

OPEN MEETINGS ADVISORY OPINION NO. 2015-02

Issued on November 5, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

A **City Council member of the City of Parkersburg** asks whether a meeting where members of City Council gave an accounting firm a bid package violated the Open Governmental Proceedings Act.

FACTS RELIED UPON BY THE COMMITTEE

Parkersburg City Council consists of nine members and has three standing committees: Finance, Personnel and Public Works. Each committee is made up of five members from City Council, and each Committee makes recommendations to the City Council. On March 10, 2015, the Finance Committee approved a motion recommending that City Council approve an amount not to exceed \$8,600 for an audit from the State Auditor's Office. Requester represents that once the Finance Committee approved this recommendation, the Finance Committee was to take no further official action and, in fact, took no further official action in regard to the recommended audit as it was now a matter for City Council.

On April 21, 2015, City Council adopted a resolution that budgeted up to \$8,600 for a "sampling audit." The resolution was silent as to what entity would perform the audit.

On June 1, 2015, four members of City Council met with an accounting firm at the accounting firm's office. The meeting was not publicly noticed. The four City Council members present also served on one or more standing committees. Three of the members present served on the Finance Committee; two served on the Personnel Committee, and two served on the Public Works Committee. At the meeting, the accounting firm was given a bid package which included a list of items to be completed regarding the audit. The Council members also answered questions regarding the bid package, including the scope of the audit to be performed.

The Requester asks whether the June 1, 2015, meeting violated the Open Governmental Proceedings Act.¹

¹ The Committee notes that similar facts were presented in Open Meetings Advisory Opinion 2015-01. However, the facts presented in that opinion are distinguishable from the instant opinion because they reflect that the Finance Committee met with the accounting firm to *retain* its services and *define* the scope of its services to be provided.

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 Governmental Proceedings Act ("Open Meetings Act" or "Act") seeks to ensure that "the proceedings of public agencies be conducted openly." W. Va. Code § 6-9A-1.

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.

The Open Meetings Act does not prohibit members of a governing body from associating with one another outside of a public meeting in all circumstances. In the instant case, this Committee will first determine whether the June 1, 2015, gathering of four City Council members was a "meeting" as defined by the Open Meetings Act.

The Act defines a "meeting" 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." W.Va. Code § 6-9A-2(5) (*emphasis added*). "Quorum" is defined in the Act as "the gathering of a simple majority of the constituent membership of a governing body." W.Va. Code § 6-9A-2(8).

In the situation at issue, the gathering of four of the nine members of City Council did not constitute a quorum.

In Open Meetings Advisory Opinion 2007-01, this Committee held that "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." **Therefore, since** the June 1, 2015, gathering at issue involved less than a quorum of City Council members, it did not constitute a meeting of the Council which is subject to the Act even if participants discussed matters related to the bid package that may later require official action by City Council at a properly noticed public meeting.²

The analysis does not end here, however. It also must be determined whether the June 1, 2015, gathering constituted a "meeting" of one of the Council's standing committees since four Council members present at the gathering also are members of various Council committees. A city council committee is also a governing body for purposes of the Open Meetings Act and therefore must comply with the Act's requirements. Open Meetings Advisory Opinions 99-09, 2007-01, 2014-02 and 2015-01; W. Va. Code § 6-9A-2(4) and (7).

According to the Requester, both the Personnel and the Public Works Committees had two of their five members present at the June 1, 2015, gathering. Those Committees therefore did not have a quorum of members present. **Using the previous analysis of the role of a quorum, it is found that the gathering of two members of the Personnel**

² The Committee cautions the Requester, however, that "there are situations where a series of communications involving less than a quorum at any one time would violate the Act. For example, [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." Open Meetings Advisory Opinion 2007-01.

Committee, and of two members of the Public Works Committee, did not constitute a "meeting" of either Committee under the Open Meetings Act because less than a quorum of those governing bodies was present.

The Requester also indicates that three of the five members of the Finance Committee were present at the June 1, 2015, meeting. Since a quorum of the Finance Committee was present at the June 1, 2015, gathering, it must be determined whether any discussion therein was intended to lead to official action by the Finance Committee.

In Open Meetings Advisory Opinion 2015-01, the Committee on Open Governmental Meetings responded to a similar question regarding the City of Parkersburg's Finance Committee. The Committee held therein that a meeting between Finance Committee members and an accounting firm in order to retain the accounting firm's services and to define the scope of the services to be provided would include discussion "which results in an official action," *i.e.*, entering into a contract on behalf of the City. W. Va. Code § 6-9A-2(5). The facts provided in the instant request, however, reflect that the Finance Committee had already recommended to City Council - during the Committee's March 10, 2015, meeting -- that an audit be obtained. The current Requester further represents that after the Finance Committee made its recommendation, it would not and, in fact, did not take further official action regarding the audit because the audit was then a matter for City Council.

In Open Meetings Advisory Opinion 2001-08, this Committee concluded that a gathering of public officials regarding a matter which they previously considered and acted upon is not a "meeting" subject to the Act because, relying on the representations of that Requester, the gathering would not reasonably be expected to lead to matters to come before the governing body for official action. This Committee cautioned, however, that if a particular matter was discussed at the gathering that unexpectedly led to new issues that would require official action by the governing body, then any discussion regarding those particular issues must be deferred until the next regularly scheduled public meeting. *Id.*

Relying on Requester's representations herein that the discussion with the accounting firm on June 1, 2015, would not and, in fact, did not lead to additional official action on the part of the Finance Committee, the June 1, 2015, gathering of three members of the Finance Committee with an accounting firm was not a "meeting" of the Finance Committee which was subject to the Open Governmental Proceedings Act. The gathering accordingly did not violate the Open Governmental Proceedings Act.

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.

/s/ Larry Tweel

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