

Open Meetings Advisory Opinion No. 2017-02 Issued

on August 3, 2017, by

**The West Virginia Ethics Commission
Committee on Open Governmental Meetings**

Opinion Sought

The **Director of the West Virginia Division of Homeland Security and Emergency Management** asks whether the Open Governmental Proceedings Act applies to meetings of the Statewide Interoperability Executive Committee in the exercise of its supervision and implementation of the Statewide Interoperability Radio Network.

Facts Relied Upon by the Committee

In 2017, the West Virginia Legislature passed House Bill 2759 creating the Statewide Interoperability Radio Network ("SIRN"). H.B. 2759, 83rd Leg., Reg. Sess. (W. Va. 2017). The SIRN is defined as "the interoperable communications network established for the purpose of implementing and maintaining an interoperable communications network for first responders to help assure the safety of all citizens in the event of disaster or emergency." W. Va. Code§ 15-14-2(b). The stated objective of the SIRN is that "[w]ith any Homeland Security threat or event, and all disasters, natural or man-made, the state must be able to instantly and effectively communicate in order to collaborate with various entities which are geographically dispersed." W. Va. Code§ 15-14-3(a).

The bill further created the Statewide Interoperability Executive Committee ("SIEC"), defining it as the "the governing body of the SIRN." W. Va. Code§ 15-14-2(d). The SIEC is mandated to:

- (1) Monitor the implementation and operation of the SIRN;
- (2) Establish goals and guidance for the betterment of the SIRN;
- (3) Review and approve all requests for use of the SIRN and its equipment by a public or private entity;
- (4) Serve as the mechanism for developing, updating and implementing policies, procedures and guidelines related to the SIRN;
- (5) Identify new technologies and develop technologies and standards for the SIRN;

- (6) Enhance the coordination of all available resources for public safety communications interoperability;
- (7) Investigate all matters relating to integrity, foresight in funding and operations and planning for the SIRN.

W. Va. Code§ 15-14-6. The SIEC, at minimum, consists of 17 members including, but not limited to, the Requester, the Superintendent of the West Virginia State Police, the President of the West Virginia Emergency Management Council, the Adjutant General of the West Virginia National Guard and the West Virginia Chief Technology Officer. W. Va. Code§ 15-14-5(a). Additionally, the Requester is mandated to serve as the chairman of the SIEC. W. Va. Code§ 15-14-5(b).

The Requester states:

The SIEC will be discussing build out and technical issues that deal with [West Virginia Freedom of Information Act ("FOIA")] exempt information about trade secrets of the network hardware, law-enforcement, security and public safety matters that deal with the prevention and mitigation of impacts caused by: large scale criminal acts, terrorist acts, natural or man-made disasters or terrorist threats.

Per the Requester, "FOIA already exempts security and disaster plans, risk assessments, tests or results of tests to the system, along with the architecture and infrastructure designs of the layout or facilities will be located." The Requester states that almost every aspect of the SIEC meetings will concern items that are covered by FOIA exemptions. The Requester asks whether the SIEC meetings need to conform to the requirements of the West Virginia Open Governmental Proceedings Act and, if so, to what extent do the SIEC meetings need to be public.

Code Provisions Relied Upon by the Committee

W. Va. Code§ 6-9A-2(4) reads, in relevant part, as follows:

"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) reads, in relevant part, as follows:

"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.

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

"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 reads, in relevant part, as follows:

(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.

(e) 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.

(3) When calculating the days, the day of the meeting is not to be counted. If a meeting notice is filed anytime other than during the Secretary of State's regular business hours, the date of filing will be considered the next business day. 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.

W. Va. Code § 6-9A-4 reads, in relevant part, as follows:

(a) The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body

shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.

(b) An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions:....

(7) To plan or consider an official investigation or matter relating to crime prevention or law enforcement;

(8) To develop security personnel or devices;....

(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the freedom of information act as set forth in article one, chapter twenty-nine-b of this code.

Advisory Opinion

The Open Governmental Proceedings Act ("Open Meetings Act" or "Act") provides that "all meetings of any *governing body* shall be open to the public." W. Va. Code § 6-9A-3(a) (emphasis added). Thus, the Committee on Open Governmental Meetings ("Committee") must determine whether the SIEC is a governing body subject to the Act. A governing body is defined as "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(4). A public agency is defined as "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-2(7).

Governing Body of Public Agency

The Committee first finds that the SIRN is a public agency under the Open Meetings Act. The SIRN was created by statute pursuant to "[o]ne of the most important and profound duties of the State of West Virginia[,]" "to provide for the safety and security of her citizens." W. Va. Code§ 15-14-3(a). The statute provides that "[t]he state must constantly be prepared to immediately respond to any homeland security threat or event and all disasters, natural or man-made." *Id.* The SIRN is thus authorized by law to

implement and maintain an interoperable communications network to assure an immediate and coordinated response to disasters and emergencies. W. Va. Code §§ 15-14-1 through 15-14-10. Consequently, the SIRN is a public agency under the Act because it is an administrative unit of state government authorized by law to exercise some portion of executive power.

The Committee additionally finds that the SIEC is a governing body under the Open Meetings Act. The SIEC consists of, at minimum, 17 members. W. Va. Code § 15-14-5(a). The SIEC, among other responsibilities, establishes goals and guidance for the betterment of the SIRN, reviews and approves all requests for use of the SIRN and develops policies and procedures related to the SIRN. W. Va. Code § 15-14-6. Furthermore, W. Va. Code § 15-14-2(d) expressly defines the SIEC as "the governing body of the SIRN." **The SIEC is thus a governing body under the Act because it consists of two or more members and has the authority to make decisions for a public agency, the SIRN, on policy and administration.**

Open Meetings

The SIEC therefore must conform to the requirements of the Open Meetings Act. SIEC meetings, except as otherwise provided by law, shall be open to the public. W. Va. Code § 6-9A-3(a). Meetings must be noticed with the West Virginia Secretary of State, and a meeting agenda must be made available a reasonable time in advance of each meeting. W. Va. Code §§ 6-9A-3(d) through (e). The meeting agenda must reasonably describe any matter requiring official action by the SIEC, employing language that will reasonably place the public and the media on notice of the particular items that will be considered during each meeting. Open Meetings Advisory Opinion 2009-04. Meeting minutes must also be prepared and made available to the public and media within a reasonable time after each meeting. W. Va. Code § 6-9A-5; Open Meetings Advisory Opinion 2010-04.

Executive Sessions

The Requester raises a concern "that conducting SIEC meetings openly places the public safety and health at risk by publishing sensitive technical data." The Act, however, does "not require nor permit every meeting to be a public meeting." W. Va. Code § 6-9A-1. The Act allows governing bodies to hold executive sessions and exclude the public when a closed session is necessary to discuss a matter enumerated in W. Va. Code § 6-9A-4(b).

Based on the Requester's representations, the SIEC will be considering matters that are permitted to be discussed in executive session. First, the Requester states that almost every aspect of the SIEC's meetings will concern items already covered by FOIA exemptions. The Act permits executive sessions to be held to discuss any matter "which is not considered a public record within the meaning of [FOIA]." W. Va. Code § 6-9A-4(b)(12). Neither the Ethics Commission nor this Committee, however, has the

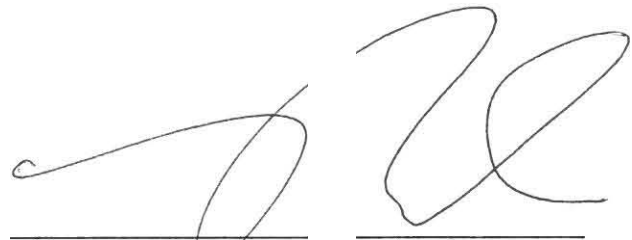
authority to provide definitive guidance on the meaning and application of FOIA. Open Meetings Advisory Opinion 2008-09. The Requester further states that the SIEC will be discussing matters that deal with preventing and mitigating the impact of "large scale criminal acts, terrorist acts, natural or man-made disasters or terrorist threats." The Act additionally permits executive sessions to be held to consider matters relating to crime prevention or law enforcement and to consider matters relating to the development of security personnel or devices. W. Va. Code §§ 6B-9A-4(b)(7) through (8).

To hold an executive session, the matter must be first sufficiently identified in a meeting agenda. Advisory Opinion 2009-04 ("A governing body may only go into executive session when its meeting agenda identifies in language that will reasonably place the public on notice of the item to be discussed and the item is one of the exceptions authorized by W. Va. Code § 6-9A-4."). The presiding officer of the SIEC must identify the authorization for holding the executive session during the open portion of the meeting, prior to convening the executive session. W. Va. Code § 6-9A-4(a). The SIEC must then determine by a majority vote of the members present to hold an executive session.

The Committee holds that the Open Governmental Proceedings Act applies to meetings of the Statewide Interoperability Executive Committee in the exercise of its supervision and implementation of the Statewide Interoperability Radio Network.

The Committee suggests that the Statewide Interoperability Executive Committee seek guidance and relief from the Legislature regarding protecting confidential and sensitive information while complying with 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 through 6-9A-12, and does not purport to interpret other laws or rules.

A handwritten signature in black ink, consisting of a stylized 'L' followed by a large, loopy flourish that ends in a small hook.

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