

Open Meetings Advisory Opinion No. 2022-02

Issued on May 5, 2022, by

The West Virginia Ethics Commission
Committee on Open Governmental Meetings

Opinion Sought

The **West Virginia Tobacco Use Prevention and Cessation Task Force** asks whether it is subject to the Open Governmental Proceedings Act and, if so, what the requirements are for posting its meetings.

Facts Relied Upon by the Committee

The West Virginia Tobacco Use Prevention and Cessation Task Force (“Task Force”) was created by the Legislature “for the purpose of recommending and monitoring the establishment and management of programs that are found to be effective in the reduction of tobacco, tobacco products, alternative nicotine products, and vapor products use by all state citizens” W. Va. Code § 16-9G-1.¹ The Task Force is statutorily authorized to monitor programs administered by the Division of Tobacco Prevention. W. Va. Code § 16-9G-1(d).

The Task Force has twelve members. The enabling statute requires the Commissioner of the Bureau for Public Health or his or her designee to serve as the chair. The other board members are the Superintendent of the Department of Education or his or her designee, and ten members appointed by the Governor who have the statutorily prescribed qualifications. W. Va. Code § 16-9G-1(b). *Id.* The Task Force must meet quarterly. W. Va. Code § 16-9G-1(c).

The Division of Tobacco Prevention is required to provide staff support to the Task Force. W. Va. Code § 16-9G-1(d). The Division of Tobacco Prevention is part of the Bureau for Public Health. W. Va. Code § 16-9G-2. The Bureau for Public Health is part of the Department of Health and Human Resources, and both are part of the executive branch. W. Va. Code §§ 5F-1-2(a)(3) and 5F-2-1(h).

The Requester states that its enabling legislation does not appear to have any requirements for posting meetings ahead of time, and therefore the Requester seeks guidance on whether the Task Force is subject to the Open Meetings Act.

¹ H. B. 4494, 2020 Regular Session (W. Va. 2020)

Code Provisions Relied Upon by the Committee

W. Va. Code § 6-9A-2(4) states:

"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; for the purposes of this article, a governing body of the Legislature is any standing, select or special committee, except the commission on special investigations, as determined by the rules of the respective houses of the Legislature.

W. Va. Code § 6-9A-2(7) states:

"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. The term "public agency" does not include courts created by article eight of the West Virginia Constitution or the system of family law masters created by article four, chapter forty-eight-a of this code.

W. Va. Code § 6-9A-3(a) states:

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-3(e) provides:

Each governing body of the executive branch of the state shall electronically file a notice of each meeting with the Secretary of State for publication on the Secretary of State's website.

(1) Each notice shall state the date, time, place and purpose of the meeting.

(2) Each notice of a special meeting or a regular meeting shall be filed in a manner to allow each notice to appear on the Secretary of State's website at least five business days prior to the date of the meeting.

(3) When calculating the days, the day of the meeting is not to be counted. If a meeting notice is filed anytime other than during the Secretary of State's regular business hours, the date of filing will be considered the next business day.

Advisory Opinion

Applicability of the Open Governmental Proceedings Act to the Task Force

The Open Governmental Proceedings Act (“Open Meetings Act” or “Act”) requires “all meetings of any governing body” to be open to the public. W. Va. Code § 6-9A-3(a). The Act applies to the Task Force if it meets the definition of “governing body” in W. Va. Code § 6-9A-2(4).

The Act defines a governing body as “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). The test for whether the Task Force meets the definition of “governing body” is two-fold. First, the Committee on Governmental Meetings (“Committee”) must determine whether the Task Force is a public agency. W. Va. Code § 6-9A-2(7). Second, the Committee must determine whether its appointed members have authority to make decisions for or make recommendations to a public agency on policy or administration.

The Act defines a “public agency” as “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.”

The Task Force is staffed by the Division of Tobacco Prevention. W. Va. Code § 16-9G-1(d). The Division of Tobacco Prevention is part of the Bureau for Public Health which is part of the Department of Health and Human Resources, an executive branch agency. W. Va. Code §§ 5F-1-2(a)(3) and 5F-2-1(h). Hence, the Committee finds that the Task Force is an administrative unit of the executive branch of state government.

The Committee must also determine whether the Task Force is authorized by law to exercise some portion of executive power. Its powers include:

- “Recommending and monitoring the establishment and management of programs that are found to be effective in the reduction of tobacco, tobacco products, alternative nicotine products, and vapor products use by all state citizens” W. Va. Code § 16-9G-1(a).
- Monitoring “the Division of Tobacco Prevention’s programs” and making “recommendations to the division on expenditures and programs which are being administered by that office” W. Va. Code § 16-9G-1(c) and (d).
- Reporting “annually to the Legislative Oversight Committee on Health and Human Resources Accountability by December 1st” on matters enumerated in Code, including “an assessment of each program

administered by the Division of Tobacco Prevention.” W. Va. Code § 16-9G-1(c) and (d).

Based upon the authority of the Task Force, the Committee finds that the Task Force exercises some portion of executive power. The Committee finds, therefore, that the Task Force is a public agency for purposes of the Open Meetings Act.

The second part of the test is whether the Task Force board is a “governing body.” To fall within the definition, two or more members of the agency must have the authority to “make decisions for or make recommendations to a public agency on policy or administration.” W. Va. Code § 6-9A-2(4). The Task Force consists of twelve members. As outlined above, the Task Force is expressly tasked with making decisions for the Division of Tobacco Prevention and reporting recommendations to a Legislative Committee. The Task Force therefore has authority to make decisions for or recommendations to a public agency.

The Committee on Open Governmental Meetings holds that the Open Meetings Act applies to the West Virginia Tobacco Use Prevention and Cessation Task Force as it meets the definition of a governing body. This holding is consistent with the plain language of the Open Meetings Act and the following Opinions.

In Open Meetings Advisory Opinion 2002-21, the Committee held that the West Virginia Commission on Holocaust Education was a “public agency” as defined by the Open Governmental Proceeding Act. The Commission was created by law and had a legislative mandate to “survey, design, encourage and promote implementation of holocaust awareness programs in West Virginia”

In Open Meetings Advisory Opinion 2008-14, the Committee held that the Unemployment Compensation Solutions Task Force, which had been created via an Executive Order, met the definition of “public agency” under the Act. The Committee held: “Although the statute [Open Governmental Proceeding Act] does not specifically mention a ‘task force,’ such an entity may properly be included under the phrase ‘any other agency or subunit.’” The Committee concluded that the Task Force, because of its authority to make decisions for or recommendations to a public agency, was subject to the Open Meetings Act.

In Open Meetings Advisory Opinion 2017-02, the Committee held that the Statewide Interoperability Executive Committee, which was created by statute and consisted of 17 members, was a public agency subject to the Open Meetings Act.

The Requester notes that the enabling legislation for the Task Force, W. Va. Code § 16-9G-1, contains no reference to the Open Governmental Proceedings Act nor any requirement for noticing its meetings. This, in and of itself, does not exempt the Task Force from complying with the Open Governmental Proceedings Act. By its own terms, the Open Governmental Proceedings Act is applicable to all governing bodies of all public entities unless a governing body is statutorily exempted. See W. Va. Code §§

6-9A-1(a) and 6-9A-3(a). Exemption from the Open Governmental Proceedings Act requires specific statutory language such as that found in the Emergency Ambulance Act.²

Meeting notice requirements

The Committee on Open Governmental Meetings holds that the Task Force must notice its meetings with the Secretary of State in compliance with W. Va. Code § 6-9A-3(e) because the Task Force is a governing body of the executive branch.

The Act establishes the following notice requirements for governing bodies in the executive branch:

(e) Each governing body of the executive branch of the state shall electronically file a notice of each meeting with the Secretary of State for publication on the Secretary of State's website.

(1) Each notice shall state the date, time, place and purpose of the meeting.

(2) Each notice of a special meeting or a regular meeting shall be filed in a manner to allow each notice to appear on the Secretary of State's website at least five business days prior to the date of the meeting.

(3) When calculating the days, the day of the meeting is not to be counted. If a meeting notice is filed anytime other than during the Secretary of State's regular business hours, the date of filing will be considered the next business day.

Id.

The Task Force must also make meeting agendas available in advance to the public and news media. W. Va. Code § 6-9A-3(e). Agendas must give reasonable notice to the public of what issues will be discussed.³ The time requirements for making agendas available are:

- Regular meeting - three business days before the meeting.
- Special meetings - two business days before the meeting
- Emergency meeting - as soon as practicable prior to the meeting.⁴

²W. Va. Code § 7-15-18 provides, “[t]his article shall constitute full and complete authority for the provision of emergency ambulance service within a county by a county commission and for the creation of any authority and carrying out the powers and duties of any such authority. The provisions of this article shall be liberally construed to accomplish its purpose and no procedure or proceedings, notices, consents or approvals shall be required in connection therewith except as may be prescribed by this article.” See *Teets v. Miller*, 237 W. Va. 473, 788 S.E.2d 1 (W. Va. 2016) .

³ See [O.M.A.O. 2008-17](#)(discussing agenda requirements).

⁴ See [O.M.A.O. 2006-15](#)(discussing time requirements for making meeting agendas available).

In calculating days, do not count the day of the meeting, weekend days, or legal holidays. Half-day holidays are not legal holidays for the purpose of calculating days.
Id.

In conclusion, the Committee finds that the Task Force is a governing body of the executive branch and must comply with the Open Meetings Act.

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.

/s/ Lynn Davis

Lynn Davis, Chairperson
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