

TRANSPARENCY TRUMPS TECHNOLOGY: RECONCILING
OPEN MEETING LAWS WITH MODERN TECHNOLOGY

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INTRODUCTION

As technological advances revolutionize communication patterns in the private and public sectors, government actors must consider their reactions carefully. Public representatives may take advantage of modern technology to improve communications with constituents and to operate more efficiently.¹ However, this progress must be made with an eye to complying with certain statutory restrictions placed on public bodies.

Open meeting laws require that certain governmental bodies discuss and decide matters of public interest at planned, advertised meetings in full view of the public.² Most open meeting statutes, however, have not been updated for many years and thus fail to instruct public bodies on how to square their provisions with modern technology.³ As a result, many government actors struggle to comply with open meeting statutes when attempting to use available technology to benefit themselves and their constituents.⁴

Legal scholars have noted the difficulties inherent in applying the restrictive provisions of open meeting laws to advances in technology.⁵ Some argue that the benefits to be gained from public bodies' utilization of technology, particularly interactive online forums and group e-mails, outweigh potential harms.⁶ These

1. See Bill Sherman, *Your Mayor, "Your Friend": Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 141, 143 (2011).

2. See *infra* Part I.A.

3. See Alan J. Bojorquez & Damien Shores, *Open Government and the Net: Bringing Social Media into the Light*, 11 TEX. TECH. ADMIN. L.J. 45, 49-50 (2009).

4. See *id.*

5. See, e.g., *id.*; Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245, 267 (2008); John F. Fatino, *Public Employers and E-mail: A Primer for the Practitioner and the Public Professional*, 23 N. ILL. U. L. REV. 131, 151-59 (2003); John Paul Jones & Molly T. Geissenhainer, *Administrative Law*, 43 U. RICH. L. REV. 73, 95-98 (2008); Jessica M. Natale, Note, *Exploring Virtual Legal Presence: The Present and the Promise*, 1 J. HIGH TECH. L. 157, 158-60 (2002).

6. See Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2002-07 (2011); John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719, 722 (2004); Sherman, *supra* note 1, at 140-45; Stephen Schaeffer, Note, *Sunshine in Cyberspace?: Electronic Deliberation and the Reach of Open Meeting Laws*, 48 ST. LOUIS U. L.J. 755, 786-89 (2004);

scholars conclude that, if these technologies do not comply with existing laws, lawmakers must amend open meeting statutes to allow for their use.⁷ This Note contributes to existing legal scholarship by providing a concrete proposal for public bodies' use *and* avoidance of available technologies while preserving the primary goal of open meeting laws: transparency.

This Note will argue that, in order to comply with the spirit and the letter of open meeting laws, public bodies should limit use of modern technology to: (1) providing information and soliciting public feedback through noninteractive websites, and (2) enabling remote participation of public body members at meetings. This Note will then contend that public bodies should not utilize interactive online forums or group e-mails. Although these technologies may offer certain obvious benefits, this Note argues that: (1) they do not comply with current open meeting law requirements, and (2) legislatures should not alter open meeting laws to allow for their use.⁸ It concludes that although more permissive statutes might lead to an increase in civic participation and government efficiency, these potential gains must be sacrificed in order to preserve transparency, the primary purpose of open meeting laws.⁹

Part I explains the circumstances under which open meeting law requirements apply. It also considers the goals legislatures hope to accomplish by enacting these laws and introduces the new technologies that must be squared with unclear statutory requirements.¹⁰ Part II proposes two ways public bodies can and should utilize modern technology to further the goals of open meeting laws without risking noncompliance. Part III then argues that interactive online forums and group e-mail usage are bound to conflict with legal requirements and that legislatures should not alter public meeting laws to allow for their use. Finally, Part IV considers how

Stacey D. Schesser, Note, *A New Domain for Public Speech: Opening Public Spaces Online*, 94 CALIF. L. REV. 1791, 1793 (2006); Mark Thompson, Note, *Opening Virtual Doors: Addressing Ohio's Open Meeting Law and the Use of Electronic Communication*, 34 U. DAYTON L. REV. 407, 424-27 (2009).

7. See Lidsky, *supra* note 6, at 2002-07; O'Connor & Baratz, *supra* note 6, at 722; Sherman, *supra* note 1, at 140-45; Schaeffer, *supra* note 6, at 786-89; Schesser, *supra* note 6, at 1793; Thompson, *supra* note 6, at 424-27.

8. See *infra* Part III.

9. See *infra* Part IV.

10. See Bojorquez & Shores, *supra* note 3, at 49-50.

these proposals accomplish the underlying goals of open meeting laws, arguing that, in order to achieve the primary open meeting goal of transparency, the secondary goals of public participation and efficiency must be partially compromised.

I. BACKGROUND

All states, as well as the federal government, have enacted open meeting laws.¹¹ This Part introduces certain foundational elements of these laws. Part I.A first identifies the definitions relevant to the interpretation of open meeting laws. Part I.B then discusses the three goals driving these laws: government transparency, public participation, and efficiency. Next, Part I.C introduces forms of modern technology that present possibilities for improved functioning and highlights the obstacles to compliance for public bodies seeking their use.

A. *Open Meeting Law Definitions*

Interpretation and application of open meeting law requirements begins with statutory definitions of the terms “public body,”¹² “meeting,”¹³ and “deliberation.”¹⁴ Although state open meeting laws vary, they generally define these concepts in similar ways.¹⁵

Public bodies are government entities subject to open meeting law requirements.¹⁶ They typically include governing boards, committees, subcommittees,¹⁷ and elected bodies with decision-making abilities¹⁸ at the state and municipal level.¹⁹ Some states

11. See Schaeffer, *supra* note 6, at 757 & n.14.

12. See *id.* at 759-61.

13. See *id.* at 761-64.

14. See *id.* at 765-69.

15. See *id.* at 757 n.14.

16. See *id.* at 759.

17. In some states, subcommittees are subject to open meeting law requirements only if assembled by a public body. See, e.g., *Davis v. City of Detroit Fin. Review Team*, 821 N.W.2d 896, 925 (Mich. Ct. App. 2012) (holding that a subcommittee appointed by the Governor was not subject to the requirements of the Michigan Open Meetings Act because the appointing entity was not a public body).

18. Legislatures and judiciaries are typically exempt from open meeting laws. See, e.g., *Locke v. Hawkes*, 595 So. 2d 32, 37 (Fla. 1992) (“[T]he definition of [public body,] while not intended to apply to the legislature, ... applies particularly to those entities over which the

require that government entities have more than one member in order to fall within the definition of public body.²⁰

A meeting is a gathering of a quorum of a public body—often defined as a simple majority—where issues within the public body’s jurisdiction are discussed.²¹ Some states deem any gathering of public officials where public business is addressed to be a meeting, even when less than a majority is present.²² Most sunshine laws carefully prescribe the circumstances under which a public body may meet in closed session, requiring that all other meetings be made open and accessible to the public.²³ Some state laws also address physical presence requirements of public body members at meetings.²⁴

Meetings must be planned so that the public body can give advance notice of the meeting’s time, location, and anticipated topics

legislature has some means of legislative control, including counties, municipalities, and school boards, and state agencies, bureaus, and commissions, and private business entities working for any of these public entities and officials.”).

19. *See, e.g.*, *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 518 (Minn. 1983) (listing governing bodies, committees, subcommittees, boards, departments, and commissions as subject to Minnesota’s Open Meeting Law); *see also* Schaeffer, *supra* note 6, at 759-60.

20. *See, e.g.*, *Herald Co. v. City of Bay City*, 614 N.W.2d 873, 885 (Mich. 2000) (holding that a city manager was not a public body subject to the Michigan Open Meetings Act because his decision-making power stemmed from the city charter and was not assigned by a public body); *Op. Okla. Att’y Gen. No. 77-260* (1977) (explaining that a single person cannot operate as a public body). *But see* *Int’l Ass’n of Firefighters, Local 2479 v. Thorpe*, 632 P.2d 408, 412 (Okla. 1981) (holding that a subordinate entity consisting of a single member acting with decision-making power may constitute a public body).

21. *Moberg*, 336 N.W.2d at 518 (“[M]eetings’ subject to the requirements of the Open Meeting Law are those gatherings of a quorum or more members of the governing body ... at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body.”).

22. *See, e.g.*, *Hill v. Fairfax Cnty. Sch. Bd.*, 727 S.E.2d 75, 78 (Va. 2012) (noting that a meeting may take place under Virginia law if three members of a public body are present, regardless of the public body’s total membership); *see also* O’Connor & Baratz, *supra* note 6, at 768-69; *cf.* *Mabry v. Union Parish Sch. Bd.*, 974 So. 2d 787, 789 (La. Ct. App. 2008) (implying the legitimacy of a “walking quorum” to participate in a meeting “where different members leave the meeting and different members enter the meeting so that while an actual quorum is never physically present an actual quorum during the course of the meeting participates in the discussion”).

23. *See, e.g.*, *Dist. Att’y for Plymouth Dist. v. Bd. of Selectmen of Middleborough*, 481 N.E.2d 1128, 1131 & n.6 (Mass. 1985) (holding that, under the Massachusetts Open Meeting Law, a board’s private consultation with an attorney was an improper closed session).

24. *See, e.g.*, *Goode v. Dep’t of Soc. Servs.*, 373 N.W.2d 210, 212 (Mich. Ct. App. 1985) (holding that public body members may participate in hearings via teleconference call as long as each location is open to public attendance); Schaeffer, *supra* note 6, at 761.

of discussion to the public.²⁵ Open meeting laws thus prescribe the manner in which proper notice of meetings may be given.²⁶ During and after meetings, accurate minutes must be taken, approved by the public body, and made available to the public upon request.²⁷

Deliberation constitutes discussion of matters within a public body's jurisdiction, among at least a quorum—the minimum number of public body members required to constitute a meeting.²⁸ Deliberation is distinct from a mere chance meeting or social gathering at which jurisdictional matters are not discussed, even if a quorum of a public body happens to be present.²⁹ Public bodies are thus subject to open meeting law requirements when holding meetings, where a quorum of a body deliberates over matters within its jurisdiction.

B. Goals of Sunshine Laws

Sunshine laws are enacted with three main purposes: transparency, public participation, and efficiency.

1. Transparency

Government transparency is the primary goal behind open meeting statutes, as evidenced by judicial interpretations of the guiding statutory language in many states: “[T]ransparency can, it is said, reduce corruption, bribery, regulatory capture, and other

25. See, e.g., MASS. GEN. LAWS ch. 30A, § 20(b)-(c) (2011); R.I. GEN. LAWS ANN. § 42-46-6 (West 2012); see also Thompson, *supra* note 6, at 412-13.

26. See, e.g., ch. 30A, § 20(b)-(c); *Tanner v. Town Council of Town of E. Greenwich*, 880 A.2d 784, 797 (R.I. 2005) (holding that, in order to provide “fair notice” in compliance with the Rhode Island Open Meetings Act, public bodies must include plans to vote in notices of upcoming meetings); see also Thompson, *supra* note 6, at 412-13.

27. See, e.g., ch. 30A, § 22; *Harris v. Nordquist*, 771 P.2d 637, 641 (Or. Ct. App. 1989) (holding that minutes must be made available to members of the public upon request for up to one year following meetings); see also Thompson, *supra* note 6, at 414.

28. Deliberation may involve mere discussion where no action is taken on the topic. See, e.g., *Univ. & Cmty. Coll. Sys. of Nev. v. DR Partners*, 18 P.3d 1042, 1050 (Nev. 2001) (Maupin, J., dissenting) (concluding that interviewing should be considered deliberation); see also Schaeffer, *supra* note 6, at 782.

29. See *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 494 N.W.2d 408, 410 (Wis. 1993).

forms of governmental misbehavior.”³⁰ The Florida Supreme Court characterized the purpose of sunshine laws as “prevent[ing] at nonpublic meetings the crystallization of secret decisions.”³¹ Using similar language, the Massachusetts Supreme Judicial Court held: “The open meeting law is designed to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based.”³² Transparency requires not only the mere avoidance of secret discussions, but also accountability to members of the public for policy decisions; for example, the purpose of the Ohio Open Meeting Law “is to assure accountability of elected officials by prohibiting their secret deliberations of public issues.”³³ Thus, transparency is widely cited as the primary purpose of sunshine laws.

Practitioner Teresa Pupillo argues that state legislatures should include a purpose provision with open meeting laws, to make clear that they exist “to ensure that governmental business is open to the public.”³⁴ Some states have done just that. Under the section titled “[l]egislative findings and declaration,” Pennsylvania’s Open Meetings Law states that “secrecy in public affairs undermines the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society.”³⁵ Pennsylvania thus describes the scenario it seeks to avoid,³⁶ whereas Nevada explains its desired outcome.³⁷ The “legislative declaration and intent”

30. Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1349.

31. Cheryl Cooper, *Sending the Wrong Message: Technology, Sunshine Law, and the Public Record in Florida*, 39 STETSON L. REV. 411, 418 (2010) (quoting *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974)).

32. *Ghiglione v. Sch. Comm. of Southbridge*, 378 N.E.2d 984, 987 (Mass. 1978); *see also*, e.g., *State ex rel. Hodge v. Town of Turtle Lake*, 508 N.W.2d 603, 606 (Wis. 1993) (“[The Open Meetings Law aims to] provid[e] the public with the fullest and most complete information possible regarding the affairs of government.”); *People ex rel. Difanis v. Barr*, 414 N.E.2d 731, 735 (Ill. 1980) (“[The Illinois Open Meetings Law exists to] prohibit secret deliberation and action on business which properly should be discussed in a public forum due to its potential impact on the public.”).

33. Thompson, *supra* note 6, at 408; *see also* O’Connor & Baratz, *supra* note 6, at 719.

34. Teresa Dale Pupillo, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L. Q. 1165, 1185 (1993).

35. 65 PA. CONS. STAT. ANN. § 702(a) (West 2012).

36. *See id.*

37. NEV. REV. STAT. ANN. § 241.010 (West 2011).

section of Nevada's Open Meetings Law states, "It is the intent of the law that [public bodies'] actions be taken openly and that their deliberations be conducted openly."³⁸

2. Public Participation

Encouragement of public participation is often cited as another important goal of open meeting laws.³⁹ The Florida Supreme Court explained, "As more people participate in governmental activities, the decisionmaking process will be improved."⁴⁰ For this reason, public participation is a highly valued component of democratic governance,⁴¹ and it frequently receives careful consideration as lawmakers draft and revise sunshine laws; for example, the Court of Appeals of North Carolina stated that "the legislature's purpose for [the Open Meetings Law] is to ensure that public bodies receive input regarding the substance of the public body's actions."⁴² Yet many sunshine laws allow public bodies to impose limits and restrictions on public participation.

For example, although some states protect the public's right to speak at open meetings, many do not require that meeting attendees be given an opportunity to express opinions or ask questions.⁴³ The Massachusetts Open Meeting Law does not require public bodies to allow public participation at meetings.⁴⁴ Finding a public body that limited public participation at a meeting to only two attendees to be in compliance with the Open Meeting Law, the Massachusetts Attorney General explained, "The ... [l]aw gives clear

38. *Id.*

39. Schaeffer concluded that public participation is actually the primary purpose of open meeting laws. Schaeffer, *supra* note 6, at 790. However, he opened his discussion by presenting the dual purposes of sunshine laws on equal footing: transparency and public participation. *Id.* at 755.

40. *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 476 (Fla. 1974).

41. The California Attorney General explains, "Simply put, some efficiency is sacrificed for the benefits of greater public participation in government." CAL. ATTY GEN.'S OFFICE, A HANDY GUIDE TO THE BAGLEY-KEENE OPEN MEETING ACT 3 (2004).

42. *Garlock v. Wake Cnty. Bd. of Educ.*, 712 S.E.2d 158, 174 (N.C. Ct. App. 2011).

43. *See, e.g.*, E-mail from Camille S. Jobin-Davis, N.Y. Dep't of State Comm. on Open Gov't Op., OML-AO 5296 (June 12, 2012) ("[I]f a public body, such as a village board, does not want to answer questions or permit the public to speak or otherwise participate at its meetings, we do not believe that it would be obliged to do so.").

44. *See* MASS. GEN. LAWS ch. 30A, § 20(f) (2011).

authority to the chair of a public body to determine who may speak to the body, and does not require that the body allow public participation during a meeting.”⁴⁵

Conversely, California and Nebraska are among the states that do require public bodies to allow members of the public to speak during discussions of public business.⁴⁶ The fact that not all states require open public participation at meetings indicates that, although this goal is important in the eyes of lawmakers and courts, its significance is secondary to the uniformly cited goal of transparency.

3. *Efficiency*

The third and least cited goal of open meeting laws is the preservation of government efficiency.⁴⁷ Public bodies must be able to satisfy open meeting law requirements while maintaining functionality.⁴⁸ As the Supreme Judicial Court of Massachusetts stated, “Public officials ... might be unduly hampered in the performance of their duties” if all their meetings must be public.⁴⁹ Efficiency cannot be sacrificed to an extreme degree, otherwise public bodies will manage public affairs ineffectively. Thus, policymakers must carefully consider the preservation of public body productivity when drafting and passing open meeting legislation. The Massachusetts Attorney General explained that the Open Meeting Law “seeks to balance the public’s interest in witnessing the deliberations of public officials with the government’s need to manage its operations efficiently.”⁵⁰ Similarly, the New York Court of Appeals noted that while the Open Meetings Law must create transparency, it must also “protect[] the ability of the government to carry out its responsibilities.”⁵¹

45. Op. Mass. Att’y Gen. No. 2012-59 (2012).

46. See CAL. GOV’T CODE § 54953(a) (West Supp. 2002); NEB. REV. STAT. ANN. § 84-1412(2) (West 2012).

47. See O’Connor & Baratz, *supra* note 6, at 722.

48. See *id.*

49. Ghiglione v. Sch. Comm. of Southbridge, 378 N.E.2d 984, 987 (Mass. 1978).

50. COMMONWEALTH OF MASS., OFFICE OF ATT’Y GEN. MARTHA COAKLEY, OPEN MEETING LAW GUIDE 1 (Aug. 1, 2013).

51. Gordon v. Vill. of Monticello, Inc., 661 N.E.2d 691, 693 (N.Y. 1995).

C. Modern Technology

Government actors need guidance regarding the appropriate use of modern technology in compliance with sunshine laws,⁵² as many statutes are vague and do not address the proper role of technology in public meetings.⁵³ This Section will address modern technologies most likely to pose compliance challenges for public bodies: e-mail; audiovisual tools; and interactive and noninteractive websites.⁵⁴ E-mail has become a common method of communication and, if used by a quorum of a public body, may result in conversations improperly taking place outside of the public eye. For example, group e-mails with multiple recipients may be sent to a quorum of a public body, and members may then select “reply all” to communicate with all recipients listed on the original e-mail. Additionally, e-mails exchanged between two or more members may be forwarded an indefinite number of times, ultimately reaching a quorum of a public body and thus constituting a meeting subject to open meeting law requirements.

Audiovisual advances in technology may also increase opportunities for public body members to participate in meetings without being physically present.⁵⁵ Teleconference options allow nonpresent members to call in to meetings and to listen and be heard using speaker phones.⁵⁶ In recent years, the possibilities for remote participation have improved through audiovisual capabilities that allow nonpresent members to see and observe meeting proceedings and likewise to be seen on a computer screen by attendees at a main meeting site.⁵⁷

Finally, websites offer both interactive and noninteractive options.⁵⁸ Interactive online forums may allow public body members

52. See Chance & Locke, *supra* note 5, at 260-61.

53. See Pupillo, *supra* note 34, at 1175.

54. The effective incorporation of technological advances into civic functioning could actually increase public body members' engagement in in-person meetings, which, in addition to its potential relationship with open meeting law goals, makes this possibility one worth exploring. See Phil Reiman, *In Congress Electric: The Need for On-Line Parliamentary Procedure*, 18 J. MARSHALL J. COMPUTER & INFO. L. 963, 964 (2000).

55. See Chance & Locke, *supra* note 5, at 266; Natale, *supra* note 5, at 158.

56. See Natale, *supra* note 5, at 159.

57. See Chance & Locke, *supra* note 5, at 266.

58. See *id.* at 263-66; Lidsky, *supra* note 6, at 2002-10.

and members of the public to communicate directly with, and in open view of, anyone who visits the website.⁵⁹ Here, public body members may choose to communicate as a collective group or as individuals, using either one or many online identities to communicate with members of the public. These online forums may take the form of bulletin boards, allowing people to post comments and creating strings of responses listed in the order of their posting.⁶⁰ They may also be used to host scheduled, real-time conversations among multiple participants, similar to chat rooms utilizing instant message technology.⁶¹

Noninteractive websites may also be used by public bodies to post information about matters within the bodies' jurisdiction.⁶² These websites can also provide mechanisms for the receipt of feedback, whether in the form of public posts or private messages, from members of the public.⁶³ When soliciting feedback through noninteractive websites, members of public bodies do not participate in discussions with community members or interact with one another in view of the public.⁶⁴

II. EMBRACING TECHNOLOGY

This Part proposes two ways that public bodies can and should utilize modern technology in compliance with existing open meeting laws: (1) providing information and soliciting feedback through noninteractive websites, and (2) enabling the remote participation of public body members in meetings.

A. Providing Information and Soliciting Feedback

Public bodies should take full advantage of noninteractive websites to communicate information to the public and solicit public feedback. In a 2010 study, 30 percent of adult Americans reported seeking out online resources to gather government-related informa-

59. See Sherman, *supra* note 1, at 112.

60. See Chance & Locke, *supra* note 5, at 263-65.

61. See *id.*

62. See Sherman, *supra* note 1, at 126.

63. See Chance & Locke, *supra* note 5, at 263-65.

64. See *id.*

tion.⁶⁵ The public's use of online resources does not constitute a meeting, which would require the posting of notice and the creation of a record;⁶⁶ it is simply the delivery of information to constituents outside of a meeting. Similarly, the acceptance of public comments and feedback through noninteractive websites does not in any way mimic a meeting.⁶⁷ Although some states do not require public bodies to solicit or accept public feedback, they do not discourage public bodies from doing so.

Providing information through noninteractive websites promotes transparency by allowing public bodies to inform the public of scheduled meetings; communicate actions taken at previous meetings; and post official meeting minutes, vote tallies, and budgets.⁶⁸ Public bodies can even adopt the regular practice of webcasting in-person meetings to online viewers.⁶⁹ The solicitation of public feedback through noninteractive websites does not, however, impact transparency; members may contemplate feedback received online in advance of meetings, so long as a quorum of the public body does not discuss submitted feedback outside of meetings.⁷⁰

The use of websites to provide information and solicit feedback also meets the open meeting goal of promoting public participation. Although the mere provision of information does not invite direct public participation, a better-informed public is more likely and better equipped to participate in the affairs of boards and committees that make decisions locally, and perhaps more likely to provide feedback online.⁷¹ People find it convenient to gather and receive

65. See Sherman, *supra* note 1, at 102-03 (citing Aaron Smith, *Government Online: The Internet Gives Citizens New Paths to Government Services and Information*, PEW INTERNET (Apr. 27, 2010), http://pewinternet.org/~media/Files/Reports/2010/PIP_Government_Online_2010_with_topline.pdf).

66. See *supra* notes 26-27 and accompanying text.

67. See *supra* note 21 and accompanying text.

68. See Leslie L. Marshall, Telford: *Casting Sunlight on Shadow Governments—Limits to the Delegation of Government Power to Associations of Officials and Agencies*, 24 SEATTLE U. L. REV. 139, 166 (2000).

69. See Schesser, *supra* note 6, at 1824.

70. See *supra* note 28 and accompanying text.

71. See Schaeffer, *supra* note 6, at 786.

information from public bodies online⁷² and to communicate their questions, concerns, or comments regarding jurisdictional issues.⁷³

Finally, the use of noninteractive websites also promotes the sunshine goal of efficiency. The Internet provides an easy, paperless way to communicate information to the public. For example, instead of seeking out notice of upcoming meetings at designated municipal buildings, potential attendees can go online and quickly look up meeting schedules. For this reason, California requires public bodies to post agendas for upcoming meetings online.⁷⁴ Additionally, the collection of online feedback from members of the public promotes efficiency by allowing public bodies to gather feedback *prior* to meetings. Members may view and consider public comments individually—before attending meetings—and then during the meetings discuss and respond as a group. This method of collecting feedback may prove a useful addition to the traditional practice of hearing public comments during meetings.

B. Remote Participation

Public bodies should also utilize audiovisual technologies to enable members to attend meetings remotely. Some states allow remote participation only if specific measures are taken to ensure that attendees and participants at all locations can adequately observe the meeting,⁷⁵ whereas other states allow it only in cases of emergency.⁷⁶ In allowing remote participation, the Florida Attorney General has distinguished between informal deliberations and formal votes to take action: public bodies may host wholly remote informal deliberations online—so long as they are properly noticed and accessible to the public—but public bodies must convene a quorum of members in person in order to vote to take action.⁷⁷

72. See Jones & Geissenhainer, *supra* note 5, at 98; see also Sherman, *supra* note 1, at 133 (“[C]onstituents value the availability and acquisition of information [from civic social networks].”).

73. See Schesser, *supra* note 6, at 1824.

74. CAL. GOV'T CODE § 54954.2(a)(1) (West 2012).

75. *E.g.*, MASS. GEN. LAWS ch. 30A, § 20(d) (2011).

76. See Jones & Geissenhainer, *supra* note 5, at 97 (construing VA. CODE ANN. § 2.2-3708(B) (2001, Repl. Vol. 2008)).

77. Op. Fla. Att'y Gen. No. 2001-66 (2001).

As commentator Jessica Natale notes, “Currently, the law is wrestling with the acceptability of virtual presence and the public is considering the benefits and disadvantages of being virtually present for governmental meetings.”⁷⁸ For example, Maryland’s Court of Special Appeals interpreted the Open Meetings Act to allow meeting participation by telephone as long as the conference call is audible to members of the public in attendance at each location.⁷⁹ The court stated that the Open Meetings Act’s definition of a meeting, and specifically its “presence” requirement, could include participation through the use of technology.⁸⁰

The use of remote participation increases efficiency by allowing meetings to take place even when a required quorum of members cannot be physically present. The freedom afforded by remote participation supports governmental action and has “amazing potential in terms of convenience [and] efficiency.”⁸¹

Remote participation may also provide a modest boost to the open meeting law goal of public participation. If a meeting member is allowed to participate remotely on a regular basis, or if remote participation is arranged well in advance of a meeting, a satellite meeting site may be established where members of the public for whom the primary meeting is inconveniently located can come to observe the meeting.⁸² Taking this approach, Virginia law requires that all remote participation locations be open for public attendance.⁸³ Remote participation is allowed only in certain cases, but is most readily available to Virginia public bodies when a quorum is physically present at the primary meeting location.⁸⁴ Although remote participation has the potential to boost government efficiency and promote public participation, it does not impact transparency. State legislatures thus should consider expanding

78. Natale, *supra* note 5, at 158.

79. *Tuzeer v. Yim, LLC*, 29 A.3d 1019, 1035 (Md. Ct. Spec. App. 2011).

80. *Id.* at 1034.

81. See Natale, *supra* note 5, at 160.

82. See *Goode v. Dep’t of Soc. Servs.*, 373 N.W.2d 210, 212 (Mich. Ct. App. 1985) (holding that remote participation “actually increases the accessibility of the public to attend”); Schaeffer, *supra* note 6, at 763.

83. VA. CODE ANN. § 2.2-3708(B) (2001, Repl. Vol. 2011).

84. *Id.*

remote participation freedoms, especially in states with more restrictive laws in place.

III. AVOIDING TECHNOLOGY

This Part argues that interactive online forums and group e-mails typically do not comply with existing sunshine laws,⁸⁵ and that laws should not be changed to allow for their use. It then responds to counterarguments posed by legal scholars.

In 1998, after a quorum of the board governing Nevada's public universities communicated in succession by phone and fax, the Nevada Supreme Court held that "a quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law."⁸⁶ Nevada was not the only state to raise early objections to electronic meetings. In 2002, the Iowa Attorney General issued a "Sunshine Advisory" bulletin regarding electronic meetings.⁸⁷ The bulletin stated that electronic meetings are permissible only when an in-person meeting is "impossible or impracticable" and that all electronic meetings must allow members of the public full and unrestricted access.⁸⁸ These opinions exemplify the legal community's general wariness at the prospect of replacing traditional in-person meetings with electronic stand-ins. Although some states have issued specific decisions regarding the use of interactive online forums and group e-mails by public bodies, states have not reached a general consensus regarding their compliance with open meeting laws.

85. See Thompson, *supra* note 6, at 407.

86. Del Papa v. Bd. of Regents of Univ. & Cmty. Coll. Sys. of Nev., 956 P.2d 770, 778 (Nev. 1998).

87. IOWA ATT'Y GEN.'S OFFICE, SUNSHINE ADVISORY BULLETIN: PUBLIC ACCESS TO ELECTRONIC MEETINGS (Sept. 2002), available at http://www.state.ia.us/government/ag/sunshine_advisories/2002/September.html (listing telephones and video conferences as examples, but not limiting the bulletin's applicability to those forms of electronic communication).

88. *Id.* at 2.

A. Interactive Online Forums

Commentators have noted that although interactive online forums “can be of great benefit to the public[,] ... issues of maintaining procedural order, public access, public notice, and quorum requirements make this technology especially sensitive to the demands of [open meeting laws].”⁸⁹ State attorneys general have given conflicting opinions advising public bodies on the legality of interactive forums. The Kansas Attorney General ruled that use of an online bulletin board would be permissible as “a perpetual, virtual meeting” if both notice of the ongoing discussion and access to either a public computer or a printout of the bulletin board were made available to the public.⁹⁰ The Florida Attorney General interpreted the issue differently, however; a 2007 advisory opinion stated that the use of electronic bulletin boards to host meetings would generally fail to comply with the requirements of Florida’s Government in the Sunshine Law because any discussion extending days or weeks would place too great a burden on members of the public to monitor the ongoing discussion.⁹¹ As in Florida, the concerns of sunshine law advocates throughout the country tend to center on whether online meetings can be reasonably and fairly accessible to the public.

At present, most states have not specified the circumstances under which use of these forums is allowed or prohibited. This situation creates a high risk of noncompliance for public bodies who choose to utilize online forums.⁹² The remainder of this Section will demonstrate that interactive online forums harm public bodies’ ability to remain transparent and operate efficiently, despite providing a potential boost to public participation.

1. Transparency

The use of interactive websites makes it challenging for public bodies to remain transparent to the public. First, it is difficult to

89. Chance & Locke, *supra* note 5, at 263-64.

90. Op. Kan. Att’y Gen. No. 98-49 (1998).

91. Op. Fla. Att’y Gen. 2007 WL 1054632 (2007).

92. See Bojorquez & Shores, *supra* note 3, at 62.

preserve public body deliberations that occur through constituents' posts and online discussions so that, after an online meeting, nonpresent members of the public can ascertain the substance and sequence of deliberations on specific topics.⁹³ In addition, between rotating online discussion forums and open in-person meetings, it may be challenging for members of the public to know how to monitor or participate in deliberations on a particular subject. In 2002 the Florida Attorney General ruled that a twenty-two day online forum meeting held by the Southwest Florida Water Management District violated the Florida Sunshine Law by lasting too long to allow "citizens to determine when a particular issue in which they may be interested [would] be discussed."⁹⁴ In 2007 the Florida Attorney General explained further: "[T]his office continues to have reservations about any proposal for a public meeting which places the burden on the public to constantly monitor [a website] in order to participate meaningfully in the discussion and which extends this burden over the course of days, weeks, or months."⁹⁵

Additionally, many citizens may be unfamiliar with the specific quorum requirements of their state, and even those who are familiar with their state's procedural requirements might not know how to properly apply them to continuing online discussions. Thus, this type of ongoing meeting can cause great confusion for interested readers attempting to distinguish deliberative comments from unofficial comments—again impairing the transparency goal of open meeting laws.

2. *Efficiency*

The use of interactive websites has the potential to harm efficiency as well as transparency. First, public bodies may face a myriad of bureaucratic difficulties attempting to remain compliant with sunshine laws.⁹⁶ Any online activity that constitutes a meeting

93. See *infra* notes 129-31 and accompanying text.

94. Op. Fla. Att'y Gen. No. 2002-32 (2002). The Attorney General did, however, state that a properly noticed meeting contained to a matter of hours and allowing public participation would comply with Sunshine Law requirements. *Id.*

95. Op. Fla. Att'y Gen. 2007 WL 1054632 (2007).

96. See Sherman, *supra* note 1, at 109.

must be properly recorded.⁹⁷ Under current open meeting laws, an approximation of meeting minutes would have to be created.⁹⁸ Clear, comprehensive minutes may be difficult to produce for interactive forum meetings because the temporal element of the various posts would be challenging to capture; therefore, drafters might attempt topical coverage instead. This type of recording could easily obfuscate a public body's discussion of an issue, rendering the record of online forum meetings incomplete.

Public bodies may also face internal organizational challenges to efficiency goals when hosting meetings through interactive websites. If public body members are given legislative approval to host ongoing meetings through online forums, the line between individual posts by public body members and deliberations among a quorum of members may be difficult to draw. Public body members may be unsure when they are participating in official deliberations—with formal action as a potential outcome—versus when they are merely voicing individual viewpoints. One can imagine an in-person meeting, following an online meeting, at which members' conflicting understandings of the content and makeup of official online deliberations causes great confusion. Was a consensus reached on a particular issue? Or did the chain of posts not include a required quorum of the public body? Along these lines, members might be unaware of a fellow member's departure from a discussion. Even if online notifications of arrivals and departures are provided through a website, virtual presence is likely more difficult to monitor than physical presence.⁹⁹ Ultimately, online meetings—meant to modernize the meeting process—could cause administrative and organizational hurdles that hamper efficiency.

3. Public Participation

Although the use of interactive online forums has the potential to harm transparency and efficiency, the practice may boost public participation. The Internet provides an easy way for constituents to access deliberations; interested members of the public may find it

97. See *supra* note 27 and accompanying text.

98. See *supra* note 27 and accompanying text; e.g., MASS. GEN. LAWS ch. 30A, § 22 (2011).

99. See generally Thompson, *supra* note 6, at 424.

more convenient to go online than to attend in-person meetings. Similarly, if online deliberations in an interactive forum extend over days or weeks, members of the public have the opportunity to go online, observe deliberations, and participate in ongoing conversations as their schedules allow. Government actors may find that the interactive nature of online discussion forums would improve their ability to connect meaningfully with an increased number of citizens.¹⁰⁰ Over time, as more members of the public would communicate with their representatives, they might feel empowered to increase their level of involvement generally, in all matters within the jurisdiction of the public body.¹⁰¹

B. Group E-mails and E-mail Forwards

The use of group e-mails and e-mail forwards by public body members carries significant risk of noncompliance with current laws and harms open meeting goals of transparency and public participation, despite increasing public body efficiency.

Although the majority of sunshine laws do not directly address this issue, states differ in their interpretations of when meetings, and subsequently deliberations, occur via e-mail.¹⁰² Hoping to prevent open meeting law violations, the Wisconsin Attorney General advised:

[B]ecause of the absence of judicial guidance on the subject, and because electronic mail creates the risk that it will be used to carry on private debate and discussion on matters that belong at public meetings subject to public scrutiny, the Attorney General's Office strongly discourages the members of every governmental

100. Lidsky, *supra* note 6, at 2002-07 (stating that interactive social media allows government actors to access more citizens, reach a new demographic, build community, eliminate intermediaries, crowdsource, communicate faster, and appear responsive).

101. *See id.* at 2008 ("Social media forums, especially those sponsored by the government, have the potential to advance the First Amendment values of free speech, free association, and the petitioning of government for redress of grievances."); Sherman, *supra* note 1, at 132 ("[C]onstituents value the community that arises from the creation of relationships in civic social networks.").

102. *See* Schaeffer, *supra* note 6, at 770, 783.

body from using electronic mail to communicate about issues within the body's realm of authority.¹⁰³

Although a number of states have merely provided similar cautionary guidance regarding e-mail usage, some state courts have addressed the practice directly in response to situations involving questionable actions by public bodies.

A single e-mail regarding public business between two public body members is unlikely to violate the law. If such an e-mail reaches a quorum of members through forwards, however, it may become an impermissible deliberation.¹⁰⁴ Additionally, in some states, an e-mail among less than a quorum may even be a violation. The Massachusetts Supreme Judicial Court held that e-mails between individual school board members had the effect of circumventing the Open Meeting Law, despite the fact that less than a quorum of the school board actively participated in the e-mail exchange.¹⁰⁵ Under this view, although a physical gathering has not taken place, a portion of the group has deliberated regarding public business outside of a properly noticed open meeting.¹⁰⁶ Similarly, the Louisiana Attorney General warned that, although e-mails exchanged among less than a quorum of a public body technically do not constitute a violation of Louisiana's Open Meetings Law, there is an inherent risk that e-mails will reach a quorum—either through direct sends to multiple group members or through forwards.¹⁰⁷

Conversely, by focusing on the real-time gathering aspect of meetings for the purpose of “simultaneous discussion and deliberation,” practitioners John O'Connor and Michael Baratz argue that e-mails do not constitute meetings and therefore are not subject to

103. WIS. DEP'T OF JUSTICE, ATT'Y GEN. J.B. VAN HOLLEN, WISCONSIN OPEN MEETINGS LAW: A COMPLIANCE GUIDE 8 (2010), available at <http://www.doj.state.wi.us/sites/default/files/dls/open-meetings-law-compliance-guide-2010.pdf>.

104. See Thompson, *supra* note 6, at 425.

105. Dist. Att'y for the N. Dist. v. Sch. Comm. of Wayland, 918 N.E. 2d 796, 803 (2009) (holding that those who merely received e-mails, but did not respond or forward them, counted towards the total number of deliberating members); see also Wood v. Battle Ground Sch. Dist., 27 P.3d 1208, 1217 (Wash. Ct. App. 2001) (holding that an exchange of e-mails can constitute a meeting).

106. See Thompson, *supra* note 6, at 425.

107. Op. La. Att'y Gen. No. 12-0177 (2012).

the requirements of open meeting laws.¹⁰⁸ The Maryland Attorney General took this view in a 1996 ruling; the opinion stated that the exchange of e-mails between a majority of commission members did not constitute a convening subject to the Open Meeting Law because the e-mails were spaced out over the course of days, and therefore never approached “simultaneous interchange.”¹⁰⁹ The Attorney General likened the e-mails to an exchange of written notes, as opposed to a real-time telephone conversation, which would have been subject to Open Meeting Law restrictions.¹¹⁰

The Supreme Court of Virginia also has differentiated between instantaneous electronic communication, such as text messages and chat rooms, and delayed electronic communication, such as e-mail—the functional equivalent of “traditional letters sent by ordinary mail, courier, or facsimile.”¹¹¹ In a 2004 Virginia case, e-mails sent back and forth with hours or days between responses were not sufficiently simultaneous to constitute an improperly closed meeting.¹¹² In a similar 2012 case, the Supreme Court of Virginia held that when e-mails were sent back and forth between public body members with only minutes or hours between responses, the electronic communication still lacked sufficient simultaneity to constitute an improperly closed meeting.¹¹³ Thus, states applying this real-time standard to e-mail correspondence tend to find public bodies in compliance with open meeting laws.

If e-mails among a quorum of a public body are not exempted from meeting status by state law simultaneity requirements, however, they are not likely to comply with existing sunshine laws.¹¹⁴ Discussing the Ohio Open Meeting Law, commentator Mark Thompson notes, “It would be difficult to argue that a meeting through the use of e-mail would comply with the requirements of ... [open meeting laws] because the lack of ‘real-time’ communication

108. O'Connor & Baratz, *supra* note 6, at 758.

109. Opinion No. 96-016, 81 Op. Md. Att'y Gen. 140 (1996).

110. *Id.*

111. Beck v. Shelton, 593 S.E.2d 195, 198 (Va. 2004).

112. *Id.* at 200.

113. Hill v. Fairfax Cnty. Sch. Bd., 727 S.E.2d 75, 79 (Va. 2012).

114. See Thompson, *supra* note 6, at 425.

would make it difficult, if not impossible, to allow the meeting to comply with ... notice and openness requirements.”¹¹⁵

1. Transparency

Setting aside the question of compliance, group e-mails and e-mail forwards clearly harm the open meeting law goal of government transparency by allowing public body members to communicate regarding issues within their jurisdiction away from the public eye. Nebraska’s Public Meetings Statutes specifically proscribe the use of e-mail to circumvent the purposes of the law for this reason.¹¹⁶ In 2004 when the legislature proposed the addition of e-mail usage to the law’s prohibition on circumvention, the Nebraska Attorney General advised that any evidence of intent to misuse e-mail in order to conduct public business behind closed doors would be seen as knowing circumvention of the law.¹¹⁷ This interpretation recognizes the inherently private, unobservable nature of e-mail, which frustrates the open meeting goal of transparency.

2. Public Participation

Additionally, as commentator Stephen Schaeffer notes, “Distributing the records to the public after the fact, electronically or not, hinders public participation and influence and thus frustrates the purposes of the law.”¹¹⁸ Taking this view, the California Attorney General ruled that e-mail deliberations among a majority of board members violated the open meeting law because the public could not “monitor the deliberations as they occur[red].”¹¹⁹ The Attorney General stated that the three actions taken by the board to make the e-mails accessible to the public were insufficient: (1) sending copies of the e-mails to the secretary and chair of the agency; (2) posting the e-mails on the agency website; and (3) reporting the

115. *Id.* at 424; *see also* Fatino, *supra* note 5, at 152, 154, 156-57, 160 (noting that deliberative e-mail usage among public body members is illegal in states with sunshine laws requiring real-time public observation of meetings).

116. NEB. REV. STAT. ANN. § 84-1411(3)(h) (West 2012).

117. Op. Neb. Att’y Gen. No. 04007 (2004).

118. *See* Schaeffer, *supra* note 6, at 784.

119. Op. Cal. Att’y Gen. No. 00-906 (2001).

contents of the e-mails at the agency's next meeting.¹²⁰ These actions all involve after-the-fact reporting, which cannot support public participation in the same way as real-time attendance and observation.¹²¹

3. *Efficiency*

Finally, although public body use of e-mail harms transparency and public participation, it clearly increases efficiency by providing a quick and convenient way for two or more public body members to communicate regarding matters within their jurisdiction.¹²²

C. *Responses to Counterarguments*

This Section will present and respond to counterarguments posed by legal scholars regarding public body utilization of interactive online forums and group e-mails.

Practitioner Bill Sherman argues generally, “[C]ivic social networks, by bringing public officials and constituents into an open public square, foster government transparency and accountability.”¹²³ Mark Thompson also advocates for public body use of interactive forums, specifically those that allow members of the public and public body members to post comments at any time over an extended period.¹²⁴ Sherman asserts that preventing public bodies from utilizing interactive online forums harms the public's ability to hold government actors accountable, largely because communications that would be captured verbatim in online transcripts are otherwise unclearly preserved in meeting minutes.¹²⁵ He believes that the imperfect system of preserving government deliberations in minutes makes corrupt and secretive government behavior less discoverable and, therefore, potentially more problematic.¹²⁶

120. *Id.*

121. See Schaeffer, *supra* note 6, at 786.

122. See O'Connor & Baratz, *supra* note 6, at 722.

123. Sherman, *supra* note 1, at 141.

124. Thompson, *supra* note 6, at 427 (“Although there are challenges in the interpretation and application of the OML to on-line meetings, it would be foolish to neglect the power of on-line communication.”).

125. Sherman, *supra* note 1, at 143.

126. *Id.*

This argument fails to give adequate weight to the fact that improper secret deliberations, away from the public eye, come in many forms and can occur whether interactive online forums are in use or not.¹²⁷ Interactive forums only improve the public's ability to examine public body deliberations *occurring in the forums themselves*; outside deliberations or secretive meetings will not be *more* discoverable simply because interactive online forums exist.¹²⁸

Jessica Natale argues that a complete transcript of online meetings would be simple to reproduce as a form of minutes.¹²⁹ However, deliberative comments may be indistinguishable from unofficial, informal comments, and the conversational format of a transcript could be difficult for readers to parse through.¹³⁰ Additionally, studies have shown that the quality and type of posts common in discussion forums are repetitive, disjointed, and extremely opinionated.¹³¹ Although public opinion should be made known to public bodies, its expression through this medium may be both difficult to record and hard to understand.¹³²

Concededly, public bodies could limit deliberations to specifically scheduled times, when a quorum of members would agree to appear online to discuss jurisdictional matters and allow members of the public to join or view the conversation. Thompson argues that "meeting ... requirements of notice to the public and keeping meeting minutes would not pose a great challenge to a public body that desires to use a bulletin board for [scheduled] meetings."¹³³ This real-time approach would suffer from two difficulties, however. First, meetings are generally led by the chair of the public body, who determines the agenda, the pace of conversation, the amount of time allotted to various issues, and when and how to allow members of the public to participate.¹³⁴ The chair would struggle to

127. *See id.*

128. *Cf.* Harlan Yu & David G. Robinson, *The New Ambiguity of "Open Government,"* 59 *UCLA L. REV. DISCOURSE* 178, 181 (2012) (noting that technology and transparency do not necessarily correlate: a government can be transparent without embracing new technology, and a government can utilize websites to reach citizens without becoming more transparent).

129. Natale, *supra* note 5, at 160.

130. *See supra* Part III.A.1.

131. *See* Sherman, *supra* note 1, at 102.

132. *See supra* Part III.A.1.

133. Thompson, *supra* note 6, at 425.

134. *See, e.g., supra* note 45 and accompanying text.

assert these controls during a scheduled online meeting, as her ability to start and stop discussions could easily be derailed by particularly vocal members of the public.¹³⁵ Additionally, a key component of the attractive convenience of the continuous, ongoing forum conversation is lost in this scenario because people are required to “attend” the meeting at a particular date and time.

O'Connor and Baratz have responded to transparency concerns by arguing that “the public’s interest in overseeing the workings of local government is protected [when public bodies communicate via e-mail] 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.”¹³⁶ Yet, first and foremost, public bodies may utilize e-mails to deliberate outside of public view by simply not producing all applicable e-mails in response to public records requests. Additionally, even if production of all relevant e-mails could be guaranteed, as noted in Part III.B, after-the-fact monitoring is a poor substitute for real-time observation and discourages active public participation.¹³⁷

IV. COMPETING GOALS: BALANCING TRANSPARENCY WITH PUBLIC PARTICIPATION AND EFFICIENCY

The three main goals of open meeting laws unavoidably conflict. Restrictions on public bodies, put in place to promote the primary open meeting purpose of transparency,¹³⁸ may necessarily hamper public participation and efficiency. In practice, this means that public bodies must avoid utilizing technologies that might otherwise be beneficial in order to guarantee public access to government decision making. This Part reviews the necessary sacrifices and valuable gains consequent to this Note’s recommendations.

135. See Schaeffer, *supra* note 6, at 789 (noting these procedural challenges but suggesting that new protocols could be devised).

136. O'Connor & Baratz, *supra* note 6, at 722.

137. See *supra* notes 119-21 and accompanying text.

138. See *supra* notes 31-33 and accompanying text.

A. *Necessary Sacrifices*

This Note's proposals regarding public bodies' utilization of modern technology require certain sacrifices: the goals of public participation and efficiency must bow to the primary open meeting law purpose of transparency.

1. *Public Participation*

The use of interactive online forums, discouraged by this Note, would likely boost public participation:¹³⁹ forums would provide a flexible and convenient way for members of the public to participate in and observe public body deliberations without traveling to observe meetings at a particular time and place.¹⁴⁰ In defense of interactive online forums, Schaeffer argues that "technology should be further embraced so that the public can participate more fully in the public business."¹⁴¹

However, some practices advocated by this Note would boost public participation. Public involvement would likely increase through public body use of noninteractive websites to gather feedback and share information.¹⁴² Additionally, members of the public may be able to attend meetings more easily if satellite meeting sites are created in conjunction with remote participation of public body members.¹⁴³

2. *Efficiency*

The open meeting goal of efficiency is also moderately limited by this Note's proposals. Group e-mails and e-mail forwards would enhance public bodies' ability to conduct business efficiently. By using e-mail public body members could easily share ideas and opinions, propose meeting agendas, approve meeting minutes, and even take formal votes in a manner that would not require the

139. See *supra* notes 100-01 and accompanying text.

140. See Schaeffer, *supra* note 6, at 787.

141. See *id.* at 788.

142. See *supra* notes 71-73 and accompanying text.

143. See *supra* notes 82-84 and accompanying text.

group to convene in one place at the same time.¹⁴⁴ Legal commentators have argued that the increase in efficiency made possible by group e-mails should not be sacrificed for lack of transparency because records of e-mails can be examined after-the-fact by the public.¹⁴⁵ As previously argued, this after-the-fact solution would provide an insufficient substitute for real-time observation and active participation.¹⁴⁶

Interactive online forums might also enhance public bodies' ability to efficiently gather feedback, discuss jurisdictional issues, and decide upon formal courses of action. However, any gains in efficiency would be mitigated by bureaucratic difficulties in creating clear, comprehensive meeting minutes¹⁴⁷ and by the organizational challenges characteristic of online discussion forums.¹⁴⁸

This Note's proposals do, however, promote efficiency in two key ways. First, noninteractive websites would increase efficiency with respect to the dissemination of information and gathering of feedback.¹⁴⁹ Second, remote participation by public body members would also vastly increase public bodies' ability to deliberate and take action by making it easier to assemble a required quorum of voters.¹⁵⁰

B. Valuable Gains

This Note's proposals both safeguard and enhance openness in government practices. Transparency is increased through the use of noninteractive websites to provide information in an easily accessible format to constituents;¹⁵¹ unharmed by the use of noninteractive websites to solicit feedback; and unharmed by the use of remote participation in meetings. Transparency is further preserved by the avoidance of interactive online forums and group e-mail usage.

In-person meetings are effective at protecting transparency because they ensure that deliberations occur in public, and they

144. See *supra* note 122 and accompanying text.

145. See O'Connor & Baratz, *supra* note 6, at 774.

146. See *supra* notes 118-21 and accompanying text.

147. See *supra* notes 98, 131-32 and accompanying text.

148. See Part III.A.2.

149. See *supra* note 74 and accompanying text.

150. See *supra* note 81 and accompanying text.

151. See *supra* notes 68-69 and accompanying text.

may be improved by noninteractive websites and remote participation by public body members.¹⁵² Although interested community members must go out of their way to attend in-person meetings, these meetings provide a valuable opportunity for public bodies to deliberate openly in full view of the public, to facilitate clear and uninterrupted communication among public body members, and to interact with attendees in a planned, controlled environment.

CONCLUSION

Many states demand that open meeting laws be construed liberally in favor of open government.¹⁵³ This approach, in effect, tips the balance of the three often-conflicting open meeting law goals towards the primary goal of transparency. Although modern technology offers attractive possibilities for improved efficiency and increased civic participation in state and local government, technologies should not be used at the expense of transparency. A government that operates quickly and with increased avenues for public involvement can satisfy the spirit of open meeting laws only if it remains accountable to its constituents.

In order to comply with open meeting law requirements and retain necessary levels of transparency, public bodies should limit use of modern technology to the following functions: (1) providing information and soliciting public feedback through noninteractive websites, and (2) enabling remote participation of public body members at meetings. Conversely, public bodies should not utilize interactive online forums or group e-mails; these technologies do not comply with current open meeting law requirements, and legislatures should not make changes to allow for their use. Although more

152. See *supra* notes 68-69, 82-84, 93-95 and accompanying text.

153. The Supreme Court of Arkansas stated:

As a rule, statutes enacted for the public benefit are to be interpreted most favorably to the public.... In the act now before us the General Assembly clearly declared the State's public policy: "It is vital in a democratic society that public business be performed in an open and public manner." We have no hesitation in asserting our conviction that the Freedom of Information Act was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved.

Laman v. McCord, 432 S.W.2d 753, 755 (Ark. 1968); see also *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 494 N.W.2d 408, 414 (Wis. 1993).

permissive statutes might prompt increases in civic participation and government efficiency, these potential improvements must be sacrificed in order to preserve transparency, the primary purpose of open meeting laws.

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