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Opening the Meetings Act to reality—abolishing the "Rule of Two"

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> "When you define meetings by the number of participants you set the participants up to skirt the law."
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> —*Anchorage Daily News* at B3 (October 23, 1992.)

In 1899 the Open Meetings Act (the "Act") stated simply "It [the local governmental body] shall sit with open doors." Today, the Act has mushroomed to four pages of 8 point type. The Act originally did not define the term "meeting." However, in its current form, the Act defines the term "meeting" as "....any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business." 5 ILCS 120/1.02. The Illinois Municipal Code defines a quorum as "a majority of the corporate authorities ..." 65 ILCS 5/3.1-40-20. Where a public body consists of five or fewer members, a majority of a quorum is two members. Consequently, two members of a public body are prohibited from speaking to one another about public business during their entire terms office. Violations of the Act, because of this "Rule of Two," constitute a Class C misdemeanor. Anyone found guilty may be fined up to $1,500 (730 ILCS 5/5-9-1(a)(3)) or imprisoned for up to 30 days (730 ILCS 5/5-8-3(a)(3)) or both for each offense. Nor can those members of public bodies, whose number exceed five, ignore this issue, assuming that this problem does not affect them. The Act applies to "subsidiary bodies." Consequently, members of committees, task forces, subcommittees, and the like, consisting of five or fewer members are subject to the Act and members are prohibited from speaking with one another about the business of the committee, task force or subcommittee.

The First Amendment to the United States Constitution provides "Congress shall make no law...abridging the freedom of speech...or the right of people peaceably to assemble ... U.S. Const. amend. I. The Illinois constitution is even more explicit. In Article 1, section 4, it provides "all persons may speak, write and publish freely...." Section 5 of Article 1 provides, "the people have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to apply for redress of grievances." These constitutional privileges reflect the importance of these fundamental rights to all Americans. While the right to exercise free speech is not absolute, any restriction of that right is to be put to a "strict scrutiny test." The current restrictive Illinois law, when it involves contact between only two public officials, does not pass that test.

Currently the Act prohibits the exercise of free speech between elected officials on public bodies containing five or fewer members. Indeed, it criminalizes such activity when exercised by persons entrusted with making decisions regarding the public good. Elected and appointed officials are deprived in such instances of the most basic of rights, the ability to express an opinion to a colleague or to learn important facts. The Act inhibits candid discussion of issues. It forces members of public bodies of five or fewer to discuss any idea or thought, either in public or through the media. Officials are not free to suggest ideas, brain storm, think out loud, float trial balloons, except under the glare of public scrutiny. This stifles creativity in solving public problems and inhibits debate and frank discussion of the issues. Officials cannot test their assumptions and data in advance of a public forum.

Moreover, the "Rule of Two" unnecessarily increases both the burden and the power of administrative staffs and consultants, while weakening the effectiveness of elected public officials. Governmental officials are required to use staff members and consultants almost like "go-betweens" in illicit relationships. Like the children's game of "telephone," a message which is communicated through too many hands, without the ability of the main participants to interact with each other, tends to delay and garble the message.

Illinois finds itself in a tiny minority of jurisdictions that has such a restrictive Act. The vast majority of states define a meeting as a quorum of the public body, which in most instances would allow discussions between two members. Only a handful of states have laws as restrictive as Illinois, which define a meeting as fewer than a quorum of a particular public body. Illinois is aligned with Kansas, Connecticut and Tennessee in attempting to prohibit conversations between two individuals. Several other states apply the law to less than a quorum, but provide some relief for two-person public bodies. For example, Hawaii excepts from the term "meeting" conversations between two members of a public body in order to gather information about official matters before the public body as long as no commitment to vote is sought. Haw. Rev. Stat. § 92-2.5(a), (f) (1998 supp.) Obviously, there are a number of ways to

address this issue without the draconian approach Illinois has taken, prohibiting conversations between two elected or appointed officials on bodies consisting of five or fewer members.

We raised this issue at the November meeting of the Illinois Municipal League's ("IML") Legislative Committee that, in response, formed a subcommittee to review this issue. Subcommittee members are Thomas P. Bayer, Mark Bologa, Vincent Cainkar, Stewart Diamond, Richard G. Flood, Rick Goeckner, Joseph L. Schatteman, Crystal Lake Mayor Aaron Shepley and Henry J. Stephens. At the subcommittee's first meeting in January it was decided to recommend pursuing legislation to the full Legislative Committee and then the IML. The subcommittee believes that the Act should be amended to include an exception by which two members of any public body may speak to each other without violating the Act, regardless of the size of the public body.

Representative Davis recently introduced House Bill 1952, which by its current language would appear to exempt a discussion of Legislative, Executive or Administrative responsibilities by any two members of a governing board or committee which has five or fewer members. This bill, or similar legislation should receive broad support and multiple offers to testify in favor of the legislation, and to contact legislators.

The type of change we are suggesting to the IML, and hopefully to the Legislature, will simply ask that the statutes recognize reality and free elected and appointed municipal officials from this imposed "solitary confinement." The suggested modification will not change the law with regard to any group of more than two individuals who are not currently allowed to discuss governmental business other than in some form of noticed public meeting. The existing rigid restrictions in the Act regarding a majority of a quorum, which include three or more individuals, would remain. The only change which we are seeking is one which is almost impossible to comply with, difficult to enforce, is not favored by the vast majority of other states, and tends to make otherwise conscientious public officials subject to civil and criminal penalties.

The subcommittee will suggest to the IML that we reach out to other units of local government who are similarly affected by the Open Meetings Act legislation. Park districts, school districts, townships, and other units of local government are all similarly affected by the draconian restrictions imposed by the Act in this regard. We would like to develop broad base support for legislation that would preserve the intent of the Act without criminalizing simple conversations. Our hope is also to promote candid discussion between elected officials, allowing them to better carry out their duties. We ask for your support. ■

This article first appeared in the June 2001 issue of the ISBA Local Government Law Newsletter. It is reprinted with the permission of the authors. Mr. Flood practices with Crystal Lake law firm of Zukowski, Rogers, Flood & McArdle. Mr. Diamond is with the Chicago firm of Ancel, Glink, Diamond, Bush, DiCianni & Rolek P.C.