

OPEN MEETINGS ADVISORY OPINION NO. 2007-10

Issued On October 4, 2007 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The Clarksburg Water Board (Board) seeks guidance on several issues in regard to meeting with its attorney in executive session.

FACTS RELIED UPON BY THE COMMITTEE

The Board wants to meet with its attorney in an executive session to discuss possible settlement of pending claims and litigation, including a federal lawsuit. The Board seeks guidance on how to list these items on the meeting agenda, including whether the parties to the lawsuit should be named. The Board also asks how specific the motion to convene an executive session should be, whether a vote to authorize the attorney to agree to a settlement must be made in an open session, and how specific any motion to authorize settlement, if required in an open session, should be.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-4 provides:

(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:

(11) Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant. If **the public agency has approved or considered a settlement in closed session**, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded;

(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential....

ADVISORY OPINION

The Open Meetings Act permits a governing body to hold an executive session and exclude the public only when a closed session is required to deal with one of the particular matters specified in W. Va. Code § 6-9A-4. The Board seeks guidance on meeting with its attorney to authorize

settlement or resolution of pending litigation, or claims which may result in litigation if left unresolved.

The Supreme Court of Appeals of West Virginia previously determined in Peters v. County Commission, 205 W. Va. 481, 519 S.E.2d 179 (1999), that privileged communications between a public body and its attorney are exempt from the open meetings requirements of the Act and may be conducted in executive session. This exception is based on the common law attorney-client privilege which has been included in Rule 1.6 of the Rules of Professional Conduct adopted by the West Virginia Supreme Court. This rule of court establishes a confidentiality provision which satisfies the requirements of W. Va. Code § 6-9A-4(b)(12). Accordingly, the Board may meet with its attorney in an executive session to discuss present or pending litigation, to the extent such discussions are protected under the attorney-client privilege.

The Board requests specific guidance on how such matters should be listed on the meeting agenda and the procedure to be followed for convening an executive session. This Committee has previously determined that matters requiring official action by a governing body should be stated on the agenda in a manner that makes the public aware of the particular matters to be dealt with at a meeting. For example, simply stating "pending claims" or "potential litigation," without more, would not provide adequate notice to the public and media of the matters to be considered.

Where the Board is going to discuss possible settlement of a pending lawsuit with its attorney, the agenda may state "consider resolution of the federal lawsuit filed by John Doe" or "discuss pending lawsuit of Doe vs. Board with legal counsel." The governing body should identify the party or parties who have filed suit against the Board by name on the meeting agenda, whenever the identity of such persons is a matter of public record.

If the Board is going to consider potential litigation, such as a claim for damages which has not yet resulted in a public lawsuit, such matters may be described on the agenda as "consider claim for damages by person who fell in manhole" or "discuss citizen's claim that her lawn was damaged by a crew repairing a water leak." It is not necessary to identify the party or parties who are seeking compensation, unless litigation has already commenced.

The Act requires each governing body to "identify the authorization under this section" for holding an executive session. In Open Meetings Advisory Opinion 2004-09, this Committee concluded that the Legislature intended to allow persons attending a meeting to be informed of the reason or reasons for excluding the public and media in order to convene in executive session. This required "authorization" for going into executive session is best provided by simply stating the general subject matter covered by a particular exemption in the Act, such as "to discuss pending matters with the Board's attorney which are protected by the attorney-client privilege" or "to obtain legal advice on pending litigation from our attorney." It is not necessary to include reference to a numbered Code section, such as "W. Va. Code § 6-9A-2-4(b)(11) & (12)." Most members of the public are more likely to be confused than enlightened by reference to a numbered Code section.

If the Board has multiple items requiring advice from counsel or granting authority to counsel to negotiate a resolution or settlement, a Board Member may make a single motion to convene an executive session to consider each of the listed agenda items. For example, a Board Member might "move to enter into an executive session to discuss the next two agenda items, consider resolution of the federal lawsuit filed by John Doe and consider claim for damages by person who fell in a manhole, in order to obtain legal advice from our attorney and grant authority to settle or resolve these matters." If a majority votes to approve the motion, the governing body may proceed into a single executive session to discuss each agenda item encompassed by the motion.

In accordance with § 6-9A-4(b)(1), a governing body is not required to reveal the terms of a settlement that has been "approved or considered ... in closed session" until the settlement is concluded. This Committee finds that this provision authorizes the Board to not only obtain guidance from its attorney on the merits of any claim or lawsuit and the risks of defending or pursuing litigation, but to provide guidance and appropriate authority to counsel to negotiate or mediate an acceptable resolution of a pending or proposed matter, including taking any required vote during the executive session. However, nothing in this opinion is intended to release the governing body from the duty to report the terms of a final settlement in accordance with subsection 11 of the Act, as well as any applicable provisions in this state's freedom of information statute or other laws.

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/ James E. Shepherd, II

James Shepherd, II, Chairperson
Open Governmental Meetings Act Committee