



Attorney Fees Awarded Even for Technical Violations of The Open Meetings Act

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Suppose that a township changed its regular meeting schedule but forgot to post notice of the change within three days as required by the Open Meetings Act (OMA). The township later discovers the mistake and posts the notice late. You may be thinking that this is not a "big deal" -- that it is just a technical violation. However, with a nearly identical set of facts, the court recently found a township violated the OMA and awarded the plaintiff attorney fees for the violation.

Earlier last year, in *Speicher v Columbia Twp Bd of Trustees*, an unpublished Court of Appeals decision, the Court found that the township violated the Michigan Open Meetings Act. The township changed its regular meeting schedule but failed to post notice of the change within three days after the meeting at which the change was made, as required by the OMA. The Court of Appeals determined that the township violated the OMA so it upheld the declaratory relief. However, the court did not believe injunctive relief was required. As a result, the Court of Appeals refused to award attorney fees, reasoning that attorney fees were not warranted because the plaintiff was not given injunctive relief, an order requiring or prohibiting certain future conduct, only declaratory relief, a declaration that the law was violated. Although the plaintiff did not ask for attorney fees in his complaint or in his initial appeal, he decided to pursue the attorney fees issue when the Court of Appeals denied them.

On reconsideration, in its Dec. 19, 2013 decision, the Court determined that it was required to award attorney fees based on existing Michigan court precedent. The current standard for awarding attorney fees is as follows: (1) a public body must not be complying with the OMA, (2) a person must commence a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act, and (3) the person must succeed in obtaining relief in the action. To satisfy the third part, prior case law suggested that a person must only be successful in obtaining any relief, not just injunctive relief.



After acknowledging the precedent, the *Speicher* Court believed the prior decisions were incorrect. In a footnote, the *Speicher* Court provided its statutory interpretation -- the award of costs and attorney fees is only permitted when the plaintiff has obtained injunctive relief, not just any relief. Thus, the Court noted its disagreement with the prior cases and called for the convening of a special panel of this Court pursuant to address the attorney fees issue.

In April 2013, another panel of the Court of Appeals dealt with the same issue in *Davis v Wayne County Airport Auth.* As in *Speicher*, the trial court in *Davis* refused to award attorney fees even though it found the Wayne County Airport Authority Board violated the OMA. However, on appeal, the Court determined that it was required by existing precedent to award attorney fees, even if there were only "technical violations" of the OMA.

In *Davis*, the plaintiff filed a lawsuit seeking both declaratory and injunctive relief against the WCAA Board in connection with the hiring of its CEO. The plaintiff also sought court costs and attorney fees. At trial, the Court found the WCAA Board violated the OMA by holding two closed sessions without having two-thirds of the board members vote, and for not making certain committee minutes available for public inspection within the time required by the OMA. The Court stated that the violations "were technical violations over a period of time." So, the trial court granted declaratory relief but not injunctive relief. However, the trial court declined to award plaintiff court costs and attorney fees because "the plaintiff did not prevail on the most significant issues and did prevail on the least significant issues. So, . . . it's a wash . . . because if you look at the whole case really on the most significant issues, the defendants prevailed."

On appeal, the Court of Appeals applied the three part test noted above to determine whether attorney fees were warranted. Because the Court found that WCAA violated the OMA and because they asked for injunctive relief the first two elements of the test were satisfied. However, contrary to the trial court's determination in *Davis*, the Court of Appeals followed existing precedent holding that declaratory relief is considered "relief" under the OMA. Thus, the third element was met. As a result, the Court of Appeals remanded the case to the trial court to determine what fees were appropriate.

Both of these cases illustrate how important it is that townships follow the strict requirements of the OMA. Even technical violations have resulted in lawsuits against the township and an award of attorney fees. So, not only is the township paying its own attorneys to defend the township, but townships are also paying plaintiff's attorneys. Thus, township officials should obtain the proper training so that even unintentional mistakes are not made.

For more information on the Open Meetings Act and how to avoid violations, please contact Anne Seuryrnck at 616.726.2240 or aseuryrnck@fosterswift.com. Anne is the practice group leader for Foster Swift's Administrative and Municipal practice group. She has extensive experience in drafting and reviewing ordinances, Freedom of Information Act (FOIA) and Open Meetings Act issues.