October 11, 2012
OPINION 12-0177

Mr. Rick S. Danielson
Mayor Pro Tem
City of Mandeville
3101 East Causeway Approach
Mandeville, LA 70448

90 - B - 4 – PUBLIC MEETINGS – State & Local Governing Bodies

La. Const. art. XII, §3 La. R.S. 42:11 et seq.

Discusses a public body communicating electronically as related to compliance with the Open Meetings Law, polling of members, and a "walking quorum."

Dear Mr. Danielson:

Our office received your request for an opinion concerning communications between council members as relating to compliance with the Open Meetings Law, La. R.S. 42:11 *et seq*.

More specifically, you have asked:

(1) Whether a council member relaying an opinion, without asking for an opinion in return, to council members via e-mail (either one person at a time or as a group e-mail) about a topic, resolution, or ordinance which will later be considered by the Council violates or circumvents the intent of the Open Meetings Law;
(2) Whether a council member may forward requests, information, or opinions received from constituents to other council members when such forwarded material may relate to issues which ultimately may come before a vote of the Council;
(3) If a citizen sends a request to a council member to take action on something within the city, is it permissible for the council member to forward the email (or forward the message in some other manner) to other council members to make them aware of the request;
(4) What the difference is between formal and informal polling;
(5) Whether there is such a thing as a "rolling quorum," and if so, what it is, how it operates, and whether or not such a thing is permissible;
(6) Whether council member Z can call council member A and ask for an opinion on a matter Z plans to propose, then call council member Y or D or R an hour later, a day later, or a week later, and ask for their thoughts as well.

The right to direct participation is based upon La. Const. art. XII, §3, which provides that "[n]o person shall be denied the right to observe the deliberations of public

bodies…except in cases established by law." The legislature enacted the Open Meetings Law to help define and describe this right of access.

La. R.S. 42:12(A) provides the public policy behind requiring open meetings and instructs liberal construction of this body of law:

> It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. Toward this end, the provisions of R.S. 42:12 through 28 shall be construed liberally.

Three of your questions concern communication between board members when no response is requested. Your request asks: (1) whether a council member relaying an opinion, without asking for an opinion in return, to council members via e-mail (either one person at a time or as a group e-mail) about a topic, resolution, or ordinance which will later be considered by the Council violates or circumvents the intent of the Open Meetings Law; (2) whether a council member may forward requests, information, or opinions received from constituents to other council members when such forwarded material may relate to issues which ultimately may come before a vote of the Council; and (3) whether it is permissible for a council member to forward an e-mail to other council members when the e-mail concerns a request from a constituent that the council member take action on something.

The Open Meetings Law does not address the use of electronic communication to disseminate information to members of a public body. Therefore, to address these questions, the definition of a "meeting" should be considered. La. R.S. 42:13(A)(1) defines a "meeting" as:

> the convening of quorum of a public body to deliberate or act on a matter over which the public body has supervision, control, jurisdiction, or advisory power. It shall also mean the convening of a quorum of a public body by the public body or by another public official to receive information regarding a matter over which the public body has supervision, control, jurisdiction, or advisory power.

A "quorum" is further defined in La. R.S. 42:13(A)(3) as "a simple majority of the total membership of a public body." Thus, the issue becomes whether or not the public body is convening to deliberate, act or receive information on a matter over which the public body has supervision, control, jurisdiction, or advisory power when a member uses electronic means to pass along wither his or her opinion, or a constituent's opinion on a matter which the public body will likely consider and vote on at a future date. As our office noted in La. Atty. Gen. Op. No. 08-0239:

> The applicable laws do not define "convene."[1] "Convene" is defined as "[t]o call together; to cause to assemble." Black's Law Dictionary 355 (8th ed. 2004). Another definition specifies "to come together in a body." convene. (2008). *Merriam-Webster Online Dictionary*.[2]
> …
> Whether or not a quorum of the public body could be said to be "convening" for the purposes of the Open Meetings Law requires an assessment of the particular facts relevant to the particular situation, taking into account the instruction to interpret the Open Meetings Law liberally, and the public policy underlying such a body of law.

As noted in the above excerpt, whether or not a quorum of a public body is convening for purposes of the Open Meetings Law necessarily requires an assessment of the particular facts of a scenario. However, in an effort to assist you in your inquiry, we have attempted to provide some general guidance to you in navigating the use of electronic communication without running afoul of the Open Meetings Law.

La. R.S. 42:14(B) provides that public bodies are prohibited from utilizing any manner of proxy voting procedure, secret balloting, or any other means to circumvent the intent of the Open Meetings Law. Thus, it would not be appropriate for members of a public body to utilize electronic communication to engage in any secret balloting to find out how council members would vote or as a method of circumventing the purposes of the Open Meetings Law. The purpose of the Open Meetings Law, as described by La. R.S. 42:12, is to ensure that public business is performed in an open and public manner and citizens are advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. In general terms, there is nothing which would prohibit a council member from sending or forwarding an e-mail to another council member, when such e-mail expresses an opinion on a matter that will later be considered by the public body, and such communication is not asking for or inviting a response. This is true whether the content of the e-mail originates from a council member or from a constituent. Even back-and-forth exchanges on a particular issue through e-mail between less than a quorum would not, in and of itself, constitute a violation of the Open Meetings Law. However, given the instruction to liberally construe these statutes, this practice could raise concerns when any such discussion is then forwarded to other council members, which could result in an e-mail chain reflecting a quorum of council members' opinions on a matter which will ultimately come before a vote. Such could have the effect of a walking quorum, which is discussed in more detail in response to question five of this opinion request.

Although not binding on a Louisiana court, we note that the Supreme Court of Virginia has considered whether e-mail messages exchanged by school board members constituted an improper closed meeting under Virginia's open meetings law, FOIA. *Hill v. Fairfax County School Bd.*, 727 S.E.2d 75 (Va. 2012). The dispositive factor in

[1] La. C.C. art. 11 provides that "[t]he words of a law must be given their generally prevailing meaning."
[2] Retrieved September 23, 2008, from http://www.merriam-webster.com/dictionary/convene.

determining the response to the question was an inquiry as to how the e-mail was actually used by the public body. The court considered the analysis used in its decision eight years prior in *Beck v. Shelton*, 593 S.E.2d 195 (Va. 2004). The *Beck* court took into account the instantaneous nature of the communication at issue, noting that:

> the use of computers for textual communication has become commonplace around the world. It can involve communication that is functionally similar to a letter sent by ordinary mail, courier, or facsimile transmission. In this respect, there may be significant delay before the communication is received and additional delay in response. However, computers can be utilized to exchange text in the nature of a discussion, potentially involving multiple participants, in what are euphemistically called 'chat rooms' or by 'instant messaging.' In these forms, computer generated communication is virtually simultaneous.

Id. at 198. The court further opined that "the key difference between permitted use of electronic communication, such as e-mail, outside the notice and open meeting requirement of FOIA, and those that constitute a 'meeting' under FOIA, is the feature of simultaneity inherent in the term 'assemblage.'" *Id*. at 199.

The *Hill* court noted "the increased prevalence of 'smartphones' and other mobile Internet-connected devices has increased both the ability to access all forms of electronic communication and the rapidity with which a response can be sent." 593 S.E.2d at 78. In concluding that the e-mail exchange did not violate Virginia's open meetings law, the court relied on the circuit court's finding that despite the fact that the e-mails were sent in much shorter intervals than the ones sent in *Beck*, they still did not involve sufficient simultaneity to constitute a meeting, and further, that the e-mails which constituted a back-and-forth exchange were only between two members at a time. *Id*. at 79. Finally, e-mails sent to more than two board members, whether directly, by carbon copy, or by forwarding, "conveyed information unilaterally, in the manner of an office memorandum." *Id*. The messages did not generate group conversations or responses with multiple recipients. *Id*.

Naturally, the immediacy between a comment and a response received depends upon the individuals communicating with one another. Additionally, the user determines whether a response goes to one party, to all parties of a communication, or whether to forward to someone who was not a party to the original communication. However, we reference the above just as a note that a Louisiana court tackling the issue of whether or not a particular electronic communication by a public body has violated the Open Meetings Law may consider the simultaneity of the messages and whether such messages generated group conversations or responses with multiple recipients.[3]

[3] Also see *District Attorney for Northern Dist. v. School Committee of Wayland*, 918 N.E.2d 796 (Mass. 2009), where the Supreme Judicial Court of Massachusetts found a public body violated the letter and spirit of the open meeting law by the chair sending an e-mail to all members of the body, requesting that they send him written comments pertaining to the superintendent's performance evaluation; the

In determining whether or not a particular electronic exchange of information runs afoul of the Open Meetings Law a court would likely give close consideration to the nature of the communication, i.e., whether the communication encourages further discussion or whether it merely seems to be passing along information, as well as the number of individuals from a public body involved in the e-mail chain. Another important aspect to note about communicating electronically is that a public official cannot control what is e-mailed or texted to him or her, only the response to such a communication. In general, there is no indication of an immediate violation upon a simply transmittal of information from a constituent to a public official, a public official to another public official, or a member of the staff to all members of a public body. It is the opinion of this office that the mere passing along of information does not seem to invoke a "convening" of a public body for purposes of the Open Meetings Law. A court would likely take into consideration a public official's response to such a communication, what the actual response is and to whom a response is conveyed. However, we do note that if the e-mail falls within the definition of a "public record" under La. R.S. 44:1(A)(2)(a), and no specific exception is applicable, the e-mail would be subject to inspection upon a request under the Public Records Act.

Therefore, in light of the above, in response to your first three questions, whether or not the members could be said to be convening requires a fact specific inquiry into the particular exchange of information. There is nothing in the law which prohibits a council member from relaying his or her opinion or the opinion of a constituent to another council member, or even multiple council members, outside of an open meeting through electronic means. We note the qualification in your opinion request that the council member is not inviting a discussion on the matter, and in responding to your question we are presuming that no discussion of the matter occurs outside of this transmittal of information. This, without further facts, does not indicate a violation of the Open Meetings Law. However, we urge you to consider the information provided above as additional considerations which may influence whether or not a specific exchange gives rise to a violation of the Open Meetings Law.

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comments were then compiled into a draft evaluation, which was circulated by e-mail to the members of the public body before the next meeting. And *Wood v. Battle Ground School District*, 27 P.3d 1208 (Was. Ct. App. 2001), where Division 2 of the Court of Appeals of Washington considered the active exchange of information and opinions in e-mails, as opposed to the passive receipt of information, as suggestive of a collective intent to deliberate and/or discuss board business. Finally, see *Lambert v. McPherson*, 2012 WL 1071632 (Ala. Civ. App. 2012), where the Court of Civil Appeals of Alabama found that an e-mail sent by a member of a public body to other members expressing his dissatisfaction with proposed change to board policy did not involve deliberation and thus did not constitute a meeting. We merely reference the above to give examples of how courts in other jurisdictions have wrestled with similar types of issues within their own state's open meetings laws. Again, we stress that the above decisions are not binding on Louisiana courts, as many states have distinct ways of defining a "meeting" for purposes of the open meetings law, and Louisiana's definition is unique in that the definition of "meeting" also includes the convening of a quorum by the public body or by a public official to receive information on a matter over which the public body has supervision, control, jurisdiction, or advisory power.

Your next question asks to identify the difference between formal and informal polling. This, presumably, is a reference to the language of La. R.S. 42:13(B), which provides:

> The provisions of R.S. 42:12 through 42:27 shall not apply to change meetings or social gatherings of members of a public body at which there is no vote or other action taken, including formal or informal polling of members.

Black's Law Dictionary contains multiple definitions of "poll," some relevant ones are as follows:

> A sampling of opinions on a given topic, conducted randomly or obtained from a specified group.
>
> The result of the counting of votes.
>
> To ask how each member of (a group) individually voted.
>
> To question (people) so as to elicit votes, opinions, or preferences.

Black's Law Dictionary 1197 (8th ed. 2004).[4]

The law does not define a formal or informal poll; however, with the instruction in La. C.C. art. 11 that the words of a law are given their generally prevailing meaning, we can presume that the legislature intended to convey in La. R.S. 42:13(B) that the Open Meetings Law does not apply to chance meetings or social gatherings of a public body, provided there is no survey of opinions or discussion of intended votes, whether such an inquiry is referred to as a poll or not.[5]

Your last two questions are related, therefore, we will address them together. Question five asks for an understanding of the term "rolling quorum" and a clarification as to whether or not such a thing is permissible under the Open Meetings Law. Question six asks whether it is permissible for council person Z to call council person A and ask for an opinion on something Z plans to do, then call Y or D or R an hour later, a day later, or week later and ask for their thoughts.

Our office has concluded a "walking quorum" is unlawful, describing such as a situation whereby different members of a public body leave a room and other members of the public body enter a room so that an actual quorum is never physically present, however, an actual quorum participates in the discussion of the issue. La. Atty. Gen. Op. No. 90-349. This term was taken from the *Brown v. East Baton Rouge Parish School Board* decision, in which the First Circuit stated that in light of the instruction to liberally

[4] The first two definitions are from "poll" as a noun and the second two are from "poll" as a verb.
[5] See also the definition of "straw poll," "[a] nonbinding vote, taken as a way of informally gauging support or opposition but usu. without a formal motion or debate." Black's Law Dictionary 1461 (8th ed. 2004).

construe this body of law, the court had an obligation to look beyond whether or not an actual quorum existed and determine whether the public body had utilized procedures which circumvented the intent of the Open Meetings Law through use of a "walking quorum," and whether such a device had the effect of circumventing the Open Meetings Law. 405 So.2d 1148, 1155 (La. App. 1 Cir. 1981). The court examined the particular facts surrounding the case and determined that there was not a "walking quorum," as there was no evidence of members of the public body trading places to avoid an actual quorum at the meeting, and there was no intent or use of this meeting as a device to circumvent the Open Meetings Law. *Id.* at 1156.

The terms "rolling quorum" and "walking quorum" are not defined by the Open Meetings Law, however, we interpret the term used in your question, "rolling quorum," to have a similar meaning of the term "walking quorum," which we understand to be a device used to circumvent the Open Meetings Law so as to allow a quorum of a public body to discuss an issue through the use of multiple discussions of less than a quorum. Thus, the effect of such action permits a public body to know how a majority of the public body would vote on an issue without the public having the benefit of observing such a discussion. This practice is not permissible by the Open Meetings Law.

In response to your final question, we again return your attention to the purpose behind the Open Meetings Law, that public business be performed in an open and public manner and that citizens are advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. La. R.S. 42:14(B). Since the definition of a "meeting" requires the convening of a quorum, your question envisions a scenario where there is no convened quorum at any given time, however, the discussion and passing along of discussion between board members has the effect of a quorum convening. While council person A may not actually have any discussion with council person Y, if council member Z shares A's opinion on the matter with Y for the purpose of showing who supports or opposes Z's proposition, this could have the same effect as A and Y having a discussion on the issue. If Z's actions are done in a manner specifically intended to avoid an actual quorum, and the effect of his or her actions provide an identical result to what would occur if an actual quorum did discuss the issue, this could raise concerns under the Open Meetings Law. But again, this depends on the actual scenario and the actual discussions that take place. In other words, this question cannot be answered generally. If a member of the public body utilizes this method in a manner which effectively stifles any further discussion of the issue at a public meeting by the public body, this could raise concerns under the Open Meetings Law.

In conclusion, without additional facts suggesting an intent to circumvent the Open Meetings Law and without inviting a discussion on the content of the material sent, the following is permissible behavior under the Open Meetings Law: (1) a council member relaying an opinion to other council members via e-mail about a topic which may later be discussed by the public body as a whole; (2) a council member forwarding requests, information, or opinions received from constituents to other council members on a topic

which may later come before the public body; and (3) a council member forwarding a request received from a constituent requesting that council member to take action on a particular matter to other council members. The Open Meetings Law prohibits questioning a majority of a public body on how each member intends to vote, whether such an inquiry is called a poll or not. A "rolling quorum" or a "walking quorum" refers to a device used to circumvent the Open Meetings Law so as to allow a quorum of a public body to discuss an issue through the use of multiple discussions of less than a quorum. Such a device is not permissible under the Open Meetings Law.

We hope that this opinion has adequately addressed the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

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SYLLABUS

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DATE ASSIGNED:

DATE RELEASED: October 11, 2012

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