

OPEN MEETINGS ADVISORY OPINION NO. 2011-05

Issued On July 14, 2011 By The WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The West Virginia State Epidemiological Workgroup asks whether it is subject to the Open Meetings Act.

FACTS RELIED UPON BY THE COMMITTEE

The West Virginia State Epidemiological Workgroup (hereinafter "Workgroup") is housed within the West Virginia Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities (hereinafter "Behavioral Health"). The group is funded through a federal grant from the United States Substance Abuse Mental Health Service Administration.

According to its charter, the group consists of twenty-one state and community organizations and individuals. A sampling of representatives includes: a Comprehensive Behavioral Health Provider; WV Poison Center; Legislative Auditor's Office; DEA; National Guard; Public Safety; Medicaid and Supreme Court of Appeals. The charter also states that Behavioral Health will appoint persons who hold the following positions in the agency to the Workgroup: Chief Data and Technology Officer, Data Analyst, Programmer; and, State Epidemiologist.

The charter provides that all decisions shall be made by consensus. The responsibilities of the members include, but are not limited to: attending all meetings or sending a representative in their place; participating in discussions to build consensus; serving as the liaison between their department, division or employer as needed; and, providing technical assistance and guidance regarding their departments.

The charter states that the Workgroup has nine separate purposes. Some of these are: examining alcohol, tobacco behavioral health and other related archival data including National Outcome Measures; assessing the prevalence of substance use, abuse, and dependence and related problems, including co-occurring mental health issues, within specific populations and across the life span; coordinating with appropriate decision-making entities within West Virginia to provide data in formats to guide effective and efficient use of prevention resources; and, developing an early warning network in coordination with local law enforcement DEA and poison control to determine current trends in use and abuse.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2(3) defines "governing body" in relevant part as "[T]he 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) defines "meeting" in relevant part as "[T]he 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(4) defines "public agency" in relevant part as "[A]ny 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) defines "quorum" as "[T]he gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio."

ADVISORY OPINION

The Committee must determine whether the Workgroup is a governing body subject to the Open Meetings Act.¹¹ A governing body is defined as "[T]he 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(3). A public agency is defined as "[A]ny administrative or legislative unit of state, county or municipal government, including any ... 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."

This Committee has previously determined that a task force created by an Executive Order of the Governor was a governing body subject to the Act. O.M.A.O. 2008-14. In its opinion the Committee stated:

¹ Based upon information and belief, the federal grant does not address whether the Workgroup is required to hold its meetings in public.

The Task Force has been created by an Executive Order. It has expressly been given authority to make recommendations on specific matters relating to administration of the unemployment compensation fund. Therefore, this Committee finds that it falls within the category of subunits having authority to make recommendations on policy and administration.

Id. at 2. See also O.M.A.O. 2007-07 wherein the Committee ruled that a study group formed by joint resolution of two cities was subject to the Open Meetings Act.

Similarly, here, the Committee finds that the Workgroup is subject to the Open Meetings Act. The Workgroup, by its nature, is more than an informal group of employees gathering to work on a project. Instead, it is a formally constituted group, housed within a public agency, whose members consist of representatives of numerous public entities. Moreover, it has a formal charter which confers certain rights and responsibilities upon its members. Finally, according to the Requester, the Workgroup was also established "to assist [DHHR] in making data informed decisions."

Legal scholars have recognized that "Advisory committees have long been recognized as special problems ... Each new arrangement must be examined anew and in its own context." Ann Taylor Schwing, Open Meeting Law 94 (2nd ed. 2000). The arrangement of the Workgroup is unique; however, examining its structure, the Committee concludes that it is a governing body, i.e. an administrative subunit of a State agency, which must abide by the requirements of the Open Meetings Act.

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