

OPEN MEETINGS ADVISORY OPINION NO. 2013-06

Issued On February 6, 2014 by

**THE WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS**

OPINION SOUGHT

The **Mayor of Philippi** asks if it is permissible for City Council members to hold work sessions directly before City Council meetings, and if so, what the Open Meetings Act requires of those sessions. The Mayor also asks for guidance on complying with notice and agenda requirements under the Open Meetings Act.

FACTS RELIED UPON BY THE COMMITTEE

The Requester states that the work sessions, until recently, took place in an outer room adjacent to Council Chambers behind closed doors. Additionally, the Requester states that, until recently, the public was generally unaware that the work sessions were open to the public. The Mayor further indicates that citizens have complained that the work sessions “have the appearance of conducting City business beyond the scope of a transparent and open government.”

He has included copies of the agenda from a December work session and the subsequent Council meeting.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2(4) states in relevant part:

“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.

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

“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:

...

(D) General discussions among members of a governing body on issues of interest to the public when held in a 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.

W. Va. Code § 6-9A-2(5)(E) states, in relevant part:

"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-3(a) states:

Except as expressly and specifically otherwise provided by law . . . 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 states:

(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 required¹

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 generally requires governing bodies of public agencies to make certain information available to the public and news media in advance of a meeting, including: (1) the date, time, place and agenda of all regularly scheduled meetings; and (2) the date, time, place and purpose of all special meetings. Open Meetings Advisory Opinion 2011-03.

¹ The statute details a list of specific times when executive sessions are permissible; they are too voluminous to list here but will be addressed throughout the opinion as appropriate.

Work sessions, in general, are meetings where a quorum of a governing body is present, and matters requiring official actions are discussed and considered, but no votes are taken. The Act does not recognize them as distinct from regular meetings, and they accordingly always constitute meetings that must be noticed under the Open Meetings Act. In Open Meetings Advisory Opinion 2008-09, the Committee explained, "Work sessions where a quorum of a governing body is present, and matters requiring official action by the governing body are discussed, are meetings subject to the requirements of the Open Meetings Act." See, e.g., Open Meetings Advisory Opinions 2001-25, 2003-11, and 2013-05.

It is immaterial that a governing body does not vote during a work session; the agenda must still identify the items discussed. In Open Meetings Advisory Opinion 2011-03, a City Council was discussing issues that were not on the agenda, and justified doing so because it was not voting on those issues at that meeting. This Committee found that "whenever a governing body discusses an issue on which it takes official action at that meeting, or at some future meeting, the agenda must identify such issue before the governing body may discuss it substantively." The same is true here.

There are numerous Open Meetings Act opinions dealing with meetings where less than a quorum is present. See, e.g., Open Meetings Advisory Opinions 2004-17, 2007-01, 2007-03, 2007-08, 2009-07, and 2013-05. The aforementioned opinions generally stand for two principles. First, "less than a quorum of [a governing body] may engage in discussions amongst themselves in which they express their views on issues of interest to the public, including issues pending before the entity on which they serve."² Second, if a subgroup exercises "some portion of executive or legislative authority,"³ then it is a governing body within the scope of the Open Meetings Act, and therefore subject to the Act's requirements. The latter requirement prevents governing bodies from using subgroups to circumvent the requirements of the Act, and makes work sessions where less than a quorum is present subject to the Act as well.

Here, the City both posts a notice and prepares an agenda for the work sessions, and now allows the public to attend. Nevertheless, the Requester is concerned about the public's apparent perception of the work sessions as "conducting City business beyond the scope of a transparent and open government," due to the fact that the work sessions take place in an outer room adjacent to Council Chambers, behind closed doors. In contrast, the City Council meetings are generally held in chambers.

The Open Meetings Act does not require City government to alter notice and agenda posting procedures to combat a negative public perception. Additionally, it does not require government entities to maintain a literal "open door." It would be impermissible, though, to hold an ostensibly "open" meeting in a literal or figurative "broom closet," where the public would not be meaningfully able to attend. Just as it is impermissible to subvert the Act by holding smaller closed meetings with less than a quorum present, it

² Open Meetings Advisory Opinion 2007-08.

³ Open Meetings Advisory Opinion 2009-07.

is equally against the spirit of the Act to intentionally hold meetings in a place where the public cannot meaningfully gain access.

The Requester also asks for guidance on complying with notice and agenda requirements for both regular meetings and work sessions. For purposes of posting notice and agendas, work sessions are treated like any other public meeting. Notice of a governing body's scheduled regular meetings must be posted in the governmental entity's central office and updated yearly. In the alternative, the Act requires notice to be given no less than three business days in advance of a regular meeting.

If a governing body meets on an irregular schedule or must have a special meeting to address non-emergency issues, it must post a notice at least two business days before the date of the meeting. Notice of special meetings must include the date, time and place of the meeting, as well as explain the "purpose" of the meeting. The purpose must be clear and put the public on reasonable notice about the topics to be discussed. This Committee has held that "unresolved personnel issues," for example, to be unclear. In Open Meetings Advisory Opinion 2008-17, similarly, this Committee explained that "old business," "new business," "legal issues," and other assorted agenda items are too vague to put the public on notice of the topic to be discussed, and are therefore impermissible.

Executive sessions also have specific requirements for compliance. First, the Commission explained in Open Meetings Advisory Opinion 2000-15 that an agenda should never declare that an item will be handled in executive session; rather, entering into executive session requires a vote. If a governing body alerts the public of the possibility of going to an executive session, it may do so following the agenda item. For example, an agenda item may read: "Consider hiring secretary (Executive Session)."

The working session agenda provided by the Requester, for example, merely states "Executive Session - Legal Matters and Personnel Matters." This is too vague to satisfy the notice requirements under the Act. While Open Meetings Advisory Opinion 2006-13 states that "a personnel matter involving discipline of an employee," or "to consider an official investigation" is permissible, W. Va. Code § 6-9A-4(b)(2)(B) explicitly states that "[g]eneral personnel policy issues may not be discussed or considered in a closed meeting." Similarly, while discussion protected by attorney-client privilege is permitted in executive session, W. Va. Code § 6-9A-4(b)(11) states in part that "[n]othing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant."

Additionally, on the same working session agenda, there are two topics added in handwriting, which, according to the Requester, were added by a different city official and were not included on the Agenda that was available for public perusal. *Ad hoc* agenda modification is also impermissible under the Open Meetings Act. Rather, agendas for regular meetings, including work sessions, must be available at the governmental body's central office at least three business days before the meeting. Amendments and additions to the agenda must be made within two business days of

the meeting, and made available in the same manner as the original agenda. No amendment may be made less than two business days before a meeting except for an emergency. The Act defines "emergency" as an unexpected event which requires immediate attention because it poses "[a]n imminent threat to public health or safety . . . [a]n imminent threat of damage to public or private property; or . . . [a]n imminent material financial loss or other imminent substantial harm to a public agency, its employees or the members of the public which it serves." W. Va. Code § 6-9A-2(2).

Minutes must also be kept for all regular meetings, special meetings, and work sessions, as well as all other gatherings that meet the Open Meetings Act's definition of "meeting" at W. Va. Code § 6-9A-2(5). Work session minutes may be merged with the minutes of the regular meeting if the meeting immediately follows the work session, according to Open Meetings Advisory Opinion 2008-09.

Finally, as above, this Committee is not charged with designating in which room a public meeting will be held. That said, governmental bodies are encouraged to conduct public meetings in rooms that are readily accessible to the public, at times when most people can attend, to comply with the spirit of the Open Meetings Act. This Committee stated in Open Meetings Advisory Opinion 2008-15 that:

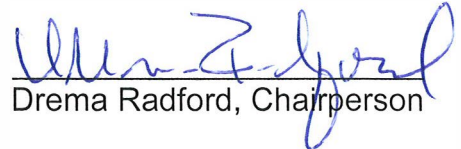
[T]here is no provision in the Open Meetings Act which mandates that a governing body of a public agency change the location of a meeting whenever it either finds or reasonably expects that its regular meeting place will not be able to accommodate all those wishing to attend. However, consistent with the purposes behind the enactment of the Open Meetings Act, this Committee strongly encourages any governing body which encounters such a situation to make every reasonable effort to accommodate the attendees, if this can be accomplished without undue hardship to the governing body or interfering with its ability to conduct an efficient public meeting.

The Open Meetings Act views work sessions as equivalent to any other governmental body's meetings. They should not be used as a means to confuse, misdirect or otherwise deceive the public. It is relatively common for governmental bodies, especially municipal government, to hold these work sessions directly before the regular meeting. It is impermissible, however, to conduct a non-compliant work session as a means of holding a *de facto* Council meeting before the actual Council meeting, leaving the Council meeting itself as a mere procedural formality.

Therefore, it is permissible for a City Council to hold a work session before a City Council meeting, as long as that session fully complies with the requirements of the Open Meetings Act. Additionally, City Council is encouraged to hold those work sessions in a location where the public can more easily attend, to avoid any real or perceived impropriety.

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.

/s/ Drema Radford, Chair


Drema Radford, Chairperson