

OPEN MEETINGS ADVISORY OPINION NO. 2008-02

Issued On February 7, 2008 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The Hardy County Commission asks if an exit conference with members of the State Auditor's Office concerning the proposed findings in an annual draft audit report constitutes a meeting subject to the Open Meetings Act, when a quorum of the Commission is present.

FACTS RELIED UPON BY THE COMMITTEE

The county is audited annually by the State Auditor's Office. Near the conclusion of the audit process, the auditor meets individually with the elected officials whose operations have been audited, such as the Assessor and Sheriff. Each official has the opportunity to present the auditor with a response to the audit. Finally, the auditor meets with one or more County Commissioners to discuss the findings in a draft audit report, including the responses provided by the county's other elected officials.

The auditor's presentation to the County Commission is primarily for information purposes. There is no requirement that the Commission take official action to accept or reject the audit. Once the final audit report is approved by the State Auditor, it becomes a public record.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2(4) defines "meeting" as follows:

[T]he 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. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

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(D) General discussions among members of a governing body on issues of interest to the public when held in planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action.

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

ADVISORY OPINION

The Open Meetings Act generally requires governing bodies of public agencies to make decisions on matters requiring official action in a public meeting that is open to the public and the media. A "meeting" is defined in relevant part as the convening of a governing

body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in official action. Pursuant to this definition, whenever a quorum of a governing body convenes to discuss public business, and there is an intention for the discussion to lead to official action, that gathering is a "meeting" contemplated by the Act. Therefore, any such meeting must comply with the notice requirements and other applicable provisions of the Act.

The exit conference between the auditor and two or more members of the County Commission, as described here, provides an opportunity for the Commissioners to ask questions of the auditors and for the auditors to verify certain information with the Commission. The Commissioners are not required to take official action to either accept or reject the audit. While this information sharing process may involve a dialogue between the County Commissioners and the auditor, it does not require a discussion among the County Commissioners.

Our Legislature excluded certain discussions from the definition of a "meeting" required to comply with the Act. One of those exclusions is contained in subsection 2(4)(D): "General discussions among members of a governing body on issues of interest to the public when held in planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action." In addition, the Legislature provided the following policy guidance in § 6-9A-1:

The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decision making.

Accordingly, a quorum of the Commission may attend an exit conference or out-briefing with the auditor, responding to questions from the auditor as well as asking questions of the auditor, so long as the Commissioners do not engage in a discussion among themselves that involves deliberating toward a decision on a matter requiring their official action.

If a particular matter discussed in the audit may require official action by the Commission, the Commissioners are permitted to discuss purely logistical issues in regard to that matter, such as whether to place the matter on the agenda for a future meeting, and when to schedule a meeting. The Commissioners may also discuss what data or documentation needs to be gathered or provided to facilitate making a decision on the matter during a future meeting.

The Commissioners may alternatively choose to have this exit conference or out-briefing presented in the course of an open meeting, if a date, time and place can be agreed upon between the Commissioners and the auditor. Ordinarily, this presentation should take place during the meeting in an open session, unless a particular matter addressed in the audit would authorize the Commission to convene an executive session to discuss that particular matter.

An executive session is only authorized to deal with one of the particular matters specified in W. Va. Code § 6-9A-4. The requester here has not identified any specific matter contained in the draft audit that might warrant meeting in executive session. This Committee will provide guidance on such matters on a case-by-case, fact-specific basis. If a situation is not encompassed by a previous precedential decision by this Committee, the requester is encouraged to seek additional guidance based on the facts and circumstances that may justify convening an executive session.

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