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TO: Darien Board of Education
FROM: Tom Mooney
RE: Caution on Board Member Communication by Email
DATE: June 4, 2019

It is important that Board members understand the dangers in communicating by email. One concern is that such communications are “public records.” Any such communication is a “public record” when it relates to the board of education operation – the Freedom of Information Act (FOIA) defines a “public record” as “any recorded data or information *relating to the conduct of the public’s business* prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.” Conn. Gen. Stat. § 1-200(5)

Another concern is that such communication could evolve into a “discussion” among a quorum of the Board members, thereby constituting an illegal meeting of the Board of Education. This concern is based on the definition of “meeting” under the FOIA, set forth in Conn. Gen. Stat. § 1-200(2), which provides in relevant part:

(2) “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.*

If the Board holds a “meeting,” it must post that meeting (along with the agenda) at least twenty-four hours in advance. Therefore, if a meeting occurs, even inadvertently, the failure to post and provide public access would constitute a violation of the FOIA.

In this context, the elements of a “meeting” are (1) communication among a quorum (2) to discuss or act upon Board business. Since communication among a quorum occurs frequently (*e.g.*, the Board packet), the key issue is whether the communication results in a “discussion.” While there are various definitions in the dictionary, one definition apropos of the concern over email communication is “an exchange of views on some topic,” with the key question being whether there is an “exchange” of views.

Exactly when communication becomes a discussion (resulting in an illegal meeting) is not self-defining. The Freedom of Information Commission tried to define such “meetings” in 2001 in a proposed declaratory ruling (Draft Declaratory Ruling # 94), and ultimately it decided to withdraw the proposed declaratory ruling and continue to consider such matters on a case-by-case basis (Report of Counsel, April 14, 2004). With the resulting knowledge that the Commission will thus rule on a case-by-case basis, I can suggest the following general guidelines:

- Email communication on Board business by Board members to each other (or to or from the Superintendent to Board members) is permissible.
- Such email communications are subject to public disclosure unless they are exempt (in whole or in part) from disclosure under the FOIA (*e.g.*, personally identifiable student information, attorney/client information).
- The status of email communication as a public record is governed by the author and the subject matter, not by where the communication was generated. The Commission has ruled that public officials must disclose email communications related to their public responsibilities, even if they are written on their personal computers at home.
- Where email communication is *unilateral*, it will likely not be considered a “meeting” that would trigger FOIA concerns. For example, when the Superintendent sends out the Board packet (whether in hard copy or by email), such communication to a quorum would not be considered a “discussion” because there is no exchange of views.
- Where such a communication generates responses that are shared with a quorum of the Board, it is possible that a “discussion” (and hence a “meeting” in violation of the FOIA) will be found. Along the continuum of case-by-case determination, the more such responses are provided, the more likely it is that an illegal “meeting” will be found. However, even one “Reply All” could result in such a finding, because such a communication would be an exchange of views among a quorum of the Board.
- Communication among less than a quorum, by email or otherwise, does not trigger the “meeting” provisions of the law. However, where communication among less than a quorum is then conveyed, even by an individual, to other Board members so that a quorum ultimately is aware of the communication, a “meeting” may be found. For example, “Joe, Sally and I were talking, and we thought that the district should abolish the Chess Club. What do you think?”