

OPEN MEETINGS ADVISORY OPINION NO. 2012-04

Issued On December 6, 2012 By The WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The Elk Conservation District asks:

- (1) Whether, when the District is approving the payment of invoices, it must list the name of each vendor on the agenda and the amount to be paid;
- (2) Whether the District must record in its minutes the names of the vendors and the amount of the payments authorized for each;
- (3) Whether, when the District is considering awarding grants or distributing public monies through programs it administers, it must list the names of applicants on its agenda and/or the amount requested therein; and,
- (4) Whether the District must list the names of grant or program recipients and the amount awarded in its minutes.

FACTS RELIED UPON BY THE COMMITTEE

The Elk Conservation District is a public body which is governed by six elected Board Members and two members appointed by the State Conservation Agency. It meets monthly. The Board is responsible for protecting the public coffers through its oversight of the agency's finances. These responsibilities include, in relevant part, approving the budget and authorizing payments to vendors.

The Open Meetings Act applies to governing bodies at the State and local level. The Open Meetings Committee takes administrative notice that governing bodies use different methodologies for administering their finances. Some confer spending authority up to a certain threshold to an employee of the agency, or to a public official, e.g. mayor, chairperson or public employee. For example, a county manager may be authorized to expend up to \$5,000.00 without seeking the approval of the County Commission. Of course such expenditures and related documentation are subject to public disclosure and are reviewed during audits of the governing body.

Other governing bodies approve each expenditure. Additionally, the volume of expenditures varies among governing bodies. If an agency or municipality has a small budget, there may only be ten payments to approve. For school boards or larger counties, there may be hundreds of payments which require approval.

Some governing bodies list each payment it is considering on the agenda. Others, particularly the ones approving a significant amount of payments, will have an agenda item which may read "Approve Invoices" or "Payment of Bills".

The Requester also asks about the requirements under the Open Meetings Act governing grants and the appropriation of public funds through the programs it administers. For example, it administers agricultural enhancement programs such as the lime program. These programs are designed to help property owners conserve their land, e.g. improving soil, weed control or pasture development. Citizens apply for inclusion in these programs. The Conservation District reviews the applications and decides during the course of a public meeting to whom these monies should be awarded. The Requester generally inquires how to list this item(s) on its agenda, and what information must be recorded in the minutes.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

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

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....

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, except in the event of an emergency requiring immediate official action.

W. Va. Code§ 6-9A-8 reads:

(a) Except as otherwise expressly provided by law, the members of a public agency may not deliberate, vote, or otherwise take official action upon any matter by reference to a letter, number or other designation or other secret device or method, which may render it difficult for persons attending a meeting of the public agency to understand what is being deliberated, voted or acted upon. However, this subsection does not prohibit a public agency from deliberating, voting or otherwise taking action by reference to an agenda, if copies of the agenda, sufficiently worded to enable the public to understand what is being deliberated, voted or acted upon, are available for public inspection at the meeting.

(b) A public agency may not vote by secret or written ballot.

ADVISORY OPINION

The Open Meetings Act provides limited guidance on meeting agendas. Exercising its power to interpret the Open Meetings Act, this Committee has previously held that a meeting agenda must list all items requiring official action. O.M.A.O. 2006-14. The Committee has further held "matters requiring official action by a governing body should be stated on the agenda in a manner that makes the public aware of the particular matters to be dealt with at a meeting." O.M.A.O.s 2006-14 and 2009-02.

Here, based upon the general rule of law established by the Committee through its prior opinions, the Committee must determine the amount of specificity required when a governing body is approving the payment of invoices. The question is not simple. On one hand, one could argue that every governing body must list on its agendas each invoice, and the amount owed therein. Yet, from a common sense standpoint, this approach may not be practical.

Before issuing this opinion, the Committee sought comments from various governing bodies to determine their thoughts on the questions posed, and to ascertain their present practices. As set forth in the fact section of this opinion, the practices of governing bodies varied.

For those governing bodies which approve numerous invoices, some emphasized that imposing a requirement that did not exist before could have unintended consequences. One County submitted a photograph as an exhibit of what its agenda would look like if it is required to list every vendor and the amount owed therein. As a picture speaks a thousand words, the Committee attaches the picture hereto and incorporates it by reference. The picture shows an agenda posted on a Courthouse door. Due to the voluminous amount of invoices listed, the agenda/document begins near the top of the door and stretches well out into the public entryway forming a "white carpet."

The Legislative findings to the Open Meetings Act state that a purpose of the Act is to provide "public access to information." W.Va. Code § 6-9A-1. The Legislature further noted, however, that the benefits of openness, access to information and a desire to improve the operation of government do not necessarily convert every "meeting" to a "public meeting" subject to the requirements of the Open Meetings Act. Indeed, the findings state:

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 government to function and the public to participate in a meaningful manner in public agency decisionmaking.

This Committee is charged with interpreting the Open Meetings Act by providing guidance to governing bodies on how to comply with the Act, balancing the public's right to information with the governing body's ability to function meaningfully. The Committee concludes that for purposes of approving invoices, an agenda item which reads "Approve Invoices" or "Payment of Bills" is sufficient. The Committee declines to impose a requirement that a governing body must list each invoice and the amount being considered. Nevertheless, to ensure "public access to information", governing bodies which elect to use the general agenda items set forth above, as opposed to listing on payments being considered on their agenda, must:

- (1) Have a list of invoices, which includes the name of each vendor and the amount owed to each, available for public review at least **two** business days before the meeting, not counting the day of the meeting. **All** invoices being considered must be on this list. If not included on the list, then the governing body must wait until the next meeting to consider and approve the same; or
- (2) Have all invoices being considered available for review at the agency's office during its public office hours. The same two business day rule set forth above applies, i.e. the governing body may not add invoices to the stack right before the meeting.

In either case, the governing body must state on its agenda under the agenda item "Approve Invoices" or "Payment of Bills" that a list of the invoices, or the invoices themselves, are available for review. This same rule of law applies to governing bodies which elect to list the names of vendors on their agenda, but do not include the amount being considered for payment.

The Open Meetings Committee finds that its holding herein does not run afoul of the Open Meeting Act's prohibition against taking official action upon a matter by reference to a letter, number or other designation or secret device which may render it difficult for persons attending a meeting to understand what is being acted upon. W.Va. Code§ 6-9A-8. The rule established herein expressly places the public on notice of what is being considered, and provides them the opportunity to examine the invoice list or invoices if they want to know which payments are being considered.

Based upon information and belief, many governing bodies generally utilize the procedure outlined above or simply list the invoices and amounts on their agendas. The Open Meetings Committee is aware that some governing bodies may

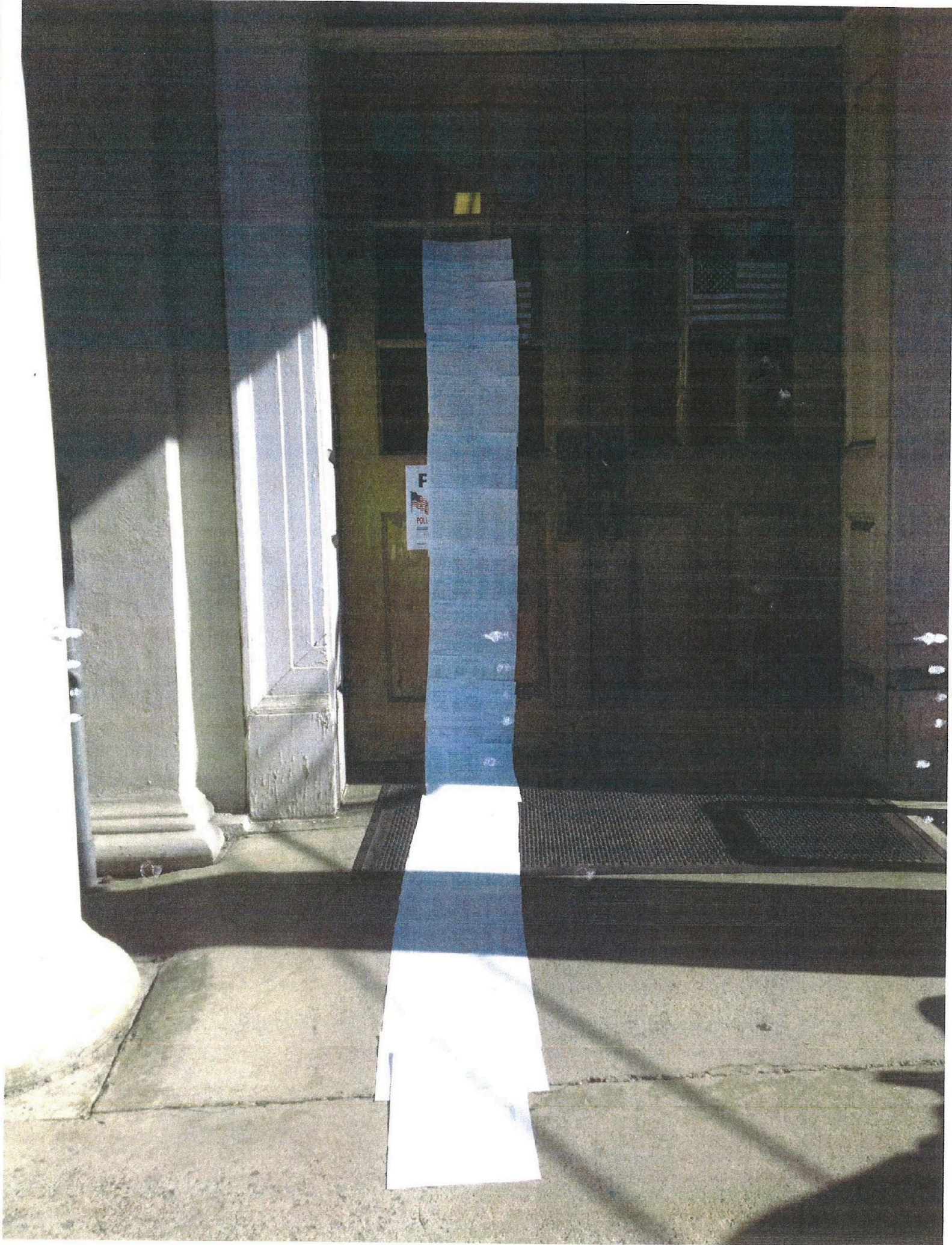
add invoices to a list or stack at the last minute, i.e. right before the meetings. As such, the Committee further recognizes that the time requirements imposed herein may give governing bodies which operate in this manner some angst. If so, the Committee offers the following recommendation: The governing body should consider adopting a policy which confers spending authority up to a certain threshold to one or more of its employee(s) or public official(s). In formulating such a policy, the governing body should consult with its attorney or the Auditor's Office, or both.

For purposes of the minutes, the governing body may indicate that there was a motion to approve invoices and that it passed. If the minutes do not record therein the name and amount of every invoice approved, governing bodies shall attach a list of the invoices approved, and the amount of each, to the minutes.

In regard to grants, the Committee finds that a governing body complies with the Open Meetings Act if its agenda item states that it is considering the award of a grant or request for money. By way of example an agenda item may read "Consider grant application of Sue Smith" or "Consider Lime Program Application of John Smith". When the governing body makes a motion to award a grant or public money, it must state in the motion the amount being awarded. Moreover, the name of the recipient and the amount awarded must be included in the minutes.

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



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