

OPEN MEETINGS ADVISORY OPINION NO. 2014-02

Issued On April 3, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The **Mayor of Harpers Ferry** asks whether *ad hoc* committees are subject to the requirements of the Open Meetings Act.

FACTS RELIED UPON BY THE COMMITTEE

The Requester states that Harpers Ferry receives a large number of tourists due to the National Park within the town boundaries. Those tourists, in turn, generate an inordinately large number of responsibilities for a town with a population of approximately 300 people, including operating a water plant, and maintaining a police department which also serves the neighboring town of Bolivar. He additionally states that the Town's small size prevents maintaining a Town Hall staff sufficient to undertake technical services such as drafting ordinances and reviewing policies.

The Requester states that the Town relies on residents to serve on official bodies such as Town Council and the Planning Commission, as well as on *ad hoc* committees¹. According to the Mayor, the committees are made up of less than a quorum of public officials, but make recommendations to the Mayor or municipal agencies. Those committees, including study groups and drafting committees, perform governmental functions that a full-time staff would otherwise do in a larger municipality.

The Requester explains further that study groups and drafting committees vary in size and membership, and generally include at least two members, but never a quorum, of Town Council members or another Town governmental body. These committees also often have fluctuating membership based on citizen availability. Additionally, decisions of these bodies are not binding, and recommendations of these groups move forward as topics to be discussed at regularly noticed public meetings of the full Town Council or other governmental body.

The Requester is additionally concerned about properly establishing a quorum at these meetings, and about the possible impracticality of meeting locations that may draw a large crowd.

¹ Robert's Rules of Order defines a "special," "select," or "*ad hoc*" committee as "a committee appointed . . . to carry out a specified task, at the completion of which ... [the committee] automatically ceases to exist. RONR (10¹ ed.), p. 474, I. 24-30.

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:

(A) "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.

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

W. Va. Code § 6-9A-2(6) states:

(E) "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) states:

"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(a) states:

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.

ADVISORY OPINION

The Requester rightly points out a difficult distinction between W. Va. Code § 6-9A-2(5)(0), on one hand, and W. Va. Code §§ 6-9A-2(4) and 6-9A-2(5)(A) on the other. The former states that general discussions among members of a governing body, without intent to lead to official action, do not constitute "meetings" under the Open Meetings Act. The latter two statutory provisions, taken together, require committees and subcommittees that recommend actions to a larger governing body to comply with the Open Meetings Act. Since government agencies often struggle to reconcile those provisions, and the Committee takes this opportunity to explain those interactions.

This Committee has previously explained in Open Meetings Advisory Opinion 2013-05 that W. Va. Code § 6-9A-2(4)(0) does not exclude a quorum of governing body members from the definition of "meeting" if the quorum of governing body members is meeting for "work sessions", "subcommittee discussions", or any other form of gathering where the discussion is intended to lead to official action, "[t]he varying terms used to describe these meetings are immaterial; instead, the analysis centers on whether the discussion is intended to lead to official action."

Accordingly, a scheduled gathering of a quorum of a governing body, deliberating on issues that will eventually require official action, always constitutes a meeting under the Open Meetings Act. For example, in Open Meetings Advisory Opinion 2008-09, this Committee explained, "[w]ork 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 and 2003-11. Such meetings, even if labeled "work sessions," therefore must be properly noticed and have a posted agenda within the requirements of the Act.

Conversely, the Open Meetings Act permits even a quorum of governing body members to meet and discuss issues with constituents and other officers, so long as there is no deliberation towards a decision². "Elected officials remain free to meet with each other, their constituents, and other public office holders. However, any conversation among a quorum of the members of a governing body which involves deliberating toward a decision on a matter requiring official action must be deferred." Open Meetings Advisory Opinion 2001-34; *See also* Open Meetings Advisory Opinions 2003-01 and 2008-09. *See also* Open Meetings Advisory Opinion 2011-13 (stating that the Act requires a meeting agenda to include all items that require official action that the Council will discuss at that meeting, even if the governing body does not take official action at that meeting but will do so at a future meeting.)

² Similarly, the Act exempts purely logistical and procedural meetings from the definition of "meeting"; § W. Va. Code § 6-9A-2(4)(E) explicitly exempts "discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting."

The Requester, however, describes groups where less than a quorum of a governing body is present, but their discussion and recommendations will ultimately require official action. This is not an issue of first impression for this Committee. Open Meetings Advisory Opinion 2004-17 explains:

[L]ess than a quorum of commissioners may engage in discussions amongst themselves in which they express their views on issues of interest to the public, including issues pending before the [governing body]. The Act is not meant to stifle all expression of opinion amongst public officials outside of a formal meeting.

This Committee applied the same rule in Open Meetings Advisory Opinion 2007-08. Therefore, it is firmly established that less than a quorum of a governing body may meet without triggering the requirements of the Open Meetings Act. Open Meetings Advisory Opinion 2007-01, however, states 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.

This Committee further clarified the Act's interaction with subunits of a governing body in Open Meetings Advisory Opinion 2001-28, explaining in a similar situation that "a City Council Committee, consisting of two or more members, the purpose of which is to formulate recommendations to the Council as a whole, is a governing body of a public agency, and must conduct its meetings in compliance with the Act." Therefore, any Town committees and study groups that contain two or more members of the primary governing body, and make recommendations to the Mayor, Town Council, or to another municipal agency, are subject to the Open Meetings Act and the requirements therein.

Nevertheless, the Requester is concerned, specifically, that any Council-ordered technical studies, drafting groups, or pre-decisional meetings require full compliance with the Open Meetings Act. Specifically, he states:

Prior to consideration by a Town Council or Mayor of changes in ordinances on such matters as taxation [and] zoning ... extensive studies are required In most cities, this work is prepared by the paid executive staff of the Mayor or the paid legislative staff. The staffing process necessary for careful consideration of technical issues and development of complex legislation is hindered in a small town if its functions cannot be informal.

The work products of our ad hoc committees are submitted to [various government bodies that comply with the Open Meetings Act] before they are included on agendas of the Town Council ... all deliberations and voting on work products of ad hoc committees is conducted in public. In other words, the committee work is preliminary and all decision making, while utilizing their work, is made by the Council.

The Open Meetings Act is strictly concerned with whether these groups make recommendations to the governing body at large, or otherwise exercise executive or legislative power. Ultimately, the distinction to be drawn here is the same as the one drawn by Open Meetings Advisory Opinion 2007-01 and the other previously cited opinions. While it is permissible for less than a quorum of a governing body to gather privately and discuss issues of interest to the public, it is not permissible for less than a quorum of a governing body *which has been tasked with making recommendations on matters that require official action by that governing body* to do so without complying with the Open Meetings Act.

This Committee thus holds that any Town committees, including study groups, which contain two or more members of the governing body, and make recommendations to the Mayor, Town Council, or to another municipal agency are subject to the Open Meetings Act. Those who are merely tasked with collation of data or preliminary research, however, are not subject to the Act as long as they are not tasked with making recommendations about that data to the Council or otherwise exercise executive or legislative power.

For example, a group of people who gather, upon order of a governing body, to collect data on traffic patterns would not have to comply with the Act. If that same group would collect that data and then recommend, to the Council or other governing body, that new traffic lights be placed in a certain location, that group would then be required to comply.

This holding is in conflict with Open Meetings Advisory Opinion 2001-31. There, this Committee used the definition of "public agency" found at W. Va. Code§ 6-9A-2(7), to determine whether committees are subject to the Open Meetings Act, and did not take into account the definition of "governing body" found at W. Va. Code§ 6-9A-2(4), which explicitly requires groups that make recommendations to a governing body to comply with the Act. Since that opinion conflicts with the great weight of this Committee's decisions on the subject, including, but not limited to, Open Meetings Advisory Opinions 99-09, 2001-28, 2002-13, and 2007-01, it is hereby overruled.

Compliance with the Open Meetings Act is not particularly difficult or onerous. The Open Meetings Act only requires that a notice and agenda of the meeting be posted within the appropriate time frame, that minutes be taken, and that the meeting be open to the public. See Open Meetings Advisory Opinions 2006-15 and 2007-06 for detailed information on notice posting and agenda requirements.

The Mayor additionally expresses concern that it is difficult to determine "what number of committee members will constitute a quorum since the size of the ...committees varies." A quorum, under W. Va. Code § 6-9A-2(8), is a "simple majority of the constituent membership of a governing body." Further, in Open Meetings Advisory Opinion 99-09, this Committee stated in regard to City Council committee meetings:

The Requester points out that the committees, which do not have a quorum of City Council Members, cannot make decisions for the Council, and their recommendations are discussed at public City Council meetings. However, [the Open Meetings Committee] considers the quorum requirement in the definition of meeting to refer to the committee's quorum, not City Council's quorum.

Therefore, the quorum requirement for a subunit is simple - barring other statutory authority, a quorum is a simple majority of the governing body appointed to that committee. A problem arises when membership on a committee is constantly in flux. While it is commendable that many townspeople volunteer to serve on these committees, inconsistent membership frustrates the purposes of both the meeting itself and of the Open Meetings Act.

Accordingly, this Committee further recommends that when the Mayor or a governing body creates a committee, *ad hoc* or otherwise, that is subject to the requirements of the Open Meetings Act, as explained above, the officials that make up said committee shall be identified by name during the meeting in which that committee is created.

Robert's Rules of Order recommends that the appointing body "announce the names of the committee members to the assembly ... and until such announcement is made the committee cannot act." RONR (10th ed.), p. 479, I. 3-7.

With membership clearly identified, the number of people necessary for a quorum is clearly defined, even if citizen volunteers choose to participate at a later time. As above, if the group is merely tasked with collation of data or preliminary research, contains fewer than two members of a governing body,³ or otherwise is not subject to the Open Meetings Act, this step is unnecessary.

The Mayor has also expressed concern about the practical meeting space available if these meetings are required to be open to the public. The Oak Hill City Council raised a similar question in Open Meetings Advisory Opinion 2008-15. There, the Council proposed a rule that permitted the Mayor to change the venue for a meeting if Council Chambers would not accommodate the number of interested attendees. This Committee approved the rule, stating that:

³ Generally, groups with less than two members of the creating governing body present are not subject to the Open Meetings Act unless statutorily created to exercise executive or legislative powers or are otherwise necessary for a larger body to function; a full explanation is not germane to the questions presented here, but additional information can be found in Open Meetings Advisory Opinions 2000-13, 2008-06 and 2009-07.

[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.

Therefore, committee meetings may be held at Town Hall or any other appropriate public meeting place, making sure that citizens are aware that they may attend. If the crowd for a particular meeting is greater than the meeting room will accommodate, then that meeting should be moved to a more spacious location.

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.


Drema Radford, Chairperson