

OPEN MEETINGS ADVISORY OPINION NO. 2009-04

Issued On August 6, 2009 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

Samuel Juniper, a Member of the Point Pleasant City Council, asks for guidance concerning several questions regarding the meaning and application of the Open Meetings Act: (1) Must a Meeting Agenda identify an issue that Council expects to discuss in executive session? (2) Must the motion to go into executive session state the reason for going into executive session? (3) May the meeting Chair and/or Mayor “coach” the Council Member making the motion to go into executive session by supplying the basis/exemption therefor? (4) If Council desires to meet in executive session to discuss another Council Member, does the “personnel” exemption to the open meeting include a public officer? (5) If Council desires to meet in executive session to discuss another Council Member, does the subject Council Member have the right to elect that the discussion take place in an open meeting? (6) Does an item have to be on the agenda before Council may vote on it? (7) Is an agenda item “The Outside Delegations: Jane Roe and John Doe Company” sufficient notice to authorize Council to vote to approve a contract with the company?

FACTS RELIED UPON BY THE COMMITTEE

The Requester seeks guidance regarding the application of the Open Meetings Act to various scenarios. His questions generally relate to the following three subjects.

First, he seeks guidance regarding how a City Council may discuss concerns it may have about one of its elected members, including how this item should be listed on the agenda and whether Council may go into executive session to discuss this matter.

Second, he asks whether City Council may vote on a matter at a meeting if it is not listed on the agenda.

Third, he asks how specific an agenda item must be. For example, if an agenda item reads: “The Outside Delegations...Jane Roe and John Doe Company”, is this agenda item sufficient to take official action to vote to award a contract to the company?

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2, *Definitions*, provides in pertinent part:

- (1) "Decision" means any determination, action, vote or final disposition of a motion, proposal, resolution, order, ordinance or measure on which a vote of the governing body is required at any meeting at which a quorum is present.
- (2) "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-3, *Public notice of meetings*, provides in pertinent part:

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.

* * *

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-4. Exceptions.

(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.

(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:

(1) To consider acts of war, threatened attack from a foreign power, civil insurrection or riot;

(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[.]

ADVISORY OPINION

The Open Meetings Act requires governing bodies of public agencies to conduct their business in the “sunshine,” giving the public the opportunity to observe their actions. The Open Meetings Act requires governing bodies to make a meeting agenda available to the public and the media a reasonable time in advance of each meeting. Accordingly, this Committee has previously determined that any matter requiring official action by the governing body should be listed on the agenda, employing language that will reasonably place the public and the media on notice of the particular items that will be considered during each meeting. Generic descriptions are insufficient to satisfy this requirement.

(1) Must a Meeting Agenda identify an issue that Council expects to discuss in executive session?

This Committee has repeatedly ruled that governing bodies should limit their discussions and deliberations solely to items identified on their agendas, with rare exception. For example, if a citizen raises an issue during a public comment period, Council may discuss whether to place the issue on an agenda for a future meeting. Or, in the rare circumstance that an actual emergency occurs, a governing body may take official action necessary to resolve the emergency although the item may not be listed on an agenda. Emergencies are sudden events that threaten public health and safety, or immediately jeopardize the City’s financial situation. Emergencies are determined on a case by case basis. The Committee encourages all governing bodies to contact the Ethics Commission immediately to determine if a situation presented constitutes a true emergency under the Act.

Similarly, we have stated that an Agenda need not state that an agenda item will be discussed in executive session. In Open Meetings Advisory Opinion 2008-17, for example, this Committee stated: “There is no provision in the Open Meetings Act that requires those particular items which might be addressed in executive session to be delineated in the agenda as potential or expected executive session matters.”

Thus, in the absence of a true emergency, a governing body may only go into executive session when its meeting agenda identifies in language that will reasonably place the public on notice of the item to be discussed **and** the item is one of the exceptions authorized by W. Va. Code § 6-9A-4.

(2) Must the motion to go into executive session state the reason for going into executive session?

The Act requires each governing body to identify the exemption under this section for holding an executive session and to approve, by a majority vote, a motion to convene an executive session. W. Va. Code § 6-9A-4(b).

The standard procedure for convening an executive session starts with a member of the governing body making a motion to convene an executive session. In stating the motion, the member should identify the authorization in the Open Meetings Act for going into executive session, such as “to address personnel matters involving a member of Council”. For example, if an agenda properly lists “personnel matters involving a member of Council” or “concerns regarding the conduct of a member of Council” a motion to convene an executive session “to consider the next agenda item which involves a personnel matter” would be acceptable, provided that the agenda is available to all members of the public and any media attending the meeting. As we have consistently stated, it is not necessary for the motion to reference the particular numbered section of the Code which authorizes an executive session.

(3) May the meeting Chair and/or Mayor “coach” the Council Member making the motion to go into executive session by supplying the basis/exemption therefor?

Although in our answer to question #2 above we stated that the movant should state the reason for going into executive session, the plain language of the Act does not require it. Indeed, the Act states: “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...” W. Va. Code § 6-9A-4(a). (emphasis supplied) Thus, nothing in the Act prohibits the presiding officer from “coaching” the movant or from simply stating the authorization for going into executive session.

(4) If Council desires to meet in executive session to discuss another Council Member, does the “personnel” exemption to the open meeting include a public officer?

The Requester is concerned that the “personnel” exemption does not include a public officer such as a Council member, but rather is limited to City employees. The Act itself includes the term “public officer” in the “personnel” exemption. Although the Act does not define the term, the Ethics Act employs a similar term, “public official”, which

includes any person who is elected or appointed to any county position. W. Va. Code § 6B-1-3. Thus, the “personnel” exemption in the Act authorizes a governing body to consider the conduct of one of its own members in executive session. W. Va. Code § 6-9A-4(b)(2)(A).

(5) If Council desires to meet in executive session to discuss another Council Member, does the subject Council Member have the right to elect that the discussion take place in an open meeting?

The answer to question #4 established that a Council member is a position included in the “personnel” exemption to the Open Meetings Act. The Act specifically provides a governing body the right to convene an executive session to conduct “a hearing on a complaint, charge or grievance against a public officer or employee, **unless the public officer or employee requests an open meeting.**” (emphasis supplied) Although Council may not necessarily characterize its meeting as a hearing, in keeping with the purpose and spirit of the Open Meetings Act, we interpret the term broadly to include a meeting at which Council wants to discuss the conduct of one of its members.

In Advisory Opinion 2000-12, this Committee reviewed the OMA’s requirements surrounding personnel matters and wrote: “In the case of a disciplinary matter, such as dismissal or suspension for cause, which may be discussed in executive session as provided in W. Va. Code § 6-9A-4(b), the meeting agenda provided the public may exclude the person’s name... unless the employee requests an open meeting.”¹

Thus, we conclude that the subject Council Member has the right to elect that the discussion take place in an open meeting rather than in executive session.

(6) Does an item have to be on the agenda before Council may vote on it?

As with our answer to the first question presented, the Act requires items to be clearly identified on a meeting agenda before a governing body may take official action thereon. The only exception to this requirement is an actual emergency. See Open Meetings Advisory Opinions 2006-14 and 2008-17.

Thus, any matter requiring Council to take official action must be listed on the agenda, employing language that will reasonably place the public and the media on notice of the particular items that will be considered during the meeting.

¹ The Requester has not asked whether the Act compels notice to individuals that a personnel matter involving them may be discussed in executive session or may otherwise take place during a meeting. As a result, we leave that question for another day, but note that such a right appears to be implicit in the statute since otherwise affected individuals would be unable to avail themselves of their right to choose to have the discussion in an open meeting.

(7) Is an agenda item “The Outside Delegations: Jane Roe and John Doe Company” sufficient notice to authorize Council to vote to approve a contract with the company?

As stated above in our answer to question #6, the Act requires governing bodies to identify agenda items with specificity. In the scenario provided by the Requester, the agenda listing of “The Outside Delegations: Jane Roe and John Doe Company” is too vague. It tells the public nothing more than that a particular company will be addressing Council. At the minimum, the agenda should state: “consider entering into contract with Jane Roe and John Doe Company for purposes of _____ [describe nature of contract]”. This gives the public reasonable notice of the particular matter Council will consider.

CONCLUSION

All members of a governing body share responsibility for conducting the organization’s business within the parameters the Legislature has established for holding open government meetings. To that end, we encourage all public officials to contact the Ethics Commission any time they have questions regarding the meaning and application of the Open Meetings Act.

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. Further, this opinion is prospective only.


Drema Radford, Chairperson