

Open Meetings Advisory Opinion No. 2018-01

Issued on March 1, 2018, by

The West Virginia Ethics Commission Committee on Open Governmental Meetings

Opinion Sought

The **President of the Wetzel County Commission** asks whether a quorum of County Commissioners may meet annually with other elected county officials and their staffs to learn about their respective offices and to allow employees to express any concerns they may have about conducting their work.

Facts Relied Upon by the Committee

The Wetzel County Commission would like to hold annual informal luncheons to meet with other elected county officials and their staffs to learn about their respective offices and to allow employees to express any concerns they may have about conducting their work. The Commission would meet with each office individually and in private. The Requester states that the overall intent of these meetings is to promote communication among the offices and to establish good relations. The Requester states that no decisions on issues will be made at these meetings.

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. 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; or

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

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-2(8) provides:

"Quorum" means the gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio.

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.

Advisory Opinion

The Open Governmental Proceedings Act ("Act") requires "meetings" of County Commissions to be open to the public. W. Va. Code § 6-9A-3. A meeting under the Act is "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). Importantly, not every gathering where a quorum of Commissioners is present constitutes a "meeting" as defined by the Act. See, e.g., W. Va. Code § 6-9A-2(5)(D); Open Meetings Advisory Opinion 2008-02 (holding that a quorum of County Commissioners may meet with a representative of the State Auditor's Office for an exit conference so long as the Commissioners refrain from deliberating toward a decision).

Here, a quorum of the Wetzel County Commission desires to annually meet with other elected county officials and their staffs in a private informal setting at a restaurant to learn about their respective offices and to permit employees to voice any concerns in conducting their work. It is immaterial whether a meeting is formal or informal. See *McComas v. Board of Educ. of Fayette County*, 475 S.E.2d 280, 290 197 W.Va. 188,

198 (1996) (“There is nothing in . . . W. Va. Code, 6-9A-1, *et. seq.*, . . . which suggests the restrictions therein should not apply to both formal and informal meetings.”). The Requester also states that no decisions on issues will be made at these meetings. The fact that no decisions will be made at a meeting is also not enough to shield governing bodies from the requirements of the Act. “By imposing the openness requirement on governing bodies who ‘deliberate toward a decision on any matter,’ the Legislature clearly intended W. Va. Code, 6-9A-1, *et seq.*, to apply to those assemblies where discussions leading up to a decision take place.” *McComas*, 475 S.E.2d at 287, 197 W. Va. at 195. “The fundamental question when a quorum is present is whether the [Commissioners] are deliberating toward a decision on one or more matters requiring official . . . action.” Open Meetings Advisory Opinion 2007-03.

The Act does not expressly define deliberate. Black’s Law Dictionary defines deliberation, in relevant part, as “the act of carefully considering issues and options before making a decision or taking some action.” *Deliberation*, Black’s Law Dictionary (10th ed. 2014). Further, the Supreme Court of Appeals of West Virginia has provided some guidance. The Court found that a private meeting between a quorum of a school board and three county administrators violated the Act when the meeting consisted of one member of the school board asking the Superintendent questions regarding consolidation plan materials the day before a vote on the issue was to take place. *McComas*, 475 S.E.2d at 293, 197 W. Va. at 201. The Court reasoned that the meeting “obviously deprived the public of hearing the Superintendent’s responses to the questions raised by the . . . materials, of hearing the give-and-take of the Board’s deliberations, and of holding both the elected and appointed public servants accountable for their reasoning.” *Id.*

Significantly, the Act also expressly excludes from the definition of meeting “[g]eneral 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(5)(D). In *Found. for Indep. Living, Inc. v. The Cabell-Huntington Bd. of Health*, the Supreme Court of Appeals of West Virginia found that an affidavit by a director of a county board of health supported the trial court’s conclusion that the county health board’s private meeting regarding a proposed clean indoor air regulation was for educational purposes and did not violate the Act. 214 W. Va. 818, 591 S.E.2d 744 (2003).

Here, if the proposed meetings will simply serve as an educational tool for the County Commissioners to learn about the functions of other county elected officials and their staff, the Act does not apply, provided there is no intent to conduct public business or for the discussion to lead to an official action. W. Va. Code § 6-9A-2(5)(D). Though it is not difficult to envision that items requiring official action on the part of the Commission may be raised during these meetings, matters that are simply brought to the attention of a quorum of County Commissioners do not constitute a “meeting” as that term is defined

in the Act. To constitute a meeting under the Act, the Commissioners must also make a decision or deliberate toward a decision on one or more matters requiring official action. W. Va. Code § 6-9A-2(5).

Based on the facts presented to the Committee, a quorum of the County Commission may attend these private meetings so long as the Commissioners do not engage in a discussion that involves deliberating toward a decision on a matter requiring official action. The Committee reminds the Requester that these private meetings may not be used to circumvent the Act's requirements. If a matter raised in the meetings may require official action by the County Commission, the Commissioners are only permitted to discuss purely logistical issues regarding that matter, such as whether the matter should be included on a future agenda and when to schedule a meeting. W. Va. Code § 6B-9A-2(5)(E); see also Open Meetings Advisory Opinion 2005-12 (permitting members of a governing body to discuss logistical matters such as the time and place for holding a meeting, who should be invited to the meeting, what data or documentation needs to be available at the meeting, and what matters should be included on the meeting agenda).

Prior to each meeting with other elected county officials and their staffs, this Committee recommends that the President of the County Commission or other designated member advise other County Commission members that they may not engage in any discussion that involves deliberating toward a decision on a matter requiring official action.

Notwithstanding its conclusion today, the Committee recommends that the County Commission follow the guidance provided in Open Meetings Advisory Opinion 2011-02 to avoid any possibility of contravening the requirements of the Act. That Opinion addressed whether a quorum of County Commissioners may attend weekly meetings with its own staff. While those meetings are of a different nature than the annual meetings with other county offices addressed in the instant Opinion, the Commission nonetheless finds its guidance useful in complying with the Act's requirements. Open Meetings Advisory Opinion 2011-02 states, in relevant part:

To comply with the requirements of the Open Meetings Act, under the circumstances described, it would be permissible for the County Commission President or another designated member of the Commission to attend the staff meeting and report back to the Commission during the course of a properly noticed meeting where this item has been placed on the agenda. For example, the agenda may read, "Report of Commissioner "X" regarding staff meeting." This report would occur during the public portion of the meeting, not an executive session unless an aspect of the report involves a matter properly discussed in an executive session in accordance with W. Va. Code § 6-9A-4. Even then, only the portion which falls within the executive session exception may be discussed during executive session. Other portions of the report which do not fall within this

exception must be discussed in open session. Another approach is to have staff provide a report during a properly noticed Commission meeting. Once again, this item must be on the agenda and the same rules regarding executive session matters, outlined above, apply.

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.

/s/ Lawrence J. Tweel

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Open Governmental Meetings Committee
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