Grosse Ile Taxpayers Association
P.O. Box 234
Grosse Ile, Michigan 48138

January 18, 2022

Paul Anderson, Chairperson & Commissioner
Michael Jurecki, Township Board Liaison & Commissioner
Scott Longton, Commissioner
Erik Ranka, Commissioner
Jeffrey Hubbard, Commissioner
Grosse Ile Township Police Commission
9601 Groh Road
Grosse Ile, MI 48138

Sent via e-mail & fax at (734) 692-9693

Re: Concerns about Township Supervisor Jim Budny's "committee" violating the Michigan Open Meetings Act & deviation from strict adherence to Grosse Ile Municipal Code Section 67.10

Dear Police Commissioners:

This letter to inform the Township Police Commission that the Grosse Ile Taxpayers Association (GITA), a community non-profit organization, has retain Attorney Frank Cusumano, Jr. to formulate independent legal opinions about the Township's ongoing actions to hire a new permanent Grosse Ile Police Department (GIPD) Chief, and evaluate possible violations of the Michigan Open Meetings Act, MCL 15.261 et seq. (OMA). The GITA was established in 2020 to support ethical, responsive and effective government plus advocate sound public policy that benefits the long-term best interests of Islanders.

The GITA sought Mr. Cusumano's legal counsel because the organization has serious concerns about the fairness, transparency and efficacy of the Township's current hiring process for the GIPD Chief under the control of Supervisor Budny. In particular, the GITA is troubled by Supervisor Budny's plan to use a "committee" he unilaterally established in November of 2021 to conduct hiring interviews for GIPD Chief applicants in private meetings (see attached Supervisor Budny's e-mail from November 23, 2021).

Mr. Cusumano believes this action would be a violation of the Michigan OMA as well as not strictly comply with Grosse Ile Municipal Code Section 67.10. Violations of the Michigan OMA could result in Circuit Court nullification of any decision made by a public body (MCL 15.270). He also maintains the opinion that a willful violation of the Michigan OMA by a Township official could result in he or she being subjected to litigation to determine possible civil liability. I have enclosed a copy of Mr. Cusumano's letter dated January 11, 2022 that he sent to the Township Board Members, Township Manager and Township Attorney to inform them of his legal analysis about this matter.

As a result, I strongly urge the Police Commissioners to consider the ramifications of acting on any reviews or recommendations produced by Supervisor Budny's "committee" if it privately meets as planned in violation of the Michigan OMA. The GITA commends the Police Commission's commitment to conducting all hiring interviews of GIPD Chief applicants in public meetings broadcast on the Township's main communications platforms (GI-TV, YouTube and Facebook Live).

The GIPD Chief is one of the most important, and powerful, positions in Township government, and the GITA thinks that citizens have the right to witness and understand how the hiring of this leader is conducted.

Moreover, the GITA firmly believes that the Police Commission's strict adherence to Township Ordinance Section 67.10 during approximately the last 50 years has greatly helped to ensure that the most qualified professionals have been hired for GIPD Chief by the Township Board.

Since 1974, the Township Board has approved the hiring of every GIPD Chief recommended by the Police Commission under the authority of Township Ordinance Section 67.10: Pat Lyons, 1974; Maurice Stevens, 1992; Bill Barron, 1996; and Joe Porcarelli, 2009. After being hired, these GIPD Chiefs served for an average of 10 years while achieving outstanding results.

We applaud the Commissioners for volunteering your time and effort to provide critically important guidance and oversight for the GIPD. No group of citizens on Grosse Ile has a better understanding of the GIPD than the Police Commission. We truly appreciate all you do to keep Grosse Ile one of the safest communities in Michigan.

Thank you for your consideration. If you have any questions about this matter, I would be pleased to answer them. I can be reached by e-mail at gitaxpayers@gmail.com.

Sincerely,

Greg Karmazin
Executive Director
Grosse Ile Taxpayers Association

Enclosures (2)

cc: Bob Zelasko, President, GICA
Kathy Walker, Vice President, GICA
Kevin Flavin, Secretary, GICA
Mark Lane, Board Member, GICA

Derek Thiel

From: Ranka, Erik <ERanka@camacollc.com>
Sent: Tuesday, November 23, 2021 11:42 AM
To: James Budny; paul anderson; Scott Longton; JEFF HUBBARD; Carl Bloetscher; David Nadeau; Jamison Yager; Joe Porcarelli; Mike Jurecki; Ute O'Connor
Cc: Derek Thiel
Subject: RE: Upcoming Job to Fill

Jim,

Thank you for clarifying the process and keeping the commission involved!

Erik

From: James Budny <jbudny@grosseile.com>
Sent: Tuesday, November 23, 2021 11:13 AM
To: paul anderson <muddycuddy@yahoo.com>; Scott Longton <attorney.sjlongton@gmail.com>; JEFF HUBBARD <jhubbard717@yahoo.com>; Ranka, Erik <ERanka@camacollc.com>; Carl Bloetscher <cbloetscher@grosseile.com>; David Nadeau <DNadeau@grosseile.com>; James Budny <jbudny@grosseile.com>; Jamison Yager <JYager@grosseile.com>; Joe Porcarelli <joeporcarelli@grosseile.com>; Mike Jurecki <MJurecki@grosseile.com>; Ute O'Connor <uoconnor@grosseile.com>
Cc: James Budny <jbudny@grosseile.com>; Derek Thiel <derekt@grosseile.com>
Subject: Upcoming Job to Fill

As most of you know the Police Chief job announcement ends this Friday (11/26/2021). We have a number of applicants which is great for us.

We all want this process to be as simple and fair as possible. With that in mind this will be the process that we follow.

Derek and his committee(review committee) will vet the applicants and do the interviews. They will put forth a candidate to the Police Commission for their recommendation.
Then the Review Committee candidate and Police Commission's recommendation will come to the Board as an action item.

This will make the process very clean, simple and fair with all parties doing their part. No one is being left out.

Thanks for everyone's help in this matter.

James C. Budny
Supervisor
Grosse Ile Township

Frank A. Cusumano, Jr.
16188 Jenny Drive
Macomb, MI. 48042
586-453-4084
586-722-2072
cusumanolaw@gmail.com

FAX

To: Grosse Ile. Board of Trustees
c/o Supervisor James Budny
9601 Groh Rd.
Grosse Ile, MI. 48138

P: (734) 676-4422 Ext. 215
F: (734) 692-9693
e-Mail: jbudny@grosseile.com

Fax: (734) 692-9693

Date: 1/11/2022

Re: Selection Process of Grosse Ile Township Police Chief Violates the Michigan Open Meetings Act, MCL 15.261 et seq.

From: Frank A. Cusumano, Jr.

Fax: 586-722-2072

Phone: 586-453-4084

Cc: Grosse Ile Taxpayers Association

Comments: Please confirm Receipt

Pages: 13 (including this cover page).

- [X] Urgent
- [X] For Review
- [ ] Please Comment
- [ ] Please Reply
- [ ] Please Recycle

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(586) 453-4084
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VIA TELEFAX & EMAIL
(734) 692-9693

January 11, 2022

Grosse Ile Township Board of Trustees
c/o Supervisor James Budny
9601 Groh Rd.
Grosse Ile, MI 48138

RE: Selection Process of Grosse Ile Township Police Chief Violates the Michigan Open Meetings Act, MCL 15.261 et seq.

Dear Sirs and Madame Clerk:

My legal services have been retained by the Grosse Ile Taxpayers Association (GITA), a community non-profit organization, to formulate a legal opinion about the Township's ongoing actions to hire a new permanent Grosse Ile Township (Township") Police Chief and evaluate possible violations of the Michigan Open Meetings Act, MCL 15.261 et seq. (OMA). The GITA was established in 2020 to support ethical, responsive and effective government plus advocate sound public policy that benefits the long-term best interests of Islanders.

The GITA sought my legal counsel because the organization has serious concerns about the fairness, transparency and efficacy of the Township's current hiring process for the Township Police Chief. In particular, the GITA is troubled by the Township's apparent lack of strict compliance with Grosse Ile Municipal Code Section 67.10 and OMA. Violations of OMA could result in nullification of any decision by a circuit court. MCL 15.270.

This correspondence serves to give formal notice and apprise the Township and its general counsel that the selection process of the Township Chief of Police is legally flawed in its current incarnation and is, in fact, a violation of OMA and its notice provisions. Specifically, the "decision," as defined at MCL 15.262(d), leading up to the selection of the future Township Police Chief, including the interview of applicants, cannot be delegated to sub-quorum individuals, committees and/or sub-committees

without those meetings/deliberations being conducted in noticed and open public meetings.

The primary purpose of this letter is to encourage compliance with the OMA requirements and assumes the public officials involved are acting in good faith and are mistakenly believing that their actions are lawful. An ancillary purpose is to discourage OMA non-compliance by establishing actual notice of the factual/legal basis supporting the ongoing OMA violation(s). Therefore, should litigation be necessary to impose civil liability against Township officials under the OMA it will be advanced before the circuit court judge that non-compliance is/was *intentional*. MCL 15.273(1). It is anticipated that the public officials involved will be hard pressed to argue "we did not know" of the OMA violation(s) or "we acted in good faith" where this letter exists and will be made an exhibit to the pleadings. Indeed, the Supervisor James Budny has stated on the Township website that it is the Supervisor's mission," [t]o execute all statutory and assigned responsibilities to the utmost of my ability…" That includes the OMA. https://www.grosseile.com/government/supervisor/index.php (accessed 01/11/2022).

§ 13 of the OMA

In *Spalding v. Swiacki*, ____ Mich App. ____; ____N.W.2d (Docket No. 354598, issued July 8, 2021), slip op., the Michigan Court of Appeals explained that § 13 of the OMA "imposes liability on a public official for violating the OMA, but only if the violation is *intentional*, MCL 15.273(1). Thus, rather than focus on the impact of the violation, the civil-liability provision focuses on the *state of mind of the public official.* This has the practical effect of imposing civil liability on those public officials who *intentionally flout the OMA* but excusing from civil liability those public officials who act in good faith but inadvertently or mistakenly violate the act. On this reading, it does not matter whether compliance was substantial or not, whether the violation was a material or technical one—rather, the focus is on the public official's state of mind." Emphasis added. *Spalding, supra* at p. 6, is attached as Exhibit A.

§3 of the OMA

The OMA provides that "[a]ll meetings of a public body must be open to the public and must be held in a place available to the general public," MCL 15.263(1), and that "[a]ll decisions of a public body must be made at a meeting open to the public," MCL 15.263(2),

Booth Newspapers, Inc. v. University of Michigan Board of Regents

The Michigan Supreme Court ruled in 1993 that "a key determination of the OMA's applicability is whether the body in question exercises governmental or proprietary authority." *Booth Newspapers, Inc. v. University of Michigan Board of Regents*, 444 Mich. 211, 226; 507 N.W.2d 422 (1993). The Court interpreted the applicability of the OMA, in an analogous situation to hiring the Grosse Ile Township Police Chief. It was,

simply, "one of the board's most important exercises of governmental authority." *Id.*, p. 225. The "selection of a public university president constitutes the *exercise of governmental authority*, regardless of whether such authority was exercised by [an individual Board member], the nominating committee, the full board, or even subcommittees. Accordingly, this individual or these entities *must be deemed 'public bodies' within the scope of the OMA.* Having established the 'public' nature of these bodies, we must now examine the precise actions taken by them and their disposition under the OMA." Emphasis added. *Booth, supra.*

Nor is a less than quorum committee or sub-committee a legal excuse for failing to conduct the "public business" of awarding high level public employment such as a Township Police Chief.

> While a committee or subcommittee of a public body which constitutes less than quorum of the public body, and is purely advisory in nature, is not subject to the Open Meetings Act, *** a public body which divides itself into subcommittees of less than quorum to collectively deliberate towards the resolution of public business, is in fact, acting as a 'public body'. A public body may not avoid violating the Act by clothing itself as a sham advisory committee or subcommittee of less than a quorum.

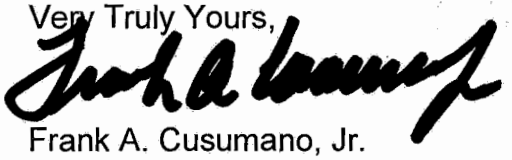
OAG 5788 (09/23/80).

Add to that, there is a Township ordinance, Grosse Ile Municipal Code Section 67.10, delegating a review and recommendation process to the Township Police Commission ("Commission"). The Commission is charged with the vetting and selection of the prospective Police Chief. The Commission is also considered a "public body" and historically has complied with the OMA to the extent that the Township Administration has understood the Act. Changing the hiring procedure is a prerogative of the elected Township Board but must be done by a recorded vote held during a properly noticed and held public meeting. While the Board could vote to amend Ordinance 67.10, the fact is that it has not done so. The "decision" to ignore the ordinance is also a violation of the OMA. Restructuring the "decision" process to avoid the OMA requirements that the process be open to the public is still controlled by settled state law under *Booth* and OAG 5788. Additionally, the offending process prejudices the public by denying its members an opportunity to make public comment on the applicants, their qualifications and the objection to the abrogation of the ordinance.

It is advanced that the ordinance and past practice by the Commission is overwhelming evidence that shows the Township has previously acknowledged that the culling of applicants for the position of Township Police Chief is an exercise of governmental authority and subject to the OMA despite being delegated to the non-Board Commission.

Thank you for your consideration of this matter. I remain,

Very Truly Yours,



Frank A. Cusumano, Jr.
Attorney at Law

Enclosure: *Spalding v. Swiacki*, ____ Mich App. ____ (2021)

cc:

Name	Email Address
Supervisor James Budny	jbudny@grosseile.com
Treasurer David Nadeau	dnadeau@grosseile.com
Clerk Ute O'Connor	uoconnor@grosseile.com
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Trustee Mike Jurecki	mjurecki@grosseile.com
Trustee Joe Porcarelli	joeporcarelli@grosseile.com
Trustee Jamison Yager	jyager@grosseile.com
Twp. Mgr. Derek Thiel	derekt@grosseile.com
Twp. Attorney T. Esordi	esordilaw@gmail.com

EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

ROBIN SPALDING and JOHN PATEREK,

Plaintiffs-Appellants,

v

MARY K. SWIACKI, CAMILLE FINLAY, JIM GOETZINGER, and STEVE NIKKEL,

Defendants-Appellees.

FOR PUBLICATION
July 8, 2021
9:05 a.m.

No. 354598
Macomb Circuit Court
LC No. 2020-000980-CZ

Before: K. F. KELLY, P.J., and SHAPIRO and SWARTZLE, JJ.

SWARTZLE, J.

With its enactment in 1976 of the Open Meetings Act (OMA), MCL 15.261 *et seq.*, our Legislature required that meetings of public bodies occur in the open. The accountability that comes with openness would be thwarted, however, if the public was not timely made aware of a meeting or if there was no penalty for violating the act. When the public is not sufficiently notified of a meeting, our Legislature has provided for several types of relief—invalidation of policies approved during that meeting, injunctive relief against future violations, and civil and criminal penalties against public officials. Different standards apply to different types of relief, as our case law has long recognized.

This case arises from defendants' decision to proceed with a meeting of the Armada Township Board of Trustees despite the board's failure to post timely notice of the meeting on the township's website. Although the board substantially complied with the notice requirements by, among other things, physically posting notice in the township's office and posting the notice to the website several hours before the meeting, there is no question that it did not strictly comply with the OMA's notice provisions. When a person brings a claim for statutory damages, that claim is not defeated by a showing of substantial compliance. As we explain, the trial court erred in this respect and we reverse.

I. BACKGROUND

Plaintiff John Paterek is the township supervisor, and plaintiff Robin Spalding is Paterek's deputy. Defendant Mary K. Swiacki is the township clerk, defendant Camille Finlay is the

township treasurer, and defendants Jim Goetzinger and Steve Nikkel are township trustees. In December 2019, the township board decided to schedule several budget workshops throughout 2020. The workshops were not "meetings" under the OMA, and no votes were planned to be taken during them. On December 18, the township posted its annual-meeting schedule on its website; the schedule included a budget workshop set for January 21, 2020, at 7 p.m. In early January 2020, the board added agenda items to the workshop, including items for which votes would be taken, and therefore the January 21 budget workshop became a "special meeting" that fell within the scope of the OMA.

Among other requirements, the OMA requires that public notice of a special meeting must be physically posted at least 18 hours before the meeting and, if the body maintains an official website, then public notice must similarly be made on that website 18 hours before the meeting. MCL 15.265(4). It is undisputed that a physical copy of the meeting agenda was posted outside the township's office on January 16, but notice was not posted on the township's website until 11:50 a.m. on January 21.

Several hours before the meeting, Paterek emailed the other board members stating that the January 21 meeting should be rescheduled because the board had not posted timely public notice on the website. Swiacki consulted a staff member of the Michigan Townships Association; according to Swiacki, the staff member advised that the board could proceed with the January 21 meeting. When the board convened later that day, Paterek again voiced his concern about the untimely notice. He informed the other board members that he would not participate in the meeting, and he moved to a seat in the audience along with other members of the public. The remaining board members proceeded with the meeting during which they deliberated and took votes on several matters.

Plaintiffs subsequently sued defendants, alleging that defendants violated the public-notice requirements of the OMA. Plaintiffs did not seek to invalidate any decision made during the January 18 meeting or enjoin future noncompliance, but rather sought statutory damages, costs, and attorney fees against defendants under MCL 15.273(1). Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that they had substantially complied with the OMA's notice requirements. For their part, plaintiffs also moved for summary disposition under MCR 2.116(I)(2).

The trial court concluded that defendants had violated the OMA by failing to provide timely notice on the website, but the violation was merely a "technical" one. The trial court held that defendants had substantially complied with the OMA's notice requirements, and therefore granted summary disposition in defendants' favor.

This appeal followed.

II. ANALYSIS

The question on appeal is a narrow, legal one—Is a public body's substantial compliance with the OMA's public-notice requirements in MCL 15.265 sufficient to defeat a claim for statutory relief under MCL 15.273? As we explain, it is not.

A. STANDARD OF REVIEW

"A trial court's grant or denial of summary dismissal is reviewed de novo by this Court." *Lantz v Southfield City Clerk*, 245 Mich App 621, 625; 628 NW2d 583 (2001). Similarly, we review de novo questions of statutory interpretation. *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010). When reviewing a statute, "we are required to give effect to the Legislature's intent." *Bartalsky v Osborn*, __ Mich App __, __; __ NW2d __ (2021), slip op at 3 (cleaned up). "The Legislature is presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms." *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018) (citation omitted).

B. PUBLIC NOTICE AND CIVIL LIABILITY UNDER THE OMA

The parties do not dispute that the January 21 special meeting was a covered "meeting" of a "public body" involving deliberations about public policy. MCL 15.262(a),(b). Thus, the meeting was subject to the provisions of the OMA, including those requiring public notice. MCL 15.265. With respect to notice, the OMA provides in relevant part:

> (1) A meeting of a public body shall not be held unless public notice is given as provided in this section by a person designated by the public body.
>
> * * *
>
> (4) Except as provided in this subsection or in subsection (6), for a rescheduled regular or a special meeting of a public body, a public notice stating the date, time, and place of the meeting shall be posted *at least 18 hours before the meeting* in a prominent and conspicuous place at both the public body's principal office *and, if the public body directly or indirectly maintains an official internet presence that includes monthly or more frequent updates of public meeting agendas or minutes, on a portion of the website that is fully accessible to the public*. . . . [MCL 15.265 (emphasis added).]

The OMA sets forth several different remedies for violations of its provisions, including civil liability for public officials. With respect to plaintiffs' claims here, "[a] public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees." MCL 15.273(1). Although a person can join an action for statutory damages, costs, and fees with an action for injunctive or exemplary relief, MCL 15.273(3), plaintiffs in this case chose to pursue only the former statutory relief.

C. *ARNOLD TRANSIT*, *NICHOLAS*, AND *LEEMREIS*

The record is clear that defendants did not post the proper public notice on the township's website at least 18 hours before the January 21 special meeting. Although defendants point out that its 2020 workshop schedule had been posted weeks before the January 21 special meeting, that schedule did not notify the public that the board would be holding a meeting on January 21 during which votes would be taken. With that said, the record is equally clear that proper notice

was physically posted in the township's office; notice via the township's website of the workshop at least alerted the public that budget matters would be discussed on January 21; notice of the meeting was posted on the website approximately seven hours before the meeting started; and members of the public were in attendance at the meeting. Based on our review of the record, we agree with the trial court that there is no genuine issue of material fact that the board failed to comply strictly with the OMA's public-notice provision, but that it did comply substantially with the provision.

Defendants argue that this conclusion is fatal to plaintiffs' claim for statutory damages, court costs, and attorney fees, pointing to this Court's holdings in *Arnold Transit Co v City of Mackinac Island*, 99 Mich App 266; 297 NW2d 904 (1980),[1] and *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525; 609 NW2d 574 (2000), abrogated on other grounds by *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125; 860 NW2d 51 (2014). In arguing this, however, defendants fail to distinguish between the various types of relief available under the OMA.

As explained by this Court in *Leemreis v Sherman Twp*, 273 Mich App 691, 700; 731 NW2d 787 (2007), there are "three distinct types of relief" under the OMA (excluding a criminal action). First, a person can seek to invalidate a decision of the public body made in violation of the OMA. MCL 15.270(2). Second, a person can seek an injunction against a public body to compel compliance or enjoin further noncompliance with the OMA. MCL 15.271(1). And third, a person can seek statutory damages, court costs, and attorney fees against a public official for an intentional violation of the OMA, as noted earlier. MCL 15.273(1); see also *Speicher*, 497 Mich at 135-136; *Citizens for a Better Algonac Co Schs v Algona Co Schs*, 317 Mich App 171, 181; 894 NW2d 645 (2016). As this Court observed in *Leemreis*, "None of these sections refers to either of the other sections. Reading the OMA as a whole, it appears that these sections, and the distinct kinds of relief that they provide, stand alone." *Leemreis*, 273 Mich App at 701. Our Supreme Court later reinforced this point in *Speicher*, quoting *Leemreis* and adding, "When a statute, like the OMA, gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only." *Speicher*, 497 Mich at 136. Thus, it is critical to keep in mind the specific type of relief sought under the OMA when considering whether a person has met the applicable standard for that relief.

In *Arnold Transit*, for instance, the plaintiffs sought invalidation of the defendant city's ferry-boats code. The plaintiffs argued that, when adopting the code, the city violated the OMA's public-notice provisions and, in accordance with MCL 15.270(2), the code should be invalidated. *Arnold Transit*, 99 Mich App at 268. This Court agreed with the plaintiffs that the city violated the "technical requirements" of the OMA by, among other things, failing to post public notice at

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[1] *Arnold Transit* was released in 1980 and, although we are not required to follow the rule of law established in a published opinion of this Court issued before November 1, 1990, MCR 7.215(J)(1), we are bound by our Supreme Court's opinion affirming the decision, *Arnold Transit Co v City of Mackinac Island*, 415 Mich 362, 363; 329 NW2d 712 (1982) ("After full consideration of the record, briefs, and argument of the parties, we are not persuaded of any error in the disposition of this matter by the Court of Appeals, 99 Mich App 266, 297 NW2d 904.").

least 18 hours before the meeting. *Id.* at 274. The Court went on to conclude, however, that there was not "any desire by defendant to conduct its meeting out of public sight or that it in fact did so." *Id.* Because the OMA was a then-relatively new act, the Court looked to the Texas Court of Appeals for guidance on public notice:

> Even though provisions of the statute are mandatory, we hold that the "notice" provisions of the statute are subject to the substantial compliance rule. The rationale of the substantial compliance rule is that while the notice provisions in statutes are mandatory, they are essentially procedural; that rigid adherence to such a procedural mandate will not be required if it is clear that a substantial compliance provides realistic fulfillment of the purpose for which the mandate was incorporated in the statute. [*Id.* at 275, quoting *Stelzer v Huddleston*, 526 SW2d 710, 713 (Tex Civ App, 1975).]

The Court held that the city had substantially complied with the OMA's public-notice provisions and, because of this, the trial court did not err by refusing to invalidate the code. *Id.* at 275-276.

Our Court had occasion to consider a similar dispute involving public notice in *Nicholas.* In that case, the plaintiffs sought to invalidate several decisions made by the township board during a meeting that had not been adequately noticed. *Nicholas*, 239 Mich App at 527. The plaintiffs also sought injunctive relief. After reviewing the record, this Court agreed with the trial court that defendants had violated the OMA. *Id.* at 532. Citing *Arnold Transit*, the Court further concluded that there was substantial compliance with the public-notice provisions and the rights of the public were not impaired. *Id.* at 532-533. Given this, the Court affirmed the trial court's judgment denying invalidation of the township board's decisions or any injunctive relief. *Id.* at 533-534.

Importantly for the present case, however, neither *Arnold Transit* nor *Nicholas* involved a claim for statutory damages under MCL 15.273(1). Because our case law requires that we focus on the distinct claim being made when determining the appropriate standard to apply, we turn to the text of MCL 15.273(1) itself and the context of the OMA as a whole.

D. TEXT AND CONTEXT

The Legislature explained in the preamble that it enacted the OMA to ensure that meetings of public bodies would be open to the public. 1976 PA 267. To ensure this openness, the Legislature provided for, among other things, public notice in advance of meetings and various separate types of relief for violations of the OMA, including invalidation of decisions, injunctions, and damages. *Id.*; MCL 15.265; MCL 15.270; MCL 15.271; MCL 15.273.

With regard to enforcement, the Legislature set forth different standards for the different forms of relief. For example, to invalidate a public body's decision, a plaintiff must show that the public body violated either: (a) the provisions of MCL 15.263(1), (2), or (3) that require that a meeting be "open" to the public; or (b) the public-notice provisions of MCL 15.265, but only if the deficient notice actually interfered with the public body's "substantial compliance" with respect to the openness requirements of MCL 15.263(1), (2), or (3). MCL 15.270(2). Additionally, a plaintiff must further show "that the noncompliance or failure has impaired the rights of the public" under the OMA. *Id.* The explicit "substantial compliance" measure for public-notice

violations, coupled with the need to show that the rights of the public were actually impaired, set a high bar for invalidating a public body's decision based solely on a defect in notice. This high bar makes sense, as invalidation of a public body's decision would impact everyone who is subject to that decision, not just the parties to the lawsuit, and thus invalidation should not occur unless the rights of the public were actually impaired.

The OMA's civil-liability provision also sets a high bar, but in a different way. In contrast to the decision-invalidation provision, which explicitly references "substantial compliance," MCL 15.270(2), the civil-liability provision makes no reference to "substantial compliance" and instead imposes liability on a public official for violating the OMA, but only if the violation is intentional, MCL 15.273(1). Thus, rather than focus on the impact of the violation, the civil-liability provision focuses on the state of mind of the public official. This has the practical effect of imposing civil liability on those public officials who intentionally flout the OMA, but excusing from civil liability those public officials who act in good faith but inadvertently or mistakenly violate the act. On this reading, it does not matter whether compliance was substantial or not, whether the violation was a material or technical one—rather, the focus is on the public official's state of mind.

In addition to the plain language of the civil-liability provision itself, this reading finds further contextual support in the OMA. As already pointed out, the decision-invalidation provision explicitly sets a "substantial compliance" measure with respect to a public-notice violation. MCL 15.270(2). Nowhere else in the OMA does the Legislature require a plaintiff to show that a violation "interfered with substantial compliance" of the act. Where the Legislature expressly sets a particular standard in one section of a statute but not in another, we presume that the Legislature intended for different standards to apply to the different sections—i.e., the Legislature's word choice was intentional. See *Bianchi v Auto Club of Mich*, 437 Mich 65, 72; 467 NW2d 17 (1991) (applying the legal maxim, "expressio unius est exclusio alterius").

In this respect, our reading of the OMA is similar to our Supreme Court's reading of the election code in *Stand Up for Democracy v Secretary of State*, 492 Mich 588; 822 NW2d 159 (2012). In that case, the Court considered whether a referendum petition complied with the requirement of the election code that " 'the heading of each part of the petition *shall be* prepared in the following form and printed in capital letters in *14-point boldfaced type*.' " *Id.* at 601 (quoting MCL 168.482(2) (note: the statute has since been amended to replace "shall" with "must," 2018 PA 608)). The referendum at issue was submitted in typeface that was smaller than 14-point. *Id.* at 596-597. The Court rejected the plaintiff's argument that substantial compliance with the typeface requirement was sufficient. The Court observed "that the Legislature knows how to construct language specifically permitting substantial compliance with regard to form and content requirements" of a referendum, *id.* at 601; the Court, in fact, pointed to an instance where the Legislature did precisely that, *id.* at 603. In the Court's view, the Legislature's use of the term "shall" indicated "a mandatory and imperative directive" that required strict, not substantial, compliance with the typeface provision. *Id.* at 601 (cleaned up).

III. CONCLUSION

Our case law stresses the importance of focusing on the particular type of relief sought for violation of the OMA. *Arnold Transit* and *Nicholas* held that a public body's decision will not be invalidated or injunctive relief imposed for a public-notice violation as long as the public body

substantially complied with the OMA. And yet, neither *Arnold Transit* nor *Nicholas* involved a claim for statutory damages against a public official. Our review of the text and context of the civil-liability provision of MCL 15.273 confirms that the substantial-compliance standard does not apply to a claim for statutory damages, court costs, and attorney fees under the OMA.

The trial court erred in granting summary disposition to defendants on this ground. Because the trial court did not reach the question of whether defendants intentionally violated the OMA, we decline to reach the question for the first time on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro

TRANSMISSION VERIFICATION REPORT

TIME : 01/12/2022 00:56

DATE,TIME	01/12 00:50
FAX NO./NAME	17346929693
DURATION	00:05:37
PAGE(S)	13
RESULT	OK
MODE	STANDARD ECM

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 5788

September 23, 1980

PUBLIC BODY:

Reports of committees or subcommittees of a public body

PUBLIC MEETINGS:

Meeting of a public body to deliberate the filling of vacancy in public office by dividing into two subcommittees

When either a committee comprising a quorum of a public body or subcommittees of a public body which constructively constitute a quorum of the public body collectively deliberate on or render decisions on the appointment of a person to fill a vacancy in a public office in a closed session, failure to open such meetings to the public is a violation of the Open Meetings Act.

Committees or subcommittees of a public body should provide the public body with data supporting its recommendation.

Honorable Edward C. Pierce

State Senator

The Capitol

Lansing, Michigan 48909

You have asked for my opinion concerning a public body conducting meetings in closed session for purposes not mentioned in section 8 of the Open Meetings Act, 1976 PA 267; MCLA 15.268; MSA 4.1800(18). It appears that an eight-person public body held a meeting closed to the public to discuss two candidates for a vacancy in a public office to be appointed by the public body. Initially, two subcommittees composed of two members of the public body were appointed by the public body to interview one candidate each for the position. When the interviews were completed, all eight members of the public body met in one location in a room that had a divider which could be drawn across the room to make two rooms. The public body then divided itself into two four-person committees and met in the two rooms in the same building. One subcommittee member of each of the two interviewing subcommittees was part of each of the four-person committees. Following the discussion of the candidate interviews with the particular four-person group, the two interviewing subcommittee members in room 'A' then went to room 'B' and the two interviewing subcommittee members in room 'B' went to room 'A' where the discussion of the two candidates was continued and a consensus on the candidate was reached. Thereafter, a public meeting was held to approve the appointment.

Based upon the above factual situation, you have requested my opinion on two questions which may be phrased as follows:

> 1. May a public body avoid the requirements of the Open Meetings Act by dividing itself into two or more committees of less than quorum to collectively deliberate toward the resolution of public business which does not fall within the exemptions of section 8 of the Open Meetings Act?
>
> 2. What requirements exist with respect to reporting to the entire public body the deliberations and decisions of the committee or subcommittees?

In OAG, 1977-1978, No 5183, (Part II, No 25), p 40 (March 8, 1977), the question of whether committees and subcommittees having less than quorum of a public body were exempt from the provisions of the Open Meetings Act, 1976 PA 267; MCLA 15.261 et seq; MSA 4.1800(11) et seq was addressed and the opinion concluded:

> '. . . Based on the wording of the enacted version of the Act and the intent of the Legislature as indicated by the changes from the original form, it is my opinion that the Act does not apply to committees and subcommittees of the public bodies which are merely advisory or only capable of making 'recommendations concerning the exercise of governmental authority.' These bodies are not legally capable of rendering a 'final decision'. In other words, a subcommittee which can only make recommendations to the public body for final decision is not required to hold its committee meetings in public hearings. I do believe, however, that where such subcommittee contains the entire body of the 'public body' which it serves, it would be a violation of the Act to allow such subcommittees to meet in the closed session. The probable result of such meeting would be the presentation to the public meeting of a fait accompli and this is to be avoided. Members of the public must be given the opportunity to be present so that they may observe the manner in which public bodies transact public business. Haven v City of Troy, supra, [39 Mich App 219; 197 NW2d 496 (1972)], and Alder v City Council of Culver City, 184 Cal App 2d 763; 7 Cal Rptr 805 (1960).' [Emphasis added.]

The rationale of that opinion applies to the factual situation under consideration. While a committee or subcommittee of a public body which constitutes less than quorum of the public body, and is purely advisory in nature, is not subject to the Open Meetings Act, supra, a a public body which divides itself into subcommittees of less than quorum to collectively deliberate towards the resolution of public business, is in fact, acting as a 'public body'. A public body may not avoid violating the Act by clothing itself as a sham advisory committee or subcommittee of less than a quorum. In Jones v Tanzler, 238 So 2d 91, 92-93 (Fla, 1970), the Florida Supreme Court stated:

> 'One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their intentions, these specified boards or commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations where decisions affecting the public are being made.
>
> '. . . It is elementary that the officials cannot do indirectly what they are prevented from doing directly.'

In State ex rel Lynch v Conta, 71 Wis 2d 662; 239 NW2d 313, 331 (1976), the Wisconsin Supreme Court considered whether a private conference meeting of less than a quorum of the members of the public body was, in reality, a meeting of the public body so as to violate the Open Meetings Act, and underscored the possible evasions of the Open Meetings Act:

> '. . . It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement in acquiesance to other members sufficient to reach a quorum. Such elaborate arrangements, if factually discovered, are an available target for the prosecutor under the simple quorum rule.' [Emphasis added.]

The Michigan Court of Appeals, in Arnold Transit Co, et al v The City of Mackinac Island, ---- Mich App ----; ---- NW2d ---- (decided August 11, 1980), made a similar observation as to the potential for evasion of the Open Meetings Act, supra, where public officials attempted to justify a meeting of a public body by calling it a meeting of a 'committee of committees.'

The Court noted that:

> '. . . To permit this, however, would make it too easy for a public body to avoid the act by conveniently labelling its meetings 'committee of committees'.'

Factual situations similar to the one posed in your inquiry have been held to be a violation of the Open Meetings Act. OAG, No 5183, supra, (Part II, No 8), p 32, concluded that phone call conference meetings are prohibited because the purpose of the Act is to provide members of the public the opportunity to be present so that they can observe the manner in which the public bodies transact business. This same reasoning was applied in OAG, 1977-1978, No 5222, p 216 (Sept 1, 1977), to prohibit 'round-robining' of bills in legislative committees. 'Round-robining' is the term given to the practice of having one member of the committee go to individual members for their signatures on a vote tally sheet in order to vote out a bill without holding a meeting open to the public to consider the bill.

In addition to requiring that all decisions of a public body as to the appointment of persons to fill vacancies in public office be made at a meeting open to the public, the Open Meetings Act, supra, Sec. 8(3), requires that '[a]ll deliberations of a public body constituting quorum of its members shall take place at a meeting open to the public. . . .'

Therefore, in response to your first question, it is my opinion that the Open Meetings Act, supra, is violated when a committee comprised of quorum of the public body, or subcommittees of a public body, which constructively constitute a quorum of the public body, collectively deliberate on or render decisions on public policy in a closed session on matters which do not fall within the provisions of the Open Meetings Act, supra, Sec. 8, allowing a closed meeting. The fact that these committees are physicially separated while they deliberate on public business does not insulate them from the requirements of the Open Meetings Act, supra.

You also inquire whether the Open Meetings Act, supra, imposes any restrictions or reporting requirements on advisory committees or subcommittees of less than a quorum. In a letter opinion to Senator Joseph Snyder, dated February 22, 1978, it is stated:

> 'In order to effectuate the clear purpose of the Open Meetings Act, which is to allow the public to view the manner in which the public officials conduct the business of government, it is clear that a portion of the meeting where the public officials receive the essential data by which they will make their ultimate decisions is an integral part of the deliberation stage of a meeting. . . . the public has an intimate interest in knowing those facts which the board will take into account in making its decision.'

While there are no literal restrictions or reporting requirements on such advisory bodies, it is my opinion that to effectuate the purpose of the Open Meetings Act, supra, the advisory committee or subcommittee should provide the public body with the data supporting the reasons for its recommendations and the procedures and methods used in reaching their recommendation.

Frank J. Kelley

Attorney General

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