

Court of Appeals Protects Personal Notes of Township Board Members

On October 20, 2011, the Michigan Court of Appeals addressed an issue that has long been the subject of discussion by public officials and municipal attorneys: Are handwritten notes of a township board member taken for his/her personal use, not circulated among other board members and not used in the creation of the minutes, subject to disclosure under the Freedom of Information Act ("Act"). The Court of Appeals in *Hopkins v. Township of Duncan*, ___ Mich App ___ (2011) concluded that such handwritten notes do not constitute public records subject to disclosure under the Act.

In *Hopkins*, a township resident submitted a FOIA request for "copies of any notes taken by any elected official during any Duncan Township Board or Zoning meetings over the past 12 months." Frank Pentti, a Township Board Trustee, took notes at all meetings. Mr. Pentti testified that the notes were strictly for his personal use, kept in his personal journal, never shared with other members of the Board and never placed in Township files.

MCL 15.232(e) defines "public record" to mean "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." Mere possession of a record by a public body does not render it a public record; a record must be used in the performance of an official function to be a public record. At the heart of the case was whether Mr. Pentti's notes were taken in the performance of an official function. If so, then the notes are subject to disclosure under the Act.

The Court of Appeals explained that it was “unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA.” Duncan Township argued that Mr. Pentti’s handwritten notes were not in furtherance of an *official function*; rather, his notes, taken voluntarily, not circulated among other Board members, not used in the preparation of meeting minutes, and retained at his sole discretion were private writings not subject to disclosure under the Act. The Court of Appeals agreed.

The Court of Appeals’ published decision in *Hopkins* is significant because it is the first judicial decision which squarely addresses the issue of whether private notes taken by Board members at a public meeting are subject to disclosure under the Act.