Open Meetings Law and Public Records Act Update

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Applicable Law
- La. Const. art. XII, §3.
- La. R.S. 44:1 et seq.

This presentation will cover recent news stories and opinions related to the open meetings law and public records act. The presentation discusses the applicable law that is raised by the issues listed below.

1. Reasonable notice of an agenda item
   a. La. R.S. 42:19(A)(1)

2. Requests for names and qualifications of applicants for a public position
   a. La. R.S. 44:1 “public record”
   b. La. R.S. 44:12.1

3. What constitutes a “Meeting”?
   a. Site visits, committee meetings, meeting with a member of the parish administration.
   b. La. R.S. 42:19
   c. La. R.S. 42:14

4. Personal e-mails sent on a public account.
   b. La. R.S. 44:1.

5. Texting and meetings / Meeting without notice
   a. La. R.S. 42:17
   b. La. R.S. 42:16
   c. La. R.S. 42:19

6. Electronic communications between members of a public body
   a. La. R.S. 42:13

7. Pertinent 2013 Legislation
   b. Enactment of La. R.S. 42:19.1

8. Lagniappe
   a. Opinion 13-0075
      i. Use of telephone for purposes of achieving a quorum.
   b. Opinion 13-0043
      i. A non-profit as a public body, outlines the recent judicial guidance on this issue.
   c. Opinion 13-0046
      i. Calling of a special meeting in a Lawrason Act municipality
Constitution

Article XII. Section 3. Louisiana Constitution (1974)
Right to Direct Participation

No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.

Revised Statutes

La. R.S. 42:11 Short title

This Chapter shall be known and may be cited as the "Open Meetings Law."

La. R.S. 42:12 Public policy for open meetings; liberal construction

A. 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.

B. Further, to advance this policy, all public bodies shall post a copy of R.S. 42:12 through 28.

La. R.S. 42:13 Definitions

A. For the purposes of R.S. 42:12 through R.S. 42:28:

(1) "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.

(2) "Public body" means village, town, and city governing authorities; parish governing authorities; school boards and boards of levee and port commissioners; boards of publicly operated utilities; planning, zoning, and airport commissions; and any other state, parish, municipal, or special district boards, commissions, or authorities, and those of any political subdivision thereof, where such body possesses policy making, advisory, or
administrative functions, including any committee or subcommittee of any of these bodies enumerated in this paragraph.

(3) "Quorum" means a simple majority of the total membership of a public body.

(4) "Consent Agenda" means a grouping of procedural or routine agenda items that can be approved with general discussion.

B. The provisions of R.S. 42:12 through R.S. 42:27 shall not apply to chance 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 the members.

_La. Atty. Gen. Op. No. 10-0121:_ If a majority of members of the New Orleans City Council or a majority of members of a Committee of the Council, assembled informally, deliberate, act or receive information regarding matters which are or may come before the Council or that Committee, such a gathering is to be considered a "meeting" which must comply with the Open Meetings Law. However, if a majority of the Council or a Committee meet by chance or gather at a social function, as long as there is no deliberation, action or information received concerning a matter over which the Council or Committee has "supervision, control, jurisdiction, or advisory power," such a gathering is not subject to the Open Meetings Law.

_La. Atty. Gen. Op. No. 09-0197:_ An ad hoc committee formed by the Chairman of the St. Tammany Parish Council which possesses an advisory function is subject to the requirements of the Open Meetings Law.

_La. Atty. Gen. Op. No. 93-0315:_ A private session of a quorum of a city council held to discuss "goal seeking" efforts of the municipality would be violative of the Open Meetings Laws.

_La. Atty. Gen. Op. No. 87-0048:_ A meeting, as defined in the Open Meetings Laws, includes gatherings to discuss or act, and the fact that no binding action is taken or intended will not remove a meeting from the requirements of the Open Meetings Laws. Meetings held pursuant to prior notice of the intent to discuss official business must meet the requirements of the Open Meetings Laws.

_La. Atty. Gen. Op. No. 84-0395:_ A "public body" includes any committee or subcommittee of a city governing authority, and the fact that a committee cannot make a final decision on a matter does not remove meetings of that committee from the ambit of the open meetings requirements. It was found, "In conclusion, a working committee of a municipality constitutes a public body when it meets to discuss matters over which it has authority or advisory power, even if the committee takes no binding action."

_La. R.S. 42:14_ **Meetings of public bodies to be open to the public**

A. Every meeting of any public body shall be open to the public unless closed pursuant to R.S. 42:16, R.S. 42:17, or R.S. 42:18.

B. Each public body shall be prohibited from utilizing any manner of proxy voting procedure, secret balloting, or any other means to circumvent the intent of R.S. 42:12 through R.S. 42:23.
C. All votes made by members of a public body shall be viva voce and shall be recorded in the minutes, journal, or other official, written proceedings of the body, which shall be a public document.

D. Except school boards, which shall be subject to RS. 42:15, each public body conducting a meeting which is subject to the notice requirements of RS. 42:19(A) shall allow a public comment period at any point in the meeting prior to action on an agenda item upon which a vote is to be taken. The governing body may adopt reasonable rules, regulations, and restrictions regarding such comment period.

La. R.S. 42:15  School board meetings: public comment

A. Notwithstanding any other law to the contrary, each school board subject to the provisions of this Chapter, except as provided in Subsection B of this Section, shall allow public comment at any meeting of the school board prior to taking any vote. The comment period shall be for each agenda item and shall precede each agenda item.

B. The Orleans Parish School Board, at any meeting of the school board, shall provide an opportunity for public comment subject to reasonable rules, regulations, and restrictions as adopted by the school board.

C. For purposes of this Section, a comment period for all comments at the beginning of a meeting shall not suffice to meet the requirements of Subsection A or Subsection B of this Section.

La. R.S. 42:16  Executive Sessions

A public body may hold executive sessions upon an affirmative vote, taken at an open meeting for which notice has been given pursuant to R.S. 42:19, of two-thirds of its constituent members present. An executive session shall be limited to matters allowed to be exempted from discussion at open meetings by R.S. 42:17; however, no final or binding action shall be taken during an executive session. The vote of each member on the question of holding such an executive session and the reason for holding such an executive session shall be recorded and entered into the minutes of the meeting. Nothing in this Section or R.S. 42:17 shall be construed to require that any meeting be closed to the public, nor shall any executive session be used as a subterfuge to defeat the purposes of R.S. 42:12 through R.S. 42:23.

La. Atty. Gen. Op. No. 01-0468: Public bodies may convene executive sessions pursuant to R.S. 42:6 for the discussion of the character, professional competence, or physical or mental health of a person; strategy sessions or negotiations with respect to collective bargaining and/or prospective litigation; investigative proceedings regarding allegations of misconduct; etc. Please see the opinion so as to be advised of any other instances and the requirements associated with public bodies' authority to convene an executive session.
La. R.S. 42:17  Exceptions to open meetings

A. A public body may hold an executive session pursuant to R.S. 42:16 for one or more of the following reasons:

(1) Discussion of the character, professional competence, or physical or mental health of a person, provided that such person is notified in writing at least twenty-four hours before the meeting and that such person may require that such discussion be held at an open meeting. However, nothing in this Paragraph shall permit an executive session for discussion of the appointment of a person to a public body or, except as provided in R.S. 39:1593(C)(2)(C), for discussing the award of a public contract. In cases of extraordinary emergency, written notice to such person shall not be required; however, the public body shall give such notice as it deems appropriate and circumstances permit.

(2) Strategy sessions or negotiations with respect to collective bargaining, prospective litigation after formal written demand, or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public body.

(3) Discussion regarding the report, development, or course of action regarding security personnel, plans, or devices.

(4) Investigative proceedings regarding allegations of misconduct.

(5) Cases of extraordinary emergency, which shall be limited to natural disaster, threat of epidemic, civil disturbances, suppression of insurrections, the repelling of invasions, or other matters of similar magnitude.

(6) Any meeting of the State Mineral Board at which records or matters entitled to confidential status by existing law are required to be considered or discussed by the board with its staff or with any employee or other individual, firm, or corporation to whom such records or matters are confidential in their nature, and are disclosed to and accepted by the board subject to such privilege, for the exclusive use in evaluating lease bids or development covering state-owned lands and water bottoms, which exception is provided pursuant to and consistently with the Public Records Act, being Chapter I of Title 44 of the Louisiana Revised Statutes of 1950, as amended, and other such statutes to which the board is subject.

(7) Discussions between a city or parish school board and individual students or the parents or tutors of such students, or both, who are within the jurisdiction of the respective school system, regarding problems of such students or their parents or tutors; provided however that any such parent, tutor, or student may require that such discussions be held in an open meeting.

(8) Presentations and discussions at meetings of civil service boards of test questions, answers, and papers produced and exhibited by the office of the state examiner, municipal fire and police civil service, pursuant to R.S. 33:2492 or 2552.

(9) The portion of any meeting of the Second Injury Board during which records or matters regarding the settlement of a workers' compensation claim are required to be
considered or discussed by the board with its staff in order to grant prior written approval as required by R.S. 23:1378(A)(8).

(10) Or any other matters now provided for or as may be provided for by the legislature.


C. The provisions of R.S. 42:12 through R.S. 42:27 shall not prohibit the removal of any person or persons who willfully disrupt a meeting to the extent that orderly conduct of the meeting is seriously compromised.

D. The provisions of R.S. 42:19 and R.S. 42:20 shall not apply to any meeting of a private citizens' advisory group or a private citizens' advisory committee established by a public body, when the members of such group or committee do not receive any compensation and serve only in an advisory capacity, except textbook advisory committees of the State Department of Education or the Board of Elementary and Secondary Education. However, all other provisions contained in R.S. 42:12 through 42:27 shall be applicable to such group or committee and the public body which established such group or committee shall comply with the provisions of R.S. 42:19 in providing the required notice of meetings of such group or committee.


La. R.S. 42:18 Executive or closed meetings of legislative houses and committees

A. Notwithstanding any contrary provision of R.S. 42:16 and R.S. 42:17, executive or closed meetings may be held by the legislature, either house thereof, or any committee or subcommittee of either house, upon the affirmative vote of at least a majority of the members of the house or the committee or subcommittee thereof making the determination to hold such meeting, for one or more of the following purposes:

(1) Discussion of confidential communications.

(2) Discussion of the character, professional competence, or physical or mental health of any person subject to contract with or to employment, election, or appointment or confirmation of appointment by either house of the legislature or any committee or subcommittee of either or by any other public body.

(3) Strategy sessions or negotiations with respect to collective bargaining, prospective litigation after formal written demand, or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the legislature, either house thereof, or any committee or subcommittee of either house.
(4) Discussion regarding a report, development, or course of action regarding security personnel, plans, or devices.

(5) Investigations by the legislature, either house thereof, or by any committee or subcommittee thereof, including the Legislative Audit Advisory Council or any other joint or statutory committee, whenever reasonable grounds exist to believe that the testimony to be elicited will reflect a failure of compliance with law.

(6) Cases of extraordinary emergency, which shall be limited to natural disaster, threat of epidemic, civil disturbances, suppression of insurrections, the repelling of invasions, or other matters of similar magnitude.

(7) Discussion by either house of the legislature, or any committee or subcommittee thereof, of any matter affecting the internal operations or management of the body.

(8) Any other matters provided by law or pursuant to the joint rules of the legislature.

B. All procedural matters pertaining to the necessity, purposes, or reasons for the holding of executive or closed meetings under the provisions of this Section shall be in accordance with such rules as are adopted by each of the houses of the legislature for the purpose.

C. The provisions of R.S. 42:12 through R.S. 42:27 shall not apply to chance meetings, social gatherings, or other gatherings at which only presentations are made to members of the legislature or members of either house thereof or of any committee or subcommittee if no vote or other action, including formal or informal polling of members, is taken.

La. R.S. 42:19 Notice of meetings

A. (i)(a) All public bodies, except the legislature and its committees and subcommittees, shall give written public notice of their regular meetings, if established by law, resolution, or ordinance, at the beginning of each calendar year. Such notice shall include the dates, times, and places of such meetings.

(b)(i) All public bodies, except the legislature and its committees and subcommittees, shall give written public notice of any regular, special, or rescheduled meeting no later than twenty-four hours before the meeting.

(ii)(aa) Such notice shall include the agenda, date, time, and place of the meeting. The agenda shall not be changed less than twenty-four hours prior to the meeting.

(bb) Each item on the agenda shall be listed separately and described with reasonable specificity. Before the public body may take any action on an item, the presiding officer or his designee shall read aloud the description of the item except as otherwise provided in Subitem (dd) of this item.

(cc) Upon unanimous approval of the members present at a meeting of a public body, the public body may take up a matter not on the agenda. Any such matter shall be identified
in the motion to take up the matter not on the agenda with reasonable specificity, including the purpose for the addition to the agenda, and entered into the minutes of the meeting. Prior to any vote on the motion to take up a matter not on the agenda by the public body, there shall be an opportunity for public comment on any such motion in accordance with R.S. 42:14 or 15. The public body shall not use its authority to take up a matter not on the agenda as a subterfuge to defeat the purposes of R.S. 42:12 through 23.

(dd) If an agenda of a meeting of a governing authority of a parish with a population of two hundred thousand or more according to the latest federal decennial census or municipality with a population of one hundred thousand or more according to the latest federal decennial census contains more than fifty items, the governing authority may take action on items listed on a consent agenda without reading the description of each item aloud. However, before any action is taken on items listed on a consent agenda, the governing authority shall allow for a public comment period. Any item listed on a consent agenda may be removed from the consent agenda by an individual member of the governing authority if a person objects to the presence of the item on the consent agenda and provides reasons for individual discussion at the meeting. The name of the person who objects to a consent agenda item and the reasons for the objection shall be included in the minutes of the meeting.

(iii) Following the above information there shall also be attached to the written public notice of the meeting, whether or not such matters will be discussed in an executive session held pursuant to R.S. 42:17(A)(2):

(aa) A statement identifying the court, case number, and the parties relative to any pending litigation to be considered at the meeting.

(bb) A statement identifying the parties involved and reasonably identifying the subject matter of any prospective litigation for which formal written demand has been made that is to be considered at the meeting.

(iv) In cases of extraordinary emergency, such notice shall not be required; however, the public body shall give such notice of the meeting as it deems appropriate and circumstances permit.

(2) Written public notice given by all public bodies, except the legislature and its committees and subcommittees, shall include, but need not be limited to:

(a) Posting a copy of the notice at the principle office of the public body holding the meeting, or if no such office exists, at the building in which the meeting is to be held; or by publication of the notice in an official journal of the public body no less than twenty-four hours before the meeting. If the public body has a website, additionally by providing notice via the Internet on the website of the public body for no less than twenty-four hours immediately preceding the meeting. The failure to timely post notice via the Internet pursuant to this Subparagraph or the inability of the public to access the public body’s website due to any type of technological failure shall not be a violation of the provisions of this Chapter.
(b) Mailing a copy of the notice to any member of the news media who requests notice of such meetings; any such member of the news media shall be given notice of all meetings in the same manner as is given to members of the public body.

B. Reasonable public notice of day to day sessions of either house of the legislature, and of all matters pertaining to such meetings, including but not necessarily restricted to the content of notices, quorums for the transaction of business, proxy voting, viva-voce votes, and recording of votes, shall be governed by the provisions of the Louisiana Constitution, the rules of procedure of the Senate and the House of Representatives, and the Joint Rules applicable to both houses. Reasonable public notice of meetings of legislative committees and subcommittees shall be given in accordance with such rules as are adopted by the respective houses for the purpose.

NOTE: See Acts 2012, No. 747, §2 regarding public bodies that do not have a website.

La. Atty. Gen. Op. No. 10-0094: In order for a public body to amend the agenda, such a motion requires the unanimous approval of all members physically present in the meeting room, even if a member is temporarily absent from the meeting room. The Chairperson has the discretion to determine whether it is appropriate to entertain the motion to amend before or after the temporarily absent board member returns.

La. Atty. Gen. Op. No. 09-0037: It is proper for “financial matters” to be placed on the Sabine Parish School Board's consent agenda, if such matters are routine or non-controversial. If a member of the public body determines that any item on the consent agenda requires discussion, then the item must be treated as a typical agenda item, allowing for debate and a separate vote.

La. Atty. Gen. Op. No. 09-0300: Concerns about publication of unofficial meeting minutes pursuant to La. R.S. 43:144 do not outweigh the public's interest in timely notice of actions taken at the meeting, since any corrections to the minutes made at a later meeting would appear in the minutes of the later meeting. The ten-day time limit set forth in La. R.S. 43:144 does not apply to the publication of minutes of meetings of the Board of Directors of the Jackson Parish Ambulance Service District.

La. R.S. 42:19.1 Procedure for the levy, increase, renewal, or continuation of a tax or for calling an election for such purposes by political subdivisions

A.(1) In addition to any other requirements provided for in R.S. 42:19 or other provisions of law, public notice of the date, time, and place of any meeting at which a political subdivision as defined in Article VI, Section 44(2) of the Constitution of Louisiana intends to levy, increase, renew, or continue any ad valorem property tax or sales and use tax or authorize the calling of an election for submittal of such question to the voters of the political subdivision shall be both published in the official journal of the political subdivision no more than sixty days nor less than thirty days before such public meeting and shall be announced to the public during the course of a public meeting of such political subdivision no more than sixty days nor less than thirty days before such public meeting.
(2)(a) In the event of cancellation or postponement of a meeting at which consideration of or action upon a proposal to levy, increase, renew, or continue any ad valorem or sales and use tax or authorize the calling of an election for submittal of such questions to the voters of the political subdivision was scheduled, notice of the date, time, and place of any subsequent meeting to consider such proposal shall be published in the official journal of the political subdivision no less than ten days before such subsequent meeting.

(b) However, in the event that consideration of or action upon any such proposal was postponed at the scheduled meeting, or any such proposal was considered at the scheduled meeting without action or vote, then any subsequent meeting to consider such proposal shall be subject to the requirements of Subparagraph (a) of this Paragraph unless the date, time, and place of a subsequent meeting for consideration of such proposal is announced to the public during the course of such meeting.

B. The provisions of this Section shall not apply to any consideration of or action upon a proposal to levy additional or increased ad valorem property tax millages on property without voter approval to which the provisions of R.S. 47:1705(B)(2)(c) and (d) apply.

La. R.S. 42:20 Written minutes

A. All public bodies shall keep written minutes of all of their open meetings. The minutes to be kept by the legislature and legislative committees and subcommittees shall be governed by the provisions of R.S. 42:21. The minutes of all other public bodies shall include but need not be limited to:

(1) The date, time, and place of the meeting.

(2) The members of the public body recorded as either present or absent.

(3) The substance of all matters decided, and, at the request of any member, a record, by individual member, of any votes taken.

(4) Any other information that the public body requests be included or reflected in the minutes.

B. The minutes shall be public records and shall be available within a reasonable time after the meeting, except where such disclosures would be inconsistent with R.S. 42:16, R.S. 42:17, and R.S. 42:18, or rules adopted under the provisions of R.S. 42:21.

La. Atty. Gen. Op. No. 04-0317: A Type 2 charter school is not subject to the mandates set forth in Title 43, Chapter 4 of the Louisiana Revised Statutes requiring the publication of minutes, unless a school’s approved charter subjects the school to such publication requirements.

La. Atty. Gen. Op. No. 92-0847 points out that the minutes must, at the least, reflect the date, time, and place of the meeting, the presence or absence of district members, substantive matters discussed and any votes taken, and any other information that district members request be reflected in the minutes.
La. R.S. 42:21 Minutes of legislative sessions, legislative committees and subcommittees

A. The journals of the proceedings of each of the houses of the legislature, as required to be kept by the provisions of Article III, Section 10(B) of the Louisiana Constitution, shall constitute the written minutes of open sessions of the Senate and of the House of Representatives.

B. The written minutes of standing, interim, joint, and other committees and subcommittees of the Senate and House of Representatives shall include such information as may be required by the rules of the respective houses.

La. R.S. 42:22 Presentation and consideration of offer to sell natural gas to a public body, or to operate or acquire ownership of, a gas utility owned or operated by a public body

A. For the purposes of this Section, "gas utility" means any revenue producing business or organization which is owned or operated by a public body, and which regularly supplies the public with natural gas at retail.

B. Prior to consideration or action by a public body to accept a proposal by a nonpublic entity to sell natural gas to a public body for use in its gas distribution system sales to retail customers for a term exceeding twelve months including rollovers or extensions, or to assume operation or acquire ownership of, a gas utility being operated or owned by the public body, the proposal shall:

(1) Be introduced, in writing, at an open meeting of the public body.

(2) Not be considered by the public body until notice of the proposal has been published in the official journal of the public body and at least thirty days has lapsed after the introduction of the proposal.

(3) Include a written report of the most recent five year history of the sale of natural gas to similar public bodies for use in gas distribution system sales to retail customers for a term exceeding twelve months including rollovers or extensions by the nonpublic entity if the entity is seeking to sell natural gas to a public body for use in its gas distribution system sales to retail customers for a term exceeding twelve months including rollovers or extensions to the public body or a five-year history of the purchase price of other gas utilities operated or owned by a public body paid by the nonpublic entity if the entity is seeking to assume operation or acquire ownership of the utility. A copy of the report shall be provided to all members of the public body and be available to the public.

(4) Include any written contract or agreement proposed between the nonpublic entity seeking to sell natural gas to a public body for use in its gas distribution system sales to retail customers for a term exceeding twelve months including rollovers or extensions to, or assume operation or acquire ownership of, the gas utility and the public body. A copy
of the contract or agreement shall be provided to all members of the public body and be available to the public.

C. Notice of the proposal and the availability of the written report and contract or agreement shall be published once in the official journal of the public body. The notice shall indicate the time and place where the public body will hold a public hearing and consider the proposal.

D. No proposal shall be considered until a public hearing on it has been held. No proposal can be adopted at the meeting at which it is introduced.

E. Any proposed revision or amendment of the published contract or agreement shall be noticed, published, and made available in its entirety in the same manner as required for the original contract or agreement. No such contract or agreement shall be entered into by the public body until at least thirty days have lapsed since the notice of the availability of the revised contract or agreement has been published.

\textit{La. Atty. Gen. Op. No. 05-0341}: A town may sell its natural gas system to a public or non-public entity; the sale or lease of gas utilities encompass and incorporate the protections codified in the public bid law.

\textbf{La. R.S. 42:23} \hspace{1cm} \textbf{Sonic and video recordings; live broadcast}

A. All of the proceedings in a public meeting may be video or tape recorded, filmed, or broadcast live. However, any nonelected board or commission that has the authority to levy a tax shall video or audio record, film, or broadcast live all proceedings in a public meeting.

B. A public body shall establish standards for the use of lighting, recording or broadcasting equipment to insure proper decorum in a public meeting.

\textit{La. Atty. Gen. Op. No. 05-0166}: A Fire District's video and audio recordings produced by security cameras are subject to a public records request. However, recordings of an executive session are covered within the exceptions of public records.

\textit{La. Atty. Gen. Op. No. 95-0277}: Under R.S. 42:8 there is a general right for a citizen to record public meetings, but the public body is mandated to establish standards so this can be done in an orderly fashion.

\textbf{La. R.S. 42:24} \hspace{1cm} \textbf{Voidability}

Any action taken in violation of R.S. 42:12 through R.S. 42:23 shall be voidable by a court of competent jurisdiction. A suit to void any action must be commenced within sixty days of the action.

\textbf{La. R.S. 42:25} \hspace{1cm} \textbf{Enforcement}

A. The attorney general shall enforce the provisions of R.S. 42:12 through R.S. 42:23 throughout the state. He may institute enforcement proceedings on his own initiative and shall institute such proceedings upon a complaint filed with him by any person, unless written reasons are given as to why the suit should not be filed.
B. Each district attorney shall enforce the provisions of R.S. 42:12 through R.S. 42:23 throughout the judicial district within which he serves. He may institute enforcement proceedings on his own initiative and shall institute such proceedings upon a complaint filed with him by any person, unless written reasons are given as to why the suit should not be filed.

C. Any person who has been denied any right conferred by the provisions of R.S. 42:12 through R.S. 42:23 or who has reason to believe that the provisions of R.S. 42:12 through R.S. 42:23 have been violated may institute enforcement proceedings.

La. R.S. 42:26 Remedies; jurisdiction; authority; attorney fees

A. In any enforcement proceeding the plaintiff may seek and the court may grant any or all of the following forms of relief:

(1) A writ of mandamus.
(2) Injunctive relief.
(3) Declaratory judgment.
(4) Judgment rendering the action void as provided in R.S. 42:24.
(5) Judgment awarding civil penalties as provided in R.S. 42:28.

B. In any enforcement proceeding the court has jurisdiction and authority to issue all necessary orders to require compliance with, or to prevent noncompliance with, or to declare the rights of parties under the provisions of R.S. 42:12 through R.S. 42:27. Any noncompliance with the orders of the court may be punished as contempt of court.

C. If a person who brings an enforcement proceeding prevails, he shall be awarded reasonable attorney fees and other costs of litigation. If such person prevails in part, the court may award him reasonable attorney fees or an appropriate portion thereof. If the court finds that the proceeding was of a frivolous nature and was brought with no substantial justification, it may award reasonable attorney fees to the prevailing party.

Courvelle v. Louisiana Recreational and Used Motor Vehicle Commission, 08-0952 (La.App. 1 Cir. 9/19/09), 21 So.3d 340. Recreational and Used Motor Vehicle Commission's stated reasons for entering into executive session, which were to discuss noticed "legal matters" and "a sensitive matter" were not of sufficient specificity to demonstrate how a public discussion of pending litigation would be detrimental and thus violated the Open Meetings Law.

La. R.S. 42:27 Venue; summary proceedings

A. Enforcement proceedings shall be instituted in the district court for the parish in which the meeting took place or will take place.

B. Enforcement proceedings shall be tried by preference and in a summary manner. Any appellate court to which the proceeding is brought shall place it on its preferential docket, shall hear it without delay, and shall render a decision as soon as practicable.
La. R.S. 42:28 Civil penalties

Any member of a public body who knowingly and wilfully [sic] participates in a meeting conducted in violation of R.S. 42:12 through R.S. 42:23, shall be subject to a civil penalty not to exceed one hundred dollars per violation. The member shall be personally liable for the payment of such penalty. A suit to collect such penalty must be instituted within sixty days of the violation.

La. Atty. Gen. Op. No. 94-547: Any member of a public body who knowingly and willfully participates in a meeting conducted in violation of R.S. 42:4.1 through R.S. 42:8, shall be subject to a civil penalty not to exceed one hundred dollars per violation. The member shall be personally liable for the payment of such penalty. A suit to collect such penalty must be instituted within sixty days of the violation.
FREQUENTLY ASKED ABOUT TOPICS

ELECTRONIC COMMUNICATION

La. Atty. Gen. Op. No. 12-0177: 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.

La. Atty. Gen. Op. No. 10-0223: Electronic communication during a public meeting between members of a public body and constituents, staff and/or another member of a public body is not, in and of itself, a violation of the Open Meetings Law. However, the analysis of a potential Open Meetings Law violation is much different when considering electronic communication between a quorum of members of a public body during a public meeting.

PROXY VOTING / PARTICIPATION BY TELEPHONE / POLLING


La. Atty. Gen. Op. No. 09-0149: A parish executive committee may adopt any rules and bylaws that of the state central committee, insofar as they do not conflict with state law. In addition, since state law does not expressly authorize proxy voting by email, any proxy vote by email should not be accepted.

La. Atty. Gen. Op. No. 02-0106: The intent of La. R.S. 42:5(B) is to require physical presence at open meetings in order to participate in any matter. Any participation via telephone, whether it is to obtain a quorum or to allow voting by non-present board members is a violation of the open meetings law.

La. Atty. Gen. Op. No. 99-0034: If a quorum of the Council or a committee thereof contacts each other by telephone for the purpose of discussing or deciding on a course of action on a matter over which it has authority, this would be considered a circumvention of the open meetings laws.

La. Atty. Gen. Op. No. 93-137: The Open Meetings Law prohibits representation by proxy. Further, telephone polls cannot be used to authorize action by a public body. Finally, the remedy of mandamus may be available to compel attendance of commission members. Attendance at meetings is not a discretionary duty, but is rather a duty purely ministerial in nature, for which the action of mandamus is appropriate.

La. Atty. Gen. Op. No. 92-166: The Slidell Ethics Board is a public body within the meaning of Louisiana’s Open Meetings Law; telephone contact between a majority of the members of the Board in order to determine policy or a course action would constitute a violation of the Open Meetings Law.


La. Atty. Gen. Op. No. 78-1017: A telephone poll of members of a school board to discuss the employment and compensation of special counsel is prohibited by the Louisiana Open Meeting Law.

“PRE-MEETING”

La. Atty. Gen. Op. No. 01-243: “Agenda planning meetings” conducted by the Amite Town Council do not violate open meetings laws as proper notice is provided before each meeting.


PUBLIC COMMENT

La. Atty. Gen. Op. No. 08-0325: Although the Mayor has the power to preside over meetings of the Board of Aldermen, the Board may adopt rules for participation in meetings. Additionally, if the Board unanimously votes to add an item not on the agenda for discussion, the Mayor cannot prohibit the members from discussing such item. Although a citizen has the right to give public comment at a public meeting, there is no requirement that the citizen be allowed to add items to the agenda for discussion.

La. Atty. Gen. Op. No. 04-0107: La. R.S. 42:5.1 does not preclude a school board from placing requirements on individuals that desire to speak such as filling out a sign-up card before a school board meeting, limiting the speaker to the agenda item on which he would like to speak, limiting the amount of time for each speaker, and/or restricting speakers from making defamatory or accusatory comments.

La. Atty. Gen. Op. No. 01-0394: Public bodies conducting a meeting shall provide by adoption of reasonable rules for opportunity for public comment at the meeting.
La. Atty. Gen. Op. No. 01-0367: The comment period established by La. R.S. 42:5(D) applies only to items placed on the agenda, and the rules and regulations governing this period are to be established by each public body.

La. Atty. Gen. Op. No. 98-17: La. R.S. 42:5.1 does not preclude a school board from placing requirements on individuals that desire to speak such as filling out a sign-up card before a meeting.

La. Atty. Gen. Op. No. 94-152: The mayor of the City of Ville Platte may require the use of an agenda Application form for public participation in setting the agenda of the City's Board of Aldermen.

INTERVIEWS

La. Atty. Gen. Op. No. 94-14: It is not proper to go into executive session to make a selection or recommendation concerning hiring a town employee. Public meetings may be tape recorded.

La. Atty. Gen. Op. No. 91-158A: The vote of a School Board selecting an interview committee, and any decision, selection or recommendation of or concerning a job applicant or prospective employee by the School Board, or its committee, must be taken in an open meeting; however, discussion of the character or mental health of a person, including a job applicant or a prospective employee, and the interviewing of such person may be done in executive session.


ATTENDANCE IN AN EXECUTIVE SESSION

La. Atty. Gen. Op. No. 99-51: The school board may call an executive session for discussions and strategies in the lawsuit at issue. No public disclosure is required of these discussions and strategies held in executive session. Non members may be permitted into an executive session of a public body if there presence is necessary and not a subterfuge to the open meetings laws.

La. Atty. Gen. Op. No. 93-233: A public body may permit anyone to attend an executive session if that person's presence is necessary and if the executive session is not being used as a subterfuge to defeat the purposes of the Louisiana Open Meetings Law.


AGENDA ITEM DESCRIPTIONS

La. Atty. Gen. Op. No. 11-0275: Agenda items on a meeting notice of a public body must be reasonably clear so as to advise the public in general terms of the subjects which will be discussed. A council member serving as mayor pro tempore does not lose his or her
ability to vote, and may cast votes for or against items on the agenda. Further, the mayor pro tempore may make or second a motion on the agenda. A quorum exists in a municipality of five council members when three members are in attendance, with one serving as the mayor pro tempore. Finally, two-thirds of a five member council is four members.

La. Atty. Gen. Op. No. 07-0181: Agenda for police jury meeting must be reasonably clear so that the general public could ascertain that the removal and reappointment of a hospital service district board member would be considered. Actions by the police jury taken in absenceof this requirement are voidable by a court of competent jurisdiction within sixty days of the action.

La. Atty. Gen. Op. No. 85-0789: All special meetings must be convened following twenty-four hour notice. The notice given must state an agenda. This agenda must also state with specificity what matters are to be discussed. Merely stating that "the Board will consider any emergency matters which may be presented by the Superintendent and/or board members," is vague and, thus, not proper notice. The notice must be specific as to what matters will be discussed.

MEMBERS OF A PUBLIC BODY ATTENDING MEETINGS AS CITIZENS

La. Atty. Gen. Op. No. 11-0267: Members of the Commission who are not members of a subcommittee of the Commission may attend subcommittee meetings and participate in their capacity as citizens, but such participation must be limited to providing comment as is available to any other member of the public, as described by La. R.S. 42:14(D). However, as a cautionary measure, whenever it is likely that a quorum of the Commission will attend a subcommittee meeting, we recommend that the posted notice of the subcommittee meetings include a statement providing that it is possible that a quorum of the Commission may be in attendance at such meeting, but that no action of the Commission as a whole will be taken.

La. Atty. Gen. Op. No. 08-0239: Whether or not a quorum of the public body could be said to be "convening" for the purposes of the Open Meetings Law at a Town Hall Meeting 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.

La. Atty. Gen. Op. No. 99-215: A parish councilman who is not a memeber of a committee may attend that committee's meetings as an observer, as long as he does not take part in any deliberations or discussions of the committee.

REVISITING AN ISSUE

La. Atty. Gen. Op. No. 11-0034: Failure to pass an ordinance at the Council's December meeting does not prohibit a majority of the Council from voting to introduce the ordinance again at the January meeting, and then adopting the ordinance by a majority vote at the Council's subsequent meeting.
MEMBER QUALIFICATION

La. Atty. Gen. Op. No. 12-0068: A member of the Board of Directors of the Louisiana Energy & Power Authority whose term has expired and whose successor has not been reappointed continues to serve until his or her successor is appointed, retains his or her voting rights as a director, and is still counted toward the total membership of the public body for purposes of calculating a quorum.

La. Atty. Gen. Op. No. 08-0014: Members of a board shall continue to serve, despite the fact that the statute determining their qualifications has been amended, when their successors have not yet been named. When a member has been appointed pursuant to a statutory provision that has been repealed, that member should no longer continue to serve.

MATTERS WITHIN MEETINGS

La. Atty. Gen. Op. No. 13-0046: The mayor of a Lawrason Act community may not refuse to hold a special meeting which has been called for by a majority of the board of aldermen.


La. Atty. Gen. Op. No. 08-0325: Although the Mayor has the power to preside over meetings of the Board of Aldermen, the Board may adopt rules for participation in meetings. Additionally, if the Board unanimously votes to add an item not on the agenda for discussion, the Mayor cannot prohibit them from discussing such item. Although a citizen has the right to give public comment at a public meeting, there is no requirement that the citizen be allowed to add items to the agenda for discussion.
Mr. Rick S. Danielson  
Mayor Pro Tem  
City of Mandeville  
3101 East Causeway Approach  
Mandeville, LA 70448

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:

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."
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

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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.

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

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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(8). 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,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

BY: Emalie A. Boyce
Assistant Attorney General

JDC: EAB
Mr. Jacob D. Dagate  
Special Assistant District Attorney  
Thirty-Second Judicial District  
7856 Main Street  
Courthouse Annex Suite 220  
Houma, Louisiana 70360  

Dear Mr. Dagate:

Our office received a request from you for an opinion concerning a public records request received by the Houma-Terrebonne Housing Authority ("HTHA"). Your letter states that a request was received by the HTHA seeking a copy of any and all e-mails which are political in nature sent by HTHA's Executive Director on ten specific dates. The request specifies that, as used in the request, "political in nature" refers to any and all documents that: (1) refer to a political party or candidate for office; (2) refer to a political party or elected official; (3) refer to any issue in controversy that has been written about in the media; and (4) are meant to advocate for a particular party or advocate against a particular party or candidate.¹

After reviewing potentially responsive e-mails to the request, it was determined that six or fewer of the e-mails that could be considered "political in nature," as defined by the requestor, were personal e-mails that had no relation to the function or business of the HTHA. Relying on La. Atty. Gen. Op. No. 10-0272 and the definition of "public record" provided by La. R.S. 44:1 et seq., you, as the attorney for HTHA, concluded that personal e-mails transmitted by the Executive Director which have no relation to any function or business of the HTHA are not "public records" as defined by the Public Records Act. Your request letter specifically asks whether the Office of the Attorney General maintains the position taken in La. Atty. Gen. Op. No. 10-0272 that e-mails of a

¹ The requestor, in follow up correspondence objecting to the HTHA's response to his request, refers to La.Const. art. X, § 9, which prohibits a civil service employee from participating or engaging in political activity, except to exercise his rights as a citizen to express an opinion privately, to serve as a commissioner at the polls, and to cast his vote as he desires. See also La. R.S. 33:2429. We note that La.Const. art. X, § 9(C) defines "political activity" as "an effort to support or oppose the election of a candidate for political office or to support a particular political party in an election. The support of issues involving bond indebtedness, tax referenda, or constitutional amendments shall not be prohibited." Clearly, the definition of "political activity" provided by the requestor to the HTHA is broader than the definition of "political activity" under La.Const. art. X, § 9.
purely personal nature sent on a public e-mail account and having no relation to public business are not public records subject to disclosure under La. R.S. 44:1(A)(2)(a).

The right of access to public information is guaranteed by La.Const. art. XII, § 3, which provides, "[n]o person shall be denied the right to . . . examine public documents, except in cases established by law." The Public Records Act, which can be found at La. R.S. 44:1 et seq., was enacted by the Louisiana Legislature to protect and define the constitutional right of access to public documents. The Louisiana Supreme Court has instructed liberal construction of the Public Records Act, with any doubt being resolved in favor of access.2 Unless an exception to the Public Records Act is applicable, a custodian has the responsibility and duty to provide access to public records, and the public has a right to copy, inspect or reproduce public records.3

A "public record" is defined by La. R.S. 44:1(A)(2)(a) as including:

All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state . . . except as otherwise provided in this Chapter or the Constitution of Louisiana.


[a] record's mere existence in a public office does not automatically make such document a "public record." It is the opinion of this office that the definition of "public records" requires a content-driven analysis for a connection between the record and the conduct of public business or the functioning of a public body.

The opinion then references La. Atty. Gen. Op. No 79-242, which concluded that the statute defining a "public record," La. R.S. 44:1, was not intended to include everything

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2 Title Research Corp. v. Rausch, 450 So.2d 933 (La.1984); Landis v. Moreau, 00-1157 (La. 2/21/01), 779 So.2d 691.
which any public official may happen to reduce to writing and includes "only those writings which are used in the performance of the functions of the public body." 

La. Atty. Gen. Op. No. 10-0272 is not intended to stand for the blanket conclusion that any private e-mails sent on public accounts are not "public records" under the Public Records Act. However, in the facts you have presented, where the records have no relation to the function of the HTHA, where there is no evidence of illegal activity, and where there has been no finding of the HTHA that disciplinary action is appropriate based on the records at issue, we reach the same conclusion reached in La. Atty. Gen. Op. No. 10-0272 that the purely personal e-mails at issue are not subject to production under the Public Records Act. If the public body had determined that illegal activities were conducted or that such records presented cause for disciplinary action, this would factor into the content-driven analysis that should be performed by the custodian in examining the connection between the record and the conduct of public business or the functioning of the public body, and could change the conclusion reached in this opinion. 

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,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

Assistant Attorney General

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4 See also La. Atty. Gen. Op. Nos. 08-0312 (a handwritten note was not a public record subject to disclosure when such note was not used, prepared, possessed or retained for use in the conduct, transaction, or performance of official duties), 79-242 and 90-364 (only those writings relevant to the functioning of the public body were subject to public access).

5 Please note that simply because these facts could change the conclusion as to whether the record is a "public record" as defined by La. R.S. 44:1(A)(2)(a), reaching such a conclusion would not automatically result that the record is subject to production. The custodian would then be required to determine whether the record is subject to disclosure or if there is an exception to production that applies.
August 9, 2013
OPINION 13-0043

Honorable Herbert B. Dixon
State Representative, District 26
804 Broadway Avenue
Alexandria, LA 71302

Dear Representative Dixon:

Our office received an opinion request from you concerning the applicability of the Open Meetings Law, La. R.S. 42:11 et seq., to the Rapides Primary Health Care Center, Inc. ("Health Care Center"), a non-profit corporation and a federally qualified community health center that provides health care to area residents, particularly those who are economically disadvantaged. From facts available in the 2012 report submitted to the Louisiana Legislative Auditor, we note that the Health Care Center was incorporated on May 19, 1992 and organized to provide efficient and effective health care meeting the medical needs of the community it serves, which is Central Louisiana.\footnote{http://app1.la.legis.state.la.us/PublicReports.nsf/3E6AED96A674972286257AA0006EEFAC/$FILE/0002D32A.pdf. Accessed on July 17, 2013.} Further, we understand that operations for the Health Care Center are funded through restricted grants from the U.S. Department of Health and Human Services, and other grants and contracts are received from state and local government agencies.\footnote{Id.}

The Louisiana Constitution protects the right to observe the deliberations of public bodies, except in cases established by law. La. Const. art. XII, §3. The public policy behind requiring open meetings for public bodies is described in La. R.S. 42:12(A), which provides:

> 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 this Chapter shall be construed liberally.

Consistent with this statement, La. R.S. 42:14(A) requires that every meeting of a public body shall be open to the public unless closed pursuant to exceptions provided for within the Open Meetings Law. A "public body" for the purposes of the Open Meetings Law means:
village, town, and city governing authorities; parish governing authorities; school boards and boards of levee and port commissioners; boards of publicly operated utilities; planning, zoning, and airport commissions; and any other state, parish, municipal, or special district boards, commissions, or authorities, and those of any political subdivision thereof, where such body possesses policy making, advisory, or administrative functions, including any committee or subcommittee of any of these bodies enumerated in this paragraph.

As represented in your opinion request, the Health Care Center is a non-profit corporation. As an initial matter, it is clear that it is not a public entity, but rather a private entity. The Louisiana Supreme Court has held that in order for an entity to be considered public, the following four factors must be considered: (1) whether the entity was created by the legislature; (2) whether its powers were specifically defined by the legislature; (3) whether the property of the entity belongs to the public; and (4) whether the entity's functions are exclusively of a public character and performed solely for public benefit. Further, all four factors must be present in order for a court to determine that an entity is public. The Health Care Center is not an entity created by the legislature, and its powers are not specifically defined by the legislature. If an entity fails to meet the criteria of even one factor, it is not a public entity. Therefore, the Health Care Center is not public.

Jurisprudence has made it clear that the mere fact that an entity is a private non-profit does not mean that it can never be a public body for purposes of the Open Meetings Law, nor does the fact that an entity receives public money mean that it is a public body for purposes of the Open Meetings Law:

The legislative history surrounding the definition of the term "public body" and the jurisprudence construing that term establish that the fact an entity is set up as a private non-profit corporation is not dispositive of the question of whether it is a public body for the purpose of the Open Meetings Law. Moreover, the mere fact that an entity receives public money does not make it a public body for the purpose of the Open Meetings Law. Rather, there are a number of factors that must be considered in determining whether an entity is subject to the Open Meetings Law. Four factors courts have looked at in making this determination are: (1) whether the entity performs a government function or performs a function which, by law, is entrusted to other public bodies; (2) whether the entity is funded by public money; (3) whether the entity exercises policy-making, advisory, and administrative functions; and (4) whether there is a connexity between the functions of the entity and the functions of a particular "public body" identified in La. R.S. 42:13(A)(2).

3 State v. Smith, 357 So.2d 505, 507-08 (La.1978).
4 Property Insurance Association of Louisiana v. Theriot, 09-1152 (La.3/16/10), 31 So.3d 1012, 1015.

After the above-cited case was decided by the First Circuit Court of Appeals, the Louisiana Supreme Court decided Louisiana High School Athletics Ass'n v. State.6 This case considered the nature of the Louisiana High School Athletics Association ("LHSAA") and concluded this entity is not a "quasi-public agency or body" as defined by La. R.S. 24:513(A).7 LHSAA is a non-profit corporation, organized by a group of principals to promote and regulate interscholastic athletic competition.

In considering whether LHSAA falls within the definition of "public body" provided by La. R.S. 42:13, the court reconsidered a previous decision regarding LHSAA,8 wherein LHSAA was determined to be a public body under La. R.S. 42:13, reasoning that LHSAA constitutes a "committee or subcommittee" of BESE or parish school boards due the "connexity between the regulatory functions of the LHSAA and the regulatory functions of a particular 'public body' found in R.S. 42:4.2(A)(2)."9 LHSAA, 107 So.3d at 606, citing Spain, 398 So.2d at 1390. Finding that the "connexity" factor is absent from the statutory definition of a "public body," LHSAA overruled the decision in Spain and concluded that LHSAA is not a "public body" as defined by La. R.S. 42:13. The decision went on to conclude that LHSAA cannot be considered a "quasi public agency or body" as defined by La. R.S. 24:513(A)(1)(b)(v). Id. at 607.

Since LHSAA determined the "connexity" factor is not one which should be considered in whether or not an entity is a "public body" under La. R.S. 42:13, we are left with three remaining factors to consider: (1) whether the entity performs a government function or performs a function which, by law, is entrusted to other public bodies; (2) whether the entity is funded by public money; and (3) whether the entity exercises policy-making, advisory, and administrative functions.

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5 We note that the First Circuit remanded this case to the district court for an evidentiary hearing on the issue of whether Capital Area Legal Services Corporation ("CALSC") is a public body for the purpose of the Open Meetings Law. This hearing was held on June 27, 2013, and the district court determined that CALSC is not a public body.

6 2012-1471 (La. 1/29/13), 107 So.3d 583.

7 The relevance of this case to the instant opinion request is derived from the court's analysis of whether the LHSAA is subject to audit pursuant to La. R.S. 24:513(A)(1)(b)(v) which describes a quasi-public agency or body as "[a]ny organization, either not-for-profit or for profit, which is subject to the open meetings law and derives a portion of its income from payments received from any public agency or body." The Court determined LHSAA was not a quasi-public body after reaching the conclusion that it was not required to comply with the Open Meetings Law.

8 Spain v LHSAA, 398 So.2d 1386 (La.1981).

9 La. R.S. 42:4.2 was redesignated as La. R.S. 42:13 by Act No. 861 of the 2010 Louisiana Legislative Session.
Your request indicates that Health Care Center provides health care to area residents, particularly those who are economically disadvantaged. While this entity performs services that governmental entities also provide by law, we understand that the Health Care Center performs these services in addition to governmental entities which make such services available to individuals in the same area. There is no evidence that suggests the Health Care Center has been designated or funded as an agency by any local entity to perform services which, by law, are entrusted to a public body. Further, there is no evidence that suggests Health Care Center exercises policy-making, advisory or administrative functions. Thus, it is the opinion of this office that the Health Care Center is not a "public body" for purposes of the Open Meetings Law, and thus, is not required to comply with 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,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

[Signature]
Emalie A. Boyce
Assistant Attorney General

JDC: EAB
Dear Ms. Miller:

Our office received your request for an opinion submitted on behalf of the Vermillion Parish Tourist Commission ("Commission"). You have asked whether it is permissible for a public body to utilize telephone conference calls during a public meeting to obtain a quorum.

The right to observe the deliberations of public bodies, except in cases established by law, is guaranteed by La. Const. art. XII, §3. The Open Meetings Law, La. R.S. 42:12 et seq., describes and defines this constitutional right.

Our office has consistently opined that the Open Meetings Law requires that a quorum of a public body be physically present at a meeting. La. Atty. Gen. Op. Nos. 99-385, 00-423, 01-256, 02-0106 and 06-0311. Specific to voting, La. R.S. 42:14(C) requires that all votes be made "viva voce." Previous opinions have interpreted this "live voice" requirement to require the person voting to be physically present, and further, that appearance by telephone or video telephone does not satisfy this requirement. Id. Thus, these opinions have stated that any participation by telephone, whether it is to obtain a quorum or to allow voting by non-present members, is a violation of the Open Meetings Law. La. Atty. Gen. Op. Nos. 01-256, 02-0106 and 06-0311.

This interpretation is consistent with the right to observe a public body's deliberations. Additionally, we note this interpretation is consistent when considering other state laws which specifically address the use of telephone or video telephone in a meeting. By way of example, consider the following:

Committee meetings between sessions; video conferencing

A legislative committee meeting that is held between sessions of the legislature and during which no vote on any matter having the effect
of law is to be taken may be conducted by video conference. Each house of the legislature may adopt rules of procedure to provide for and accommodate committee meetings by video conference, including but not limited to rules governing attendance and participation of members of the legislature in and quorums of committees for such meetings. Such rules shall provide for public participation in such meetings in accordance with R.S. 42:11 et seq. For the purposes of this Section and any rules adopted by either house of the legislature pursuant to this Section, "video conference" shall mean a method of communication which enables persons in different locations to participate in a meeting and to see, hear, and otherwise communicate with each other. No committee meeting shall be held pursuant to this Section unless a quorum of the committee is present, in person, at the location at which the meeting was advertised to take place.


Louisiana Medical Disclosure Panel: creation; membership; powers; duties

Notwithstanding the provisions of the Open Meetings Law, R.S. 42:11 et seq., or any other law, if any member of the panel is physically present at a meeting, any number of the other members of the panel may attend the meeting by use of telephone conference call, videoconferencing, or other similar telecommunication methods for purposes of establishing a quorum or voting or for any other meeting purpose allowing a panel member to fully participate in any panel meeting. The provisions of this Subsection shall apply without regard to the subject matter discussed or considered by the panel at the meeting. A meeting held by telephone conference call, videoconferencing, or other similar telecommunication method:

(1) Shall be subject to the notice requirements of R.S. 42:11 et seq.
(2) Shall not be held unless the notice of the meeting specifies the location of the meeting at which a member of the panel will be physically present.
(3) Shall be open to the public and audible to the public at the location specified in the notice.
(4) Shall provide two-way audio communication between all panel members attending the meeting during the entire meeting, and, if the two-way audio communication link with any member attending the meeting is disrupted at any time, the meeting shall not continue until the two-way audio communication link is reestablished.

La. R.S. 40:1299.39.6(R) (Emphasis added).
Board of directors

The board of directors, or any committee of the board, may hold a meeting by means of conference telephone, facsimile, or similar communications equipment provided that all persons participating in the meeting can communicate with each other. Participation in a meeting pursuant to this Paragraph shall constitute presence in person at such meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened. The provisions of this Paragraph shall not apply to any public body or any other entity provided for in R.S. 42:13.


Statutes such as the above, which authorize the use of telephone and/or video conferencing, would not be necessary if this practice were generally permissible under the Open Meetings Law. This is evident from the qualifying language in the above, i.e., La. R.S. 24:7 still requires that a quorum of the legislative committee be physically present before any members of the committee may participate by video conference and the language addressing the permissive use of telephones by a non-profit board of directors in La. R.S. 12:224 specifically notes that it does not apply to any public body or any other entity provided for in the definitions section of the Open Meetings Law (La. R.S. 42:13).

In light of the above, it remains the opinion of this office that it is not permissible for a public body to utilize telephone conference calls during a public meeting to obtain a quorum.

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,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

BY:  Emalie A. Boyce
Assistant Attorney General

JDC: EAB
Mr. Donald Bergeron  
Secretary-Treasurer  
Evangeline Parish Police Jury  
1008 W. LaSalle Street  
Ville Platte, Louisiana 70586  

Dear Mr. Bergeron:

Our office received the request submitted by your predecessor for an opinion on behalf of the Evangeline Parish Police Jury ("Police Jury") concerning the vote to appoint a Public Works Director. According to the request, the Police Jury held a meeting to vote on candidates for Public Works Director. There are nine members of the Police Jury and one member was absent. At the first vote, one candidate received four votes, a second received three votes, and a third received one vote. The request letter indicates the Police Jury attorney advised that a majority vote is required to appoint the Public Works Director. Since no candidate received a majority, the Police Jury voted again, removing the third candidate. The second vote resulted in a tie between the two candidates. The Police Jury recessed and allowed the two candidates to present their qualifications to the Police Jury. The resulting vote was another tie.

The request letter mentions that the Police Jury follows Roberts Rules of Order, and asks for an opinion from this office as to whether a plurality or majority vote is required to appoint the Public Works Director. Additionally, the letter seeks advice on the appropriate course of action when a measure being considered by the Police Jury results in multiple tie votes.

First, we will address whether a majority or plurality vote is required to appoint the Public Works Director. As stated by Robert's Rules of Order:

"The basic principle of decision in a deliberative assembly is that, to become the act or choice of the body, a proposition must be adopted by a majority vote; that is, direct approval—implying assumption of responsibility for the act—must be registered by more than half of the members present and voting on a particular matter." ¹

¹ RONR (10th ed.), p. 4, l. 5-10.
... the basic requirement for approval of an action or choice by a deliberative assembly, except where a rule provides otherwise, is a majority vote. The word majority means "more than half".  

* * *

A plurality vote is the largest number of votes to be given any candidate or proposition when three or more choices are possible; the candidate or proposition receiving the largest number of votes has a plurality. A plurality that is not a majority never chooses a proposition or elects anyone to office except by virtue of a special rule previously adopted. If such a rule is to apply to the election of officers, it must be prescribed in the bylaws. A rule that a plurality shall elect is unlikely to be in the best interests of the average organization.

As described above, a plurality that is not the majority does not elect anyone to office unless there is a previously adopted rule providing for such. The position of Public Works Director is an office within the parish government; therefore, unless prescribed otherwise within the bylaws, it would be appropriate to appoint the Public Works Director by a majority, rather than a plurality, vote.

Next, the request letter asks what to do as a result of the multiple tie votes. As shown in the minutes, the President of the Police Jury voted on the issue. Therefore, even though the vote of the chair's vote is referred to in Robert's Rules of Order as a method of resolving a tie vote, this may not be used when the President has already voted.

Our office has previously advised in the event of a tie vote that the public body should continue voting as many times as is necessary to obtain a majority vote. See La. Atty. Gen. Op. Nos. 92-41 and 78-574.

In La. Atty. Gen. Op. No. 76-634, our office advised the Police Jury Association of Louisiana that since the law does not provide a procedure for the election of the president, it is necessary for a police jury to adopt procedural rules governing such election, including rules to be followed to break a tie vote. It is advisable for the police jury to adopt procedural rules which would govern future decisions that result in a tie vote.

2 RONR (10th ed.), p. 387, l. 5-8.
4 Your request does not contain any information indicating that the bylaws prescribe a plurality vote should be utilized when appointing a director within the parish government.
In conclusion, it is the opinion of this office that the Public Works Director must be appointed by a majority vote. In the event of a tie vote on the decision to appoint the Public Works Director by the Evangeline Parish Police Jury, absent any procedural rules governing such a situation, the Police Jury should continue voting as many times as is necessary to obtain a majority vote.

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,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

BY: Emalie A. Boyce
Assistant Attorney General

JDC: EAB
Synopsis
Background: Parish coroner filed petition for declaratory relief against requester, who sought certain records from coroner under Public Records Act. Requester made a reconventional demand, and sought declaratory relief as well as a writ of mandamus. The 22nd Judicial District Court, St. Tammany Parish, No. 2010-10501, William J. Crain, Jr., ordered coroner to produce e-mails sought by requester in an electronic format and to produce copies of other records sought by requester for ten cents per page. Coronor appealed.

Holdings: The Court of Appeal, William F. Kline, Jr., retired, serving as judge pro tempore by special appointment, held that:

[1] requester was entitled to have copies of e-mails she requested from coroner reproduced in electronic format, but

[2] trial court lacked authority to order copies of grant records sought by requester at a cost of ten cents, rather than at least 25 cents, per copy.

Affirmed as amended.

Pettigrew, J., concurred and assigned reasons.

Kuhn, J., concurred in part and dissented in part and assigned reasons.

Attorneys and Law Firms

*1242 Patrick J. Berrigan, D. Rex English, Slidell, Louisiana and Deborah Cunningham Foshee, Covington, LA, for Plaintiff/Appellant, St. Tammany Parish Coroner.

Laura King, Bay St. Louis, Mississippi, for Defendant/Appellee, Edward Gibson.

Before KUHN, PETTIGREW, J.J., KLINE, J.

Opinion

KLINE, J.

**2 The St. Tammany Parish Coroner appeals a judgment ordering it to produce for Laura King copies of certain documents for 10 cents per page and ordering it to produce pages of emails in an electronic format making use of Adobe software. *1243 For the following reasons, we amend in part and affirm as amended.

PERTINENT FACTS AND PROCEDURAL HISTORY

This litigation arises from a public records request Ms. King made to the St. Tammany Parish Coroner (Coroner). On January 13, 2010, Ms. King made a public records request to the Coroner seeking copies of emails from seven persons covering the period from June 30, 2008 through the date of the request. She also asked for copies of “all Coverdell grant records” from 2007 through the date of the request. The letter suggested that the records be copied onto a CD or a flash drive, but stated that they could be produced as paper copies.

The Coroner responded on January 21, acknowledging the request. The Coroner’s office estimated that at least 93,000 pages would be produced at 25 cents per page, for an estimated total of $23,250. The letter recited that if burned to a disc, the copies would be 50 cents per page, for an estimated total of $46,500. Additionally, the letter from the Coroner's office stated that Ms. King would be charged overtime rates for the work for an indeterminate number of hours.

On January 22, 2010, the Coroner filed a Petition for Declaratory Relief. In the petition, the Coroner stated that it could not comply with Ms. King’s request within three days as required by law. The petition commented that overtime hours would be required to comply with the records request. The petition also referenced possible privileges that the Coroner might assert. The Coroner sought relief from the court allowing it more than three days to respond the records request; entitling the Coroner to reasonable copying costs for paper copies at recognized
St. Tammany Parish Coroner v. Doe, 48 So.3d 1241 (2010)
2010-0946 (La.App. 1 Cir. 10/29/10)

rates; **3 allowing the Coroner to collect the fees in advance; entitling the Coroner to reimbursement for overtime and outside copy labor charges; and requiring Ms. King to post a cost bond.

On January 26, 2010, Ms. King responded with an amended public records request. She reduced her request to seek access to only her email records between June 30, 2008 and August 25, 2009, together with the Coverdell Grant records. She sought to examine and copy the records herself. In the requesting letter, she initially agreed to pay 25 cents per copy for copies of the documents.

On February 11, Ms. King answered the petition, made a reconventional demand, and sought declaratory relief and a writ of mandamus. Ms. King generally denied the allegations of the Coroner’s petition, sought an order compelling the Coroner to comply with her public records request, and asked for attorney fees. The Coroner answered Ms. King’s reconventional demand, generally denying her allegations.

The matter came on for trial by summary proceeding on March 4, 2010. The trial court subsequently entered judgment granting in part and denying in part both parties’ demands. It ordered the Coroner to produce 440 pages of the Coverdell Grant records at a cost of 10 cents per page, or $44.00. It further ordered the Coroner to immediately provide 4,782 pages of emails immediately by electronic format, with at least 2,500 of the remaining pages to be produced by electronic format each successive Friday until all 14,339 documents were produced. The trial court ordered the Coroner to promptly generate a privilege log and ordered the Coroner to produce privileged information in redacted form if possible. The trial court denied Ms. King’s prayer for attorney fees.

DISCUSSION

The Coroner’s arguments primarily criticize the trial court’s interpretation of La. R.S. 44:32(C)(2) and Louisiana Administrative Code (LAC) 4:1.301. These provisions govern public records in the hands of state agencies. They provide as follows, in pertinent part:

La. R.S. 44:32(C)(2):

For all public records of state agencies, it shall be the duty of the custodian of such records to provide copies to persons so requesting. Fees for such copies shall be charged according to the uniform fee schedule adopted by the commissioner of administration, as provided by R.S. 39:241.

LAC 4:1.301:

A. Copies of public records furnished to a person so requesting shall be provided at fees according to the following schedule.

B. 1. Charges for the first copy of any public records shall be at a minimum $0.25 per page for microfiche reproductions or paper copies up to 8 1/2 by 14 inches.

Electronic Format Email

[1] The Coroner argues in brief that under these provisions, the trial court judgment is contrary to law because “the law requires that public records stored in a computer database will be provided through printouts.” The Coroner further **5 argues that, “[h]ad the legislature wished for the public to be able to obtain reproductions of information stored in the computer database of a state agency in any other form, they could have so stated.” He continues, “As the law stands, the only reproductions permitted of records stored in a state agency computer are printouts.”

[2] In this context, we review Louisiana law and jurisprudence to determine whether the trial court erred in ordering that the Coroner produce 14,339 pages of email on an electronic format. First, La. Const. Art. 12, § 3 provides a fundamental right to the public to have access to public records, as follows:
No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.

*1245 Pursuant to this Constitutional guarantee, La. R.S. 44:31 provides as follows:

A. Providing access to public records is a responsibility and duty of the appointive or elective office of a custodian and his employees.

B. (1) Except as otherwise provided in this Chapter or as otherwise specifically provided by law, and in accordance with the provisions of this Chapter, any person of the age of majority may inspect, copy, or reproduce any public record. (Emphasis added.)

(2) Except as otherwise provided in this Chapter or as otherwise specifically provided by law, and in accordance with the provisions of this Chapter, any person may obtain a copy or reproduction of any public record.

(3) The burden of proving that a public record is not subject to inspection, copying, or reproduction shall rest with the custodian.

Further, as provided in La. R.S. 44:31(B)(3) and La. R.S. 44:35, the burden of justification for withholding records is on the custodian. The Louisiana Supreme Court instructs us that the provisions of the Constitution and the statutes must be liberally construed in favor of free and unrestricted access, “and any doubt must be resolved in favor of the right of access.” Title Research Corp. v. Rausch, 450 So.2d 933, 936-37 (La.1984).

*1246 Pursuant to these precepts, we conclude that the trial court did not err in ordering the Coroner to produce the pages of email by electronic format.

We note, as did the supreme court in Title Research Corp., 450 So.2d at 937, that the person requesting public records has the right pursuant to La. R.S. 44:31(B)(1) to choose one of four options and that “the choice of which optional right to exercise rests with the one requesting the records and not with the custodian.” (Emphasis added.)

— Here, while Ms. King requested copies in her formal requests, at trial she requested that she either be allowed to copy the emails herself or that they be downloaded onto an electronic format. Thus, she made her election, indicating that she wanted the least expensive option.

— After discussion with counsel regarding cost, time, and ease of compliance, counsel for the Coroner conceded that it would produce the records in electronic format as follows: “Absolutely we will produce it that way.” (Emphasis added.)

Obviously, therefore, all documents had not been reproduced at that time. None *1246 had been produced to Ms. King. Accordingly, the trial court found that copy **7 costs could be avoided and ordered that the emails be downloaded onto an electronic format over a four week period.

Further, despite the Coroner’s contention to the contrary, nothing in La. R.S. 44:32(C)(2) or LAC 4:1.301 specifically prohibits reproduction of public records by electronic format. And, “access can be denied only when a law, specifically and unequivocally, provides otherwise.” Title Research Corp., 450 So.2d at 936.

**6 Pursuant to these precepts, we conclude that the trial court did not err in ordering the Coroner to produce the pages of email by electronic format.

In Johnson v. City of Pineville, 08–1234, p. 10 (La.App. 3 Cir. 4/8/09), 9 So.3d 313, 320, although involving a non-state agency, the court considered a similar public records request and found use of electronic formats is safe and reasonable. The City of Pineville court observed and reasoned regarding voluminous records, with which we agree:

We live in an age of technology in which private individuals, as well as government, can use information technology to create astronomical numbers of documents. To allow [the public entity] to create such voluminous records using information technology and then deny the use of that same...
The use of technology to the public reviewing those records would strike directly at the heart of the public’s fundamental right of access to public records that is guaranteed by the Louisiana Constitution. When confronted with public records of goliath proportions, the average citizen’s fundamental right of access would prove illusive if he is denied the opportunity to use the very technology which helped create the overwhelming amount of information. To reproduce over 13,000 e-mails on paper, when other safe, efficient, and reasonable means are available, is unnecessarily laborious, costly, wasteful, and conflicts with the legislative intent of making public records as available as possible.

City of Pineville, 08-1234 at p. 9, 9 So.3d at 319-20.

Liberally construing the public records laws in favor of access to the records, the City of Pineville court ordered reproduction of public records employing an electronic format, noting that no specific law prohibited reproduction of public records in this format. Id., 08-1234 at p. 10, 9 So.3d at 320.

Similarly, we conclude the trial court did not err in ordering the Coroner to produce the emails requested by electronic format and in providing a reasonable time for the Coroner to comply. And based on the Coroner’s representations at trial, we conclude the trial court did not err in failing to impose the apparently negligible cost of the electronic format on which the data will be downloaded.

Attempts to Distinguish City of Pineville

We respectfully acknowledge the Coroner’s attempts to distinguish City of Pineville, but we find the attempts unpersuasive. First, he argues that the use of the word “shall” in La. R.S. 44:32(C)(2) is mandatory where it requires that fees for copies “shall be charged” according to a uniform fee schedule adopted by the commissioner of administration. As discussed above, the statute does not specifically prohibit the reproduction of public records by electronic means. Secondly, he argues that unlike in City of Pineville, the emails at issue here had not been segregated from those exempt from the Public Records laws. This argument was not raised at trial and appears contrary to those made at trial. The record does not support the Coroner’s arguments in this regard. Further, the trial court gave the Coroner a reasonable amount of time to comply with its judgment.

Third, the Coroner argues that the trial court in City of Pineville ordered that the documents be produced at the cost of the person requesting the public records while the trial court here did not assess costs. As discussed above, however, the trial court found, based on the representations of counsel, that the cost of reproducing the emails at issue could be avoided. From the record before us, we cannot conclude that the trial court erred in this regard.

Fourth, the Coroner seems to argue that it can limit the number of documents a requestor can receive at no cost. The Coroner cites a prisoner suit in support of this contention. However, as discussed above, the trial court reasonably found that costs and time expenditure could be avoided by employment of an electronic format.

Further, in this fourth argument the Coroner seems to contend, without support of law, that one requesting public records should be required to pay for the Coroner’s exercise of his obligations to protect legally privileged information. The Coroner seeks to include the office costs of protecting privileged information into the costs of copying. The law, however, sometimes puts an onerous burden on the Coroner to prove that he is not required to comply with a public records request. La. R.S. 44:31(B)(3) and La. R.S. 44:35. We find nothing in the law, and the Coroner cites nothing, that would allow the Coroner to shift this burden.

Fifth, the Coroner re-asserts that LAC 4:1.301 requires that documents be reproduced on paper. We have addressed this argument in the reasons set forth above. Finally, the Coroner argues based on City of Pineville that one making a public records request should not always be allowed to reproduce public records in any way he or she chooses. Our holding today does not go so far as the Coroner suggests. Based on the record before it and the representations of counsel, the trial court fashioned a reasonable and narrowly-tailored remedy for the issues at hand in accordance with the law.

Accordingly, we find no merit in the Coroner’s second, third, and fourth assignments of error.
At trial, the Coroner argued that the Coverdell Grant records were in hard form and could not be reproduced electronically. He argues that the trial court erred in ordering a copy cost of 10 cents per copy when LAC 4:1.301 requires at least 25 cents per page. We agree that LAC 4:1.301 requires copy costs of 25 cents per page, and we do not see where the trial court has discretion to vary this cost, despite the Coroner’s representation. At trial the Coroner advised the trial court that, “It’s up to you to sort of, you know, it’s up to you to set the price.” While we agree with the trial court that 10 cents per copy is reasonable, we reluctantly conclude that the trial court abused its discretion in setting the fee for hard copies at less than that required by LAC 4:1.301.

We find merit in the Coroner’s first assignment of error. We amend the trial court judgment to reflect a copy cost for 440 pages of the Coverdell Grant records to 25 cents per page, or $110.00.

DECREE

For the foregoing reasons, we amend the trial court judgment and order and adjudge that Laura King shall pay a reasonable sum to the St. Tammany Parish Coroner’s Office of $0.25 per page for copies of the Coverdell Grant records for a total of $110.00. We vacate the judgment insofar as it ordered the St. Tammany Parish Coroner (“the Coroner”) to produce public records of that agency in an electronic format at no cost to Ms. King.

The Coroner established as a matter of law that it was entitled to impose a $0.25 charge for copies of the public records requested by King. It is undisputed that the Coroner’s office is a state agency. See La. Const. Art. V, § 29; Mullins v. State, 387 So.2d 1151 (La.1980). As such, it is subject to the rules set forth in La. R.S. 44:32 C(2), addressing public records of state agencies, which sets forth that “it shall be the duty of the custodian of such records to provide copies to persons so requesting. Fees for such copies shall be charged according to the uniform fee schedule adopted by the commissioner of administration, as provided by R.S. 39:241.” (Emphasis added). Louisiana Revised Statutes 44:32 C(2) further states, “Copies shall be provided at fees according to the schedule....” (Emphasis added.) Louisiana Revised Statutes 39:241 states, in pertinent part, “Copies of the public record furnished to a person so requesting shall be provided at fees according to the schedule....” (Emphasis added).

The uniform fee schedule for copies of public records is set forth in LAC 4:1.301. Section B of that regulation sets forth that charges for the first copy of any public records shall be at a minimum $0.25 per page for microfiche reproductions or paper copies up to 8 ½ by 14 inches.

Due to the plain meaning of the pertinent statutes and regulation, there is no need for further interpretative analysis. Ms. King is entitled to “obtain a copy or reproduction of any public record except as otherwise provided [by law].” La. R.S. 44:31 B(2). As an exception to this general rule, the law provides that when access to public records of a state agency is sought, the custodian is mandated only to provide “copies” of such records and the applicable “fees for such copies shall be charged.” La. R.S. 44:32 C(2). Thus, the legislature has placed reasonable restrictions on the public’s fundamental right of access to public records of state agencies by requiring that the person requesting copies of public records pay a fee for such copies. La. R.S. 44:32 C(2). The fee of $0.25 per copy set forth in LAC 4:1.301 is a reasonable fee.

During the March 4, 2010 hearing, the Coroner’s counsel...
informed the court that the Coroner’s office had already printed 14,339 pages of e-mail in response to Ms. King’s request. (Transcript pp. 49, 51.) The record further establishes that Ms. King did not challenge this information. The plurality’s ruling imposes the cost of such an effort on the State rather than on Ms. King, a result that is contrary to the applicable law. Thus, the record demonstrates that the Coroner met its burden of establishing that it was entitled to collect the $0.25 per page fee for the records it produced. Accordingly, I dissent in part from the plurality’s findings to the contrary.

Footnotes

1 Judge William F. Kline, Jr., retired, is serving as judge pro tempore by special appointment of the Louisiana Supreme Court.

2 Although the defendant/appellee is referred to as Jane Doe in the lawsuit caption, Ms. Laura King is the real party in interest.

3 Louisiana Revised Statutes 39:241 provides in pertinent part as follows:
   A. Not later than ninety days after the effective date of this Section, the commissioner of administration, with the approval of the governor, shall, by rule or regulation, adopt a uniform fee schedule for copies of public records of executive branch state agencies furnished to persons so requesting by custodians thereof, as provided by R.S. 44:32. Copies of the public record furnished to a person so requesting shall be provided at fees according to the schedule, except for copies of public records, the fees for the reproduction of which are otherwise fixed by law.

4 Louisiana Revised Statutes 44:35(B) provides that “the burden is on the custodian to sustain his action.”

5 The Coroner’s main concern in this regard at the trial court appears to have been the time and costs associated with asserting it privileges. We discuss his contentions below.

6 The Coroner contrasts the language employed in La, R.S. 44:32(C)(1)(a), which applied to the City of Pineville, a non-state agency The language of this paragraph is discretionary. This paragraph provides as follows:
   For all public records, except public records of state agencies, it shall be the duty of the custodian of such public records to provide copies to persons so requesting. The custodian may establish and collect reasonable fees for making copies of public records, Copies of records may be furnished without charge or at a reduced charge to indigent citizens of this state. (Emphasis added.)

7 We observe that the Public Records Laws seem designed to provide actual costs involved in providing records pursuant to a requestor’s constitutionally protected right. It does not seem designed to allow office costs and costs of asserting a public entity’s legal obligations and privileges.