

OPEN MEETINGS ADVISORY OPINION NO. 2013-01

Issued On May 2, 2013 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The **Wood County Commission** asks for guidance on when meeting agendas must be made available to the public and news media. It also asks whether its two proposed policies comply with the requirements of the Open Meetings Act: (1) regarding making available for public inspection documentation of Commission approval of certain items; and (2) adding a standing agenda item to deal with payroll modifications.

FACTS RELIED UPON BY THE COMMITTEE

The Wood County Commission meets every week on Monday, and the first and third Thursday of the month. When a holiday falls on a Monday, the County Commission meets on Thursday of that week regardless of whether it is the first or third Thursday. Additionally, the County Commission may meet on other Thursdays, as needed.

Additionally, to comply with Open Meetings Advisory Opinion 2012-04, the County Commission has adopted a practice of placing in a basket any and all items requiring Commission approval. Attached hereto as Exhibit 1 is a list describing such items. Exhibit 1 will be included as part of each agenda and will advise the public that they may review the same in the County Administrator's Office before the meeting. No items may be added to the basket after the close of business, two business days before each meeting. The basket of items will be made available for review.

Further, from time to time employees work overtime and part-time employees' hours fluctuate, resulting in a modification to their wages. Employees are paid twice a month. To avoid delays in paying employees the appropriate wages, the Commission proposes having a standing agenda item that reads: "PAYROLL MODIFICATIONS RECEIVED AFTER THE AGENDA WAS PUBLISHED".

The Commission seeks to verify when its meeting agenda should be made available to the public and the media; whether its new policy regarding approval of items is acceptable; and whether it may adopt the foregoing proposed standing agenda item.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-3 provides in pertinent part:

Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media, except in the event of an emergency requiring immediate official action.

W. Va. Code § 6-9A-8 reads:

(a) Except as otherwise expressly provided by law, the members of a public agency may not deliberate, vote, or otherwise take official action upon any matter by reference to a letter, number or other designation or other secret device or method, which may render it difficult for persons attending a meeting of the public agency to understand what is being deliberated, voted or acted upon. However, this subsection does not prohibit a public agency from deliberating, voting or otherwise taking action by reference to an agenda, if copies of the agenda, sufficiently worded to enable the public to understand what is being deliberated, voted or acted upon, are available for public inspection at the meeting.

ADVISORY OPINION

In Open Meetings Advisory Opinion 2001-19, this Committee provided guidance to the Wood County Commission on when it should issue meeting agendas for its regular meetings. Since that time, the Commission has changed its meeting schedule, and seeks this Committee's review for compliance with the Open Meetings Act.

The Open Meetings Act requires public agencies to inform the public of (1) the time, date, place and purpose of their meetings and (2) what will be dealt with at the meetings. This means agencies must (1) give "meeting notice," telling the public when and where the meeting will be held, and (2) provide a "meeting agenda," telling the public the items of business with which the meeting will deal.

In Open Meetings Advisory Opinion 2001-19, this Committee wrote:

The statute does not set a specific deadline for making an agenda available to the public.

The Committee has previously concluded that the agenda must be made available within a "reasonable time" in advance of the meeting. How far in advance of a meeting gives "reasonable" notice will vary with the

circumstances peculiar to each agency. Therefore, this question must be addressed on a case-by-case basis.

Thus, in Open Meetings Advisory Opinion 2001-04 the Committee ruled that the Braxton County Commission, when meeting twice a month, complies with the requirements of the Act by making its agenda available to the public and news media at least **three** days prior to its regularly scheduled meeting. By contrast, in Open Meetings Advisory Opinion 2001-10, the Committee found that the Kanawha County Commission, when meeting weekly, or twice a week, complies with the Act by making its agenda available to the public and news media at least **two** days prior to the meeting.

Consistent with its ruling in Open Meetings Advisory Opinion 2001-10, in Open Meetings Advisory Opinion 2001-19, the Committee found that the Wood County Commission, when meeting every Monday and Thursday, complies with the requirements of the Act if it made its agenda available to the public and news media at least **two** days prior to the meeting.

Notwithstanding the Commission's schedule modification, it still meets at least weekly. Consistent with its foregoing opinions, the Committee finds that the Wood County Commission continues to comply with the Act by making its agenda available to the public and news media at least two days prior to a meeting.

For purposes of calculating the number of days in the notice period, the day of the meeting is not counted. Further, Saturdays, Sundays and legal holidays must be excluded, as government offices are generally not open for business on such days, and there would be no one available to respond to questions from the public or news media regarding the agenda.

Next, the Committee will determine whether the Commission's proposal regarding items requiring approval satisfies the standards set forth in Open Meetings Advisory Opinion 2012-04. The Committee noted that governing bodies vary in methods of approving expenditures, and that the volume of expenditures varies among governing bodies. "If an agency or municipality has a small budget, there may only be ten payments to approve. For school boards or larger counties, there may be hundreds of payments which require approval." As a result, the Committee imposed the following requirements for all governing bodies regarding, stating that they:

- Must either identify on the agenda each invoice and amount to be approved for payment, OR state on the agenda that a list of invoices, or the invoices themselves, are available for public review;
- Must have a list of invoices, which includes the name of each vendor and the amount owed to each, available for public review at least two business days before the meeting, not counting the day of the meeting. OR Must have all invoices being considered available for review at the agency's office during its public office hours;

- May not add invoices after deadline to amend the agenda has passed, e.g. governing body may not add to the stack right before the meeting;
- Must either record in the minutes the name and amount of each invoice approved OR attach to the minutes a list of invoices approved, and the amount of each;
- When considering awarding a grant or a request for money, the agenda must identify each potential recipient by name, but may omit the amount; and
- Must include in the meeting minutes both the name of the recipient and the amount awarded.

The Commission proposes to include as part of its agenda a list of items requiring approval, identified as Exhibit 1 in its request. Documentation related to each such item will be made available for public review, and no items will be added after the close of business, two business days before each meeting. The Committee has reviewed the Commission's proposed Exhibit 1 and modified it to include only action items involving the expenditure or disbursement of public funds. With that modification, the Committee finds that this proposed practice complies with the Act so long as the Commission complies with the other provisions set forth above, such as the duty to record payments in the minutes, or attach a list of invoices or other relevant documents thereto. An agenda item reading "Discussion, Review, and Approve expenditures or disbursements identified on Exhibit 1, attached hereto" would satisfy the requirements of the Act. Exhibit 1 is attached to, and incorporated in, this advisory opinion.

Finally, the Committee will address the Commission's request to add a standing agenda item regarding payroll modifications. This Committee has repeatedly held that generic agenda items are insufficient to satisfy the notice requirements of the Act. See Open Meetings Advisory Opinions 2001-10, 2001-13, and 2006-14 (Generic descriptions in agenda are inadequate to inform public of matters requiring official action.)

The Open Meetings Act permits a governing body to amend an agenda to add additional items of business - items not known at the time the original agenda was prepared and made available to the public, up to two days before the meeting, and made available to the public in the same manner as the original agenda. Generally, no amendment of the agenda may be made less than two days before a meeting, unless it is to deal with an emergency matter. Routine matters that come up after the deadline to amend an agenda must be held over to the next meeting. If an agenda is amended to accommodate action on an emergency matter, both the meeting agenda and the meeting minutes must explain the facts and circumstances of the emergency.

Here, since the County Commission is permitted to make its agenda available two days before the meeting, it does not have the opportunity to amend an agenda, except for an emergency. As a result,, the Commission's proposal highlights the tension in the Act between allowing "government to function and the public to participate in a meaningful manner in public agency decision making." W. Va. Code § 6-9A-1. Thus, the Committee must strike a balance between providing meaningful notice to the public of what will be discussed at a meeting and constraining the governing body by an overly

specific agenda which cannot be modified to accommodate the Commission's needs.

During the 2013 Regular Session, the West Virginia State Legislature passed HB 2747 amending the Open Meetings Act. Specifically, the amendments now define "regular", "special" and "emergency" meetings. Although the legislation presently awaits the governor's signature and is not effective until July, this Committee still finds the new definition of emergency compelling. HB 2747 amends W. Va. Code § 6-9A-2 to read:

(2) "Emergency meeting" means any meeting called by a governing body for the purpose of addressing an unexpected event which requires immediate attention because it poses:

(A) An imminent threat to public health or safety;

(B) An imminent threat of damage to public or private property; or

(C) An imminent material financial loss or other imminent substantial harm to a public agency, its employees or the members of the public which it serves.

Depending on when the pay period ends, the total amount of wages to which an employee's is entitled could be delayed for up to 2 ½ weeks if the County Commission had to comply with the two day rule. The Requester has indicated that some employees only earn \$18,000 per year; this makes the wait for overtime pay exceptionally burdensome. This Committee is persuaded that this is the type of imminent material financial loss to a public employee contemplated by the amendment. Thus, the County Commission may amend its agenda less than two days before—but before the meeting starts—to include any necessary payroll modification. The amended agenda shall identify with specificity the payroll modification by department, and shall be posted in a public place in the County Courthouse and on the County Commission's website.

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.

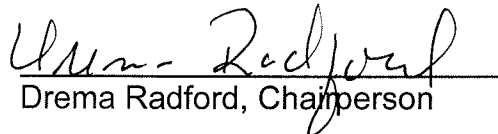

Drema Radford, Chairperson

EXHIBIT 1

Discussion, Review, and Approval of the following items may be included during this meeting and are available for public inspection in the Office of the County Administrator two days prior to this meeting.

- budget revisions
- purchase orders and requisitions
- revisions, reimbursements requests, resolutions and correspondence for grants
- grant disbursements to other entities
- invoices for expenditures to be paid
- reimbursements for travel expenses
- bid specifications and procedures for bids previously authorized by the commission
- monthly Hotel Occupancy Tax Collection disbursements
- disbursements for previously approved Innovative Programming Grants
- tax refunds, exonerations and consolidations
- probate items including settlements, petitions and fiduciary commissioner reports
- general fund disbursements to entities
- funding requests from local organizations by written form
- payroll modification as submitted by elected officials