

OPEN MEETINGS ADVISORY OPINION NO. 2004-12

Issued On August 5, 2004 By The

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

OPINION SOUGHT

The Wheeling City Council seeks guidance on meeting in executive session with its legal counsel. The Council seeks to determine what matters regarding a proposal to permit collective bargaining by city employees may be discussed with the City Solicitor in an executive session closed to the public and the media.

FACTS RELIED UPON BY THE COMMITTEE

The City Council is considering whether to authorize collective bargaining by municipal employees. Before taking official action, the Council may wish to seek legal advice from the City Solicitor regarding various legal issues raised by this initiative, including applicable city charter provisions, state statutes and court decisions. Further, if an executive session is convened to consider legal issues with legal counsel representing the City, Council Members might wish to discuss general issues regarding this same subject.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-3 provides, in pertinent part: "Except as expressly and specifically otherwise provided by law, ... all meetings of any governing body shall be open to the public."

W. Va. Code § 6-9A-4 provides, in pertinent part:

(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 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:

* * *

(11) Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant...

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

ADVISORY OPINION

The Open Meetings Act permits governing bodies of public agencies to 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 recognized in Open Meetings Advisory Opinion 2000-10 that a governing body may meet with its attorney in executive session to discuss matters protected by the attorney-client privilege. Therefore, the Wheeling City Council may elect to convene in executive session, following the procedures set forth in the Act, and obtain advice from the City Solicitor on various legal questions surrounding the proposal to authorize collective bargaining by municipal employees.

Once the attorney's advice on all pertinent legal issues has been obtained in executive session, the Council must reconvene in an open meeting. Any discussion, including discussion of such general questions as whether authorizing collective bargaining by municipal employees represents sound public policy, as well as any vote on official action to be taken, must take place in public.



Chairman