

OPEN MEETINGS ADVISORY OPINION NO. 2011-03
Issued On May 5, 2011 By The
WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

Martin Shaffer, a member of the Clarksburg City Council, asks if the Open Meetings Act requires a meeting agenda to include an item that the Council is discussing at that meeting, but not voting on until a future meeting.

FACTS RELIED UPON BY THE COMMITTEE

The Requester seeks to have items placed on the Agenda for City Council to discuss. According to the Requester, he has been informed that they did not have to put the items on the agenda because they were not voting on them at that meeting. Instead, they could discuss the matters under the "Council comments" section.

The Requester further states, "This appears to me to conflict with the spirit of our Open Meetings Law if not in direct conflict with the law. Otherwise how does a citizen know to show up to hear the discussion...."

The two items the Requester proposed to have placed on the agenda are:

1. Discussion of 5-year budget plan and our strategic plan
2. Discussion of how City of Clarksburg is going to deal with the unfunded liability for other post employment benefits (OPEB) over the next 5 years.

The Requester concludes, "To put it into perspective most of items that are voted on in council meetings are not discussed."

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code 6-9A-2(4) provides, in pertinent 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....**

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.
(emphasis supplied)

ADVISORY OPINION

The Open Meetings Act requires governing bodies of public agencies to conduct their business in the "sunshine", giving the public the opportunity to observe their actions. The Open Meetings Act further requires governing bodies to make a meeting agenda available to the public and the media a reasonable time in advance of each meeting. Accordingly, this Committee has previously determined that any matter requiring official action by the governing body should be listed on the agenda, employing language that will reasonably place the public and the media on notice of the particular items that will be considered during each meeting. This Committee has stated that the agenda requirement comprises an essential element of every regular meeting because a proper agenda facilitates meaningful public participation in the process of open government.

Although this Committee and the courts have interpreted the Open Meetings Act, there is no precedential opinion that directly answers the question presented: **Must a meeting agenda identify an issue that a governing body expects to discuss, but not vote on until a future meeting?**

The West Virginia Supreme Court of Appeals has construed the Act's definition of "meeting" stating, "We believe this language properly construed defines meeting to mean a convening of a governing body of a public body if the convening is for the purpose of making a decision **or deliberating toward a decision**" Appalachian Power Company v. Public Service Corporation, 253 S.E.2d 377, 381 (W. Va. 1979) (emphasis supplied). See a/so McComas v. Board of Education of Fayette, 475 S.E.2d 280,288 (W. Va. 1996). ("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.") (emphasis supplied).

Thus, these court decisions anticipate that items to be discussed by the governing body at a meeting must appear on the agenda for that meeting, if that discussion ultimately leads to a decision. Similarly, this Committee's prior advisory opinions suggest as much. In Open Meetings Advisory Opinion 2008-17, this Committee wrote that "the Act does not permit a governing body to discuss the merits of a matter or to deliberate toward a decision on a matter that has not been properly listed on the meeting agenda".

Similarly, in Open Meetings Advisory Opinion 2007-12, this Committee wrote: "Accordingly, each item requiring official action should be described in the agenda in a manner that makes the public aware of the particular matters that may be dealt with in the course of the meeting." And, in Open Meetings Advisory Opinion 2006-14, this Committee wrote: "A meeting agenda should list all items requiring official action by the governing body that it anticipates will be addressed in the course of a particular meeting."

In Open Meetings Advisory Opinion 2006-09, this Committee discussed opinions issued before the Legislature authorized the issuance of precedential opinions, and wrote that, "this Committee will follow its rulings in earlier, non-precedential Open Meetings Advisory Opinions, unless we conclude that a particular opinion was clearly wrong." Two such non-precedential opinions provide further support for the conclusion this Committee reaches today.

First, Open Meetings Advisory Opinion 2003-04 reads, in relevant part:

This Committee has determined that any gathering of a quorum of the members of a governing body to discuss matters requiring official action, other than logistical and procedural arrangements for a future meeting, constitutes a "meeting" under the Act. **Even if no official action is formally taken at such a session**, the governing body is required to follow normal open meeting requirements, including providing advance public notice, **an agenda of items that will ultimately require official action which will be discussed**, and minutes prepared in accordance with W. Va. Code § 6-9A-5. (emphasis supplied)

Next, in Open Meetings Advisory Opinion 2003-02, this Committee stated that "any conversation among a quorum of the members of a governing body which involves deliberating toward a decision on a matter requiring official action must be deferred until such matter can be placed on the agenda of a properly noticed meeting."

Another non-precedential opinion, however, may be interpreted to authorize a governing body to discuss an item at a meeting when it will not vote on it until a future meeting. Specifically, in Open Meetings Advisory Opinion 2000-02, this Committee held that a governing body was authorized to go into executive session to discuss a matter not listed on that meeting's agenda, so long as a majority of the members voted to go into executive session and the topic was covered by one of the Act's exemptions. (Subsequent opinions clarified that any such discussion in executive session on an item not listed on an agenda may only be for logistical purposes, i.e. determining whether to place the topic on the agenda of a future meeting. See e.g. Open Meetings Advisory Opinion 2006-13.)

The Open Meetings Act expressly states that a 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**" (emphasis supplied). It is difficult to envision any discussion on either of the Requester's proposed agenda items that would **not** ultimately result in the City's official action. Therefore, any discussion of an item of City business that may ultimately lead to, or result in, official action must be on the agenda of the meeting at which the discussion-not just the vote thereon-is held.

Thus, this Committee hereby finds that whenever a governing body discusses an issue on which it takes official action at that meeting, or at some future meeting, the agenda must identify such issue before the governing body may discuss it substantively. As a result, Open Meetings Advisory Opinion 2000-02 is expressly **overruled** and may not be relied upon.

This opinion is not intended to ban members of a governing body from raising issues-perhaps during the "Council comments" section of the meeting-or commenting on matters which are not on the agenda. Such a restraint on speech would be both

Declaration of legislative policy which reads, in relevant part, as follows:

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.

W. Va. Code§ 6-9A-1.

For example, at times matters may arise during a public comment period. Such a situation arose in Open Meetings Advisory Opinion 2007-12, and this Committee advised:

Although the Board Members may ask questions of citizens, the Superintendent, or Board staff, if the questioning involves a subject which is not on the agenda, the Board members are not permitted to deliberate among themselves toward a decision on that matter. Board Members may discuss purely logistical issues such as whether a particular matter which has been raised during a question period requires official action, if it should be placed on the agenda for a future meeting, and when to schedule a meeting. The Board may also discuss what data or documentation needs to be provided by staff or other meeting participants at a future meeting.

Later in the same opinion, this Committee further cautioned, however, that:

... each member of the governing body must exercise due care to insure that asking questions of staff or speakers does not transition from the domain of obtaining relevant information into a dialogue among the members regarding the merits of a matter on which the Board may reasonably expect to take official action....

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