

Advisory Opinion 2021-22

Issued on November 4, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **City Council member** asks whether other Council members or the City Attorney may prohibit him from recording executive sessions.

Facts Relied Upon by the Commission

Governing bodies, including city councils, may enter into an executive session which is closed to the public during a public meeting for any of the reasons authorized by the West Virginia Open Governmental Proceedings Act. W. Va. Code § 6-9A-4. The Requester asks whether it violates the West Virginia Ethics Act for other City Officials or the City Attorney to direct him to cease recording executive sessions through an audio recording device.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b)(1) states:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. . . .

W. Va. Code § 6B-2-5(e) states:

No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

Advisory Opinion

The Ethics Act contains specific rules which public officials and employees must follow.¹ W. Va. Code §§ 6B-1-1 through 6B-3-11. In adopting the Ethics Act, the Legislature

¹ The Act also applies to public servant volunteers. W. Va. Code §§ 6B-1-3(j) and (k).

found that “[t]he decisions and actions of public officials and public employees must be made from undue influence, favoritism or threat, at every level of government.”² To meet its objectives, the Act prohibits public officials and employees from engaging in certain activities such as accepting unlawful gifts, using their office for private gain, and disclosing confidential information. But, as the Commission explained in Advisory Opinion 2013-02, “[t]he Ethics Act is not a general code of conduct which prohibits public servants and public officials from engaging in any and all conduct which could be viewed as unethical. Instead, it establishes certain standards of conduct for public servants and public officials to follow”

In reviewing the restrictions in the Ethics Act, the Ethics Commission finds that no provision in the Act expressly bars a public official or public employee from recording an executive session. Similarly, no provision in the Act expressly bars a public agency from adopting a rule or policy which prohibits public officials or public employees from recording executive sessions.

The Ethics Commission finds, therefore, that the Ethics Act does not prohibit a city council from barring a public official or public employee from recording executive sessions. If a city council allows its members to record its executive session, the Requester and other City Officials may not, however, improperly disclose confidential information contained in the recordings or use confidential information to further their own interests or the interests of other persons.³ This Advisory Opinion does not address the applicability of the West Virginia Freedom of Information Act.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules.

In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.

² W. Va. Code § 6B-1-2(a)

³ Neither the Ethics Commission nor the Open Governmental Meetings Committee has issued a ruling on whether *all comments* [emphasis added] made in an executive session are confidential for purposes of the Ethics Act or the Open Governmental Proceedings Act. Nevertheless, most -- if not all -- information learned in an executive session is legally confidential, and may not be improperly disclosed or used pursuant to W. Va. Code § 6B-2-5(e). The Ethics Act does not define what information is considered confidential for purposes of W. Va. Code § 6B-2-5(e). Other statutes, rules, laws, or policies that render information confidential may render the same information confidential under W. Va. Code § 6B-2-5(e).

/s/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission