Part 3: Best Practices of a Governmental Body To Protect Itself in Challenges Under the Open Meetings Law After *Hutchison v. Shull*

As previously discussed in part one and two of this three-part series, in *Hutchison v. Shull*, the Iowa Supreme Court considered whether meetings of individual members of the three-member Warren County Board of Supervisors ("Supervisors") with the non-elected Warren County Administrator ("Administrator"), deliberating about the reorganization of county government, should have been viewed as open meetings. The Court remanded the case to the district court and instructed it to apply agency principles in determining whether, in this case, an in-person meeting of one Supervisor with the Administrator was a "meeting" as defined by Iowa Code section 21.1(2) because the Administrator was acting as the agent of another Supervisor. The Court concluded its opinion by stating that the open meetings law prohibits the majority of a governmental body from gathering in-person through the use of agents or proxies in order to deliberate any matter within the scope of its policy-making duties outside of an open meeting.

Part I of this series provided an overview and analysis of the *Hutchinson* case. Part II of this series addressed what constitutes "deliberation" under Iowa law, and explored the analysis of who is an "agent" under Iowa law. This final part in this series explores some of ways in which a governmental body can try to protect itself from challenges under Iowa's open meetings laws, in light of *Hutchinson*.

As a general matter, staff should not be granted express agency authority to act on behalf of a member of the governmental body in exercising the board's judgment or discretion unless absolutely necessary, and then only with full consideration of the possible repercussions of having the staff member assume this role. *Hutchinson* teaches that a staff member with express authority is likely to be viewed as an official who would "count" for purposes of a public meeting analysis, which should be avoided. Indeed, it may be prudent to institute a policy that specifically disclaims such authority for staff members so that the public is on notice that it is not the government body's intent for anyone to rely on a staff member as an agent unless expressly stated.

Similarly, a governmental body should evaluate past board interactions and customs with staff to determine if there may be an implied actual agency authority which could result from a reasonable interpretation by the staff that the board had consented to the staff exercising a board member's judgment or discretion, and if so, consider whether to expressly prohibit such agency authority. While exceptions may exist, it is generally contrary to the body's best interests to have anyone acting or purporting to act as an agent of the body without the body's express direction or permission.

It is also important that governmental bodies understand the sometimes subtle distinction between deliberation and non-deliberation. It is not always clear when "gathering information", "exchanging ideas" or "discussing various options" crosses the line into discussions that "focus at all concretely" or express opinions. Each circumstance will be unique, and will depend on the facts at hand. However, a prudent approach may be to consider deliberation as any discussion of matters over which the governmental body exercises judgment or discretion, *other than* merely receiving information, eliciting clarification about information presented, or discussing matters

in general, non-concrete terms (such as exchanging general ideas or discussing various options in a given situation).

Even where there is no intention to deliberate, members of a governmental body should be constantly aware, when they are in a group of a majority, that their general discussions or information gathering sessions could effortlessly become deliberation under Iowa law if they are not careful to monitor and restrict the content of the discussion. Boards should discuss and better understand situations when discussions and evaluations can, and are, taking place in order to guard against unwittingly deliberating in private.

Unfortunately, the *Hutchinson* case is fraught with tricky issues that must be navigated by a governmental body who desires to uphold its obligations to the public, while at the same time maintaining its ability to work strategically on the host of issues that bear on its work. Each situation will be different and likely call for careful consideration aided by legal counsel, but *Hutchinson* does provide a lesson in exercising caution when it comes to using non-elected officials to participate in private meetings with elected officials. Any such potential meetings should be evaluated in advance to determine whether the non-elected official(s) could be deemed to have agency authority of an elected official such that deliberations could unintentionally occur during the meeting. This lesson is especially important for those governmental entities that have a small number of elected officials on the board because even a two person meeting of a three body board could trigger the open meetings law obligations.