

## OPEN MEETINGS ADVISORY OPINION NO. 2000-10

Issued On August 3, 2000 By The

### WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

#### OPINION SOUGHT

The City Attorney for the City of Morgantown, asks if the Open Governmental Proceedings Act permits a City Council to meet in executive session to discuss pending or proposed litigation with its attorney.

#### FACTS RELIED UPON BY THE COMMITTEE

The requester notes that discussions of current or pending litigation between an attorney and client are privileged communications, and asks if such communications can be made in executive session.

#### CODE PROVISIONS RELIED UPON BY THE COMMITTEE

The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. W. Va. Code § 6-9A-4(a).

#### ADVISORY OPINION

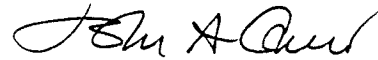
The Open Governmental Proceedings Act permits governing bodies to hold an executive session and exclude the public only when a closed session is required for one of several actions specified in W. Va. Code 6-9A-4. The Act contains no specific reference to discussions of present and pending litigation between a governing body and its legal counsel. The City asks whether such discussions may be conducted in executive session.

The Supreme Court of Appeals of West Virginia answered this question in Peters v. County Commission, 205 W.Va. 481, 519 S.E.2d 179 (1999). There, the Court ruled that privileged communications between a public body and its attorney are exempted from the open meetings requirements of the Act and may be conducted in executive session. The exception was based on the common law attorney-client privilege. The Court cited with approval the following language from an earlier decision by the Supreme Court of Tennessee in regard to its Open Meetings Act:

“The exception is limited to meetings in which discussion of present and pending litigation takes place. Clients may provide counsel with facts and information about the lawsuit and counsel may advise them about the legal ramifications of those facts and the information given them. However, once any discussion, whatsoever, begins among the members of the public body regarding what action to take based upon advice from counsel, whether it be settlement or otherwise, such discussion shall be open to the public and failure to do so shall constitute a clear violation of the Open Meetings Act.”

This Committee rules that the City Council may meet with the City Attorney in an executive session to discuss present or pending litigation, and may cite the Supreme Court's ruling in the Peters case as its authority for doing so.

This Committee also points out the Act's rule that "[n]othing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is present." W. Va. Code 6-9A-4(11). In Peters, the Supreme Court observed that in the absence of such a provision, the intent of the Act could be circumvented by a public body meeting with its attorney for the sole purpose of keeping the meeting closed to the public, under the guise of the attorney-client privilege exception.



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Chairman