

The role of email in governance



Email has revolutionised the way in which we communicate and can enable charity boards to keep up to date with developments between board meetings. But is it really that simple?



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Tesse Akpeki and Christine Rigby outline the legal and governance issues to consider when communicating by email

Is a board decision made by email valid?

Picture the scene – there has just been a board meeting and the next one is not due for another three months. An urgent issue arises that senior management feel needs a board decision. The chief executive has emailed round a detailed paper asking for a decision. If each board member emails back their approval, is that a valid board decision?

The legal answer is that it may be – it depends on the legal form of the organisation and what the constitution says about ways in which board decisions can be made.

Companies

For companies, a unanimous decision made by email will be valid. The company's articles of association do not have to explicitly permit it. This is based on case law about unanimous decisions generally, which we think would extend to email decisions.

But what if a decision is not unanimous (perhaps because some trustees disagree, a trustee is prevented from voting because of a conflict of interest, or some trustees simply don't respond)? A majority decision is usually enough to pass a resolution at a trustees' meeting but is it the same for a decision by email? There is no case law on this point yet, but our view is that a majority decision by email would not be valid unless the articles expressly allow for what is known as 'majority decision making outside meetings'.

Around 2008, when the government was drafting new model articles for private companies to accompany the reforms brought in by the Companies Act 2006, an early draft did allow for majority decision making outside meetings. However, some in the business sector expressed concerns that this could be open to abuse. For example, unscrupulous directors could take advantage of fellow directors being on holiday (and out of email contact) to propose and make a decision that

they knew the absent directors would have objected to. As a result, this wording was not included as standard in the model articles, but it is still possible to allow for majority decision making by bespoke drafting in your own articles. This is an option for new companies, and companies reviewing their articles, which many of our clients find attractive. Our experience is that concerns about potential for abuse are outweighed in many cases by boards wanting the ease and flexibility of majority decision making by email.

Charitable trusts

Charitable trusts are much like companies in that a unanimous decision can be made by email (even if there is nothing expressly permitting this in the trust deed). But an email decision approved by a majority, rather than unanimously, would only be valid if permitted by the trust deed.

Charitable incorporated organisations (CIO)

The rules for this new legal form for charities are more restrictive, with a specific regulation laying down that if a CIO's constitution is to permit its charity trustees to make decisions otherwise than at a meeting, 'the constitution must make provision as to the alternative process by which the charity trustees may make decisions'. So, for those thinking about converting to or setting up using the CIO form, email decision making is something that would need to be specifically built in to the constitution, otherwise it would not be allowed at all!

Alternatives

If your constitution does not allow a majority decision to be made by email, all is not lost. You may be able to call a board meeting at short notice – and some of the trustees may be able to attend by video or telephone conferencing to ensure the meeting is quorate (although in the case of telephone conferencing, you generally need provision to this effect in your constitution).

If you are confident that a decision would be approved at a meeting, you can canvass opinion between meetings, and at the next planned board meeting ask the board to ratify actions taken. Although this does have pitfalls – what if the board does not ratify the action?

Some charities give delegated authority to a small committee, or even the chair, to take urgent decisions between meetings. This is certainly a good idea where the board is aware that a particular urgent issue will need to be addressed before the next meeting. It may also be worth considering generally by giving authority to a small committee to deal with the unexpected. Any delegated powers should, however, only be given if consistent with the constitution and the parameters of the delegation should be carefully recorded and minuted. There should also be prompt reporting back to the whole board of any steps taken.



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Note too that the legal restrictions about use of email only apply to formal decision making. There are no difficulties at all with informal email communications between meetings, subject to the points we make about email overload below!

Is email the answer for good governance?

Email communication can engage board members and free up time in board meetings to enable participants to concentrate on strategic issues. But the exchange of views by board members between meetings comes with pros and cons. Board members must discuss policies, ask questions, share opinions and debate changes and alternatives. They must give sufficient thought to the potential risks and wider implications of their decisions. As much as possible, there needs to be opportunity to challenge, probe and provide constructive feedback.

A drawback of decision making outside meetings is that there may not be adequate opportunities for exchange of views, to debate and to challenge. Board members may rush into resolutions without due consideration. In some situations, it may be better not to use email between meetings – particularly if an issue is controversial or potentially divisive. Emotive issues, concerns, changes in policy may be better addressed using face-to-face interactions.

Checklist for decision making by email

Is email appropriate?

- What procedures are in place for emergency decisions between board meetings?
- Is email the best means of communication in this case?
- Does any board member have a conflict of interest that may make them ineligible to vote? Just one board member with a conflict may mean that you can't make a decision by email
- Does the constitution allow for majority decisions outside meetings?

Using email

- Consider how to frame email communication:
 - Make your request clear: is an action required and, if so, by when?
 - Flag any required action in the message title
- Ensure that responses are received from authenticated email addresses

Recording the decision

- Let all trustees know whether a resolution has been passed and a decision has been made
- Confirm arrangements for the minuting of email decisions and record a minute of the decision once it has been made
- Consider where actions arising from email decision making should be recorded
- Decisions made by email in the absence of an express power should be ratified at the next board meeting

Consider the question; 'is email the best format for this exchange. Would a phone conversation, or an old fashioned, one-to-one meeting be better?'

Use email effectively

There is nothing as potentially wearisome as the tedious email round robins where everyone is copied into everything and the trail and thread of the exchange becomes almost pointless. Another danger can surface if board members selectively email each other between meetings and form inner cabals. Cliques that emerge can be divisive and lead to poor governance. Before sending an email consider who needs to be copied in and remove people who don't need to be in your reply, balancing this against excluding vital decision makers.

Some board members have a tendency to ignore boundaries, particularly if the organisation encourages email between meetings. If board members email staff directly or inundate them with inappropriate requests this can exacerbate any management/governance tensions.

Consider too how to involve board members who don't have access to email – we tend to make assumptions about how people communicate, but email isn't available to and doesn't suit everyone.

OnBoard is a consultancy offering governance development, training and support to charities and social enterprises. It brings together leading third sector consultants with Bates Wells Braithwaite, leaders in charity and social enterprise law. It is this unique collaboration between legal and governance experts that ensures the highest quality advice – advice that can make a measurable difference to the effectiveness of your organisation. For more information visit: www.on-board.org

OnBoard events

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24 Sept 2013, 5pm – 7.30pm
£30 excl. VAT

In this session, we will examine the place of the virtual boardroom and look at how board meetings are being made more effective by IT. We will assess the impact of platforms such as Go to Meet and Smart Meetings and examine how tablets can contribute to effective and efficient board meetings. Diverse applications such as Doodle and YouTube will be discussed in terms of how they can help your board's communication.

To book, visit: www.bwblp.com/events/onboard/upcoming/

OnBoard: Wired to Govern 2: Utilising Social Media for Effective Performance

17 Oct 2013, 5.30pm – 7.30pm
£30 excl. VAT

Onboard is bringing together a panel of experts to explore the various applications of social media platforms such as LinkedIn, Twitter and Facebook, examining how you can integrate these technologies to your advantage.

To book, visit: www.bwblp.com/events/onboard/upcoming/