

Open Meetings Advisory Opinion No. 2023-01

Issued on March 2, 2023, by

**The West Virginia Ethics Commission
Committee on Open Governmental Meetings**

Opinion Sought

The **City of Morgantown** asks whether governing bodies, including boards and commissions, may hold a public meeting by telephone conference or other electronic means without providing a physical meeting space for the public to attend.

Facts Relied Upon by the Committee

The City of Morgantown (“City” or “Requester”) states that it has reviewed the guidance of the Ethics Commission on its website advising that public bodies may hold electronic-only public meetings during a declared public health emergency without providing a physical meeting space for members of the public. The City seeks guidance on whether the same rule applies in the absence of a public health emergency.

The City states that based on the definition of “meeting” under the Open Governmental Proceedings Act, the City believes it is likely permissible to hold meetings in which the members of a governing body and the public participate or attend only by telephone or other electronic means without the City providing a physical meeting space. The City cites the definition of “meeting” under the Open Governmental Proceedings Act which is “the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means.” W. Va. Code § 6-9A-2(5).

The City states that if the Committee on Open Governmental Meetings opines that electronic-only meetings are permissible, the City and its boards and commissions will provide public access to meetings held by telephone or video conference by listing the telephone or video conference access information on the public meeting notice and agenda as the place of the public meeting.

Code Provisions Relied Upon by the Committee

W. Va. Code § 6-9A-2(5) states:

(5) “Meeting” means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

- (A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or Court of Claims proceeding;
- (B) Any on-site inspection of any project or program;
- (C) Any political party caucus;
- (D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action; or
- (E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

W. Va. Code § 6-9A-3 states, in relevant part:

(a) Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four of this article, all meetings of any governing body shall be open to the public.

(b) Any governing body may make and enforce reasonable rules for attendance and presentation at any meeting where there is not room enough for all members of the public who wish to attend.

Advisory Opinion

The Open Governmental Proceedings Act (“Open Meetings Act” or “Act”) was enacted in 1975.¹ In 1999, the Legislature added a provision to the Act which states: “Meetings may be held by telephone conference or other electronic means.”² W. Va. Code § 6-9A-2(5). The Act does not require in-person attendance by members of the governing body at a meeting. Hence, the Open Meetings Act expressly allows members of a governing body to conduct a public meeting by telephone or other electronic means.

As the Open Meetings Act clearly allows governing bodies to hold a public meeting by telephone conference or electronic means, the only question this Committee must answer is whether a governing body must also provide a physical meeting space for members of the public. The Requester notes that during the Covid-19 pandemic, many governing bodies held meetings by telephone conference or electronic means and prohibited members of the public from attending the meetings in person. Members of the public, however, could attend the meetings remotely by audio or video conferencing thereby allowing them to hear or hear and see the governing body deliberate and vote. At times, all or a majority of the members of the governing body also participated in the meetings remotely.

¹ 1975 W. Va. Acts c. 177

² 1999 W. Va. Acts c. 208

Governing bodies held remote meetings and prohibited in-person public attendance based upon the dangers to public health caused by the coronavirus, the plain language in the Open Meetings Act, and Ethics Commission staff advice.³ The Ethics Commission staff advice, as posted on the Ethics Commission website,⁴ is, in relevant part:

It is the opinion of Ethics Commission staff that allowing citizens to attend a meeting in person is not required if the governing body determines, based upon guidance issued by the federal government, the state of West Virginia, the Centers for Disease Control and Prevention or other government agencies authorized to make these types of decisions, that it constitutes a public health risk to allow citizens to attend in person. The governing body may instead provide citizens with a call-in number for a telephonic meeting or provide access via web link to a livestream of the meeting. For example, governing bodies may meet via Skype or Webex or may stream a meeting on Facebook or other platforms.”⁵

. . . .

The Open Meetings Act states: “Except as expressly and specifically otherwise provided by law . . . all meetings of any governing body shall be open to the public.” W. Va. Code § 6-9A-3. The Committee must determine whether, in the absence of a public health emergency, governing bodies must have a physical meeting space and allow citizens to attend a meeting in person to make a meeting “open” for purposes of the Act.

A rule of statutory construction is that “[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959); see also [Advisory Opinion 2021-08](#) (discussing rules of statutory interpretation). “[W]ords and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.” Syllabus point 6, in part, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 336 S.E.2d 171 (1984); *State v. McClain*, 880 S.E.2d 889, 890 (W. Va. 2022).

³ The Ethics Commission’s executive director is tasked with rendering advice on the Open Meetings Act. Specifically, the Open Meetings Act states: “(a) Any governing body or member thereof subject to the provisions of this article may seek advice and information from the executive director of the West Virginia Ethics Commission or request in writing an advisory opinion from the West Virginia Ethics Commission Committee on Open Governmental Meetings as to whether an action or proposed action violates the provisions of this article. The executive director may render oral advice and information upon request. The committee shall respond in writing and in an expeditious manner to a request for an advisory opinion. The opinion is binding on the parties requesting the opinion.” W. Va. Code Ann. § 6-9A-11.

⁴ ethics.wv.gov (accessed 14 Feb. 2023)

⁵ Ethics Commission staff based its advice in part upon the decision of the Committee in [Open Meetings Advisory Opinion 2010-02](#) in which the Committee ruled that a governing body does not have to meet in a meeting room that is large enough to accommodate every citizen who may wish to attend a meeting.

The Open Meetings Act states that meetings shall be open, but the Act does not define “open.” An accepted meaning of open is “not restricted to a particular group or category of participants.”⁶ The Committee finds that the term “open meeting” does not mean an open physical meeting space but means that access to a meeting is not restricted to a particular group to the exclusion of others. **The Committee finds that the requirement that a meeting be open does not mean that a governing body must provide a physical meeting space.**

The Committee will also revisit prior Opinions on this topic. In 1999, shortly after the passage of the Amended Act, a governing body asked various questions about telephonic meetings, including whether the Act requires members attending by telephone to be audible to members of the public attending the meeting in person. [Open Meetings Advisory Opinion 1999-08](#). The Committee stated that a “public place must be provided for those who wish to attend” and “those persons attending by phone must be audible to all those physically present.” *Id.* In [Open Meetings Advisory Opinion 2001-36](#), the Committee stated “when one or more members [of a governing body] participate in a telephone or video conference, a public place must be provided for those who wish to attend, and those members participating by telephone must be audible to all those personally present.”

The Requesters in O.M.A.Os 1999-08 and 2001-36 did not ask if it would be sufficient for a governing body to provide public access to a meeting only via a telephone conference call-in number or other electronic means. The Committee did not, therefore, analyze that issue. The Committee also takes administrative notice that in 1999 governing bodies did not frequently use telephone conference technology and video streaming technology was not widely utilized or available. This Opinion modifies Open Meetings Advisory Opinions 1999-08 and 2001-36 to the extent any holdings in those or related Opinions conflict with this decision.⁷

In conclusion, the Committee holds that the Open Meetings Act does not require a governing body to provide a physical meeting space but requires only that citizens be given access to a meeting by telephone conferencing or other electronic means.⁸

⁶ “Open.” Merriam-Webster.com Dictionary,

Merriam-Webster, <https://www.merriam-webster.com/dictionary/open>. Accessed 26 Jan. 2023.

⁷ The analysis and conclusion in this Opinion is also consistent with the holding of the Committee in [Open Meetings Advisory Opinion 2008-15](#) in which the Committee held that “there is no provision in the Open Meeting Act which mandates that a governing body of a public agency change the location of a meeting whenever it either finds or reasonably expects that its regular meeting place will not be able to accommodate all those wishing to attend.” See *also* Open Meetings Advisory Opinion 2010-02 (discussing rules governing meeting room size). Open Meetings Advisory Opinion 2008-15 held, by implication, that a governing body does not have to open a particular meeting to all persons who wish to be physically present in the meeting room to comply with the Open Meetings Act. Instead, a governing body only needs to take reasonable steps to provide access.

⁸ City boards and commissions are also governing bodies under the Act. W. Va. Code § 6-9A-2(4). Hence, the same rule applies to them.

This Advisory Opinion is limited to questions arising under the Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1 through 6-9A-12, and does not purport to interpret other laws or rules.



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