

OPEN MEETINGS ADVISORY OPINION NO. 2004-11

Issued On August 5, 2004 By The

WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The Board of Supervisors for the Potomac Valley Conservation District asks if it is permissible to meet privately with the District's attorney in his office to discuss various aspects of recently concluded or anticipated litigation.

FACTS RELIED UPON BY THE COMMITTEE

The Board of Supervisors and their Administrator seek to meet privately with the Board's retained attorney to discuss the legal aspects and tactics of recently concluded litigation, as well as to discuss litigation which is anticipated in the future.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2(4) provides that "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. 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

W. Va. Code § 6-9A-4(a) provides: 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

(b) An executive session may be held only upon a majority 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:

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(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential. . . .

ADVISORY OPINION

Describing the purpose of the Open Meetings Act, the Legislature noted “it would be unrealistic, if not impossible, to carry on the business of government [if] every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting.” W. Va. Code § 6-9A-1. Accordingly, the Act provides that “general discussions among members of a governing body,” even when held in a planned setting with a quorum present, do not involve a meeting governed by the Act, **so long as there is no intention for the discussion to lead to an official action.**

Consistent with this statutory guidance, the Board of Supervisors may meet privately with their attorney for limited educational and training purposes to discuss matters such as lessons learned from completed litigation, or to obtain general legal guidance on avoiding future litigation. However, if any official action by the Board is required, any discussion among the Board Members should take place during a properly noticed regular, special or emergency meeting. During the course of such public meeting, the Board may elect to convene in executive session to discuss litigation matters that are protected under the attorney-client privilege.

Ordinarily, a governing body of a public agency may hold an executive session and exclude the public only when a closed session is required for one of the reasons specified in W. Va. Code § 6-9A-4. In Peters v. County Commission, 205 W.Va. 481, 519 S.E.2d 179 (1999), the Supreme Court of Appeals of West Virginia ruled that privileged communications between a public body and its attorney are exempt from the open meetings requirements of the Act based upon the common law attorney-client privilege. This privilege is recognized in Rule 1.6 of the Rules of Professional Conduct adopted by our Supreme Court, thereby satisfying the requirements of W. Va. Code § 6-9A-4(b)(12).

Based upon the Court’s holding in Peters, this Committee finds that a governing body may meet with its attorney in executive session to discuss matters protected by the attorney-client privilege. Therefore, the Board may elect to convene in executive session, following the procedures set forth in the Act, and obtain advice from the Board’s attorney regarding concluded, threatened or proposed litigation. Once the attorney’s advice has been obtained in executive session, the Board must reconvene in an open meeting, if there is any discussion or vote on official action to be taken.



Chairman