

OPEN MEETINGS ADVISORY OPINION NO. 2007-01

Issued On February 1, 2007 By The

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

OPINION SOUGHT

The West Virginia Statewide Addressing and Mapping Board seeks guidance on what gatherings constitute a "meeting" for purposes of the Open Meetings Act.

FACTS RELIED UPON BY THE COMMITTEE

The Statewide Addressing and Mapping Board (Board) was established to create a statewide addressing and mapping system to support enhanced 911 service and other related purposes. This project involves development of a sophisticated geographic information system (GIS). Due to the complexity of the project and the technology involved, the Board has contracted with an engineering firm to serve as the Project Manager.

In accordance with W. Va. Code § 24E-1-3, the Board consists of 11 members, including an employee of the State Geological and Economic Survey qualified in the GIS field, the Director of the Division of Homeland Security and Emergency Services, a representative of the Division of Highways, a representative of the Public Service Commission, a County Commissioner, a County Assessor, and two County 911 Directors. Based upon their particular expertise, one or more of these Board Members will consult with the Project Manager's employees regarding technical issues on a daily basis. Some of these gatherings may include two or more Board Members.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2(3) defines "governing body" in pertinent part as "[T]he 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(4) defines "meeting" as follows:

[T]he 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 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) defines "official action" as "[A]ction 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(6) defines "public agency" as "[A]ny 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."

W. Va. Code § 6-9A-2(7) defines "quorum" as "[T]he gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio."

ADVISORY OPINION

The Board seeks guidance from this Committee regarding several matters. First, the Board asks whether a gathering between two or more Board members (but less than a quorum) and the Project Manager, to review progress and ask questions regarding the status of the project, or certain aspects of the project, would involve a "meeting" subject to the requirements of the Act.

The Open Meetings Act generally requires governing bodies of public agencies to make decisions on matters requiring official action in a public meeting that is open to the public and the media. A "meeting" is defined in relevant part as the convening of a governing body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in official action. Pursuant to this definition, it is clear that if a quorum of a governing body convenes to discuss public business, and there is an intention for the discussions to lead to official action, such gathering is a "meeting" contemplated by the Act. Therefore, the meeting must comply with the notice requirements and other applicable provisions of the Act.

The Act defines "meeting" to involve the convening of a governing body of a public agency for which a quorum is required in order to make a decision or deliberate toward a decision on any matter which results in an official action. The Act defines "quorum" as the gathering of a simple majority of the constituent membership of a governing body. Because this Board consists of 11 members, 6 members are required to attain a quorum to conduct official business.

When the Act was amended in 1999, the Legislature included a public policy statement in W. Va. Code § 6-9A-1, which declares that the proceedings of public agencies should ordinarily be conducted openly, during a meeting open to the public and the media. As part of that policy declaration, the Legislature recognized that the requirement to conduct all of a governing body's business in a public meeting is not absolute, stating:

The Legislature finds, however, that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate *in* a meaningful manner in public agency decision making.

Consistent with these definitions and the above-quoted Legislative policy declaration, this Committee determined in Open Meetings Advisory Opinion 2004-17, involving the Jefferson County Commission, that two of five elected Commissioners, which was less than the quorum required to

conduct official business, could "engage in discussions amongst themselves in which they express their views on issues of interest to the public, including issues pending before the commission."

The Board has explained that there are occasions when two or more Board Members need to confer with the Project Manager to discuss technical issues. Moreover, the legislation which established the Board specifies that certain Board Members must have expertise or a background in certain fields in order to serve on the Board. Accordingly, as previously recognized by this Committee, a gathering involving less than a quorum of a governing body does not constitute a meeting subject to the Act, even if the participants discuss matters that may later require official action by the governing body at a meeting attended by a quorum of the body.

However, there are situations where a series of communications involving less than a quorum at any one time would violate the Act. For example, Board Members may not use a series of communications with the intended purpose of a majority of the governing body predetermining the outcome of a matter pending or likely to come before the governing body. Similarly, in Open Meetings Advisory Opinion 2006-09, involving the Jefferson County Planning Commission, this Committee cautioned that written communications, including electronic mail or "E-mail," should not be used to avoid public discussions that would ordinarily be expected to take place in the context of a public meeting.

Next, the Board asks if Board Members are appointed to serve on a committee or subcommittee whose membership is less than a quorum of the Board, and such committee's authority is limited to making recommendations to the Board on specific policy or administrative matters, must this committee comply with the notice and agenda requirements of the Act.

The Act defines a "public agency" to include "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." Further, the Act defines "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, the membership of a governing body consists of two or more members "

This Committee concludes that any committee or subcommittee consisting of two or more Board Members, but less than a quorum of the Board, which is appointed to make recommendations to the Board as a whole on such matters as specific policies or administrative matters, or any other matters requiring official action by the Board, involves a "governing body" within the meaning and intent of the Act, and the meetings of any such committee or subcommittee should be conducted in compliance with the Act.

The Board further asks if two or more Board Members get together without discussing policy or administration matters, or deliberating toward a decision or recommendations to the entire Board, would this gathering involve a "meeting" subject to the Act.

The Legislature has defined "meeting" in the Act to exclude "[g]eneral 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 As determined by this Committee in Open Meetings Advisory Opinion 2003-01, involving the Wood County Commission, not all conversations involving members of a governing body are out of bounds, even if a quorum is present. Therefore,

a gathering where the participants refrain from discussing matters requiring official action, or the discussion is limited to logistical and preliminary matters that do not involve deliberating toward a decision on the merits of a matter requiring official action by the Board, would not involve a "meeting" contemplated by the Act.

Finally, the Board asks if a quorum of Board Members may attend a weekly project status conference with the Project Manager who presents a technical overview and update on the progress toward completing the project. The Board Members would not discuss policy or administration matters nor would they deliberate toward a decision on matters requiring official Board action.

The requester has explained that these weekly status conferences do not ordinarily involve matters requiring official action by the Board. Moreover, the conferences focus on reporting information, as opposed to discussing issues and finding solutions.

However, a progress report which indicates that the project is behind schedule and will need to have certain deadlines extended, or the contractor has encountered unexpected technical problems that will require a contract extension or a price change, would necessarily involve matters that require official action. This Committee has previously concluded that when a quorum is present to discuss matters that require official action by the governing body, whether at a "work session," "workshop" or "pre-meeting," such a gathering ordinarily involves more than a general discussion in a social, educational, training, informal or ceremonial setting, and should be treated as a meeting subject to the Act. Accordingly, this Committee finds that the "status conference" described in the request would constitute a "meeting" contemplated by the Act, and should be properly noticed as a public meeting.

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-1 l, 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