

## **Open Meetings Advisory Opinion No. 2019-03**

**Issued on September 5, 2019, by**

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

#### **Opinion Sought**

The **Berkeley County Deputy Sheriffs Civil Service Commission** asks whether the Open Meetings Act prohibits a quorum of its members from meeting with one another and with staff in private to discuss internal administrative matters.

#### **Facts Relied Upon by the Committee**

The Berkeley County Deputy Sheriffs Civil Service Commission ("Civil Service Commission" or "Commission") is a governing body of a public agency consisting of three Commissioners.

The Clerk of the Berkeley County Council, as required by statute<sup>1</sup>, assigns two Deputy Clerks to perform clerical and administrative tasks for the Civil Service Commission. The Clerk of the County Council directs the Deputy Clerks in the filing, recording, archiving and preservation of the records of the Commission, while the day-to-day administrative activities and practices of the Deputy Clerks are generally left to the direction of the Commission. The Requester asks whether a quorum of Civil Service Commissioners may meet with one another and with staff in private to discuss staff job duties, staff performance, appropriate office conduct, purchasing office supplies and providing budget information to the Civil Service Commission. The Requester also asks whether a quorum may meet to discuss logistical matters, such as creating and publishing the meeting agendas and meeting minutes.

The Civil Service Commission states that the exceptions in the Act to the term "meeting" do not appear to directly address the activities about which its members wish to meet in a non-public meeting.

#### **Code Provisions Relied Upon by the Committee**

W. Va. Code§ 6-9A-2(4) reads, in relevant part, as follows:

"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 ....

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<sup>1</sup>W. Va. Code§§ 7-14-4 and 5.

W. Va. Code § 6-9A-2(5) reads, in relevant part, as follows:

"Meeting" means the 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:

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

W. Va. Code § 6-9A-2(6) provides:

"Official action" means action which is taken by virtue of power granted by law, ordinance, policy, rule, or by virtue of the office held.

W. Va. Code § 6-9A-2(8) provides:

"Quorum" means the gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio.

W. Va. Code § 6-9A-3 reads, in relevant part, as follows:

(a) 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-4 reads, in relevant part, as follows:

(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: ....

(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.

### **Advisory Opinion**

The Open Governmental Proceedings Act ("Open Meetings Act" or "Act") requires "meetings" of governing bodies such as the Civil Service Commission to be open to the public. W. Va. Code § 6-9A-3. A "meeting" under the Act is "the 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." W. Va. Code § 6-9A-2(5).

The Committee on Open Governmental Meetings must determine whether discussions of the administrative activities and practices described by the Civil Service Commission between at least two of the Commissioners - with or without staff members - constitute a "meeting" which must be open to the public.

### ***Logistical matters***

The Act specifies that the term "meeting" does not include "discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting." W. Va. Code § 6-9A-2(5)(E).

In Open Meetings Advisory Opinion 2003-02, the Committee held that a quorum of county planning commissioners may meet outside of a public meeting to discuss what items will be on the agenda and what information staff needs to provide prior to a meeting because these items were logistical matters falling within the purview of W. Va. Code § 6-9A-2(5)(E).

**The Committee similarly finds that a quorum of the Civil Service Commission may meet with one another or with staff in a non-public meeting to discuss information related to creating and publishing the meeting agendas and meeting minutes because they constitute discussions on logistical and procedural methods to schedule and regulate a meeting. The Committee cautions that the discussions may not move into discussions or deliberations toward a decision requiring official action.**

### ***Policies and staff performance***

The Civil Service Commission also asks whether a quorum may meet with one another and with staff in private to discuss day-to-day operations such as staff job duties, staff performance, appropriate office conduct, and providing budget information to the Civil Service Commission. The Civil Service Commission indicates that while its anticipated

meetings would include addressing the clerical staff's performance of tasks, they would not address their hiring, firing or discipline.

"The fundamental question when a quorum is present is whether the [Civil Service Commissioners] are deliberating toward a decision on one or more matters requiring official ... action." Open Meetings Advisory Opinion 2007-03.

Addressing personnel policies relating to staff duties, staff performance and appropriate office conduct qualifies as "official action" under the Act. Indeed, the Act itself presupposes that personnel issues qualify as official action by providing that such items may be considered in executive session. W. Va. Code § 6-9A-4(b)(2). The Commission has addressed the Act's application to a variety of personnel issues in previous Opinions. See, e.g., Open Meetings Advisory Opinion 2008-17 (holding that "unresolved personnel issues" is not an adequate agenda listing); Open Meetings Advisory Opinion 2008-10 (holding that establishing goals and objectives for Superintendent as part of evaluation process is a personnel matter that may be discussed in executive session); Open Meetings Advisory Opinion 2006-13 (holding that general personnel policies should not be discussed in executive session pursuant to the personnel exemption) and Open Meetings Advisory Opinion 2001-02 (finding that drafting an employee job description involves a general personnel policy issue that may not be discussed in executive session). While many of the Opinions address whether certain personnel matters may be discussed in executive session, no Opinion concludes that personnel matters may be addressed by a quorum of a public agency outside the confines of an open meeting.

The Committee has concluded in a previous Advisory Opinion that a quorum of a county commission could meet with staffs of other county agencies outside the confines of an open meeting. That Opinion is distinguishable from the instant request. In Open Meetings Advisory Opinion 2018-01, the Committee concluded that county commissioners may meet with other county officials and their staffs regarding any concerns the staffs had about performing their work so long as the meetings would simply serve as an educational tool for the commissioners to learn about the functions of other county elected officials and their staffs. Nonetheless, to avoid any possibility of contravening the Act, the Committee still recommended that a designated member of the county commission attend the meetings and report back to the commission during a properly noticed meeting where this item has been placed on the agenda.

Here, based on the facts provided, the Civil Service Commissioners wish to set office policies, address staff performance issues and respond to grievances brought by staff rather than meet with staff as an educational tool. **The Committee therefore holds that a quorum of Civil Service Commissioners may not meet with one another or with staff outside of a properly noticed public meeting to discuss matters such as staff job duties, staff performance and what constitutes appropriate office conduct.**

**The Committee on Open Governmental Meetings notes that the Civil Service Commission may designate a Civil Service Commissioner to meet with staff outside of a public meeting and then report back to the Civil Service Commission,**

**if necessary, during a properly noticed public meeting where the item is placed on the agenda. See Open Meetings Advisory Opinion 2011-02.**

### ***Executive Session***

Finally, the Civil Service Commission states that it is concerned that discussions related to staff performance may not be held in executive session because the Civil Service Commission does not have the power to hire, fire or discipline the Deputy Clerks.

The Act, at W. Va. Code § 6-9A-4(b)(2)(A), provides that the following employment matters may be discussed in executive session:

- (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 ....

In Advisory Opinion 2001-18, the Committee held that employee performance reviews may be held in executive session. Here, the Civil Service Commission wishes to review, evaluate and/or correct how tasks are performed in the office. Such matters arise out of the employment of staff members, regardless of who has the authority to hire, fire and discipline them. **Therefore, the Committee on Open Governmental Meetings holds that specific personnel matters such as employee performance may be discussed in executive session.**

However, the Open Meetings Act provides that general personnel issues may not be discussed or considered in a closed meeting. W. Va. Code § 6-9A-4(b)(2)(B). In Advisory Opinion 2006-13, the Committee held that general personnel policy issues such as a hiring policy applicable to all or a class of employees could not be discussed in executive session. The Committee noted that general personnel policy issues include "what duties should be performed by a particular employee classification."

**Accordingly, the Civil Service Commission may not discuss general personnel issues in executive session.**

### ***Office Supplies***

The Civil Service Commission also asks whether a quorum may meet with one another and with staff in private to discuss ordering office supplies. **Approving expenditures or setting spending policies on behalf of a public agency constitutes official action which must be considered in the confines of an open meeting. See generally** Open Meetings Advisory Opinion 2012-04. Without further detail regarding the proposed discussion, the Committee is unable to address this item further.

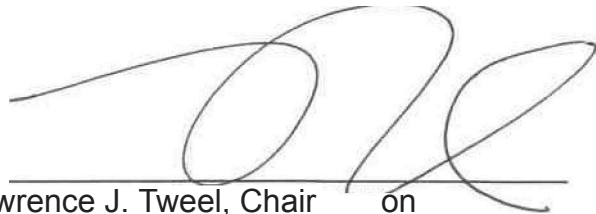
***Budget Information***

The Civil Service Commission asks whether a quorum may meet with one another and with staff in private to discuss providing budget information to the Civil Service Commission.

The Committee has previously held that "[t]here is no provision in the Open Meetings Act which restricts staff . . . from providing [Commission] members with written material intended to facilitate the process of conducting an open public meeting." Open Meetings Opinion 2008-09. "Documentation, including but not limited to, proposed action items, supporting documents, and staff recommendations and guidance, may be included in packets of written material provided to each [Commission] member in advance of a meeting." *Id.* However, "communications regarding matters requiring official action should be limited to the staff or individual members sending out drafts of matters such as by-laws, budgets, policies, correspondence, and meeting minutes, so the voting members of the governing body will have an opportunity to review these documents in advance of the meeting." Open Meetings Advisory Opinion 2006-09.

**The Civil Service Commission may accordingly receive budget information from staff or an individual member in advance of a scheduled meeting without implicating the Open Meetings Act so long as a quorum of Commission members do not engage in deliberations regarding the budget.**

*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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Open Governmental Meetings Committee  
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