

OPEN MEETINGS ADVISORY OPINION NO. 2009-05

**Issued On September 3, 2009 By The
WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS**

OPINION SOUGHT

Samuel Juniper, a Member of the Point Pleasant City Council, asks whether the Open Meetings Act compels notice to individuals that a personnel matter involving them may be discussed during a meeting of a governing body.

FACTS RELIED UPON BY THE COMMITTEE

Last month, in Open Meetings Advisory Opinion 2009-04, the Requester presented seven questions which this Committee answered. His current request arises from our answer to his question #5: If Council desires to meet in executive session to discuss another Council Member, does the subject Council Member have the right to elect that the discussion take place in an open meeting?

The Requester is a member of City Council. In the past, Council has gone into executive session to discuss the conduct of one of its own members. This Committee answered Question #5 affirmatively, and stated in a footnote:

The Requester has not asked whether the Act compels notice to individuals that a personnel matter involving them may be discussed in executive session or may otherwise take place during a meeting. As a result, we leave that question for another day, but note that such a right appears to be implicit in the statute since otherwise affected individuals would be unable to avail themselves of their right to choose to have the discussion in an open meeting.

Subsequent to the issuance of OMA Advisory Opinion 2009-04, the Requester requested an answer to that very question.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

The relevant portions of the Open Meetings Act read:

W. Va. Code § 6-9A-2. Definitions:

* * *

(2) "Executive session" means any meeting or part of a meeting of a governing body which is closed to the public.

W. Va. Code § 6-9A-3. Meetings:

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.

* * *

W. Va. Code § 6-9A-4. Exceptions.

(a) The governing body of a public agency may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section....

(b) An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions: * * *

(2) To consider:

(A) Matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee, or prospective public officer or employee **unless the public officer or employee or prospective public officer or employee requests an open meeting**; or

(B) For the purpose of conducting a hearing on a complaint, charge or grievance against a public officer or employee, **unless the public officer or employee requests an open meeting** (emphasis supplied)

ADVISORY OPINION

Although the Open Meetings Act authorizes public officers to request an open meeting rather than having discussions concerning them conducted in executive session, the statute is silent as to whether or how the affected individuals are to be notified of the impending discussions. Statutory silence alone, however, is not the sole indicator of legislative intent. This Committee's responsibility to interpret the OMA has required us, in some advisory opinions, to establish certain requirements not explicit in the Act to provide more specific guidance to governing bodies regarding compliance with the Act.

For example, in OMAO 2001-10, this Committee noted: "The Act does not deal comprehensively with how and when meeting information, either meeting notices or meeting agendas, are to be made available to the public." The Committee then concluded that governing bodies may provide reasonable advance notice of the items to be acted upon at a regular meeting by issuing the meeting agenda at least three business days before each meeting, a requirement not explicitly set forth in the Act.

Yet when presented with the pending question in the past, we relied on the absence of language in the Act. As a result, in Advisory Opinion 2005-07, we advised a member of the Preston County Board of Education that there was no provision in the Act requiring advance notice to individuals that personnel matters involving them may be on a meeting agenda or discussed at a meeting. See also OMAO 2000-15. This Committee has not yet issued a precedential Advisory Opinion answering this question, and we believe that it is one that deserves further consideration to provide definitive guidance to public officials.

Thus, we must examine the legislative intent behind the provision in the Act that allows affected individuals to elect to have a governing body's personnel concerns aired in the open together with the absence of any language related to notice of the impending discussions. The personnel exemption to the requirement to conduct a meeting in the open is broad; it includes matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee. Further, it includes conducting a hearing on a complaint, charge or grievance against a public officer or employee.

If the question were merely whether employees or public officers had the right to notice of an adverse personnel discussion/action concerning them, our task would be much simpler. But where, as here, there are a whole host of personnel actions, we cannot answer this question in a vacuum but must examine the ramifications a positive response to the question may cause.

Although the Requester wants to know whether a member of City Council is entitled to advance notice that his or her conduct will be featured on the agenda for an upcoming meeting, our answer has a wider impact. An affirmative response has the potential to impose unduly burdensome or sometimes impracticable requirements on a governing body when called upon to handle a wide range of issues relating to potential, present and former employees. For example, it could adversely impact or otherwise compromise a preliminary investigation of an employee suspected of wrongdoing.

Consider a disciplinary scenario wherein an employer receives an anonymous complaint that an employee is embezzling. The administrator begins a preliminary investigation but before its conclusion, seeks the governing body's approval to secure the services of a professional to assist in the completion of the investigation. Is the alleged wrongdoer entitled to notice at this preliminary stage?

Then there is the issue of prospective employees, also mentioned in the statute. Did the Legislature intend that an agency would have to inform all applicants for a position that the governing body is about to make a hiring decision, and that their qualifications, possible salary and benefits will be discussed? Did the Legislature intend that all candidates for promotion have the right to be notified that a governing body will be

considering them? Maybe yes, since these are public officers or employees paid with public funds; maybe not, if doing so creates an undue burden on HR staff when hundreds of individuals have applied.

Based upon the plain language in the Open Meetings Act, this Committee finds that there is no right to specific notice. The governing body is required, however, to list the item 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. Generic descriptions are insufficient to satisfy this requirement. The subject of the discussion may realize as a result of the agenda item (or by some other way) that she or he is the one, but otherwise is not entitled to actual advance notice.

There will be times when a properly worded agenda will put the target on notice, e.g. consider disciplinary action against Town employee where the Town employs only one person. By contrast “consider sexual harassment complaint against a teacher”, in a county that employs hundreds of teachers, doesn’t clue in the wrongdoer any more than her/his guilty conscience would. Here, were the Council to employ our suggested language in its agenda and state “personnel matters involving a member of Council” or “concerns regarding the conduct of a member of Council”, likely the Requester would know which Council member it was. If not, the Requester, or indeed any other member of Council, could inform the presiding officer that, in the event that she or he is the subject of the discussion, that discussion should take place in the open, not closed, session.

In this case, it does not appear that the Legislature intended to require governing bodies to provide notice to individuals of potential personnel discussions. In the absence of such expressed intent, the Open Meetings Committee declines to read an implicit right into the statute even though it may seem like a logical extension of the Act’s requirements. If the Legislature **did** intend the Open Meetings Act to compel notice to individuals that a personnel matter involving them may be discussed during a meeting of a governing body, then the Open Meetings Committee believes that the best means of clarifying this intent is through the Legislative process.¹

On the other hand, to extend this requirement to all personnel matters, such as investigations or hiring situations, would appear unworkable.

¹ The Open Meetings Committee recognizes the importance of transparency. In this case the Open Meetings Committee takes no position as to whether as a matter of public policy the subjects of personnel discussions are entitled to notice. The Committee stands by its earlier observation, however, that before ultimately terminating an employee or taking final disciplinary action, such a right appears to be implicit in the statute since affected individuals would otherwise be unable to avail themselves of their right to choose to have the discussion in an open meeting.

Thus, we conclude that the Open Meetings Act as it is presently written does **not** compel notice to individuals that a personnel matter involving them may be discussed during a meeting of a governing body. Governing bodies are encouraged to consult with their attorneys to ensure that other rights, such as constitutional due process rights, if any, of affected employees, are protected when those bodies discuss personnel matters. Similarly, they are encouraged to provide notice in those situations where the essential functions of the governing body are not compromised by such notice.

CONCLUSION

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. Further, this opinion is prospective only.

/s/ Drema Radford, Chair


Drema Radford, Chairperson