



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2021-048

August 18, 2021

The Honorable David Whitaker
State Representative
717 North Lewis Avenue
Fayetteville, AR 72701-1611

Dear Representative Whitaker:

This is in response to your request for my opinion regarding Arkansas cities' conducting their city council meetings virtually. In your correspondence, you referred to a 2018 opinion from this office,¹ wherein I opined that a city council may adopt rules to enable council committees to conduct open public meetings by telephone conference so long as there is some means of ensuring that members of the public in attendance can hear the conversation. In light of that opinion and recently enacted state law concerning virtual public meetings, you have asked the following questions:

1. If a city council has adopted rules of procedure pursuant to Arkansas Code § 14-43-501, which includes authorization to meet virtually rather than physically, can the city council meet through electronic means rather than in person as long as there are means in place to ensure that members of the public can hear and participate in the conversation and debate?
2. Are Act 2 of the Fiscal Session of the 92nd General Assembly and Act 56 of the Regular Session of the 93rd General Assembly, either collectively or individually, still applicable and effective despite the expiration of the Governor's Pandemic Emergency Decree?

¹ Op. Att'y Gen. 2018-017.

RESPONSE

The answer to your first question is “yes,” so long as safeguards for the public to virtually “attend” these meetings are in place and followed. With respect to your second question, while the relevant portions of Act 2 of 2020 have expired, Act 56 of 2021 *is* currently applicable because of the Governor’s emergency declaration of July 29, 2021.

DISCUSSION

Question 1: If a city council has adopted rules of procedure pursuant to Arkansas Code § 14-43-501, which includes authorization to meet virtually rather than physically, can the city council meet through electronic means rather than in person as long as there are means in place to ensure that members of the public can hear and participate in the conversation and debate?

Yes. In Op. Att’y Gen. 2018-017, which I have enclosed for your convenience, I opined that a city council’s rules permitting its members to fully attend council committee meetings via conference call, wherein a speaker would broadcast a council member’s voice so that it would be audible for anyone in attendance to hear, did not violate the FOIA. In my opinion, the analysis in that 2018 opinion remains sound, and that reasoning can easily be extended to council meetings as a whole.

It is important to keep in mind, as I wrote in Opinion 2018-017, that these procedural rules do implicate the open-meetings section of the Arkansas Freedom of Information Act (FOIA).² Thus, it is crucial that any such rules the city council promulgates provide for giving proper notice of the virtual meeting and unmistakably protect the public’s right to attend (by being able to listen to, or listen *and* view, the proceedings and discussions via the appropriate electronic means). “If safeguards are not present, however, the meeting violates the FOIA.”³

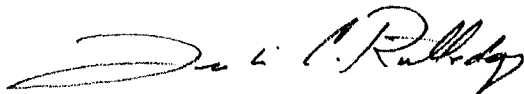
Question 2: Are Act 2 of the Fiscal Session of the 92nd General Assembly and Act 56 of the Regular Session of the 93rd General Assembly, either collectively or individually, still applicable and effective despite the expiration of the Governor’s Pandemic Emergency Decree?

² Ark. Code Ann. § 25-19-106 (Supp. 2019).

³ John J. Watkins, Richard J. Peltz-Steele, & Robert Steinbuch, THE ARKANSAS FREEDOM OF INFORMATION ACT 344 (Arkansas Law Press, 6th ed., 2017).

While the relevant provisions of Act 2 of 2020 have expired, Act 56 of 2021 *is* currently applicable. The law that permitted virtual meetings in 2020, and that was included as special language in appropriation Act 2 of 2020, expired December 31, 2020.⁴ However, Act 56 of 2021—which codified Act 2’s expired language,⁵ and which only applies during a gubernatorial disaster-emergency declaration⁶—is in force as of this writing. This is in light of the Governor’s emergency declaration of July 29, 2021.⁷ When that executive order is rescinded, the provisions of Act 56 will become inapplicable.

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Rutledge", written in a cursive style.

LESLIE RUTLEDGE
Attorney General

Enclosure

⁴ 2020 Ark. Acts No. 2, §§ 42, 43. Act 2 of 2020 as a whole expired June 30, 2021.

⁵ 2021 Ark. Acts No. 56, § 1, to be codified at Ark. Code Ann. § 25-19-106(e).

⁶ *Id.* to be codified at Ark. Code Ann. § 25-19-106(e)(1) (“If the Governor declares a disaster emergency under the Arkansas Emergency Services Act of 1973, § 12-75-101 et. seq., a public entity may assemble, gather, meet, and conduct an open public meeting through electronic means....”).

⁷ https://governor.arkansas.gov/images/uploads/executiveOrders/21.07_.29_EO_21-14_.pdf.



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2018-017

June 27, 2018

The Honorable Ken Casady
Prosecuting Attorney
Twenty-Second Judicial District
102 South Main Street
Benton, AR 72015

Dear Mr. Casady:

You have requested my opinion regarding the City of Benton's authority, pursuant to Ark. Code Ann. § 14-43-501, to adopt certain procedural rules for its committee meetings. Your request states that the City of Benton is a city of the first class operating under the mayor-council form of government. You have provided the following background regarding the rules under consideration:

[The] rules will allow council members to participate in the committee meetings by conference call. This will be allowed for any member of the committee or council member who is not a member of the committee, who wishes to participate in the committee meeting. Council members who are present by conference call will be allowed to participate in the discussion, be counted toward the quorum requirement if he or she is a member of the committee and be allowed to vote on any measure. A speaker will broadcast the council member's voice where it is audible for anyone in attendance to hear. These rules are being considered for committee meetings only and are not being considered for regular or special city council meetings.

With this background information in mind, you ask: "If adopted, would such rules violate state law?"

RESPONSE

Based on your general description of the proposed rules, the answer is “no.” The rules as described would not violate state law, in my opinion.

DISCUSSION

The statute you have cited—Ark. Code Ann. § 14-43-501—provides that the city council “shall determine the rules of its proceedings”¹ It further identifies particular subjects for possible rule-making by the council.² But it provides that these are “without limitation.”³

State law therefore authorizes, and indeed requires, the city council to make rules of procedure for the conduct of its own government. And the council clearly has broad authority to promulgate such rules. Section 14-43-501 does not provide specific authority for the rules you describe (allowing council members to participate in committee meetings by conference call). But I believe rules of this sort would generally fall within the statute’s broad scope and be permissible, so long as they are not contrary to any other general state law. The Arkansas Constitution expressly provides that “[n]o municipal corporation shall be authorized to pass any laws contrary to the general laws of the state.”⁴ This principle is reiterated in the Arkansas Code.⁵

Because the rules in question involve committee meetings of the city council, they plainly implicate the open-meetings portion of the Arkansas Freedom of

¹ Ark. Code Ann. § 14-43-501(a)(2)(C)(i) (Supp. 2017).

² *Id.* at § 14-43-501(a)(2)(C)(iii) (“The governing body may consider the passage of rules on the following subjects, including without limitation: (a) The agenda for meetings; (b) The filing of resolutions and ordinances; and (c) Citizen commentary.”).

³ *Id.*

⁴ Ark. Const., art. 12, § 4 (Repl. 2004).

⁵ Ark. Code Ann. § 14-55-101 (providing that cities can enact ordinances that are “not inconsistent with the laws of the state”) (Repl. 1998). *See also City of Fort Smith v. Hous. Auth. of City of Fort Smith*, 256 Ark. 254, 506 S.W.2d 534 (1974); *Nahlen v. Woods*, 255 Ark. 974, 504 S.W.2d 749 (1974).

Information Act (FOIA).⁶ Particular consideration must therefore be given to this state law.⁷

Under the FOIA, meetings of “governing bodies” must be conducted as “public meetings.”⁸ This requirement extends to meetings of committees that are composed, at least in part, of members of the city council. Such committees are “governing bodies” under the FOIA.⁹ Their meetings must therefore be open to the public absent an exemption under the FOIA justifying a closed (“executive”) session.¹⁰

The procedural rules that you have asked about must be evaluated in light of the FOIA’s open-meetings requirement. You report that council members would be allowed to participate in committee meetings by conference call. And you state that members of the public in attendance at the meeting would be able to hear the voices of those council members who are present by conference call. In my opinion, the proposed rules as generally described are not contrary to the FOIA. It is permissible for a governing body to have a meeting by telephone conference if there is some means of ensuring that members of the public in attendance can hear the conversation:

In light of [*Rehab Hospital Services Corporation v. Delta-Hills Health Systems Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840

⁶ Ark. Code Ann. § 25-19-106 (Supp. 2017).

⁷ The topic of “public information and open meetings” is specifically designated by state law as a “state affair.” Ark. Code Ann. § 14-43-601(a)(1)(A) (Repl. 2013). This area therefore does not fall within a municipality’s full legislative power over its “municipal affairs.” *Id.* at § 14-43-601(a)(1); Ark. Code Ann. § 14-43-602 (Repl. 2013). Nevertheless, a municipality may exercise any function or legislative power upon “state affairs” if not in conflict with state law. Ark. Code Ann. § 14-43-601(a)(2).

⁸ Ark. Code Ann. § 25-19-106(a) (“Except as otherwise specifically provided by law, all meetings ... of the governing bodies of all municipalities ... shall be public meetings.”).

⁹ See *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975); Ops. Att’y Gen. 2017-118, 2014-124.

¹⁰ Ark. Code Ann. § 25-19-106(c) (regarding “executive sessions”).

(1985)],^[11] a governing body can hold a discussion or take a vote by telephone conference call if (1) notice to the public and press has been given, as the FOIA requires; and (2) a speaker phone or similar device is set up in a room where the public and press are able to listen to the conversation. Use of a speaker phone would ensure that observers can hear all portions of the telephonic communication, just as if the members of the governing body were physically present at the meeting. If safeguards are not present, however, the meeting violates the FOIA.¹²

My research has disclosed no other provision of state law that would prohibit the proposed rules you have generally described. The answer to your question is therefore “no,” in my opinion. These rules would not violate state law.

Sincerely,



LESLIE RUTLEDGE
Attorney General

¹¹ In *Rehab Hospital*, the Arkansas Supreme Court observed that a “telephone poll, if conducted with proper notice, and if conducted with telephones available to the public and press, could have been an acceptable type of open meeting.” 285 Ark. at 401, 687 S.W.2d at 842.

¹² John J. Watkins, Richard J. Peltz-Steele, & Robert Steinbuch, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 344 (Arkansas Law Press, 6th ed., 2017).