Open Meetings Advisory Opinion No. 2022-01

Issued on March 3, 2022, by

The West Virginia Ethics Commission
Committee on Open Governmental Meetings

Opinion Sought

The **Harrison County Commission** asks whether information discussed in executive session is confidential.

Facts Relied Upon by the Committee

Governing bodies, including county commissions, may enter into an executive session which is closed to the public during a meeting for any of the reasons authorized by the West Virginia Open Governmental Meetings Act, at W. Va. Code § 6-9A-4. The Requester asks if information presented or discussed during executive sessions is confidential and the ramifications, if any, for disclosing such information.

Code Provisions Relied Upon by the Committee

W. Va. Code § 6-9A-2(3) states:

> "Executive session" means any meeting or part of a meeting of a governing body which is closed to the public.

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

> a) The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.
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> (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:
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> . . . .

W. Va. Code § 6-9A-5 provides, in relevant part, as follows:

> Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:
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> . . . .

Advisory Opinion

"Executive session" is defined in the Open Governmental Proceedings Act ("Open Meetings Act" or "Act") as "any meeting or part of a meeting of a governing body which is closed to the public." W. Va. Code § 6-9A-2(3). Two requirements must be met before a governing body may hold an executive session.

First, an executive session may only be held for the reasons listed in the Open Meetings Act. *See* W. Va. Code § 6-9A-4(b) (listing actions for which an executive session may be held). For example, a governing body may hold an executive session to consider the employment or discharge of a public employee. W. Va. Code § 6-9A-4(b)(2)(A).

Second, a majority of the members of the governing body present must authorize the holding of an executive session by an affirmative vote. W. Va. Code § 6-9A-4(b). The decision to hold an executive session is, therefore, discretionary.

The Open Meetings Act neither requires nor prohibits a governing body from taking minutes during executive sessions. *See* W. Va. Code § 6-9A-5; *see also* Open Meetings Advisory Opinion 2000-15 (holding that taking minutes of executive sessions is discretionary). If a governing body takes minutes in an executive session, then a governing body is not required to release them pursuant to the Open Meetings Act. *Id*. A court may, however, order the release of executive session minutes in civil or criminal actions.[1] No provision in the Open Meetings Act expressly prohibits governing bodies from releasing executive session minutes. Moreover, the Act states that "no decision may be made in executive session." W. Va. Code § 6-9A-4(a).

Because an executive session is closed to the public, the Requester seeks guidance on whether discussions in an executive session are confidential.[2] In conjunction with its

[1] *State ex rel. Marshall County Commission v. Carter,* 689 S.E.2d 796, 804 (W. Va. 2010)

[2]This Committee recognizes that the Ethics Commission, in Advisory Opinion 2021-22, and this Committee, in Open Meetings Advisory Opinion 2021-01, held that neither the Ethics Act nor the Open Meetings Act prohibits a public official from audio recording executive sessions. The Opinions further hold that neither Act prohibits a governing body from barring audio recordings of executive sessions. In so holding, the Ethics Commission commented in footnote 3 of Advisory Opinion 2021-22 that "most – if not all – information learned in an executive session is legally confidential . . . ." The Ethics Commission did not assert in Advisory Opinion 2021-22 that the Open Meetings Act is the statute that renders information in executive session confidential. Therefore, Advisory Opinion 2021-22 and Open Meetings

Opinion request, the Requester submitted a Washington State Attorney General Opinion, Wash.Op.Atty.Gen. 2017 No. 5 (Aug. 3, 2017), that addresses whether information learned during executive sessions is confidential for purposes of that state's law. The Washington Attorney General held that participants in an executive session have a legal obligation to maintain the confidentiality of matters discussed during a properly convened executive session. *Id*. at p. 8. In so holding, Washington's Attorney General's Office relied on the legislative intent of its open meetings law and reasoned that for participants to divulge information shared during "executive sessions without the approval of the governing body as a whole would frustrate the purpose of allowing executive sessions in the first place." *Id.* at p. 3.

Many jurisdictions, however, have found the opposite. For example, the Maryland Attorney General held that nothing in Maryland's open meetings laws required executive session participants to maintain the confidentiality of those proceedings. Md.Op.Atty.Gen. (Nov. 26, 1980). Louisiana's Attorney General similarly held that Louisiana's open meetings law does not address making public those matters discussed in executive session, but a duty of confidentiality may arise from other laws. La.Op.Atty.Gen. 91-48 (1991); *see also* Ky.Op.Atty.Gen. 78-182 (Mar. 16, 1978) (nothing in the open meetings law proscribes divulging information about closed meetings, but a public body may adopt a bylaw or rule to that effect); Tex.Op.Atty.Gen. JM-1071 (July 11, 1989) (the open meetings law "does not prohibit persons who are present at the executive session from afterwards talking about the subject matter of the session.").

Similarly, the Supreme Court of South Carolina considered whether its Freedom of Information Act (FOIA) made documents confidential, thereby forbidding their disclosure. The Court held:

> The purpose of the Act is to protect the public by providing for the disclosure of information. However, the exemptions from disclosure contained in §§ 30-4-40 and -70 do not create a duty not to disclose. These exemptions, at most, simply allow the public agency the discretion to withhold exempted materials from public disclosure. No legislative intent to create a duty of confidentiality can be found in the language of the Act. We hold, therefore, that no special duty of confidentiality is established by the FOIA.

Bellamy v. Brown, 408 S.E.2d 219, 295 (S.C. 1991). In examining whether its state's FOIA laws made a document legally confidential, the *Bellamy* Court relied, in part, upon the United States Supreme Court's decision in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), in which the Supreme Court held that the federal Freedom of Information Act ("FOIA") is exclusively a disclosure statute and cannot be used to enforce the confidentiality of records. The *Chrysler* Court noted that the FOIA exemptions to

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Advisory Opinion 2021-01, while instructive, are not determinative of the specific issue before the Committee in this Opinion.

disclosure do not foreclose disclosure by an agency, but rather the federal FOIA law "demarcates" the agency's obligation to disclose. *Id*. at 292.

In *State ex rel. Marshall County Commission v. Carter,* 689 S.E.2d 796, 804 (W. Va. 2010), the West Virginia Supreme Court analyzed whether executive session communications were shielded from disclosure for purposes of discovery in a civil action. The Court held "the Act and its executive session exception are concerned with the public's access to government meetings, not what may or may not be obtained by means of civil discovery." *Id*. at 803. Hence, the Court declined to find that the Open Meetings Act created an "executive session privilege" for purposes of litigation. *Id*.
In so holding, the *State ex rel. Marshall County Commission* Court noted the numerous other jurisdictions that supported its holding[3] and found as follows:

> The petitioners further contend that permitting discovery of discussions conducted in executive session will impede a full and frank discussion of the issues in such sessions. We disagree. Nothing in our decision herein impedes the purpose for which the Legislature enacted the executive session exception to the Open Governmental Proceedings Act. Government bodies can still freely consider and discuss in closed meetings all relevant information necessary to lawfully and efficiently conduct government business. We simply reaffirm the rights of a litigant in a civil action to discover potentially relevant evidence of unlawful conduct arising from an executive session of a government body.

Id. at 804. The West Virginia Supreme Court did not address in its Opinion whether members of a governing body may, outside the context of civil litigation, publicly discuss or disclose matters discussed during an executive session.

This Committee must determine whether West Virginia's Open Meetings Act makes communications in an executive session confidential. A rule of statutory construction is that "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the

[3] "Moreover, our decision herein is supported by courts in other jurisdictions that have addressed this issue and have declined to find that similar open meetings statutes create an executive session privilege. *See, e.g., State v. District Judges for Chase County,* 273 Neb. 148, 728 N.W.2d 275, 279-80 (2007) (finding that "[i]n view of the fact that the Open Meetings Act contains no language related to a closed session discovery privilege, we conclude that no such privilege exists in Nebraska"); *Springfield Local Sch. Dist. Bd. *76 of Education v. Ass'n of Pub. Sch. Employees,* 106 Ohio App.3d 855, 667 N.E.2d 458, 467 (1995) (ruling that "there is no absolute privilege to be accorded discussions held in executive session [although] a trial court, in its discretion, may limit discovery"); *Dillon v. City of Davenport,* 366 N.W.2d 918, 921 (Iowa 1985) (open meetings act "does not specify that the discussions at the closed meeting acquire the status of confidential communications which are privileged from any use other than specified"); *Connick v. Brechtel,* 713 So.2d 583, 587 (La.Ct.App.1998) (finding "the fact that some matters may be discussed in executive session does not render the ... discussions and actions taken in executive session privileged"); *Sands v. Whitnall School Dist.,* 312 Wis.2d 1, 754 N.W.2d 439 452 (2008) (finding "no language in our own open meetings laws indicating that our legislature intended to create a broad discovery privilege for communications occurring in closed sessions of governmental bodies")." *State ex rel. Marshall County Commission v. Carter,* 689 S.E.2d at 803-04.

courts not to construe but to apply the statute." Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959); *see also* Advisory Opinion 2021-08. In reviewing the plain language of the Act, the Committee finds that the Act does not make executive session communications confidential. This conclusion is supported by and consistent with the West Virginia Supreme Court's approach to the executive session privilege in *State ex rel. Marshall County Commission v. Carter*.

This Committee finds that if the Legislature intended for all information presented and discussed during executive sessions to remain confidential, then such an obligation would have been included in the plain language of the Open Meetings Act. Other states have done as much. Arizona's Open Meetings Law states that "[m]inutes of and discussions made at executive sessions shall be kept confidential . . . ." A.R.S. § 38-431.03. "Any person guilty of violating any provisions of this article shall be guilty of a class 3 misdemeanor." A.R.S. § 38-431.06. Similarly, Texas's Open Meetings Act provides that "[a]n individual, corporation, or partnership that without lawful authority knowingly discloses to a member of the public the certified agenda or tape recording of a meeting that was lawfully closed to the public under this chapter" commits a misdemeanor and is liable to the person damaged by the disclosure. Tex.Gov't. Code Ann. § 551.146.

The Committee on Open Governmental Meetings holds that the Open Meetings Act does not make information discussed during executive sessions confidential because executive sessions are discretionary and the Act does not state that executive session communications are confidential. Other rules and laws, however, may create a duty of confidentiality.[4] This ruling does not preclude a governing body from adopting a rule which provides that information discussed during a legally authorized executive session is confidential. This holding simply provides that the Open Meetings Act does not inherently create that confidentiality.[5]

In addition to asking whether information discussed in executive sessions is confidential, the Requester also asks other related questions. The Committee will briefly address those questions:

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[4] For example, W. Va. Code § 18-2-5H renders certain student information confidential and limits the disclosure of such information. If a Board of Education discussed a student disciplinary matter in executive session, then W. Va. Code § 18-2-5H, not the Open Meetings Act, would render that student's information confidential and restrict disclosure of the same.

[5] For example, Robert's Rules of Order, RONR (11th ed.), p. 96, ll. 6-16, states: "A member of a society can be punished under disciplinary procedure if he violates the secrecy of an executive session. Anyone else permitted to be present is honor-bound not to divulge anything that occurred. The minutes, or records of proceedings, of an executive session must be read and acted upon only in executive session, unless that which would be reported in the minutes--that is, the action taken, as distinct from that which was said in debate--was not secret, or secrecy has been lifted by the assembly. When the minutes of the executive session must be considered for approval at an executive session held solely for that purpose, the brief minutes of the latter meeting are, or are assumed to be, approved by that meeting."

Whether the disclosure of information obtained during an executive session violates W. Va. Code § 6-9A-7 or other West Virginia laws.

West Virginia Code § 6-9A-7 makes it a misdemeanor for any person to willfully and knowingly violate the provisions of the Open Meetings Act. Because the Open Meetings Act does not prohibit the disclosure of information discussed during an executive session, the disclosure of such information is not a violation of the Open Meetings Act.

Other laws may prohibit disclosure. For example, W. Va. Code § 6-9A-4(b)(3) allows a governing body to enter into executive session to "decide upon disciplining, suspension or expulsion of any student in any public school or public college or university, unless the student requests an open meeting." Members of a governing body must comply with laws protecting the privacy rights of students. Furthermore, the West Virginia Governmental Ethics Act prohibits public officials and employees from disclosing information rendered confidential by other rules and laws. W. Va. Code § 6B-2-5(e).

Whether the governing body holds an "executive session privilege" and whether that privilege can be waived by an individual member of the governing body without majority approval.

This Committee has held that the Open Meetings Act does not make executive session communications confidential; hence, there is not an executive session privilege under the Act. As noted above by the West Virginia Supreme Court, the Open Meetings Act does not create an executive privilege for the purposes of discovery in civil litigation. *State ex rel. Marshall County Commission*, 689 S.E.2d at 804.

Communications in an executive session with a governing body's attorney may be protected by the attorney-client privilege. This Committee does not have authority to decide whether a member of a governing body may unilaterally waive the attorney-client privilege.

What ramifications exist if a public official willfully and knowingly discloses information learned during an executive session.

As previously noted, the disclosure of information learned during an executive session is not a violation of the Open Meetings Act, but could be a violation of other confidentiality laws and the Ethics Act, W. Va. Code § 6B-2-5(e). A person found guilty of violating the Ethics Act is subject to the penalties contained in the Ethics Act at W. Va. Code § 6B-2-4(s). This Committee has no authority to determine whether the disclosure of executive session communications may subject a public official to removal from 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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Lynn Davis, Chairperson
Open Governmental Meetings Committee
West Virginia Ethics Commission