

Advisory Opinion 2019-01

Issued on January 3, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **State Agency** asks whether it may solicit funds for the purpose of fostering women's health and wellness and use the solicited funds to pay for its operating expenses.

Facts Relied Upon by the Commission

The Requester's mission is to promote the welfare of women. Its statutory duties include reviewing and studying the status of women in the state; recommending methods of overcoming discrimination against women in employment; promoting the education and training of women; securing appropriate recognition of women's accomplishments and disseminating information for the purpose of educating the public about matters of interest to women.

The Requester wants to solicit funds for the purpose of fostering women's health and wellness. In furtherance of its mission, the Requester states that it:

[M]akes and reviews surveys and research; provides opportunities throughout the state to hear from women about their concerns and challenges; posts related educational information via local and social media; submits annual recommendations to the WV Governor and Legislature, and attends and provides activities, events and educational materials that promote its five public policy pillars: child well-being, domestic violence prevention, economic empowerment, education, and health.

Examples of events the Requester organizes are a day for women and girls at the Legislature, candidate training workshops and wellness events.

The Requester states that the Legislature has not provided an appropriation to it for this fiscal year and that the Agency has limited resources. The Requester wants to solicit funds for its operating expenses, which include "office rent, telecommunications, travel, association dues, conference fees, grant writer expense, salaries, parking, copier lease, computers, Office of Technology fees, postage and office supplies."

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b) provides, in pertinent part:

(1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own

private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code § 6B-2-5(c)(1) provides, in relevant part:

A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family.

W. Va. Code R. § 158-7-6 (2008) provides, in relevant part:

6.1. Public officials and public employees may solicit gifts for a charitable purpose when there is no resulting direct pecuniary benefit to the public official or public employee or an immediate family member.

6.2. The Ethics Commission may recognize programs or activities as involving a charitable purpose on a case-by-case basis.

. . . .

6.7. State government agencies and the governing bodies of political subdivisions may solicit funds to support or underwrite agency programs which are statutorily created or authorized and are intended to help the poor and disadvantaged.

If a state government agency or governing body of a political subdivision seeks to solicit funds for use by the agency for any other purpose, then the state government agency or governing body of a political subdivision must first seek permission from the Executive Director of the West Virginia Ethics Commission or the Ethics Commission through issuance of a formal advisory opinion. The Executive Director or Ethics Commission may only authorize such a solicitation if it serves a public purpose. . . .

Advisory Opinion

The Ethics Act prohibits public employees and officials from soliciting gifts unless the gift is for a charitable purpose for which there is no resulting direct pecuniary benefit to the public official or public employee or his or her immediate family member. See W. Va. Code § 6B-2-5(c).

The Commission's Legislative Rule, W. Va. Code R. § 158-7-6 (2008), which specifically governs using solicited funds for agency programs, provides that "[s]tate government agencies and the governing bodies of political subdivisions may solicit funds to support or underwrite agency programs which are statutorily created or authorized and are intended to help the poor and disadvantaged." *Id.* **Upon reviewing the Requester's statutory mission and duties, the Commission finds that the Legislature has authorized the Requester to administer programs intended to foster women's health and wellness.**

The next question is whether the programs administered by the Agency are intended to "benefit the poor and disadvantaged" for purposes of W. Va. Code R. § 158-7-6. Prior to the passage of W. Va. Code R. § 158-7-6 in 2008, the Commission issued several Advisory Opinions that evaluated whether programs were intended to help the poor and disadvantaged. The Commission, for example, approved solicitations for public health programs (Advisory Opinion 2005-02), programs that benefit disadvantaged youth (Advisory Opinion 1996-36), and a health care program for disadvantaged children (Advisory Opinion 1999-37).

The Legislative purposes for the Agency include overcoming discrimination against women in employment and enabling women to develop their skills, continue their education and be retrained. The Requester states that the Agency's policy pillars are child well-being, domestic violence prevention, economic empowerment, education, and health. The Commission finds that the Legislature created the Agency primarily for the purpose of benefiting poor and disadvantaged women in the state. **The Ethics Commission finds, therefore, that pursuant to W. Va. Code R. § 158-7-6 (2008), solicited funds may be used by the Agency for operating expenses incurred in administering its programs. The Agency may not, however, have a public official or employee solicit funds for his or her own salary as this action would result in a direct pecuniary benefit to a public official or public employee.**

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and does not purport to interpret other laws or rules.

In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

Open Meetings Advisory Opinion No. 2019-01

Issued on January 3, 2019, by

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

Opinion Sought

The **Superintendent of Brooke County Schools** asks whether out-of-calendar days and days outside the school environment are counted when computing time periods for providing notice of meetings under the Open Governmental Proceedings Act.

Facts Relied Upon by the Committee

County boards of education are required to provide 20 noninstructional days within a school term, six of which must be outside the school environment (“OSE”) days. W. Va. Code § 18-5-45(c)(3). In full, the 20 noninstructional days are required to be comprised of seven paid holidays; election day; six OSE days; one day for preparation for opening school; one day for preparation for closing school; and the remaining days are to be designated for curriculum development, professional development, teacher-pupil-parent conferences and professional meetings, etc. *Id.* Boards of education must also designate out-of-calendar (“OC”) days that are to be used for instructional days in the event school is cancelled for any reason. W. Va. Code § 18-5-45(c)(4).

All employees are paid for, but do not work on, OSE days. With regard to OC days, 200-day employees (e.g., teachers) do not report to work and are not paid unless the OC day is converted into an instructional day. 261-day employees (year-round employees including, e.g., central office staff), however, are required to work on OC days.

Code Provisions Relied Upon by the Committee

W. Va. Code § 6-9A-3 reads as follows:

(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.

....

(d) Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media.

Advisory Opinion

The Open Meetings Act requires governing bodies of public agencies to timely post a meeting notice which notifies the public when and where a public meeting will be held and to make available an agenda which notifies the public of the items of business which will be addressed at the meeting. W. Va. Code § 6-9A-3.

The Act does not specifically establish when meeting notices or meeting agendas for local governing bodies¹, such as county boards of education, must be made available to the public. As the Act does not provide specific guidance for local governing bodies, in accordance with its authority to interpret the Open Meetings Act, this Committee has established time frames in prior Open Meetings Advisory Opinions in which local governing bodies may post meeting notices and make agendas available.

For a governing body which meets on a regular basis, the Committee has established that posting notices and making agendas available at least three business days before each regularly scheduled meeting complies with the Act. Open Meetings Advisory Opinions 2006-11 and 2006-15.² A Board may make an agenda available by "posting its meeting agenda for each regularly scheduled meeting in a public place at its central office, as well as having copies of the agenda available to be picked up at the same location during regular business hours. In addition, the Board, in its discretion, may distribute agendas to the news media by mail, telephone facsimile or E-mail, or the agenda may be posted on an Internet website, if the Board has established a presence on the Internet." Open Meetings Advisory Opinion 2006-15.

The School Superintendent asks whether OC days and OSE days are counted when computing time periods under the Act. **When counting business days under the Act, the day of the meeting, Saturdays, Sundays and legal holidays are excluded.** Open Meetings Act Advisory Opinions 2006-15 and 2012-01. Accordingly, OC and OSE days are to be counted unless they occur on the day of the meeting, Saturday, Sunday or are considered a legal holiday.

Whether OSE and OC days are considered legal holidays can be ascertained by reviewing West Virginia's statutes governing school calendars and legal school holidays. The school calendar statute treats OSE and OC days separate and distinct from paid holidays. W. Va. Code § 18-5-45(c). The statute provides that noninstructional days shall include, among others, seven paid holidays *and* six OSE days. W. Va. Code § 18-5-45(c)(3). The statute additionally states that the school term shall include OC days to be used for instructional days in the event school is cancelled. W. Va. Code § 18-5-45(c)(4). Furthermore, OSE and OC days are not among the designated legal school holidays. W.

¹ The Act provides that state agencies must file a notice in a manner to allow each notice to appear on the Secretary of State's website at least five business days prior to the date of the meeting. W. Va. Code § 6-9A-3(e).

² Local governing bodies that meet once a week may post notices and make agendas available for regular meetings two business days before the meeting. See Open Meetings Advisory Opinion 2007-09.

Va. Code § 18A-5-2(a) (designating legal school holidays as Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, New Year's Day, Martin Luther King's birthday, Memorial Day and West Virginia Day).³

The Committee on Open Governmental Meetings therefore holds that OSE days and OC days are not considered legal holidays and are thus counted for purposes of computing time periods under the Open Governmental Proceedings Act. The Committee notes that proper notice and agenda requirements must continue to be met during OC and OSE days.

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.



Lawrence J. Tweel, Chairperson
Open Governmental Meetings Committee
West Virginia Ethics Commission

³ The statute additionally provides that schools shall be closed “on any day appointed and set apart by the president or the Governor as a holiday of special observance by the people of the state.” W. Va. Code § 18A-5-2(a).

Open Meetings Advisory Opinion No. 2019-02

Issued on January 3, 2019, by

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

Opinion Sought

The **City of Winfield** asks whether it may enact an ordinance prohibiting private citizens from filming public meetings under the Open Governmental Proceedings Act.

Facts Relied Upon by the Committee

The City of Winfield is considering an ordinance that limits the public's ability to film City Council meetings and other public meetings conducted at Winfield City Hall. The City will continue to permit the media to film and/or record public meetings. The meetings are also audio-recorded by the City, and minutes are prepared. For public order and the avoidance of undue interference, however, the City does not believe it should allow filming of meetings by the public.

The City does not wish to limit access to its meetings. The meetings are open to the public, and the public may request copies of audio-recordings and minutes of meetings.

Code Provisions Relied Upon by the Committee

W. Va. Code § 6-9A-9 provides:

(a) Except as otherwise provided in this section, any radio or television station is entitled to broadcast all or any part of a meeting required to be open.

(b) A public agency may regulate the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting, so as to prevent undue interference with the meeting. The public agency shall allow the equipment to be placed within the meeting room in such a way as to permit its intended use, and the ordinary use of the equipment may not be declared to constitute undue interference: Provided, That if the public agency, in good faith, determines that the size of the meeting room is such that all the members of the public present and the equipment and personnel necessary for broadcasting, photographing, filming and tape-recording the meeting cannot be accommodated in the meeting room without unduly interfering with the meeting and an adequate alternative meeting room is not readily available, then the public agency, acting in good faith and consistent with the purposes of this article, may require the pooling of the equipment and the personnel operating it.

Advisory Opinion

Based upon the plain language of the Open Governmental Proceedings Act (“Open Meetings Act” or “Act”), this Committee finds that the City may not enact an ordinance prohibiting the public from filming public meetings. Although the City suggests that the Act, at W. Va. Code § 6-9A-9, permits the media, but not the public, to film its meetings, this Committee disagrees.

W. Va. Code § 6-9A-9 governs the broadcasting or recording of meetings. W. Va. Code § 6-9A-9(b) affirmatively requires public agencies to allow the equipment necessary for broadcasting, photographing, filming or recording a meeting to be placed in the meeting room. This subsection does not qualify who is permitted to use such equipment, and it only allows public agencies to regulate its use for one reason, which is to prevent undue interference with a meeting. *Id.* Agencies are also prohibited from claiming that the ordinary use of such equipment constitutes undue interference with their meetings. *Id.*

The City states that it is seeking to avoid undue interference by prohibiting the public from filming its meetings. The use of recording equipment does not constitute undue interference under the Act simply because the public is operating it. The Act expressly precludes the City from claiming that the ordinary use of equipment to film a meeting constitutes undue interference, and it is wholly specious to conclude that the ordinary use of equipment to film a meeting no longer constitutes ordinary use because it is being used by the public as opposed to the media. W. Va. Code § 6-9A-9(b).

The Committee on Open Governmental Meetings therefore holds that as it pertains to the use of equipment necessary for broadcasting, photographing, filming or recording a meeting, a public agency may not prohibit anyone -- the public or the media -- from using such equipment unless it is to prevent undue interference with the meeting. Further, the public’s ordinary use of such equipment alone may not be declared to constitute undue interference with a public agency’s meetings.¹

¹ The Committee’s Opinion today is consistent with its prior Opinions addressing the subject. See Open Meetings Advisory Opinions 2001-07, 2005-08 and 2008-09. The Committee also notes that several other jurisdictions have determined that permitting citizens to record open meetings fulfills the policy of their respective open meetings laws. See Ky. Op. Att’y Gen. 96-OMD-143 (1996) (finding that a regulation, rule, or policy of a public body which uniformly prohibits the tape recording of a public meeting is arbitrary, capricious, restrictive and unreasonable and that a person should be permitted to tape record a meeting when it is non-disruptive); Mo. Op. Att’y. Gen. No. 151-95 (Sept. 25, 1995) (finding that even though Missouri has no provision addressing whether citizens may record a meeting, the policy of its Open Meeting Law and decisions by other states demonstrate that a city council does not have the authority to prohibit citizens from unobtrusively videotaping an open meeting); 1991 Fla. Op. Att’y Gen. 87 (Apr. 26, 1991) (finding that while a board may adopt reasonable rules to ensure the orderly conduct of its meeting, rules prohibiting the use of nondisruptive tape recording devices would appear to be unreasonable and arbitrary and, therefore, invalid); Colo. Op. Att’y Gen. AG Alpha No. 79 (May 16, 1979) (finding that members of the public should be permitted to tape record meetings even though the Open Meetings Law is silent on the question of tape recordings by interested citizens or members of press); 38 Mont. Op. Att’y Gen. 29 (Feb. 13, 1979) (finding that the legislative policy announced in its Open Meetings Law would be furthered by allowing interested members of the public to mechanically record open meetings); and 38 Or. Op. Att’y Gen. 50 (Aug. 10, 1976) (finding that a governing body has no legitimate interest in prohibiting the making of a record of its public proceedings, and it accordingly has no more right to prohibit the unobtrusive use of

Finally, the Committee notes that the Act provides an example of the kind of finding that must be made to constitute undue interference:

[I]f the public agency, in good faith, determines that the size of the meeting room is such that all the members of the public present and the equipment and personnel necessary for broadcasting, photographing, filming and tape-recording the meeting cannot be accommodated in the meeting room without unduly interfering with the meeting and an adequate alternative meeting room is not readily available, then the public agency, acting in good faith and consistent with the purposes of this article, may require the pooling of the equipment and the personnel operating it.

W. Va. Code § 6-9A-9(b). Given the small size and non-disruptive nature of recording equipment today, the Committee finds it difficult to envision a scenario where the size of the meeting room cannot accommodate both the equipment to film a meeting as well as everyone present. Even if such a good faith finding can be made, the Act nonetheless forbids a complete prohibition on the use of such equipment, instead providing that a public agency may require that the equipment be pooled. *Id.*; See also 1996 N.D. Op. Att'y Gen. 38 (1996) (finding that another example of undue interference may occur when numerous people film a meeting while roaming around the meeting room and that a city council may reasonably limit the areas of the room from which a meeting may be filmed).

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.



Lawrence J. Tweel, Chairperson
Open Governmental Meetings Committee
West Virginia Ethics Commission

a recording device, than to prohibit the manual taking of notes, or to prohibit the subsequent reporting of what was said).