

OPEN MEETINGS ADVISORY OPINION NO. 2009-06

Issued On November 5, 2009 By The WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The Executive Director of the West Virginia School Board Association asks whether a consultant retained by a County Board of Education to assist in conducting a search for a new superintendent may meet one-on-one with the elected members of the County Board for purposes of establishing criteria to assist the County Board in objectively defining which skills and characters traits it considers important in a new superintendent?

FACTS RELIED UPON BY THE COMMITTEE

At times, the West Virginia School Board Association is retained by county boards of education to assist them in conducting searches for a new superintendent. As part of this process, the School Board Association assists the County Board Members in attempting to articulate, in an objective manner, what skills and character traits the County Board is looking for in a superintendent. These criteria are developed through a checklist which the school board members complete, and by information obtained from interviews with the County Board Members. (Criteria checklist attached hereto and incorporated herein by reference).

An employee of the School Board Association, hereinafter referred to as the "consultant", oversees this process. As part of the interview process with the County School Board Members, information is gleaned by the consultant in regard to what specific challenges a county is facing and what characteristics in a new superintendent would best serve the goals of the County Board in addressing these challenges.

The Requester states that if one-on-one meetings are permitted under the Open Meetings Act, the consultant would not communicate to each County Board Member what the other Members have said. Instead, the Requester states that the consultant will take the information obtained and compile it into one document. The County School Board does not vote to approve this document. Instead, it is provided to the County School Board Members as a reference for them during the interview process to assist them in formulating interview questions and for purposes of evaluating the strengths of candidates. This document is also made available to the public.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W.Va. Code § 6-9A-2 reads, in relevant part:

(1) "Decision" means any determination, action, vote or final disposition of a motion, proposal, resolution, order, ordinance or measure on which a vote of the governing body is required at any meeting at which a quorum is present.

...

(3) "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...

(4) "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...

(6) "Public agency" means any 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. The term "public agency" does not include courts created by article eight of the West Virginia constitution or the system of family law masters created by article four, chapter forty-eight-a of this code.

(7) "Quorum" means the gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio.

ADVISORY OPINION

A "meeting" is defined, in relevant part, as the convening of a governing body for purposes of making a decision or deliberating towards a decision. When a quorum of the members of a governing body or subcommittee communicates for purposes of decision-making or deliberation, then these communications must occur during the course of a public meeting which is noticed and conducted in accordance with the Open Meetings Act.

The Open Meetings Committee must determine whether the one-on-one meetings constitute a "meeting" as defined by the Act. If so, then the one-on-one interviews must occur during a properly noticed meeting. If not, then the one-on-one meetings may occur in a private setting at a date and time convenient to the consultant and individual board members.

The Open Meetings Committee finds that under the specific facts presented, the one-on-one interviews are not “meetings” which are subject to the Open Meetings Act. In reaching this conclusion, the Open Meetings Committee relies upon the following factors: (1) The consultant is not a member of the governing body; (2) During the course of the meetings, the consultant will not communicate to each county board member what their fellow board members have related for purposes of reaching a consensus. Instead, the main objective of the meeting is to gather information, not to take official action through prohibited serial communications;¹ (3) The information gathered through this process is compiled into a report which is made available to the public; and, (4) The sole responsibility of compiling this report has been delegated to the consultant. The governing body, *i.e.* the County Board of Education, does not vote to accept or reject the report. Instead, it uses the report as a resource during the selection process.

In its declaration of policy for the Open Meeting Act, it is stated: “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.” W.Va. Code § 6-9A-1. In regard to the use of a consultant by any County Board of Education under the specific circumstances described, the Committee finds that the one-on-one meetings are permissible.

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

¹ In O.M.A.O. 2007-01, this Committee ruled that members of a governing body could not communicate with each other through a series of emails to avoid convening and conducting a public meeting. The situation presented is different as the intended purpose of the interviews is not to reach a consensus through serial communications which are communicated through a third party, *i.e.* the consultant, but to provide information to the consultant to allow him to complete his work.