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DEPARTMENT OF JUSTICE
CIVIL DIVISION
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OPINION 20-0006

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

La. R.S. 14:134 and 42:11, *et seq.*

The convening of a quorum of a public body outside of a public meeting to discuss matters over which they have control is a violation of the Open Meetings Law. Continued failure or refusal to attend meetings in full may constitute malfeasance in office. Recalls La. Atty. Gen. Op. 75-595.

Mayor Terry Gardner
City of Minden
P.O. Box 580
Minden, LA 71058

Dear Mayor Gardner:

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.* Pursuant to your conversation with our office on January 9, 2020, we have consolidated your opinion request to address the following issues:

> (1) Are discussions and pre-planning between a majority of the membership of a public body that take place outside of a public meeting, regarding business over which they have control, a violation of the Open Meetings Law;
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> (2) What actions would constitute a walking or rolling quorum;
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> (3) If a quorum is established at the beginning of a meeting, and a majority of the members subsequently leave, can the remaining members continue with the meeting; and
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> (4) What relief is available to prevent council members from intentionally walking out of a meeting to avoid voting on issues or so that a quorum is not present to conduct business?

Your questions center on deliberations and discussions between members of the Minden City Council that take place outside of a public meeting. Your request describes several occasions, where you believe some council members met outside the view of the public to discuss business that comes before the Council and pre-planned a walk out to avoid voting on such issues or to defeat a quorum.

The provisions of Open Meetings Law are predicated on the fact 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 Open Meetings Law shall be construed liberally. La. R.S.

42:12. That is, whenever there is an uncertain situation in question, the application of the Open Meetings Laws should bend in favor of the granting access to the public.

To address the first two questions regarding a walking or rolling quorum, 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)(2) and (4) 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,
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> (4) "Quorum" means a simple majority of the total membership of a public body. R.S. 42:13(A)(2) and (4).

Every meeting of any public body shall be open to the public unless closed for a lawful, properly noticed executive session. La. R.S. 42:14(A). Any discussions between a quorum of the membership on a matter over which the public body has supervision, control, jurisdiction or advisory power must comply with the Open Meetings Law. Such a discussion of a quorum outside of a properly noticed meeting is a violation of the Open Meetings Law. Further, 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 attempt to skirt these laws is through a "walking" or "rolling" quorum, which is in itself a violation of the Open Meetings Law. 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. Our office has concluded that 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.

At least one court has stated that 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 a violation of the Open Meeting Law.[1] However, when a member of the council communicates separately outside of a public meeting with at least a quorum of council members to discuss an issue or plan a response, i.e. a walkout to defeat a quorum, these

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

conversations may constitute a "walking" quorum, the prohibited means of circumventing the Open Meetings Law discussed above.

It is important to note that a walking quorum could be achieved in the situation described above, if, after two members have a discussion that rises to the level of polling and decision making, the two council members then communicated with other council members and relayed the information or decisions. For example, in a public body that has five members - if council members A and B have a conversation, A cannot then go tell C and D, while B goes to tell E. In such a public body, a conversation of only three members would constitute a quorum and must comply with the Open Meetings Law. Regardless if each of those discussions happens one on one, the effect is that a quorum of members of the council 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.

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 Meetings Law.

The point at which communications of less than a quorum which occur outside of a public meeting rises to the level of a violation of the Open Meetings Law is a fact intensive inquiry. Considerations include the specific content of the communication, the degree of participation among the council members, how many council members actively participated, whether those communications were subsequently relayed to other members, etc. 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 recommend for your review, La. Atty. Gen. Op. No. 14-0140. You can locate the opinions of the Louisiana Attorney General on the Louisiana Department of Justice website, www.ag.louisiana.gov/Opinions, or may obtain a copy by calling our opinion coordinator at (225) 326-6000.

We will now address your third question - if a quorum is established at the beginning of a meeting and a majority of the members leave prior to adjournment, can the remaining members continue with the meeting? The simple answer is found in the definitions

provided in La. R.S. 42:13. Louisiana Revised Statute 42:13(2) defines a meeting as "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." The convening of a quorum is a foundational element of having a meeting. Thus, absent a quorum, a meeting can no longer take place. It is important to note that any action taken at a "meeting" following the loss of a quorum would be null and without the force of law. Due to La. Atty. Gen. Op. No. 75-595 coming to the inaccurate conclusion on this issue, we hereby recall that opinion.

Finally, you ask what relief is available to stop council members from walking out of a meeting to avoid voting on issues or so that a quorum is not present to conduct business. Louisiana Revised Statute 14:134 defines malfeasance in office as follows:

> (A) Malfeasance in office is committed when any public officer or public employee shall:
> (1) Intentionally refuse or fail to perform any duty lawfully required of him, as such officer or employee; or
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> (B) Any duty lawfully required of a public officer or public employee when delegated by him to a public officer or public employee shall be deemed to be a lawful duty of such public officer or employee. The delegation of such lawful duty shall not relieve the public officer or employee of his lawful duty.
> (C)(1) Whoever commits the crime of malfeasance in office shall be imprisoned for not more than five years with or without hard labor or shall be fined not more than five thousand dollars, or both.

Louisiana Constitution Article 10, § 24(A) provides, "[a] state or district official, whether elected or appointed, shall be liable to impeachment for commission or conviction, during his term of office of a felony or for malfeasance or gross misconduct while in such office."

The crime of malfeasance in office is intended to protect the public by deterring elected officials and governmental employees alike from the abuse of public office and duties. *State v. McGuffie*, 42,069 (La.App. 2 Cir. 8/1/07, 11–12), 962 So.2d 1111, 1118, *writ denied,* 2007-2033 (La. 2/22/08), 976 So.2d 1283. The Louisiana Supreme Court held in *State v. Perez*, 464 So2d 737 (La. 1985), that:

> [b]efore a public officer or employee can be charged with malfeasance in office under LSA-R.S. 14:134, there must be a statute or provision of law which delineates an affirmative duty upon the officer or employee... The duty must be expressly imposed by law upon the officer or employee because he is entitled to know exactly what conduct is expected of him in his official capacity and what conduct will subject him to criminal charges.

We note, Minden Code of Ordinances §2-34 states "[e]ach alderman present shall be required to vote on all questions unless excused by the council, but shall not vote for himself on a question involving his individual interest unless he prepares and files a statement as permitted by La. R.S. 42:1120."

In La. Atty. Gen. Op. 02-63, our office concluded that while no statute was found that penalized a school board member for failure to attend meetings, "[i]t is our opinion that the continued failure or refusal to attend meetings of the School Board, without any excuse other than that of purely business reasons, would doubtless constitute malfeasance in office, and the courts would doubtless construe such malfeasance as misconduct in office." La. Atty. Gen. Op. 02-63 (citing Attorney General Opinion of 1960-62, page 311). With regards to the charge of malfeasance in office, the decision to bring charges rests with the District Attorney. The District Attorney has broad discretion in both the institution and handling of criminal prosecutions. La. Atty. Gen. Op. No. 00-51 and *State v. Kibodeaux*, 435 So.2d 1128 (La.App. 1 Cir. 1983). Whether failure to attend meetings amounts to malfeasance is a factual question within the discretion of the district attorney.

We hope that this opinion has adequately addresses 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

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