

OPEN MEETINGS ADVISORY OPINION NO. 2015-01

Issued on August 6, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

A **City Council member of the City of Parkersburg** asks if it is permissible for a quorum of the City's finance committee members to meet with an accounting firm outside of a public meeting to discuss the scope of an audit and retain the firm to perform the audit.

FACTS RELIED UPON BY THE COMMITTEE

City Council adopted a resolution that budgeted up to \$8,600.00 for a "forensic sampling audit." The purpose of the audit was "to restore the public's trust in the finances of the City of Parkersburg." City Council did not take any official action in this resolution concerning the scope of the audit or what entity would be retained to perform the audit.

The Requester asks whether a quorum of the finance committee members (three of five) and the President of City Council may meet in private with an accounting firm for the purpose of defining the scope of the audit and retaining the firm.

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; for the purposes of this article, a governing body of the Legislature is any standing, select or special committee, except the commission on special investigations, as determined by the rules of the respective houses of the Legislature.

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.**

(Emphasis added)

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. The term "public agency" does not include courts created by article eight of the West Virginia Constitution or the system of family law masters created by article four, chapter forty-eight-a of this code.

(Emphasis added)

ADVISORY OPINION

The Open Meetings Act ensures that "the proceedings of public agencies be conducted openly." W. Va. Code § 6-9A-1. The Legislature stated: "Open government allows the public to educate itself about government decision making through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government." W. Va. Code § 6-9A-1.

Of course, the Open Meetings Act does not prohibit members of a governing body from associating with each other outside of public meetings in all circumstances. The Legislature acknowledged 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." W. Va. Code § 6-9A-1. For instance, Open Meetings Advisory Opinion 2007-01 explains that "a gathering where the participants refrain from discussing matters requiring official action ... would not involve a 'meeting' contemplated by the Act."

The Open Meetings Act does, however, prohibit a quorum of a governing body from meeting to discuss issues the body will eventually have to decide. This Committee has long held that a committee of the city council is a governing body for purposes of the Open Meetings Act and therefore must comply with all of the Act's requirements. Open Meetings Advisory Opinions 99-09, 2007-01, 2014-02, and W. Va. Code § 6-9A-2(4) and (7).

The next issue to consider is whether the members "would deliberate toward a decision on any matter which results in an official action." For example, in Advisory Opinion 2008-09, this committee held that a public board may attend a presentation concerning matters of interest. "Board members may ask questions of the presenters but should refrain from discussion among themselves on any matters requiring official action."

In this instance, the meeting between the finance committee members and the accounting firm was to retain its services and define the scope of its services to be provided. Clearly, such a meeting would include "the discussion to lead to an official action, *i.e.*, entering into a contract on behalf of the City. W. Va. Code § 6-9A-2(5).

In conclusion, this Committee finds that a quorum of finance committee members may not meet outside of a properly noticed public meeting with an accounting firm to define the scope of the services to be provided and to retain its services.

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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