

OPEN MEETINGS ADVISORY OPINION NO. 2008-04

Issued On March 6, 2008 By The

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

OPINION SOUGHT

The President of the Kanawha County Commission and the County Clerk¹ of Kanawha County ask if the Board of Ballot Commissioners is subject to the requirements of the Open Meetings Act.

FACTS RELIED UPON BY THE COMMITTEE

W. Va. Code § 3-1-19 requires certain election-related functions be conducted by a Board of Ballot Commissioners consisting of the currently serving County Clerk and two persons appointed by the County Clerk. The County Clerk is required to appoint one person from each of the two political parties which cast the largest and second largest number of votes at the "last preceding general election." The statute provides that the County Clerk will serve as Chairman.

In accordance with W. Va. Code § 3-1-21(a): "The board of ballot commissioners for each county shall provide the ballots and sample ballots necessary for conducting every election for public officers in which the voters of the county participate." The Board of Ballot Commissioners is also responsible for providing the ballots for any countywide special election ordered by the County Commission. In addition, the Board has authority to take corrective action regarding any error on a ballot that is of sufficient magnitude to confuse or mislead the voters.

In order to provide the required ballots, the Board must select a vendor which is qualified to print ballots in accordance with the provisions of W. Va. Code § 3-1-21a. Vendors are certified as qualified to print ballots through a process administered by the Secretary of State and the State Elections Commission.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2(3) defines "governing body" as "[T]he members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration, the membership of a governing body consists of two or more members. . . ."

W. Va. Code § 6-9A-2(6) defines "public agency" as "[A]ny administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing authorized by law to exercise some portion of executive or legislative power."

¹ Because the County Clerk is a statutory member of the Board of Ballot Commissioners, she has standing to seek a formal advisory opinion from this Committee on the meaning and application of the Open Meetings Act pursuant to W. Va. Code § 6-9A-11(a).

ADVISORY OPINION

The Open Meetings Act applies to governing bodies of public agencies which exercise executive or legislative power. Based upon a review of W. Va. Code §§ 3-1-19 through 3-1-21, this Committee finds that the Board of Ballot Commissioners exercise some portion of executive power in regard to the conduct of elections. For example, the Board decides which vendor will receive public funds to print the ballots and sample ballots to be used in various elections, and determines the layout of the ballot. Therefore, a Board of Ballot Commissioners established pursuant to W. Va. Code § 3-1-19 constitutes a governing body of a public agency subject to the requirements of 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.


James E. Shepherd II, Chairman