October 7, 2013
OPINION 13-0132

90-A-1 PUBLIC FUNDS & CONTRACTS
La. Const. art. VII. Sec. 14

The Livingston Parish Council is the entity that must determine whether public funds may be spent to provide a legal defense to two councilmen who have not been sued in their individual capacities but claim otherwise. If the Council determines that the council members performed the alleged actions in their official capacities, and the Parish may be legally liable for the acts of these public officials, then the Parish may provide an attorney to represent them in the manner set forth in the Parish Home Rule Charter. If not, then the Parish may, but is not required to, reimburse necessary and reasonable legal expenses after the lawsuit has concluded and resulted in a judgment of no liability for the councilmen and/or a finding that the councilmen's statements were made in the course and scope of their official duties.

Lisa T. Frederick, Clerk
Livingston Parish Council
Post Office Box 335
Livingston, Louisiana 70754

Dear Ms. Frederick:

Your request for an Attorney General's Opinion regarding the use of public funds to pay for the defense of two lawsuits brought against two members of the Livingston Parish Council ("Council") has been referred to me for response.

Enclosed with your opinion request was a copy of two lawsuits filed against two Council members seeking to recover damages for defamation allegedly caused by statements the two Council members made during an interview with an investigative reporter of a local television station. The Petitions make it clear that Plaintiffs intend to sue the two Council members in their individual capacities and not in their official capacities. However, your opinion request states that "the Council determined that when Harris and Wale made the statements to the investigative reporter, they were acting in the course and scope of their duties as members of the Council. Harris and Wale were interviewed because of their elected positions as members of the Council."

Your request states that at its meeting on June 13, 2013, the Council approved the use of public funds to pay for the defense of the two lawsuits brought against the two members of the Council and asks our office to confirm that this use of public funds is permitted under the law.

Our office has previously addressed whether public funds may be used to pay for or reimburse legal fees incurred by a local public official when he must hire an attorney to defend himself against civil, criminal, or ethics charges filed against him.[1] We have

[1] The following opinions address the use of public funds by a local entity for reimbursement of legal fees incurred when a public official has to defend himself against criminal, ethics, or civil charges brought against him: La. Atty. Gen. Op. Nos. 77-1131, 77-1610, 79-349, 79-349A, 80-105A, 80-209, 83-475, 83-

consistently stated that if a local public official or employee is sued for civil damages or charged with a crime and is found not liable or not guilty, and the allegations arose out of the performance of his official functions, then the public body that employs that person may, but does not have to, pay or reimburse the attorney's fees and expenses for the defense of the suit. If the public entity chooses to use public funds to pay for or reimburse the legal expenses incurred by a public official, that entity must also determine: (i) that the hourly rate charged by the attorney was reasonable; (ii) that the hours spent by the attorney were reasonable and necessary; and (iii) that any costs incurred by the attorney were reasonable and necessary. *See* La. Atty. Gen. Op. Nos. 10-0099, 07-0045, 94-369, 95-242, 98-433, 01-94, and 07-0041. If the local entity determines that the rate charge or hours and expenses incurred were unreasonable and/or unnecessary, public funds should not be used to reimburse those expenses.

More recently, we have received opinion requests regarding the use of public funds to pay for the defense of a public official sued in his individual capacity. Our office has previously addressed the distinction between being sued in one's individual versus official capacity. In an action against a public official in his "official capacity," the governmental entity is the true defendant and would ultimately be responsible for any judgment rendered against the public official for actions undertaken in his official capacity. On the other hand, if a public official's actions are *ultra vires* or beyond the course and scope of his position, then liability may be imposed on the public official individually. La. Atty. Gen. Op. No. 87-340A was written in response to a request "that we distinguish between liability in an individual capacity and liability in an official capacity." The opinion stated that:

> Liability in one's individual capacity basically means personal liability, liability imposed on an individual personally. Liability in one's official capacity, in this instance as an officer or employee of a public institution, is liability imposed on an individual for acts committed as a result of his official position. The acts on which the liability is based are usually acts which are either authorized by statutes or committed under color of law.

If a judgment is issued against a public official for actions taken in his official capacity, then in most cases, the public entity is the party responsible for payment of the judgment.

The decision whether to sue a public official in his official or individual capacity is made by the person suing and his attorney. The fact that a lawsuit states that a public official is being sued in his individual capacity is not dispositive of the fact that the actions/violations alleged in the lawsuit actually occurred outside of the scope of one's

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611, 85-412, 87-699, 87-744, 90-38, 90-490, 94-276, 94-384, 94-369, 94-369A, 96-152, 96-398, 97-369, 98-474, 99-27, 99-180, 99-356A, 00-157, 01-94, 02-0005, 02-0027, 03-0261, 04-0133, 05-0050, 05-0144, 05-0302, 05-0377, 07-0041, 07-0045, 07-0132, 08-0094, 08-0101, 09-0074, 09-0130, 09-0132, 09-0280, 10-0099, 10-0182, 10-0290, 11-0182, 12-0071, and 12-0080.

official duties. Conversely, captioning a lawsuit against a public official in his official capacity does not necessarily mean that the actions alleged occurred in the course and scope of one's official duties. Ultimately, the determination of whether the cause of action and facts pled in a petition will result in liability and whether those actions were taken in one's official or individual capacity must be made by a court of competent jurisdiction.

With regard to when a public entity may choose to reimburse legal expenses incurred by a public official, past opinions of this office have determined that in order to use public funds to reimburse a public official for legal fees incurred in defending himself against charges brought against him, there must first be a finding of no guilt/liability. *See* La. Atty. Gen. Op. No. 99-356A (stating that "payment before the conclusion of the proceedings would not be consistent with the mandate that reimbursement be only upon the official being exonerated, and that is when litigation has concluded."); *see also* La. Atty. Gen. Op. No. 97-369 (stating that "[t]he Attorney General's office has also consistently opined that public funds may only be utilized to pay the legal expenses incurred by public officials and employees in connection with civil suits brought against them if (and only after) the defense of the litigation is successful and if the allegations arose out of the performance of the official functions of the public officer or employee.").

However, in La. Atty. Gen. Op. No. 12-0137, our office stated that if a civil suit is filed against a local public official and the local public entity makes a determination that the charges arise from the official's official actions, "it is our opinion that public funds may be used to pay for his defense without the necessity of awaiting a final judgment." The opinion had the caveat that, "[i]f at any point during the litigation it becomes apparent that the conduct of the public official occurred outside or beyond the course and scope of his public duties, then public funding of the defense must stop." This opinion involved a lawsuit where the public official was sued in both his official and individual capacities and it was our understanding that the public entity concluded the actions alleged were undertaken in the course and scope of the public official's official duties and thus, the public entity would be the party responsible for any judgment issued against the public official.

Public entities have a duty to be prudent administrators of the public fisc. By deciding to use public funds to pay for a public official's defense, under the assumption that all actions alleged were undertaken in the course and scope of the public official's duties, the public entity runs the risk that a court may ultimately reach a different conclusion. If the court determines that the public official was acting outside of or beyond his official duties, then the public body would have made those payments in violation of La. Const. art. VII, Sec. 14, and the public body would have a duty to recover the public funds spent on the defense of the lawsuit.

Our office cannot act as a fact finder and determine whether the allegations contained therein are against the council members in their individual or official capacities and,

therefore, cannot give you a definitive answer regarding whether the Council may pay any legal fees incurred by the two council members in the defamation lawsuits at issue. The decision regarding whether the council members' actions were taken in their official capacities, and therefore, may subject the Parish to a judgment for damages being issued against it, must be made by the Council in consultation with their attorney after a review of the pleadings and related documents. It is therefore the opinion of this office that if the Parish determines that the Council members performed the actions complained of in their official capacity and that the Parish may be legally liable for the acts of these public officials, then the Parish should provide an attorney to represent them in the manner set forth in the Livingston Parish Home Rule Charter inasmuch as the Parish has a responsibility to provide a legal defense and try to limit its liability.

If there is any doubt regarding whether the actions complained of were performed by the public official in his individual capacity, it is the opinion of our office that the public entity should refrain from reimbursing attorney's fees until the case has been concluded and the court has determined whether the actions were part of the public official's official duties. If a judgment issued by the Court concludes that the public official performed the actions complained of in his official capacity or if the judgment concludes that the public official did nothing wrong, then the Parish may consider a claim for reimbursement for the reasonable attorney's fees incurred during the public official's defense of the suit. Therefore, it is our further opinion that the best practice is that the Parish only pay necessary and reasonable legal expenses after the lawsuit has concluded and resulted in a judgment of no liability for the councilmen and/or a finding that the councilmen's statements were made in the course and scope of their official duties. Such action removes any risk that the Parish may violate La. Const. art. VII, Sec. 14 by paying the legal expenses incurred in this case which are not the legal responsibility of the Parish.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

Yours very truly,

JAMES D. "BUDDY" CALDWELL
Attorney General

By: _____
Lindsey K. Hunter
Assistant Attorney General

JDC/LKH/chb

Opinion 13-0132
Syllabus

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Lisa T. Frederick, Clerk
Livingston Parish Council
Post Office Box 335
Livingston, Louisiana 70754

Date Received:

Date Released: October 7, 2013

Lindsey K. Hunter
Assistant Attorney General