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OPINION 19-0128

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

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

Discussions of the Louisiana Open Meetings Law
regarding permissible and prohibited communications
between board members outside of a public meeting.

Dear Ms. Baier:

You have requested an opinion of the Attorney General's office regarding the provisions of the Louisiana Open Meetings Law, La. R.S. 42:11, *et seq.* Specifically, you ask when communications between board members outside of a public meeting rise to the level of a walking or rolling quorum violation.

The Legislature has declared that 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. La. R.S. 42:12. Further, it is a constitutional right that no person shall be denied the right to observe the deliberations of public bodies. La. Const. art. XII, §3. In order to achieve these goals, the legislature has mandated that the provisions of the Open Meetings Law shall be construed liberally. La. R.S. 42:12.

Your questions center on communications between board members outside of a meeting. Your request asks: (1) when a district defender sends an email to all board members with comments regarding a future agenda item, may one board member communicate with another board member to discuss the issue presented by the district defender; (2) further, may one board member communicate with each board member separately to discuss the issue presented by the district defender; (3) does this hypothetical reach the level of a walking quorum or polling - if not, what does; and (4) at what point do these kinds of communications violate the Open Meetings Law?

To address these questions, we must first define the working terminology. The terms "meeting" and "quorum" are defined by the Open Meetings Law in La. R.S. 42:13(A) as follows:

(2) "Meeting" means the convening of a 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,

(4) "Quorum" means a simple majority of the total membership of a public body. R.S. 42:13.

The legislature has made it clear that any means used to circumvent the intent of the Open Meetings Law, such as proxy voting procedure, secret balloting, and informal polling, are prohibited. La. R.S. 42:14(B). One common way in which public bodies may violate these laws is through a "walking" or "rolling" quorum. A "walking" or "rolling" quorum is a procedural device used to have conversations with a quorum of the public body through multiple smaller conversations of less than a quorum. A "walking" or "rolling" quorum is unlawful because while no conversation has occurred with an actual quorum physically present at a single location, a quorum effectively participates in a discussion of an issue. Such action is impermissible because it enables a public body to determine how a majority of the public body would vote on an issue while depriving the public of the benefit of observing such a discussion and being able to offer public comments. La. Atty. Gen. Op. Nos. 12-0177 and 90-349.

Whether or not an action by members of a public body constitute a violation of the Open Meetings Law is a factual determination best left to the fact-finder. The Office of the Attorney General does not serve as a fact finder in the process of rendering an opinion. La. Atty. Gen. Op. Nos. 18-0054, 16-0076, 08-0012, and 00-466. However, in an effort to provide some guidance relative to your general questions, we respond as follows.

As to your first question regarding a discussion between two board members about an issue raised by a district public defender pertaining to a future agenda item, if this is the end of the communications between the members of the board, then no violation has occurred. One council member informing another council member how he or she intends to vote on a matter at a future meeting and encouraging the fellow council member to vote in a similar manner is not, without more, an open meetings violation. In this scenario there is no quorum and therefore no meeting as defined by La. R.S. 42:13.

The Second Circuit Court of Appeal explained in *Mabry v. Union Parish School Board* that the informal exchange of ideas and opinions before a meeting is important for the issues of agenda setting and compromise that make a deliberative body function efficiently and thus, generally, informal discussions between public officials would have to reach a much more structured level with secretive binding force on at least a quorum of the membership before the Open Meetings Law would be implicated.¹ Therefore, a walking quorum and violation of the Open Meetings Law occurs if members of the governmental body gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with

¹ *Mabry v. Union Par. Sch. Bd.*, 42,856 (La. App. 2 Cir. 1/16/08), 974 So. 2d 787, 789–90.

a quorum of the body with the intent to circumvent the Open Meetings Law as prohibited by La. R.S. 42:14(B). Members who knowingly and willfully participate in a walking quorum may be liable for civil penalties under La. R.S. 42:28. Members should be mindful of these factors when deciding whether to engage in any in person or electronic communications with other members outside of a public meeting. For your reference, we have included a copy of La. Atty. Gen. Op. No. 14-0140 which discusses electronic communications between council members and application of the Open Meetings Law.

A potential violation arises in the hypothetical scenario presented in your second question. If a member of the board communicates separately with each board member to discuss the issue, these conversations may constitute a "walking" quorum, the prohibited means of circumventing the Open Meeting Law discussed above.


It is important to note that a walking quorum could be achieved in the situation presented in your first question if, after finishing up their conversation, the two board members then communicated with the four other board members and relayed the information, allowing for a quorum of six members participate in the discussion. For example, in a public body that has eleven members - if board members A and B have a conversation, A cannot then go tell C and D, while B goes to tell E and F. Regardless if all of those discussions happen one on one, the effect is that six members of the board essentially participated in the discussion. A "walking quorum" would be effectively established and a discussion of the matter had outside of the purview of the public; and thus such a scenario would amount to a violation of the Open Meetings Law. Additionally, if the discussion pertains to matters set for an administrative hearing, any discussion outside of an open meeting may result in the tainting of the administrative hearing process and may constitute a violation of the defendant's due process.

Please be aware that quorums can be achieved through electronic means as well. A group text message, email chain, or similar electronic communications of a quorum of the public body are no less violative of the Open Meetings Law than if those discussions were held in a back room. The effect is the same – discussions and deliberations of a public body occurred out of the view of the public. Any electronic communications between less than a quorum should be approached with caution by each individual board member, as e-mails or text messages could be forwarded and result in polling or a "walking quorum." It is the advice of this office that before sending an email or other electronic message, that the sender consider the intent of the message. Communications to relay information, such as the time and place of the meetings are permissible. However, if the intent of the messages is to elicit a response, to engage in a discussion, or poll how the members of the public body are going to vote on an item, then the communications could constitute a violation of the Open Meeting 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,

JEFF LANDRY
ATTORNEY GENERAL

BY:  _____
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