

OPEN MEETINGS ADVISORY OPINION NO. 2009-08

Issued On December 3, 2009 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The President of the Lewis County Commission asks:

(1) Whether a quorum of the members of the County Commission may text message each other during the course of a public meeting?

(2) Whether Members of the County Commission may text message a member of the public during the course of a meeting for purposes of obtaining factual information or an opinion, or both?

FACTS RELIED UPON BY THE COMMITTEE

Advances in technology have made communicating via email or text messaging through the use of hand held electronic devices a common form of communication. The Lewis County Commission has three elected commissioners.

The Requester seeks guidance in regard to whether members of the Commission may communicate via written electronic communications during the course of a meeting on matters pending before the Commission. He further inquires whether electronic communications may be used to obtain factual information, or an opinion, or both, from a member of the public, which would then be read into the record.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W, Va. Code § 6-9A-1, *Declaration of Legislative Policy*, provides as follows:

The Legislature hereby finds and declares that public agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions....

Open government allows the public to educate itself about government decisionmaking through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government.

...

W. Va. Code § 6-9A-2, *Definitions*, provides, in pertinent part:

(4) "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:

* * *

(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.

...

(7) "Quorum" means the gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio.

Finally, W. Va. Code § 6-9A-3 provides that, except for certain specific exceptions, "all meetings of any governing body shall be open to the public."

ADVISORY OPINION

This State's Open Meetings Act does not directly address electronic mail communications. Indeed, when the Legislature passed this law in 1975, it was not envisioned by the general population that such a form of communication would be possible.

The Open Meetings Committee first addressed the application of the Open Meetings Act to electronic communications between members of a governing body in O.M.A.O 2006-09. In this opinion the Committee stated, "Generally, written communications, including electronic mail or 'E-mail,' should not be used to avoid public discussions that would ordinarily take place in the context of an open public meeting. Therefore, an exchange of E-mail communications among a quorum of a governing body which involves deliberating toward a decision on a matter requiring official action is not permitted by the Act."

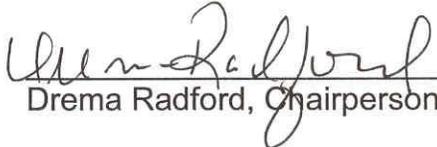
Based upon the cited opinion and the plain language of the Open Meetings Act, the Committee finds that a **quorum** of a governing body, including a quorum of any

committee or other sub-unit of a governing body, may not communicate via text messaging, instant messaging, email or any other form of electronic communications during the course of a meeting for the purpose of deliberating on a matter which will require official action. This form of communication may not be used to avoid deliberations which the Open Meetings Act requires to take place in the context of an open meeting. Just as electronic communications may not be used to circumvent the Act outside of the meeting, the same rule of laws applies in regard to the use of electronic communications **during** the meeting.

Next, the Requester asks whether members of the governing body may electronically communicate with members of the public during the course of a meeting for purposes of obtaining information or an opinion, or both, on a matter pending before the body. The Open Meetings Act only governs communications amongst members of a governing body. There is nothing in the Act which prohibits the use of electronic communications, either during the course of a meeting or outside of a meeting, by members of a governing body to communicate with members of the public for purposes of obtaining information, or for any other reason. As such, it would not violate the Open Meetings Act for a member of a governing body to phone, text or email a member of the public for information during the course of a meeting.

Last, the Requester has proposed a rule to implement the use of such technology, to wit: “[A] motion [could] be made to table the matter, move that the presiding commissioner, if approved, use the cell phone to text for the information and then for the record, read the inquiry and the response [and have this matter] witnessed by the recording clerk.” The Committee hereby finds that, although the Open Meetings Act does not require it, the Requester’s suggested rule does not violate any provisions of the Act.

This advisory opinion is limited to questions arising under the Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1, *et seq.*, and does not purport to interpret other laws or rules. Pursuant to W. Va. Code § 6-9A-11, a governing body or member thereof that acts in good faith reliance on this advisory opinion has an absolute defense to any civil suit or criminal prosecution for any action taken based upon this opinion, so long as the underlying facts and circumstances surrounding the action are the same or substantially the same as those being addressed in this opinion, unless and until it is amended or revoked.


Drema Radford, Chairperson