

OPEN MEETINGS ADVISORY OPINION NO. 2014-04

Issued on January 8, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The **Public Water System Supply Study Commission** asks if its work sessions are subject to the Open Meetings Act and, if so, what notice requirements are applicable.

FACTS RELIED UPON BY THE COMMITTEE

The Public Water System Supply Study Commission ("Water Commission") was formed during the 2014 Legislative Session. The Water Commission's purpose, as described by W. Va. Code § 22-31-12, is to study and report to the Joint Committee on Government and Finance on five subjects.

According to the Requester, the Water Commission decided to split its members into five separate work groups in order to discuss those five subjects. The work groups would "meet and report back to the Water Commission to consider at its meetings."

None of the work groups contain a quorum of the Water Commission. All of the groups, however, contain two or more members. Any recommendation by a work group to be formally considered by the Water Commission would be made and discussed at Water Commission meetings, which already reportedly comply with the Open Governmental Proceedings Act ("Open Meetings Act"). The work groups do not have regularly scheduled meetings or designated meeting locations.

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 ...

W. Va. Code § 6-9A-2(7) states, in relevant part:

"Public agency" means 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.

W. Va. Code § 6-9A-3(e) states, in relevant part:

Each governing body of the executive branch of the state shall electronically file a notice of each meeting with the Secretary of State for publication on the Secretary of State's website.

(1) Each notice shall state the date, time, place and purpose of the meeting.

(2) Each notice of a special meeting or a regular meeting shall be filed in a manner to allow each notice to appear on the Secretary of State's website at least five business days prior to the date of the meeting.

ADVISORY OPINION

W. Va. Code § 6-9A-2(5) defines "meeting," for purposes of the Open Meetings Act, as 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.

Consequently, the Requester's question requires the West Virginia Ethics Commission Committee on Open Governmental Meetings ("the Committee") make the following determinations:

- Are the Water Commission's subgroups parts of a "public agency" under the Open Meetings Act?
- If so, do they constitute a "governing body" under the Act?
- If so, do the subgroup's sessions constitute a "meeting" under the Open Meetings Act?

"Public agency" is defined in W. Va. Code § 6-9A-2(7). This provision provides a relatively low bar to determine the nature of an agency; it merely requires that agency to be a unit of state, county or municipal government, and exercise "some portion" of executive or legislative power.

The Water Commission is statutorily created by W. Va. Code § 22-31-12 and conducts studies of various water protection plans, regulations and legislation and subsequently makes recommendations to the Joint Committee on Government and Finance. The West Virginia Ethics Commission Committee on Open Governmental Meetings has previously held that a body which is delegated power to make recommendations to the governing body as a whole is an "administrative or legislative unit of state ... government ... authorized by law to exercise some portion of executive or legislative power." See, *e.g.*, Advisory Opinion 2007-01, Page 3. Accordingly, the Water Commission is a "public agency" for purposes of the Ethics Act.

W. Va. Code § 6-9A-2(7) also sets forth that any "subcommittee or any other agency or subunit of the foregoing" also constitutes a "public agency" for purposes of the Act. Therefore, the subgroups are subject to the Open Meetings Act.

Next, W. Va. Code § 6-9A-2(4) explains, in essence, that a "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, and that the membership of a governing body consists of two or more members. In the situation at issue, since the subgroups are explicitly charged with making recommendations to the public agency, and contain two or more members of the primary agency, the groups would constitute a "governing body" for purposes of the Open Meetings Act.

These subgroups meet the statutory definitions of "governing body" and "public agency." Accordingly, if a subgroup meets to discuss matters upon which they will later make recommendations to the Board as a whole, it must comply with the Open Meetings Act when it does so. Open Meetings Advisory Opinion 2007-01, in dealing with a question from the West Virginia Statewide Addressing and Mapping Board, similarly concluded:

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.

Similarly, this Committee held in Open Meetings Advisory Opinion 2014-02, that:

[A]ny 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.

Therefore, the "work groups" described by the Requester herein are meetings subject to the Open Meetings Act and the meetings must be conducted in compliance with the Act.

The Requester also asks what notice requirements apply to these subgroup meetings. While W. Va. Code § 6-9A-3 requires a governing body of the executive branch to electronically file notice of its meetings with the Secretary of State at least five days prior to a meeting; it is unclear if the Water Commission is part of the executive branch. The Requester adds that if the subgroup meetings are not part of the executive branch, then "they would appear to be special irregular meetings that must be posted for two business days in advance of the meeting."

The Water Commission, pursuant to W. Va. Code § 22-31-12(b), consists of four experts appointed by the Governor and single voting representatives appointed by the Rural Water Association, the Municipal League, the Secretary of the Department of Environmental Protection, the Commissioner of the Bureau for Public Health, the Director of the Division of Homeland Security, the Chairman of the Public Service Commission, as well as single non-voting representatives appointed by the President of the Senate and the Speaker of the House of Delegates.

The Committee on Open Governmental Meetings is not statutorily authorized to determine whether governing bodies are part of the executive branch, and recommends that the Requester contact the Attorney General's office for such a determination. In the absence of that information, the Commission recommends following the procedure outlined at W. Va. Code § 6-9A-3. In the event that the Water Commission is not a part of the executive branch, the Requester is correct and the subgroup meetings would be special irregular meetings that require notice be given two business days in advance. For additional information, please see Open Meetings Advisory Opinion 2006-15.

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 as 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.



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