

Open Meetings Advisory Opinion No. 2021-01

Issued on November 4, 2021, by

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

Opinion Sought

A **City Council member** for the City of Westover asks whether other Council members or the City Attorney may prohibit him from recording executive sessions.

Facts Relied Upon by the Committee

The City of Westover holds portions of its public meetings closed to the public in executive session. A City Council member asks whether it violates the West Virginia Open Governmental Proceedings Act (“Open Meetings Act” or “Act”) for other City Officials or the City Attorney to direct him to cease recording executive sessions with an audio recording device.

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.

(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:

.....

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 its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings except executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting

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

(a) Except as otherwise provided in this section, any radio or television station is entitled to broadcast all or any part of a meeting required to be open.

(b) A public agency may regulate the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting, so as to prevent undue interference with the meeting. The public agency shall allow the equipment to be placed within the meeting room in such a way as to permit its intended use

Advisory Opinion

A governing body may hold an executive session and exclude members of the public when “a closed session is required” for the reasons listed in the Open Meetings Act. See W. Va. Code § 6-9A-4(b). This Committee has previously held that W. Va. Code § 6-9A-5 gives a governing body complete discretion on whether to record an executive session.¹

This Committee held in Open Meetings Advisory Opinion 2019-02 that the Open Meetings Act gives the public the right to record open portions of public meetings. In deciding Open Meetings Advisory Opinion 2019-02, the Committee relied upon the plain language in the Act governing the broadcasting and recording of public portions of meetings.² While the Open Meetings Act authorizes the recording of public portions of a meeting by members of the public, the Act does not extend this same right to public officials or employees who attend an executive session. See Open Meetings Advisory Opinion 2019-02.

In reviewing the plain language in the Open Meetings Act, the Committee finds that no language in the Act expressly bars a public official or public employee from recording executive sessions. Similarly, no language in the Act expressly bars a public agency

¹ Open Meetings Advisory Opinion 2000-15 and Open Meetings Advisory Opinion 2002-02.

² W. Va. Code § 6-9A-9

from adopting a rule or policy which prohibits public officials or public employees from recording executive sessions.

Therefore, the Committee on Open Governmental Meetings finds that the Open Meetings Act does not prohibit a governing body from barring a public official or public employee from recording executive sessions.³ The Requester also asks whether the City Attorney may direct him to not record a meeting. This Committee does not have authority to rule on the express or implied authority of a City Attorney. This Advisory Opinion does not address the applicability of the West Virginia Freedom of Information 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
Open Governmental Meetings Committee
West Virginia Ethics Commission

³ W. Va. Code § 6-9A-4 lists which actions may be considered in executive sessions. This Committee reminds the Requester and the governing body that executive sessions may only be entered into for one or more of the actions listed in W. Va. Code § 6-9A-4.