

OPEN MEETINGS ADVISORY OPINION NO. 2016-02

Issued on September 1, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The **Pocahontas County Commission** asks whether its policy and procedures relating to posting agendas complies with the Open Governmental Proceedings Act.

FACTS RELIED UPON BY THE COMMITTEE

The Pocahontas County Commission has recently updated its policy and procedures ("policy") for the issuance of meeting agendas for all regular, special and emergency meetings. The County Commission holds its regular meetings on the first and third Tuesdays of each month.

Agendas for regular meetings will be posted at the Pocahontas County Courthouse and made available in the County Commission Office no later than three business days before a regularly scheduled meeting.

Agendas for special meetings will state the date, time, place and purpose of the meeting and will be posted at the Pocahontas County Courthouse and made available in the County Commission Office no later than two business days before a scheduled special meeting.

Agendas for emergency meetings will state the date, time, place and purpose of the meeting and will be posted at the Pocahontas County Courthouse and made available in the County Commission Office as soon as possible after an emergency meeting has been declared.

The policy also states that Saturdays, Sundays, legal holidays and pre-scheduled days for closing the Courthouse are not considered business days for purposes of posting agendas. Additionally, agendas for regular and special meetings will be posted at the Pocahontas County Courthouse and made available in the County Commission Office by 4:30 p.m. on the day of the required notice period. The policy states that reasonable effort will be made to provide notice of all meetings to the local media after posting as soon as practical.

A complete copy of the policy is attached to this Advisory Opinion as Appendix A.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W.Va. Code§ 6-9A-2(2) reads as follows:

"Emergency meeting" means any meeting called by a governing body for the purpose of addressing an unexpected event which requires immediate attention because it poses:

- (A) An imminent threat to public health or safety;
- (B) An imminent threat of damage to public or private property; or
- (C) An imminent material financial loss or other imminent substantial harm to a public agency, its employees or the members of the public which it serves.

W.Va. Code§ 6-9A-3 reads in relevant part:

- (a) 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.

- (d) Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media.

- (h) In the event of an emergency a governing body may call an emergency meeting.
 - (1) The governing body of a state executive branch agency shall electronically file a notice for an emergency meeting with the Secretary of State, as soon as practicable prior to the meeting. Any other governing body shall notice an emergency meeting in a manner which is consistent with this article and the Ethics Commission Committee on Open Governmental Meeting's opinions issued pursuant to the authority of section ten of this article, as soon as practicable prior to the meeting.

- (2) The emergency meeting notice shall state the date, time, place and purpose of the meeting and the facts and circumstances of the emergency.

ADVISORY OPINION

The Open Governmental Proceedings Act ("Act") requires local governing bodies, including county commissions, to "make certain information available to the public and news media in advance of a meeting, including: (1) the date, time, place and agenda of all regularly scheduled meetings; and (2) the date, time, place and purpose of all special meetings." Open Meetings Advisory Opinion 2006-15; W.Va. Code§ 6-9A-3(d). The Act, however, does not specifically establish when meeting notices or meeting agendas of local governing bodies must be made available to the public. As the Act does not provide specific guidance, this Committee has established required time frames in which local governing bodies must post their meeting notices and agendas. See W.Va. Code§§ 6-9A-10 through 11 (authorizing this Committee to interpret the Open Meetings Act).

For regular meetings, local governing bodies that meet monthly or bi-monthly "may comply with the Act by making the meeting agenda available at least three business days before each regularly scheduled meeting." Open Meetings Advisory Opinion 2016-15; *but see* Open Meetings Advisory Opinion 2007-09 ("[A] governing body of a public agency... which establishes a regular meeting schedule that involves meeting weekly, or more frequently, may comply with the Open Meetings Act by making a meeting agenda available to the public and the media at least two business days in advance of each regular meeting."). In counting business days, the day of the meeting, Saturdays, Sundays and legal holidays are excluded. *Id.* Additionally, the deadline for making the agenda available is the close of business on the first day of the three business day requirement. Open Meetings Advisory Opinions 2004-13 and 2006-15. For example, in the absence of an intervening legal holiday, a governing body may issue notice of a regular meeting to be held on Tuesday no later than the close of business on the preceding Thursday. *Id.* Further, a local governing body may make the agenda available "by posting its meeting agenda for each regularly scheduled meeting in a public place ... as well as having copies of the agenda available to be picked up at the same location during regular business hours." *Id.* While governing bodies are encouraged to notify the media of meetings, the Act does not require direct notice to the media. Open Meetings Advisory Opinion 2012-01.

For special meetings, the Act requires that notice must include "the date, time, place and purpose." W.Va. Code § 6-9A-3(d). "The 'purpose' of a special meeting is considered synonymous with the agenda for that meeting." Open Meetings Advisory Opinion 2006-15. "In order to provide reasonable notice of a special meeting, the Board should post the meeting notice in the Board's central office, in a place which is readily available to the public during normal working hours, at least two business days in advance of the meeting." *Id.* Business days are calculated for special meetings in the same manner as they are for regular meetings.

The Committee finds that the policy's three-day notice period for posting agendas for regular meetings and two-day notice period for posting agendas for special meetings are consistent with the minimum requirements of the Act. The policy also properly excludes Saturdays, Sundays and legal holidays from the business day calculation. However, the policy fails to reflect that the day of the meeting is also to be excluded. Therefore, the Committee finds that the policy need be revised to exclude the day of the meeting from the regular and special meeting notice period calculation to satisfy the minimal requirements of the Act.

While Requester's policy deals with agendas as opposed to providing notice, the Committee nonetheless takes this opportunity to remind Requester that its policy does not require regular meeting agendas to include the date, time and place of the regular meetings as its policy requires for special and emergency meeting agendas. A separate notice containing this information must be provided for regular meetings if it is not included in the regular meeting agenda. See Open Meetings Advisory Opinion 2016-15 ("When a governing body meets in accordance with a fixed schedule, such as the second and fourth Monday of each month, it may comply with the meeting notice requirement in the Act by annually posting notice of the date, time and place of these 'regular' meetings for the coming year, and keeping this notice posted throughout the year.")

In addition to regularly scheduled meetings and special meetings, public agencies may hold emergency meetings. A "governing body shall notice an emergency meeting in a manner which is consistent with this article and the Ethics Commission Committee on Open Governmental Meeting's opinions issued pursuant to the authority of section ten of this article, as soon as practicable prior to the meeting." W.Va. Code § 6-9A-3(h)(1). "Any meeting notice issued, and the meeting minutes, must fully explain the purpose of the meeting and the facts and circumstances justifying an emergency meeting." Open Meetings Advisory Opinion 2006-15; W.Va. Code § 6-9A-3(h)(2). Additionally, "[i]f an agenda is amended to accommodate action on an emergency matter, both the meeting agenda and the meeting minutes must explain the facts and circumstances of the emergency." *Id.*

In order to meet the minimum requirements of the Act, the Committee finds that the policy's notice period for emergency meetings need be revised to provide that a governing body shall post an emergency meeting as soon as practicable prior to the meeting. The policy further needs to be revised to require that the agenda explain the facts and circumstances of the emergency in addition to the date, time, place and purpose of the emergency meeting.

Finally, the Committee notes that this Opinion, and any immunity which the governing body receives, will be limited to whether the policy is inconsistent with the Act. The Opinion will not address discretionary application of a rule to a specific situation. Having noted the limited scope of this Opinion, the Committee finds that the Commission's policy, when including the changes outlined above, is not inconsistent with the Act.

This Advisory Opinion is limited to questions arising under the Open Governmental Proceedings Act, W Va. Code §§ 6-9A-1 through 6-9A-12, 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.

A handwritten signature in black ink, appearing to read 'L. Tweel', is written over a horizontal line. The signature is fluid and cursive.

Lawrence J. Tweel, Chairperson
Open Governmental Meetings Committee
West Virginia Ethics Commission

APPENDIX A

POCAHONTAS COUNTY COMMISSION

AGENDA POLICY AND PROCEDURES

The Pocahontas County Commission will hold its regularly scheduled meetings on the first (1st) and third (3rd) Tuesdays of each month at the County Commission Office located in the Pocahontas County Courthouse, 900 Tenth Avenue, Marlinton, West Virginia 24954 as follows:

The first (1st) Tuesday meeting of each month shall begin at 8:30 am. and the third (3rd) Tuesday meeting of each month shall begin at 5:30 pm.

Agendas for the Commission's regularly scheduled meetings shall be posted at the Pocahontas County Courthouse and also made available in the County Commission Office, no later than three (3) business days before a meeting by 4:30 pm. of the first day, except for emergency situations to be determined by the County Commission. Saturdays, Sundays and legal holidays, or pre-scheduled days for closing the Courthouse are not considered business days for purposes of posting agendas.

Should a legal holiday or a pre-scheduled day for closing the Courthouse fall on one of the three (3) days as outlined above, then the agenda shall be posted one (1) day earlier by 4:30 pm. for each holiday or pre-scheduled closing of the Courthouse.

When a meeting agenda has been issued three (3) or more business days in advance of a meeting, it may be amended up to two (2) business days before the meeting. Agendas may only be amended at the request of a County Commissioner, and once amended, will be posted in the same manner as the original agenda. Reasonable effort will be made to provide notice of all meetings to the local media as soon after posting as practical.

Agendas for special meetings, stating the date, time and place, and purpose of the meeting, shall be posted at the Pocahontas County Courthouse and also made available in the County Commission Office no later than two (2) business days before a meeting by 4:30 pm. of the first day. Saturdays, Sundays and legal holidays, or pre-scheduled days for closing the Courthouse are not considered business days for purposes of posting agendas.

Should a legal holiday or a pre-scheduled day for closing the Courthouse fall on one of the two (2) days as outlined above, then the agenda shall be posted one (1) day earlier by 4:30 pm. for each holiday or pre-scheduled closing of the Courthouse. Reasonable effort will be made to provide notice of all special meetings to the local media as soon after posting as practical.

Agendas for emergency situations as determined by the County Commission,

stating the date, time and place, and purpose of the meeting, shall be posted at the Pocahontas County Courthouse and made available in the County Commission Office as soon as possible after an emergency meeting has been declared, and reasonable effort will be made to provide notice of any such meeting to the local media as soon after posting as practical.

All requests to be added to any County Commission agenda should be made by contacting the County Commission's Office not later than 4:00 pm. at least one (1) business day prior to the first (1st) day of posting, to allow sufficient time for approval by the Commission.

Adopted by the Pocahontas County Commission on June 21, 2016