

OPEN MEETINGS ADVISORY OPINION NO. 2000-15

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

COPY

OPINION SOUGHT

George Antonik, a member of the New Martinsville City Council, asks a number of questions involving the conduct of an executive session of a governing body.

FACTS RELIED UPON BY THE COMMITTEE

Mr. Antonik seeks to determine the proper procedure to be followed in regard to conducting proceedings in executive session during future meetings of the City Council. He asks several questions requiring interpretation of the Open Meetings Act (Act).

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-3 provides that “[e]ach governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings . . . are made available, in advance, to the public and news media”

The Act defines “executive session” to mean “any meeting or part of a meeting of a governing body which is closed to the public.” W. Va. Code § 6-9A-2(2).

W. Va. Code § 6-9A-4 provides the following pertinent guidance regarding executive sessions:

(a) 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. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.

(b) An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions:

(2) To consider:

(A) Matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee, or prospective public officer or employee unless the public officer or employee or prospective public officer or employee requests an open meeting; or

(B) For the purpose of conducting a hearing on a complaint, charge or grievance against a public officer or employee, unless the public officer or employee requests an open meeting. Final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting[.]

W. Va. Code § 6-9A-5 provides, in pertinent part:

Each governing body shall provide for the preparation of written minutes of all its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings except executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting

ADVISORY OPINION

The requester's questions will be addressed in order.

(1) Can a governing body of a public agency post a meeting as an executive session, before the governing body meets and votes to go into executive session?

A decision by City Council to go into executive session must be made during the meeting at which the session occurs - the decision can not be made in advance of a meeting. Therefore, Council's agenda should not identify an agenda item as one which will be handled in executive session during the upcoming meeting, because those Council members present at the meeting may or may not vote to go into executive session to discuss the matter.

It would not be a violation of the Act for Council's agenda to note that a matter may be handled in executive session. However, any potential benefit to the public from such speculation should be weighed against the possibility that it could discourage attendance by those who are interested in the matter.

(2) If the actions of an elected City Council member are to be discussed in an executive session, is it proper to list the subject of the meeting in the agenda as "employee relations?"

The Act requires that the public be given meaningful notice of the topics which will be discussed at a meeting. A discussion of the actions of a member of City Council should not be listed in the agenda as "employee relations," unless the member is also a City employee.

(3) If matters personal to a public officer or employee or a prospective officer or employee are to be discussed in an executive session, should the person who is the subject of the discussion be notified in advance of the meeting?

No provision of the Act requires an employee or public official, whose conduct or actions will be discussed in an executive session, to be given personal advance notice of such a discussion. Whether personal notice may be required under the due process clause of the federal or state constitution, or other laws or statutes, is a question that falls outside the Committee's authority.

(4) If personnel matters regarding two employees are to be discussed in an executive session, what happens if one employee wants the executive session to be open to the public and the other employee wants the session closed?

The Act permits a governing body to discuss certain personnel matters in executive session, unless the affected employee requests an open meeting. The governing body should initially determine if the matter involving the two employees can be dealt with in separate sessions. If it is impractical to discuss the matter separately, the Act does not permit discussion of the matter in executive session over the objection of either of the affected employees.

(5) What procedure must be followed in taking minutes of executive session meetings?

The Act grants governing bodies of public agencies discretion to determine whether minutes of executive sessions are taken. If a governing body decides to take minutes of an executive session, the minutes should contain the same information as required for portions of the meeting that are open to the public.

(6) What procedure should be followed in order to convene an executive session of a governing body?

A governing body should generally follow its standard procedural rules in deciding whether to convene in executive session. For example, a member would move that the governing body convene an executive session for one of the reasons permitted in W. Va. Code § 6-9A-4, or other applicable law, another member would second the motion, and the chair of the governing body would repeat the motion for the benefit of the public, identifying the exemption proposed for authorizing an executive session. The members of the governing body would then vote on the motion. A majority vote in favor of the motion is required before an executive session may be held.



Chairman