

Open Meetings Advisory Opinion No. 2018-02

Issued on March 1, 2018, by

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

Opinion Sought

The **West Virginia Workers' Compensation Industrial Council** asks whether it may convene an executive session for the purpose of considering a public employee's potential discharge if the employee has requested an open meeting when portions of the discussions would invade the privacy rights of other employees and/or involve other matters or records rendered confidential by law.

Facts Relied Upon by the Committee

The West Virginia Workers' Compensation Industrial Council ("Council") desires to convene an executive session wherein it will consider the potential discharge of an employee. The affected employee, however, has requested that the meeting regarding this matter be open to the public. The Council states:

While the Employee in this matter may waive their own privacy interests and have this matter addressed in an open meeting, they are unable to waive the privacy interests of the other employees referenced and therefore, the Industrial Council has determined that this confidential personnel matter must be addressed in Executive Session.

Specifically, the Council states that it "is advised that highly confidential personnel matters of 5-10 employees will be disclosed in the course of discussing this matter." The allegations against the affected employee involve hostile and retaliatory conduct against two subordinates for filing non-selection grievances, neglect of duty, insubordination and improper conduct. The Council further states that the hostile and retaliatory conduct allegations against the affected employee are allegedly part of a continuing pattern and practice of harassment, intimidation and non-discriminatory hostile work environment that contain past statements of conduct involving other employees and other grievances. Other issues will include management duties, classification and description of job duties of employees and compliance with directives on certain budgetary matters. The salaries and classifications of employees not involved in the grievance process may also be discussed.

The Council states:

There may be no dispute that the other employees who are related to this matter have an expectation of privacy in their personal employment matters, including pending grievances. While the employee that is subject to

discipline may want to air this dispute in public, none of the other 5-10 employees have waived their privacy interests nor have they consented to a discussion of their individual personnel matters or grievances in public.

Code Provisions Relied Upon by the Committee

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.

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

(b) An executive session may be held only upon a majority affirmative 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:

.....

(2) To consider:

(A) Matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee, or prospective public officer or employee unless the public officer or employee or prospective public officer or employee requests an open meeting; or

(B) For the purpose of conducting a hearing on a complaint, charge or grievance against a public officer or employee, unless the public officer or employee requests an open meeting. General personnel policy issues may not be discussed or considered in a closed meeting. Final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting;

.....

(6) To discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy such as any records, data, reports, recommendations or other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation, insurance and similar program or institution operated by a public agency

pertaining to any specific individual admitted to or served by the institution or program, the individual's personal and family circumstances;

. . . .

(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the freedom of information act as set forth in article one, chapter twenty-nine-b of this code.

Advisory Opinion

The Open Governmental Proceedings Act ("Act") expressly permits a governing body to convene an executive session to consider matters arising from the disciplining, discharge or dismissal of a public employee unless the public employee requests an open meeting. W. Va. Code § 6-9A-4(b)(2)(A). Similarly, the Act permits a governing body to convene an executive session for the purpose of conducting a hearing on a complaint, charge or grievance against a public employee, unless the public employee requests an open meeting. W. Va. Code § 6-9A-4(b)(2)(B); *see also* Open Meetings Advisory Opinion 2009-04 (concluding that a city council member has the right to elect that the discussion regarding the council member's conduct take place in an open meeting rather than in executive session).

Here, the Council is considering a public employee's potential discharge and that employee has requested that the Council consider the matter in an open meeting. While the Council recognizes that the employee may waive his or her own privacy interests under the Act and elect to have the meeting open, the Council states that highly confidential personnel matters of 5-10 employees will be disclosed in the course of discussing this matter and that these issues must be discussed in executive session. The Council cites to two other exemptions in the Act permitting governing bodies to hold an executive session. W. Va. Code § 6-9A-4(b)(6) permits holding an executive session to discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy. Additionally, W. Va. Code § 6-9A-4(b)(12) permits holding an executive session to "discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the freedom of information act"

The Council states that by state statute grievance matters are required to be held in confidence. W. Va. Code § 6C-2-3(q)(1) provides that "[a]ll grievance forms decisions, agreements and reports shall be kept in a file separate from the personnel file of the employee and may not become a part of the personnel file, but shall remain confidential except by mutual written agreement of the parties." The Council also states that the West

Virginia Freedom of Information Act provides that personnel files and other personnel information are exempt from disclosure, citing W. Va. Code § 29B-1-4(a)(2).¹ The Council states that since these documents are statutorily protected, any public discussion of them is likewise prohibited.

Neither the Ethics Commission nor this Committee has the authority to provide definitive guidance on the meaning and application of W. Va. Code § 6C-2-3(q)(1) or the West Virginia Freedom of Information Act.²

The issue under the Open Meetings Act is to what extent may the Council discuss items that pertain to other employees in executive session under W. Va. Code § 6-9A-4(b)(12) when the employee being considered for potential discharge has requested an open meeting pursuant to W. Va. Code § 6-9A-4(b)(2). The Committee has not previously considered this question and has not found any West Virginia case directly on point.

In Open Meetings Advisory Opinion 2002-13 the Committee addressed W. Va. Code § 6-9A-4(b)(2) in the context of a public agency considering multiple job applicants. The Committee stated, "Where one applicant elects to be interviewed in an open session, and other applicants do not, the committee would conduct one interview in public while the remaining interviews could be conducted in executive session." Open Meetings Advisory Opinion 2002-13. The Committee, however, did not address whether after conducting the interviews the public agency could subsequently discuss all applicants, including the applicant electing an open session, in executive session when the other applicants have not elected an open session. *Id.*; cf. ADV OM 99-13, R.I. Op. Att'y. Gen., 1999 WL 34814176 (finding that a school committee's deliberations regarding all job candidates in executive session, when one candidate requested an open meeting, did not violate the open meetings laws because discussions pertaining to one candidate could not be segregated, and it would prejudice the rights of other candidates to hold an open meeting unless all persons affected requested an open meeting).

Federal authorities have provided some guidance in this regard. Federal cases, interpreting the federal Sunshine Act, have found that "even if one or more exemptions may justify closure of a portion of a particular meeting, the agency must attempt to segregate the non-exempt from the exempt portions, and close only those portions of the

¹ W. Va. Code § 29B-1-4(a)(2) provides that the following category of information is exempt from disclosure under the West Virginia Freedom of Information Act: "Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure of the information would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in this particular instance: Provided, That this article does not preclude an individual from inspecting or copying his or her own personal, medical or similar file[.]"

² See Open Meetings Advisory Opinion 2008-09 (finding that the issue of whether documents in a pre-meeting packet must be released to the public is controlled by the State's Freedom of Information law, the agency's enabling legislation and applicable privacy laws and that the Committee did not have authority to provide guidance on the meaning and application of these other laws).

meeting involving exempt topics” *Shurberg Broad. of Hartford, Inc. v. F.C.C.*, 617 F. Supp. 825, 828 (D.D.C. 1985) (citing *Philadelphia Newspapers, Inc. v. NRC*, 727 F.2d 1195, 1200 (D.C.Cir.1984)). However, “[i]f segregation of exempt and non-exempt material would make a coherent discussion impossible, then it may be reasonable to close the entire meeting.” *Com. Cause v. Nuclear Reg. Commn.*, 674 F.2d 921, 936 n. 46 (D.C. Cir. 1982).

In *State v. Bd. of Educ. of Unified Sch. Dist. No. 305, Saline County*, the Court of Appeals of Kansas utilized this framework in considering whether a board of education violated its open meetings act when it discussed issues surrounding four administrators in executive session to consider personnel matters. 764 P.2d 459 (Kan. App. 1988). Prior to a bond election, the four administrators learned and failed to inform the board or the public that submitted bid amounts for the bond project were about double the figure placed on the ballot for election. *Id.* at 460. The board discussed in executive session “the failure of the named administrators to inform the Board of the bids; the extent of the administrators’ legal rights; whether other persons could have had pre-election knowledge of the bids; whether any Board members had such pre-election knowledge; whether an investigative committee should be formed and, if so, what qualifications would be appropriate; and what compensation for committee members might be in order.” *Id.*

The State contended that the executive session included matters beyond the scope of the stated reason for entering executive session, i.e., personnel matters. *Id.* In finding no violation of its open meetings act, the Court of Appeals of Kansas found “that to segregate the topics into open and closed sessions would have been very burdensome and impractical, if not impossible, due to the common thread of the connection of the four named individuals, whose privacy should be protected, to the events discussed.” *Id.* at 461; *but see Philadelphia Newspapers*, 727 F.2d at 1201 (“In the present case the Commission has made no effort to segregate the exempt from the nonexempt and has made no showing that coherent discussion would be impossible if discussion of the [exempt matter] were segregated from the rest of the meeting.”).

Here, the Committee finds that the West Virginia Workers’ Compensation Industrial Council must attempt to segregate the non-exempt portions from the exempt portions of its meeting. If segregation of exempt and nonexempt portions would make a coherent discussion impossible, then it would be appropriate to hold the meeting in executive session. Based upon the facts presented, this Committee cannot determine whether a coherent discussion would be impossible if the items the Council claims are confidential -- employee grievances and confidential personnel matters -- were segregated from non-exempt portions of its meeting.

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