

OPEN MEETINGS ADVISORY OPINION NO. 2013-05

Originally Issued on December 12, 2013 and Ratified

on January 21, 2014 by

**THE WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS**

OPINION SOUGHT

A **Member of the Berkeley County Council** asks if it is permissible for a County Sheriff to meet with each Council Member individually to discuss issues affecting the Sheriff's budget.

FACTS RELIED UPON BY THE COMMITTEE

According to the Requester, the Sheriff has requested a meeting with each individual Council Member to discuss budgetary concerns. The County Operations Officer and County Attorney have advised the Council Members that participating in such meetings could violate the Open Meetings Act depending on what is discussed therein.

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.

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.

W. Va. Code§ 6-9A-2(5)(D) states, in relevant part, that the term "meeting" does not include:

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.

W. Va. Code§ 6-9A-2(5)(E) states, in relevant part:

"Official action" means action which is taken by virtue of power granted by law, ordinance, policy, rule, or by virtue of the office held.

W. Va. Code§ 6-9A-3(a) states:

Except as expressly and specifically otherwise provided by law ... and except as provided in section four of this article, all meetings of any governing body shall be open to the public.

ADVISORY OPINION

Nearly twenty (20) years ago, the West Virginia Supreme Court discussed what constitutes a meeting for the purposes of the Open Meetings Act in *Mccomas v. Board of Education*, 197 W. Va. 188, 475 S.E.2d 280 (1996). The Court stated:

[A]n interpretation of the Sunshine Act that precludes any off-the-record discussion between board members about board business would be both undesirable and unworkable -- and possibly unconstitutional. In drawing the line between those conversations outside the Act's requirements and those meetings within it, we think a common sense approach is required, one that focuses on the question of whether allowing a governing body to exclude the public from a particular meeting would undermine the Act's fundamental purposes.

Id. at 198.

The Court further elaborated on this point, explaining:

At a certain point, the number of members participating gives the discussion an importance that requires the invitation of the public. On the other hand, even individual meetings, if privately held, can in some cases violate the Act ... [s]imilarly, where a governing body concocts a scheme with the specific intent to circumvent the Act, a court should not hesitate to declare the scheme illegal ... an examination of the effects of holding a meeting in private would look at the decision-making process as a whole to determine if the public has been deprived of a meaningful opportunity to respond to, or hold officials accountable for, their private deliberations."

Id. at 199.

The Court concluded that "the facts will vary dramatically from case to case, and they must be carefully examined in each instance to protect the legislative and constitutional designs." *Id.*

The Legislature codified this "common sense approach" when it amended the Act in 1999. In order to do so, the Legislature included a public policy statement in W. Va. Code§ 6-9A-1, which declares that the proceedings of public agencies should ordinarily be conducted openly, during a meeting open to the public and the media. As part of that policy declaration, the Legislature recognized that the requirement to conduct all of a governing body's business in a public meeting is not absolute, stating:

The Legislature finds, however, that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. The Legislature finds 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. It is the intent of the Legislature to balance these interests in order to allow the government to function and the public to participate in a meaningful manner in public agency decision making.

Additionally, the Legislature added language to the definition of "meeting" under the Act when it was amended in 1999. One class of discussions explicitly excluded from the definition of meeting is, "[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(4)(D), *supra*.

This Committee has consistently held that a scheduled gathering of a quorum of Board members constitutes a meeting that must be noticed under the Open Meetings Act. In Open Meetings Advisory Opinion 2008-09, the Committee explained, "Work sessions where a quorum of a governing body is present, and matters requiring official action by the governing body are discussed, are meetings subject to the requirements of the Open Meetings Act." The same rule is applied in Open Meetings Advisory Opinions 2001-25 and 2003-11.

It is important to note that the discussions excluded from the definition of "meeting" are primarily not official functions or formally scheduled gatherings. Examples of "meetings" include a quorum of governing body members meeting for "work sessions", "subcommittee discussions", or any other form of gathering where the discussion is intended to lead to official action. W. Va. Code§ 6-9A-2(4)(D). The varying terms used to describe these meetings are immaterial; instead, the analysis centers on whether the discussion is intended to lead to official action.

Notably, the above opinions make specific mention of work sessions where a quorum is present, and find that those types of meetings are organized by the governing body to discuss matters intended to lead to an official action. This is also true with committee meetings, since committees usually report back to the full body. Indeed, in situations where a quorum is present and discussing official matters, there are few situations where the Open Meetings Act will not be implicated.

Nevertheless, this Committee wrote, in Open Meetings Advisory Opinion 2004-17, that "less than a quorum of commissioners may engage in discussions amongst themselves in which they express their views on issues of interest to the public, including issues pending before the [governing body]. The Act is not meant to stifle all expression of opinion amongst public officials outside of a formal meeting."

Similarly, in Open Meetings Advisory Opinion 2007-08, this Committee held that "less than a quorum of Town Council Members may engage in discussions amongst themselves in which they express their views on issues of interest to the public, including issues pending before the entity on which they serve." Both of the aforementioned opinions, as this one, relied heavily on *Mccomas* and the Legislature's policy statement at W. Va. Code § 6-9A-1 in determining the appropriate outcome.

This finding does not extend to committees, subcommittees, or any other meeting where the officials recommend official actions, however. Open Meetings Advisory Opinion 2007-01 clearly defines what types of gatherings are subject to the Act. In relevant part, the Committee concluded:

Any committee or subcommittee consisting of two or more Board Members, but less than a quorum of the Board, which is appointed to make recommendations to the Board as a whole on such matters as specific policies or administrative matters, or any other matters requiring official action by the Board, involves a "governing body" within the meaning and intent of the Act, and the meetings of any such committee or subcommittee should be conducted in compliance with the Act.

Further, Open Meetings Advisory Opinion 2009-07 stands for the principle that if a subgroup exercises "some portion of executive or legislative authority," then it is a governing body within the scope of the Open Meetings Act, and therefore subject to the Act's requirements. This requirement prevents governing bodies from using subgroups to circumvent the requirements of the Act.

Similarly, the Committee has consistently maintained that governing bodies may not circumvent the Open Meetings Act by holding a series of smaller individual meetings, sending a series of e-mails or text messages, or otherwise skirting compliance requirements.

More explicitly, the Committee stated in Open Meetings Advisory Opinion 2007-03:

A series of meetings between a single Board Member and the Board's attorney or Executive Director, in order to avoid having to convene a meeting subject to the Open Meetings Act, would be inconsistent with the spirit and intent, if not the letter, of the Act. This Committee has previously concluded that a series of phone calls to Board Members does not constitute a proper meeting. Likewise, a series of face-to-face meetings involving less of a quorum of Board Members may not be conducted to avoid holding a properly noticed public meeting.

Open Meetings Advisory Opinion 2007-08 similarly states that:

[T]here are situations where a series of communications by less than a quorum might violate the Act. For instance, public officials could be in violation of the Act if they use a series of communications, whether face-to-face meetings, telephone conversations, or an exchange of electronic mail, with the intent of allowing a majority of the governing body to predetermine the outcome of a particular matter pending before the entity on which they serve. The committee finds that such a course of conduct would constitute an improper meeting, inconsistent with both the spirit and the intent of the Sunshine Law.

Here, the Requester states that a County Sheriff has requested a meeting with each individual Council Member to discuss budgetary concerns which are more appropriately discussed in a public forum. Indeed, the County Council is required by statute to take official action on the Sheriff's budget. The Committee hereby holds that any concerns that the Sheriff wants to express to all council members must therefore occur in an open meeting, duly noticed and placed on an agenda in compliance with the Open Meetings Act.

The Act does not prohibit members of a governmental body from meeting with non-members to discuss matters of concern. That is not, however, the question presented here. Rather, as cited above, the legislative intent of the Act explicitly states 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 ... were required to be a public meeting." This Committee finds the question presented to be a close call.

This Committee has always held that governing bodies may not knowingly circumvent the Act. As in Open Meetings Advisory Opinion 2007-03, *supra*, "[a] series of meetings between a single Board Member and the Board's attorney or Executive Director, in order to avoid having to convene a meeting subject to the Open Meetings Act, would be inconsistent with the spirit and intent, if not the letter, of the Act."

Nothing in this opinion should be construed as stating that public officials may not generally meet in private with constituents to discuss issues of public concern. Rather, specific facts provided by the Requester indicate that the intent of the meeting is for the

Sheriff to lobby the individual Council Members for additional budgetary funding, and the Council members are aware of that fact.

In short, the facts provided suggest an attempt to "use a series of communications ... with the intent of allowing a majority of the governing body to predetermine the outcome of a particular matter pending before the entity on which they serve," a situation barred by Open Meetings Advisory Opinion 2007-08 and other past findings.

As mentioned before, the Supreme Court counseled before that "a common sense approach is required, one that focuses on the question of whether allowing a governing body to exclude the public from a particular meeting would undermine the Act's fundamental purposes." *Mccomas, supra*. Accordingly, this Committee finds that the Requester, as well as the other Council members, would violate the Open Meetings Act by meeting with the Sheriff under these particular circumstances.

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, so 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/ Drema Radford, Chair


Drema Radford, Chairperson