unlike ordinary letters, emails are more or less undeniable when a public official is faced with a determined adversary, particularly one with the ability to obtain either judicial or legislative subpoenas. As a result, the public’s right to open government is even better protected when public officials correspond by email than when they correspond by letter.

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<sup>230</sup> It also bears mention that there are no marginal costs associated with sending email correspondence; once a user has an email account, sending emails is generally free. By contrast, public officials or local governments bear marginal costs whenever a letter is sent or a facsimile transmitted. Thus, using email is not only easier, but is cheaper than other forms of written correspondence, at least for those public officials who already have access to an email account.

<sup>231</sup> Colvin, *supra* note 7, at 100 (“E-mail creates an electronic record that cannot be totally deleted, at least until ‘electronic shredders’ become available. Because e-mail cannot be deleted, it is essentially nondeniable.”).

Maintaining the current open meeting regime, which in most states means that email correspondence is not subject to open meetings statutes, also can have a salutary effect on open government by fostering habits of communication that result in a more complete written record of communications among government officials. Take, for example, communications by two members of a city council on a matter of great public concern. Assuming that the city council's quorum is greater than two, most states' open meeting statutes do not prohibit such a communication.<sup>232</sup> If this communication occurs face-to-face, or by telephone, the communication is not only outside the purview of the state's open meeting statute, but also outside the state's open records statute because *there is no record to be maintained*.

By contrast, if the communication occurs by email, the communication is still legal, but the communication generally would be subject to the state's open records statute and therefore could be discovered by the public at large. Anything that encourages email communication at the expense of non-public face-to-face meetings or telephone conversations strikes a blow for open government. Indeed, in the context of *Beck v. Shelton*,<sup>233</sup> the executive director of the Virginia Coalition for Open Government, while opposing the ultimate result in *Beck*, conceded the value of email records as a bulwark against governmental secrecy.<sup>234</sup> Thus, a state legislature would best serve the interests of open government not by prohibiting email communications but rather by ensuring that the state open records statute clearly sweeps emails within its ambit. A legislature also can further the concept of open government by ensuring that local government officials—many of whom may only be part-time legislators—understand their obligation to retain emails dealing with public business.

With one exception, all of the public interests underlying open meeting statutes—such as eliminating secrecy, educating the voting public, and avoiding government corruption<sup>235</sup>—are served by permitting email communications on the same basis that the exchange of other forms of written correspondence because the public is able to discover the details of public officials' communications through an open records request.<sup>236</sup> The one

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<sup>232</sup> See *supra* notes 27-33 and accompanying text (setting forth the "meeting" definition of many states' open meeting statutes).

<sup>233</sup> 593 S.E.2d 195 (Va. 2004).

<sup>234</sup> See Beth W. Hunley, *City E-Mail Case Advances*, FREDERICKSBURG.COM, July 11, 2003 (quoting Frosty Landon, executive director of the Virginia Coalition for Open Government, as follows: "I would hate to see anything occur that chilled the use of e-mail since it is a public record. We do need to have a paper trail."), at <http://www.fredericksburg.com/News/FLS/2003/07112003/1034728>.

<sup>235</sup> See *supra* notes 201-06 and accompanying text (discussing the public interests underlying open meeting legislation).

<sup>236</sup> One commentator has argued with some force that the public is *best* served by after the fact

interest arguably disserved by permitting ordinary email correspondence is the public's interest in participating in the deliberative process of public bodies as those deliberations occur.<sup>237</sup> There are, however, at least two responses to this legitimate concern. First, the authors believe that the interest in public observation of public bodies' deliberations while they occur—as opposed to observing them after the fact—is significantly outweighed by the myriad benefits, discussed above,<sup>238</sup> that the public reaps by allowing its public officials to have some degree of communication and collaboration outside the open meeting context. Second, because state open meeting statutes generally provide that official government action can only occur at a publicly-noticed open meeting,<sup>239</sup> the public *still* has the ability to observe and/or participate in the deliberative process at the time that any government initiative is being readied for a public vote.

Given that the public's right to know is already protected with respect to emails by open records statutes, any policy concerns with the manner in which government officials use email communications seems best suited for a *political* solution rather than a *legislative* one. The most sensible course—one that promotes both government efficiency and openness—is to continue to permit public officials to exchange ordinary email communications, subject to open records requirements. If the public, which has inherent access to the relevant facts, is dissatisfied with the manner in which its elected officials are using email communications, it can express its dissatisfaction at the ballot box and elect local government officials who will use email correspondence in a manner more consistent with the pub-

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disclosure of government deliberations because the public's right to know is protected without impairing the efficient operation of local government, bringing undue public pressure to bear on the deliberative process, or by encouraging inefficient practices such as grandstanding by public officials. *See* Tucker, *supra* note 203, at 541 (“Providing public access to written information, after the fact, as under the Freedom of Information Act, probably provides more useful information than access to a meeting does and has arguably a considerably less inhibiting influence on the process of written expression than providing access to a meeting has on the process of oral expression.”).

<sup>237</sup> *See supra* note 199 and accompanying text.

<sup>238</sup> *See supra* notes 209-28 and accompanying text (discussing the ways that unfettered open government can disserve the public interest).

<sup>239</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 38-431.02 (West 2001) (“Public notice of all meeting of public bodies shall be given . . . .”); 5 ILL. COMP. STAT. ANN. 120/2.02 (West Supp. 2004) (“Public notice of all meetings, whether open or closed to the public, shall be given . . . .”); MD. CODE ANN., STATE GOV'T § 10-506 (1999) (“Before meeting in a closed or open session, a public body shall give reasonable advance notice of the session.”); N.J. STAT. ANN. § 10:4-8 (West 2002) (“[N]o public body shall hold a meeting unless adequate notice thereof has been provided to the public.”); VA. CODE ANN. § 2.2-3707 (Michie Supp. 2004) (“Every public body shall give notice of the date, time, and location of its meetings . . . .”).

lic's expectations.<sup>240</sup> To saddle each and every local government body with a prohibition on ordinary email communications would disserve the public's interest in government efficiency in exchange for either a nonexistent or marginal enhancement of "openness."

## CONCLUSION

The Virginia Supreme Court's decision in *Beck v. Shelton* is a landmark one not because it is creative or, with all respect to the court, because of its rhetorical flourish, but mainly because it was first. As the first state supreme court to confront the legality of email communications under an open meeting statute, the court's analytical framework may inform the way that other courts, state attorneys general, and public officials approach the issue. The *Beck* decision gives meaning to all of the words in Virginia's FOIA statute, recognizing that the statute's use of the term "assemblage" to define an informal meeting necessarily excludes from the statute's coverage any communications occurring while members of the public body are not assembled together. The *Beck* decision is a workmanlike opinion that scores few style points but clearly came to the right result.

While *Beck* will not be the last word on open meeting statutes as applied to electronic communications, it is a good first word. *Beck* establishes a framework for analyzing the propriety of any mode of communication, whether it be emails, chat rooms, instant messaging, or whatever new communication device that might be available twenty years from now. Regardless of the precise means of communication, the lesson from *Beck* is that the reach of an open meeting statute generally should hinge on whether the communication is more or less simultaneous, as the touchstone of a "meeting," "assemblage," or "gathering" is the simultaneous communication and deliberation of its participants. The clarity of the simultaneity principle provides considerable guidance to public officials in conforming their conduct to the strictures of their respective state open meeting statutes.

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<sup>240</sup> Indeed, while recognizing the limitations on the ability of courts to substitute their notions of sound public policy for that of the legislature, the Tennessee Court of Appeals noted that the voting public ultimately has the final say in such matters:

The people and the press are not helpless in this process . . . . If the Legislature abuses the power delegated to it . . . the press is free to inform the people of the abuse. But the remedy must be in the court of public opinion and not in the judiciary.

*Mayhew v. Wilder*, 46 S.W.3d 760, 774 (2001). This principle applies equally to legislative policy choices. By allowing public officials to use their good judgment as to the appropriate manner of using email communications, subject at all times to the rights of the press and public under state open records statutes, the voting public ultimately is the final arbiter of the propriety of the public officials' conduct.

The result in *Beck* is right not just as a matter of statutory construction, but also is right as a matter of public policy. There is no good reason to impede public officials' ability to communicate with each other in a manner that creates an exact written record of the communication that is available to the public under an open records request. Although a state legislature certainly could react to decisions such as *Beck* by amending its state open meeting statute to sweep email communications within its reach, such legislation would be a mindless bow before the false god of unfettered open government. While the "people have a right to know,"<sup>241</sup> they also have a right to an open meeting regime that respects the public's interest in getting things done. A public policy more respectful of the people is one that maximizes government effectiveness while giving the citizenry access to the communications of public officials. Such a state of affairs allows the people to decide for themselves, on a case-by-case basis, whether they approve of the manner in which their public officials communicate with each other by email, and to balance as a political question the sometimes competing virtues of openness and efficiency.

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<sup>241</sup> *Open Meeting Statutes*, *supra* note 16, at 1199.