

OPEN MEETINGS ADVISORY OPINION NO. 2006-09

Issued On September 7, 2006 By The

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

OPINION SOUGHT

The Jefferson County Planning Commission seeks guidance on the use of electronic mail.

FACTS RELIED UPON BY THE COMMITTEE

The Jefferson County Planning Commission wants to determine if individual Commissioners may send proposals to staff via electronic mail to be forwarded to all Commission Members in advance of a meeting. Examples of draft documents that would be included in this process are by-laws, budgets, policies, correspondence, and corrections to minutes. Commissioners would not respond to these documents until a properly noticed meeting and copies of all such material would be on file and available for public inspection.

Prior to implementing this policy, the Planning Commission proposes to include the following language in its By-laws and Procedures:

Members may send information to the office, for immediate forwarding to all Planning Commissioners, electronically or otherwise, between meetings, but may not reply about anything that could result in an official action. Such materials will be filed and made available to the public immediately.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W, Va. Code § 6-9A-1, *Declaration of Legislative Policy*, provides as follows:

The Legislature hereby finds and declares that public agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions. The Legislature hereby further finds and declares that the citizens of this state do not yield their sovereignty to the governmental agencies that serve them. The people in delegating authority do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government created by them.

Open government allows the public to educate itself about government decisionmaking through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government.

Public access to information promotes attendance at meetings, improves planning of meetings, and encourages more thorough preparation and complete discussion of issues by participating officials. The government also benefits from openness because better preparation and public input allow government agencies to gauge public preferences accurately and thereby tailor their actions and policies more closely to

public needs. Public confidence and understanding ease potential resistance to government programs.

Accordingly, the benefits of openness inure to both the public affected by governmental decisionmaking and the decision makers themselves. The Legislature finds, however, that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should 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. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decisionmaking.

W. Va. Code § 6-9A-2(4), *Definitions*, provides, in pertinent part:

“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. Meetings may be held by telephone conference or other electronic means. 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; or

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

Finally, W. Va. Code § 6-9A-3 provides that, except for certain specific exceptions, “all meetings of any governing body shall be open to the public.”

ADVISORY OPINION

This State’s Open Meetings Act does not directly address electronic mail communications. In interpreting and applying the Act, this Committee will follow the express intent of the Legislature which, with limited exceptions, requires governing bodies of public agencies to accomplish the collective process of decision making on matters within their official purview during a public meeting.

Generally, written communications, including electronic mail or “E-mail,” should not be used to avoid public discussions that would ordinarily take place in the context of an open public meeting. Therefore, an exchange of E-mail communications among a quorum of a governing body which involves deliberating toward a decision on a matter requiring official action is not permitted by the Act.

Nonetheless, this Committee recognizes that not all communication between or among the members of a governing body of a public agency will take place in the course of a scheduled meeting that is open to the public and the media. In an earlier, non-precedential opinion, Open Meetings Advisory

Opinion 2000-07, this Committee authorized members of a City Planning Commission to receive copies of proposed plans in advance of a scheduled meeting, so each member would have an opportunity to review the plans in preparation for the meeting.

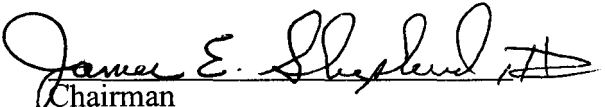
In issuing precedential opinions in accordance with authority provided in W. Va. Code § 6-9A-11, as amended by the Legislature in 2006, this Committee will follow its rulings in earlier, non-precedential Open Meetings Advisory Opinions, unless we conclude that a particular opinion was clearly wrong. The guidance in Open Meetings Advisory Opinion 2000-07, which generally allows Planning Commission Members to individually receive copies of proposed plans in advance of a meeting, remains valid. Further, if proposed plans can be converted to electronic mail, they may be provided to the members in advance of the meeting, in substantially the same manner as various draft documents proposed here by the Jefferson County Planning Commission.

This Committee previously recognized in another non-precedential opinion, Open Meetings Advisory Opinion, 2005-12, that “a series of E-mail exchanges could virtually eliminate any need for discussion at an open public meeting.” Accordingly, E-mail communications regarding matters requiring official action should be limited to the staff or individual members sending out drafts of matters such as by-laws, budgets, policies, correspondence, and meeting minutes, so the voting members of the governing body will have an opportunity to review these documents in advance of the meeting.

It is the opinion of this Committee that circulating “draft corrections to minutes” would exceed the limitations established in this Advisory Opinion. A “draft correction” necessarily implies that an original draft of a document has already been received. Consequently, a “draft correction” represents the next step in a dialogue regarding what the document should ultimately say. Of course, an individual Commissioner may submit suggested or proposed corrections to the meeting minutes to staff via E-mail. However, as we read the language in the Planning Commission’s proposed procedure, to avoid a dialogue on the merits of a matter requiring official action, the staff should not forward these suggested or proposed corrections of the draft minutes to the other Commissioners via E-mail. (Approval of meeting minutes is a matter that requires official action by a governing body.)

This Committee further notes that § 6-9A-2(4)(E) of the Act allows a quorum of a governing body to discuss purely logistical matters, such as the time and place for holding a meeting, who should be invited to the meeting to make a presentation, what data or documentation needs to be available at the meeting, and what matters should be included on the meeting agenda. Therefore, the Planning Commission members and staff may use electronic mail to the maximum extent practicable to communicate regarding those logistical matters which are exempt from the open meetings requirements in the Act.

This advisory opinion is limited to questions arising under the Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1, *et seq.*, and does not purport to interpret other laws or rules. Pursuant to W. Va. Code § 6-9A-11, a governing body or member thereof that acts in good faith reliance on this advisory opinion has an absolute defense to any civil suit or criminal prosecution for any action taken based upon this opinion, so long as the underlying facts and circumstances surrounding the action are the same or substantially the same as those being addressed in this opinion, unless and until it is amended or revoked.


Chairman