

## Open Meetings Advisory Opinion No. 2017-01

Issued on June 1, 2017, by

### The West Virginia Ethics Commission Committee on Open Governmental Meetings

#### Opinion Sought

A **City Council Member-Elect for the City of Morgantown** asks whether the Open Governmental Proceedings Act applies to a gathering of elected municipal officials during the time between their election and the time they assume the full duties and authority of their elected office.

#### Facts Relied Upon by the Committee

On April 25, 2017, the Requester was elected to represent the Fifth Ward on Morgantown's City Council. The Requester states that he and other city council members-elect will assume the full duties and authority of their office upon taking the oath of office on July 1, 2017. The Requester states some city council members-elect have expressed an interest in meeting before July 1, 2017, for the purposes of both team building and continuing discussions and debates of issues that arose during the election campaign. The Requester asks whether the Open Governmental Proceedings Act ("Open Meetings Act" or "Act") would apply to this gathering of city council members-elect.

The Committee notes that the term "city council members-elect" in this Opinion does not include incumbent members of city council who have been re-elected; incumbent city council members *have* taken the oath of office and assumed the full duties and authority of office up until the beginning of their next term.

#### Code Provisions Relied Upon by the Committee

W. Va. Code § 6-9A-2(4) reads, in relevant part, as follows:

"Governing body" means the 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(5) reads, in relevant part, as follows:

"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.

W. Va. Code § 6-9A-2(7) reads, in relevant part, as follows:

"Public agency" means any 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.

W. Va. Code § 6-9A-3(a) reads as follows:

Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four of this article, all meetings of any governing body shall be open to the public.

### **Advisory Opinion**

The Open Meetings Act provides that "all meetings of any governing body shall be open to the public." W. Va. Code § 6-9A-3(a). Thus, to be subject to the Open Meetings Act, the proposed gathering of city council members-elect must constitute a "meeting" of a "governing body." "The first hurdle in determining whether the Act applies is deciding whether there is a governing body of a public agency." *French v. Mercer Cnty. Comm'n*, No. 14-0790 (W. Va., Nov. 10, 2015) (memorandum decision). Accordingly, irrespective of the issues to be discussed during the proposed gathering, the city council members-elect must first constitute a "governing body" as that term is defined under the Open Meetings Act.

The Act defines "governing body" to mean "the members of any public agency *having the authority to make decisions for or recommendations to a public agency on policy or administration.*" W. Va. Code § 6-9A-2(4) (emphasis added). Members of city council undeniably constitute a governing body under the Act because they have authority to make decisions for or recommendations to a public agency, the city, on policy or administration. See, e.g., Open Meetings Advisory Opinions 2009-04, 2011-03, and 2013-06. Here, the city council members-elect have yet to be sworn in to assume the full duties and authority of office.

Per the West Virginia Constitution, every person elected or appointed to any office must take an oath of office before exercising the authority of that office or discharging the duties thereof. W. Va. Const. Art. IV Sec. 5 ("[E]very person elected or appointed to any office, before proceeding to exercise the authority, or discharge the duties thereof, shall make oath or affirmation that he will support the constitution of the United States and the constitution of this state, and that he will faithfully discharge the duties of his said office to the best of his skill and judgment."); see also W. Va. Code § 6-1-7 ("No person elected or appointed to any office, civil or military, shall enter into the office, exercise any of the authority or discharge any of the duties pertaining thereto, or receive any compensation therefor, before taking the oath of office[.]"). Furthermore, Morgantown's City Charter similarly provides that "[e]very person elected or appointed to any office, before

proceeding to exercise the authority, or discharge the duties thereof, shall take the oath or affirmation prescribed by the Constitution of this State.” Art. I, Sec. 9.05. **Based upon the foregoing, this Committee finds that a gathering of city council members-elect does not constitute a governing body under the Open Meetings Act because the members-elect do not have the authority to make decisions for or recommendations to the city on policy or administration prior to taking the oath of office.**

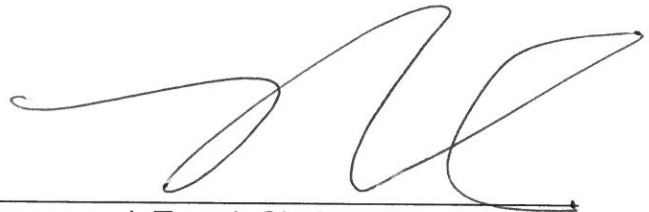
The Committee, in reaching its conclusion, found the following decisions in other jurisdictions highly instructive. In 2004, the Supreme Court of Virginia held that a “trial court did not err in holding that the open meeting provisions . . . did not apply to meetings of members of a public body that reach the required threshold of participants . . . only by inclusion of members-elect.” *Beck v. Shelton*, 267 Va. 482, 593 S.E.2d 195, 198 (2004). The Court further stated it would “not rewrite Code § 2.2-3701 to change the word ‘members’ to the phrase ‘members or members-elect.’ . . . If the legislature chooses to do so, it is properly within its power to do so.” *Id.*

Additionally, the Court of Appeals of Washington, Division 2, found under its Open Meetings Act that “[a]lthough the OPMA defines ‘action’ broadly, nothing suggests that members-elect have the power to transact a governing body’s official business before they are sworn in. Thus, they are not ‘members’ of a governing body with authority to take ‘action.’” *Wood v. Battle Ground School Dist.*, 107 Wash. App. 550, 27 P.3d 1208, 1215 (2001). Like the Supreme Court of Virginia in *Beck*, the Washington Court went on to state that “it is for the Legislature . . . to determine a basic legislative question such as whether [members-elect are] covered.” *Id.* (internal quotation omitted) (alteration in original); see also *Kuehnapfel v. Chintall*, No. A-3238-12T1, (N.J. Super. App. Div., July 15, 2014) (per curiam) (not for publication) (“At the time of that meeting, [the committeemen-elect] lacked any authority under the laws of this State. . . . As the . . . gathering did not constitute either a ‘public body’ or a ‘meeting’ as defined by OPMA, there was no violation.”); *216 Sutter Bay Associates v. County of Sutter*, 68 Cal.Rptr.2d 492, 58 Cal.App.4th 860, 878 (Cal. App. 3 Dist., 1997) (“When [the] incumbent supervisor . . . met with supervisors-elect . . . in December 1992, the Brown Act did not apply to supervisors-elect, but only to those who had already assumed office.”); *but see Hough v. Stembridge*, 278 So.2d 288, 289 (Fla. App. 3 Dist., 1973) (“To adopt this viewpoint would in effect permit . . . members-elect of a public board or commission to gather with impunity behind closed doors and discuss matters on which foreseeable action may be taken by that board or commission in clear violation of the purpose, intent, and spirit of the Government in the Sunshine Law.”).

In reaching its conclusion, this Committee does not ignore the potential for members-elect of a governing body to gather behind closed doors before assuming office to discuss matters on which foreseeable action may be taken. Although this Committee does not endorse such gatherings, this Committee is bound to interpret the law as written by the Legislature. Although the Legislature sought in the Act to protect the public’s interest “to participate in a meaningful manner in public agency decisionmaking[.]” W. Va. Code § 6-9A-1, it limited the application of the Act to meetings where members have “the authority

to make decisions for or recommendations to a public agency on policy and administration." W. Va. Code §§ 6-9A-2(4) & (5). Nothing suggests that members-elect have said authority prior to taking the oath of office.

*This Advisory Opinion is limited to questions arising under the Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1 through 6-9A-12, and does not purport to interpret other laws or rules.*

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Lawrence J. Tweel, Chairperson  
Open Governmental Meetings Committee  
West Virginia Ethics Commission