THE WEST VIRGINIA OPEN GOVERNMENTAL PROCEEDINGS ACT

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON, WEST VIRGINIA 25305

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A SUMMARY OF THE LAW ON OPEN GOVERNMENTAL PROCEEDINGS (THE OPEN MEETINGS OR "SUNSHINE" ACT)

INTENT:

The State statute on Open Governmental Proceedings, sometimes called the Open Meetings or "Sunshine" Act, was enacted to ensure that the proceedings of all public agencies are conducted in an open and public manner, so that the people may be informed about the actions of their governments and retain control over them.

SCOPE:

The Act applies to all State, county and municipal administrative or legislative units of government, including their departments, agencies, committees, boards and commissions. It does not apply to the courts. Meetings of the governing bodies of all public agencies must be open to the public, unless a specific statutory exception applies. Each governing body may adopt reasonable rules for attendance of the public at its meetings, but no one may be required to register to speak more than fifteen minutes before a scheduled meeting.

Every public agency is required to give advance notice to the public and news media of the date, time, place and agenda of all regular meetings and the date, time, place and purpose of all special meetings, except in the case of an emergency requiring immediate action. Public agencies must keep written minutes of all meetings, and must make them available to the public within a reasonable time after the meeting. These minutes must include all measures proposed and the results of all votes taken. Voting by secret or written ballot is prohibited.

Any radio or television station is entitled to broadcast all or any part of an open meeting. The public agency may reasonably control the placement and use of cameras and other equipment so as not to unduly interfere with the meeting.

EXCEPTIONS:

While the scope of the Act is expansive, it does provide specific exceptions for which a governing body of a public agency may hold an executive session, which is a meeting that is not open to the public. The exceptions are set forth in W. Va. Code § 6-9A-4 (1999), at pages 7 and 8 herein.

A governing body of a public agency may hold an executive session (closed meeting) during a regular, special or emergency meeting, only after the presiding officer publicly identifies the specific exception under the Act for having a closed meeting, and a majority of the members present votes to hold an executive session. No decisions can be made during an executive session, but minutes may be taken.

ENFORCEMENT:

Any citizen may bring a legal action in the circuit court of the county where the public agency regularly meets to enforce the provisions of the Act. The court may order the public agency to comply with the Act, and may enjoin or set aside any action taken or decision made in violation of the Act if a petition is filed within one hundred twenty (120) days after the action was taken or the decision was made. If a governing body of a public agency is found to be in violation of the Act, the public agency may be ordered to pay the complaining person's attorney fees and expenses incurred in successfully litigating the issue.

PENALTIES:

Any member of a public or governmental body who willfully and knowingly violates the Act is guilty of a misdemeanor, and upon conviction may be fined up to $500.00. A second or subsequent conviction for violating the Act can result in a fine of between $100.00 and $1,000.00.

OPINIONS:

The Open Governmental Meetings Committee of the West Virginia Ethics Commission may give advisory opinions interpreting the Open Meetings Act to any governing body or member thereof who is subject to the Act. Such opinions are binding on the parties requesting them, and provide an absolute defense to any civil suit or criminal prosecution for any action taken in good faith reliance on the opinion, unless the Committee was willfully and intentionally misinformed as to the facts by the requesting party. The opinions also provide an absolute defense to others who rely upon them in taking actions under substantially the same circumstances.

PUBLIC NOTICE OF MEETINGS IN THE STATE REGISTER:

West Virginia Code § 6-9A-3 (1999) requires that each governing body of the State executive branch file a notice of any meeting with the Secretary of State for publication in the West Virginia Register.

Each notice shall state the time, place and purpose of the meeting, and must be filed in a manner to allow each notice to appear in the State Register at least five (5) days prior to the date of the meeting, except in cases of an emergency. (Generally the Register is published on Friday, making the fifth day fall on Wednesday.)

When an agency has not met the requirements of the Open Governmental Proceedings Act, asterisks appear beside the meeting notice for that agency in the Register, and a footnote at the bottom of the page indicates that the notice does not comply with the Act.

Pursuant to W. Va. Code § 29A-2-4 (1982), every paper filed in the State Register is a public record provable and admissible as evidence in a court of law. The Secretary of State's Office is required by W. Va. Code § 29A-2-7 (1997) to "offer to the public convenient and efficient access to copies of the state register or parts thereof desired by the citizens."

INFORMATION:

The Attorney General is required to compile a summary of the statutory and case law interpreting the Open Meetings Act for the purpose of informing all public officials of the requirements of the Act. This material will be provided to the Secretary of State, county clerks, municipal clerks and recorders for distribution to all elected and appointed officials within their jurisdictions.

STATUTE

OPEN GOVERNMENTAL PROCEEDINGS.

§ 6-9A-1. Declaration of legislative policy.

The Legislature hereby finds and declares that public agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions. The Legislature hereby further finds and declares that the citizens of this state do not yield their sovereignty to the governmental agencies that serve them. The people in delegating authority do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government created by them.

Open government allows the public to educate itself about government decision-making through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government.

Public access to information promotes attendance at meetings, improves planning of meetings, and encourages more thorough preparation and complete discussion of issues by participating officials. The government also benefits from openness because better preparation and public input allow government agencies to gauge public preferences accurately and thereby tailor their actions and policies more closely to public needs. Public confidence and understanding ease potential resistance to government programs.

Accordingly, the benefits of openness inure to both the public affected by governmental decision-making and the decision makers themselves. 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. 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. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decision-making. (1975, c. 177; 1999, c. 208.)

§ 6-9A-2. Definitions.

As used in this article:

(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.

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

(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; for the purposes of this article, a governing body of the Legislature is any standing, select or special committee, except the commission on special investigations, as determined by the rules of the respective houses of the Legislature.

(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. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

(A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding;

(B) Any on-site inspection of any project or program;

(C) Any political party caucus;

(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.

(5) "Official action" means action which is taken by virtue of power granted by law, ordinance, policy, rule, or by virtue of the office held.

(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 [§§ 48A-4-1 *et seq.*], 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. (1975, c. 177; 1978, c. 85; 1993, c. 29; 1999, c. 208.)

§ 6-9A-3. Proceedings to be open; public notice of meetings.

Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four [§ 6-9A-4] of this article, all meetings of any governing body shall be open to the public. Any governing body may make and enforce reasonable rules for attendance and presentation at any meeting where there is not room enough for all members of the public who wish to attend. This article does not prohibit the removal from a meeting of any member of the public who is disrupting the meeting to the extent that orderly conduct of the meeting is compromised: *Provided,* That persons who desire to address the governing body may not be required to register to address the body more than fifteen minutes prior to time the scheduled meeting is to commence.

Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media, except in the event of an emergency requiring immediate official action.

Each governing body of the executive branch of the state shall file a notice of any meeting with the secretary of state for publication in the state register. Each notice shall state the date, time, place and purpose of the meeting. Each notice shall be filed in a manner to allow each notice to appear in the state register at least five days prior to the date of the meeting.

In the event of an emergency requiring immediate official action, any governing body of the executive branch of the state may file an emergency meeting notice at any time prior to the meeting. The emergency meeting notice shall state the date, time, place and purpose of the meeting and the facts and circumstances of the emergency.

Upon petition by any adversely affected party any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with the requirements of this section. (1975, c. 177; 1978, c. 85; 1987, c. 98; 1999, c. 208.)

§ 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. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.

(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:

(1) To consider acts of war, threatened attack from a foreign power, civil insurrection or riot;

(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. General personnel policy issues may not be discussed or considered in a closed meeting. Final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting;

(3) To decide upon disciplining, suspension or expulsion of any student in any public school or public college or university, unless the student requests an open meeting;

(4) To issue, effect, deny, suspend or revoke a license, certificate or registration under the laws of this state or any political subdivision, unless the person seeking the license, certificate or registration or whose license, certificate or registration was denied, suspended or revoked requests an open meeting;

(5) To consider the physical or mental health of any person, unless the person requests an open meeting;

(6) To discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy such as any records, data, reports, recommendations

or other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation, insurance and similar program or institution operated by a public agency pertaining to any specific individual admitted to or served by the institution or program, the individual's personal and family circumstances;

(7) To plan or consider an official investigation or matter relating to crime prevention or law enforcement;

(8) To develop security personnel or devices;

(9) To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision: *Provided,* That information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed. *Provided,* However, that information not subject to release pursuant to the West Virginia freedom of information act does not become subject to disclosure as a result of executive session;

(10) To avoid the premature disclosure of an honorary degree, scholarship, prize or similar award;

(11) Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is a participant. If the public agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded;

(12) To discuss any matter which, by express provision of federal law or state statute or rule of court is rendered confidential, or which is not considered a public record within the meaning of the freedom of information act as set forth in article one [§§ 29B-1-1 *et seq.*], chapter twenty-nine-b of this code. (1975, c. 177; 1978, c. 85; 1999, c. 208.)

§ 6-9A-5. Minutes.

Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four [§ 6-9A-4] of this article, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

(1) The date, time and place of the meeting;

(2) The name of each member of the governing body present and absent;

(3) All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and

(4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name. (1975, c. 177; 1978, c. 85; 1999, c. 208.)

§ 6-9A-6. Enforcement by injunctions; actions in violation of article voidable; voidability of bond issues.

The circuit court in the county where the public agency regularly meets has jurisdiction to enforce this article upon civil action commenced by any citizen of this state within one hundred twenty days after the action complained of was taken or the decision complained of was made. Where the action seeks injunctive relief, no bond may be required unless the petition appears to be without merit or made with the sole intent of harassing or delaying or avoiding return by the governing body.

The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation [of] this article. An injunction may also order that subsequent actions be taken or decisions be made in conformity with the provisions of this article: *Provided*, That no bond issue that has been passed or approved by any governing body in this state may be annulled under this section if notice of the meeting at which the bond issue was finally considered was given at least ten days prior to the meeting by a Class I legal advertisement published in accordance with the provisions of article three [§§ 59-3-1 *et seq.*], chapter fifty-nine of this code in a qualified newspaper having a general circulation in the geographic area represented by that governing body.

In addition to or in conjunction with any other acts or omissions which may be determined to be in violation of this act, it is a violation of this Act for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action.

Any order which compels compliance or enjoins noncompliance with the provisions of this article, or which annuls a decision made in violation of this article shall include findings of fact and conclusions of law and shall be recorded in the minutes of the governing body. (1975, c. 177; 1978, c. 85; 1979, c. 85; 1993, c. 29; 1999, c. 208.)

§ 6-9A-7. Violation of article; criminal penalties; attorney fees and expenses in civil actions.

(a) Any person who is a member of a public or governmental body required to conduct open meetings in compliance with the provisions of this article and who willfully and knowingly violates the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars: *Provided,* That a person who is convicted of a second or subsequent offense under this subsection is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars.

(b) A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article may be liable to a prevailing party for fees and other expenses incurred by that party in connection with litigating the issue of whether the governing body acted in violation of this article, unless the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust.

(c) Where the court, upon denying the relief sought by the complaining person in the action, finds that the action was frivolous or commenced with the primary intent of harassing the governing body or any member thereof or, in the absence of good faith, of delaying any meetings or decisions of the governing body, the court may require the complaining person to pay the governing body's necessary attorney fees and expenses. (1978, c. 85; 1999, c. 208.)

§ 6-9A-8. Acting by reference; written ballots.

(a) Except as otherwise expressly provided by law, the members of a public agency may not deliberate, vote, or otherwise take official action upon any matter by reference to a letter, number or other designation or other secret device or method, which may render it difficult for persons attending a meeting of the public agency to understand what is being deliberated, voted or acted upon. However, this subsection does not prohibit a public agency from deliberating, voting or otherwise taking action by reference to an agenda, if copies of the agenda, sufficiently worded to enable the public to understand what is being deliberated, voted or acted upon, are available for public inspection at the meeting.

(b) A public agency may not vote by secret or written ballot. (1999, c. 208.)

§ 6-9A-9. Broadcasting or recording meetings.

(a) Except as otherwise provided in this section, any radio or television station is entitled to broadcast all or any part of a meeting required to be open.

(b) A public agency may regulate the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting, so as to prevent undue interference with the meeting. The public agency shall allow the equipment to be placed within the meeting room in such a way as to permit its intended use, and the ordinary use of the equipment may not be declared to constitute undue interference: *Provided,* That if the public agency, in good faith, determines that the size of the meeting room is such that all the members of the public present and the equipment and personnel necessary for broadcasting, photographing, filming and tape-recording the meeting cannot be accommodated in the meeting room without unduly interfering with the meeting and an adequate alternative meeting room is not readily available, then the public agency, acting in good faith and consistent with the purposes of this article, may require the pooling of the equipment and the personnel operating it. (1999, c. 208.)

§ 6-9A-10. Open governmental meetings committee.

The West Virginia ethics commission, pursuant to subsection (j), section one [§ 6B-2-1(j)], article two, chapter six-b of this code, shall appoint from the membership of the commission a subcommittee of three persons designated as the West Virginia ethics commission committee on open governmental meetings. The chairman shall designate one of the persons to chair the committee. In addition to the three members of the committee, two additional members of the commission shall be designated to serve as alternate members of the committee.

The chairman of the committee or the executive director shall call meetings of the committee to act on requests for advisory opinions interpreting the West Virginia open government meetings act. Advisory opinions shall be issued in a timely manner, not to exceed thirty days. (1999, c. 208.)

§ 6-9A-11. Request for advisory opinion; maintaining confidentiality.

(a) Any governing body or member thereof subject to the provisions of this article may seek advice and information from the executive director of the West Virginia Ethics Commission or request in writing an advisory opinion from the West Virginia Ethics Commission Committee on Open Governmental Meetings as to whether an action or proposed action violates the provisions of this article. The executive director may render oral advice and information upon request. The committee shall respond in writing and in an expeditious manner to a request for an advisory opinion. The opinion is binding on the parties requesting the opinion.

(b) Any governing body or member thereof that seeks an advisory opinion and acts in good faith reliance on the opinion has an absolute defense to any civil suit or criminal prosecution for any action taken in good faith reliance on the opinion unless the committee was willfully and intentionally misinformed as to the facts by the body or its representative.

(c) A governing body or member thereof that acts in good faith reliance on a written advisory opinion sought by another person or governing body has an absolute defense to any civil suit or criminal prosecution for any action taken based upon a written opinion of the West Virginia ethics commission committee, as long as underlying facts and circumstances surrounding the action were the same or substantially the same as those being addressed by the written opinion.

(d) The committee and commission may take appropriate action to protect from disclosure information which is properly shielded by an exception provided in section four [§ 6-9A-4] of this article. (1999, c. 208; 2006 c. 98.)

§ 6-9A-12. Duty of attorney general, secretary of state, clerks of the county commissions and city clerks or recorders.

It is the duty of the attorney general to compile the statutory and case law pertaining to this article and to prepare appropriate summaries and interpretations for the purpose of informing all public officials subject to this article of the requirements of this article. It is the duty of the secretary of state, the clerks of the county commissions, joint clerks of the county commissions and circuit courts, if any, and the city clerks or recorders of the municipalities of the state to provide a copy of the material compiled by the attorney general to all elected public officials within their respective jurisdictions. The clerks or recorders will make the material available to appointed public officials. Likewise, it is their respective duties to provide a copy or summary to any newly appointed or elected person within thirty days of the elected or appointed official taking the oath of office or an appointed person's start of term. (1999, c. 208.)

INTERPRETATIONS OF THE ACT

When posed with an Open Governmental Proceedings Act (Open Meetings Act) question, three initial inquiries must be made to determine if a governmental proceeding is required to be open under the Act. These questions are:

1. Is the entity a governing body of a **public agency** as defined by the Open Meetings Act?

2. Is the governing body's gathering a **meeting** as defined by the Open Meetings Act?

3. Is there a specific **statutory exception** to the Open Meetings Act?

The answers to these questions may be found in the Act or in the statute of the public agency involved. If a meeting of the governing body of a public agency is involved, and it is not covered by a specific statutory exception to the provisions of the Open Meetings Act, then the meeting must be open to the public.

The following West Virginia Supreme Court of Appeals decisions and Attorney General's Opinions have defined more specifically the governmental proceedings which must be open to the public under the Open Meetings Act. Although an Opinion of the Attorney General does not have the force of law, it is the official opinion of the State's chief legal officer as to how the West Virginia Supreme Court would rule should the same issue be before the Court.

PUBLIC AGENCY:

The definition of a "public agency" [formerly "public *body*"] in the Open Meetings Act includes any administrative or legislative unit of the State or of any county, board of education or municipality. It does not include the judiciary. W. Va. Code § 6-9A-2(6) (1999). "Governing body" means two or more members of any public agency having authority to make decisions or recommendations on policy or administration. W. Va. Code § 6-9A-2(3) (1999).

The members of a **board of education** constitute a "governing body" subject to the Sunshine Law's requirements. *McComas v. Board of Education of Fayette County*, 197 W. Va. 188, 194, 475 S.E.2d 280, 286 (1996).

In *Appalachian Power Company v. Public Service Commission*, 162 W. Va. 839, 253 S.E.2d 377 (1979), the parties stipulated that the West Virginia **Public Service Commission** is a "public body" [now "public agency"] as defined by the Act, and that any two of the three commissioners constituted its "governing body." The Supreme Court of Appeals did not disagree.

The Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1 *et seq.*, applies only to governmental entities and to persons holding public positions. It does not apply to meetings of **political party executive committees**. 58 Op. Att'y Gen. 28 (October 10, 1978).

A **county commission**, when acting as a **board of canvassers** for elections pursuant to W. Va. Code § 3-6-9, is both a "governing body" and a "public body" [now "public agency"] within the meaning of the Open Meetings Act. 59 Op. Att'y Gen. 34 (October 20, 1980).

The **West Virginia Human Rights Commission** is a "public body" [now "public agency"] within the meaning of the Open Meetings Act, and the nine members thereof constitute its "governing body" under the Act. Any five members of the Commission constitute a quorum for the transaction of business, and minutes of its meetings shall be kept by its secretary pursuant to W. Va. Code § 5-11-6. Op. Att'y Gen. (July 17, 1986).

Some statutes specifically apply the provisions of the Open Meetings Act to proceedings which otherwise might not be considered to fall within its coverage. For example, W. Va. Code § 18B-12-3(3) (1989) provides that meetings of the directors of nonstock, nonprofit higher education research corporations are subject to the provisions of W. Va. Code § 6-9A-3. In addition, W. Va. Code § 16-5G-3 (1999) requires that meetings of the governing bodies of all hospitals owned or operated by nonprofit corporations, nonprofit associations or local governmental units be open to the public, in much the same manner as required of public agencies under the Open Meetings Act. A list of these statutes is attached as an Appendix for your reference.

MEETING:

A "meeting" is defined by the Act as "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 official action." It does not include adjudicatory decision-making in quasi-judicial, administrative or court of claims proceedings; on-site inspections of a project or program; political party caucuses; discussions among members of a governing body on issues of public interest in a social, educational, training, informal, ceremonial or similar setting where there is no intention for the discussion to lead to official action; or discussions on logistical and procedural methods to schedule and regulate a meeting. W. Va. Code § 6-9A-2(4) (1999). Unless otherwise provided, a simple majority of the constituent membership of a governing body constitutes a quorum. W. Va. Code § 6-9A-2(7) (1999).

In *Appalachian Power Company v. Public Service Commission*, 162 W. Va. 839, 253 S.E.2d 377 (1979), the Supreme Court construed the definition of the term "meeting" in W. Va. Code § 6-9A-2(4) (1978) 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, and if some statute or rule **requires a quorum** as a prerequisite to convening." 162 W. Va. at 844, 253 S.E.2d at 381. The Court reasoned that the provisions of W. Va. Code § 6-9A-2(4), coupled with the requirement in W. Va. Code § 6-9A-5 (1978) that written minutes be prepared of all actions taken, clearly contemplates that a "meeting" under the Act must have sufficient members of the governing body present to be capable of transacting business.

The Court in *Appalachian Power Company* observed that although the Public Service Commission statutes provide for several types of hearings, there is no quorum requirement for hearings, nor are members of the Commission even required to attend or conduct hearings. The Court found that the term "meeting" was clearly not applicable to Commission hearings conducted by staff alone, and that the Open Meetings Act applies to **Public Service Commission hearings** only when two or more commissioners convene and conduct the hearing. Under the same analysis, the Court held that the Act does not apply to consultations of Public Service Commissioners with staff members, deliberations by commissioners, or the process of individual commissioners making a decision.

The Supreme Court in the *Appalachian Power Company* case also found that **adjudicatory sessions** of the Public Service Commission were excepted from the operation of the Open Meetings Act by the definition of "meeting" in W. Va. Code § 6-9A-2(4), which states that the term does not include "[a]ny meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding[.]" The Court determined that proceedings of the Public Service Commission are quasi-judicial in nature because they have many of the characteristics of a judicial proceeding, including notice, presentation of evidence, the making of a record, examination of witnesses under oath and the exercise of subpoena power, and that any final decision reached as a result of such proceedings is an adjudicatory decision. Therefore, the Court held that the Open Meetings Act does not apply to assemblages of the Public Service Commissioners held for the purposes of discussing their individual decisions, concurring and rendering a final decision or judgment.

In *McComas v. Board of Educ. of Fayette County*, 197 W. Va. 188, 475 S.E.2d 280 (1996), four members of the Fayette County Board of Education met privately on a Sunday afternoon at the Board's office with the Superintendent of Fayette County Schools and two associate superintendents to ask questions regarding the proposed closure of Gauley Bridge High School and Falls View Elementary School. The next day, at a public meeting, the Board of Education voted to close both schools following little discussion. Three taxpayers and residents of Fayette County brought suit to block this decision, and the Fayette County Circuit Court voided the vote taken at the public hearing in favor of the school closings and consolidation plan, holding that the Board of Education had violated the Sunshine Law. The West Virginia Supreme Court affirmed this decision, holding, in Syllabus Point 5 of *McComas*: "A **planned meeting among a quorum** of a school board to gather, review or discuss information relevant to an issue before the board must be public, and if it is not, its conduct violates the Open Governmental Proceedings Act, W. Va. Code, 6-9A-3."

The Court in *McComas* noted that the *Appalachian Power Company* case had held that "meetings" under the Open Meetings Act will involve the transaction of business, which includes **deliberating toward a decision** on any matter. The Court held that the Legislature therefore intended the Act to apply to "those assemblies where discussions leading up to a decision take place," and "also encompasses at least some meetings between board members and staff." 197 W. Va. at 195, 475 S.E.2d at 287. Individual meetings or even social gatherings can result in a violation of the Act, depending on their content and the intentions of the parties. *See* 197 W. Va. at 199, 475 S.E.2d at 291.

However, not every gathering between or among members of a governing body of a public agency will constitute a "meeting" in violation of the Open Meetings Law. The Supreme Court in Syllabus Point 4 of *McComas* also held: "In drawing the line between those conversations outside the requirements of the Open Governmental Proceedings Act, W. Va. Code, 6-9A-1, *et seq.*, and those meetings that are within it, a common sense approach is required; one that focuses on the question of whether allowing a governing body to exclude the public from a particular meeting would undermine the Act's fundamental purposes." In answering this question, the criteria to be considered include:

- The content of the discussion;
- The number of members of the public body participating;
- The percentage of the public body that those in attendance represent;
- The significance of the identity of the absent members;
- The intentions of the members;
- The nature and degree of planning involved;
- The duration of the meeting and of the substantive discussion;
- The setting; and
- The possible effects on decision-making of holding the meeting in private.

The above list of criteria is not exhaustive, and courts will carefully examine the facts of each case in determining whether the public has been improperly excluded from the decision-making process. The Supreme Court in *McComas* adopted an expansive interpretation of the Act to achieve its goals, and cautioned against attempts to avoid its requirements by the use of evasive techniques and devices. *See* 197 W. Va. at 197-98, 475 S.E.2d at 289-90. In so doing, the Court rejected the contention that a gathering must have the formal trappings of a regular meeting (such as formal procedures and the keeping of minutes) for it to be a "meeting" within the law. 197 W. Va. at 198, 475 S.E.2d at 290.

The clear import of the *McComas* decision is that whenever a majority of the members of a public body gather to discuss any matter that they know they will be voting on later, the meeting must be open to the public.

The 1999 amendments to the Open Meetings Act provided an exception from the holding of *McComas* for **unintentional violations** which may occur in social, educational or informal settings. *See* W. Va. Code § 6-9A-2(4)(D) (1999) (excluding from the definition of "meeting" in the Act "[g]eneral 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 . . ."). In *Foundation for Independent Living v. Cabell-Huntington Board of Health*, 214 W. Va. 818, 591 S.E.2d 744 (2003), the Supreme Court held that an **educational meeting** between the board of health and two members of the Tobacco Prevention Program to discuss a proposed indoor smoking regulation, which did not involve deliberation toward a decision or a vote, was not a "meeting" as defined by the Act, and therefore no violation had occurred.

However, West Virginia Code § 6-9A-6 (1999) also provides that "it is a violation of this Act for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action." Clearly, a public agency may not intentionally use this exception to circumvent the requirements of the Act.

In *Common Cause of West Virginia v. Tomblin*, 186 W. Va. 537, 413 S.E.2d 358 (1991), a complaint before the West Virginia Supreme Court of Appeals alleged that the **Conferees Committee on the Budget** caused a "Budget Digest" to be prepared and distributed pursuant to W. Va. Code § 4-1-18 (1969), which differed significantly from the actual budget bill as passed by the Legislature. The petitioners also asserted that no formal meeting was held by members of the Committee and that if such a meeting was held, it did not meet the requirements of the Open Meetings Act, W. Va. Code §§ 6-9A-1 *et seq.* Although it did not address the applicability of the Open Meetings Act, the Supreme Court held that in order to comply with W. Va. Code § 4-1-18, the final **legislative Budget Digest** must be approved by a majority vote of a quorum of the entire Budget Conferees Committee, at a regular meeting scheduled in the normal course of business and open to the public.

When a **county commission**, sitting as a **board of canvassers** for elections pursuant to W. Va. Code § 3-6-9, convenes for the purpose of conducting a canvass or recount, the Open Meetings Act applies, and the meeting must be open. Further, W. Va. Code § 3-6-9 requires the board of canvassers to keep a complete record of its proceedings, and all orders made must be entered upon the record. As to any questions of law or fact which may be "quasi-judicial" in nature, a board of canvassers may privately consult with its legal advisers, and may privately deliberate and discuss prospective **"adjudicatory" decisions** on such questions. However, such decisions must be

announced and entered while the board is convened in open session. 59 Op. Att'y Gen. 34 (October 20, 1980).

Decisions or orders reached as a result of adjudicatory assemblages of the **West Virginia Human Rights Commission** pursuant to the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 *et seq.*, should be entered on the record of a convened open meeting and recorded as minutes in the manner set forth in W. Va. Code § 6-9A-5, thereafter subject to public review and inspection. The Human Rights Commission may privately confer with its legal advisors and Commission staff members and may privately deliberate and discuss among its members prospective **adjudicatory action** on any question of law or fact which may be quasi-judicial in nature, as these deliberations do not fall within the ambit of the Open Meetings Act. The Commission is under no duty to record said discussions; however, any such recordation characterized as minutes or otherwise, would constitute nonpublic information. The Human Rights Commission may privately convene, provided there is a quorum of five members, in **adjudicatory assemblages** for the purpose of discussing their individual decisions and rendering a final decision. These assemblages are also exempt from the Open Meetings Act, W. Va. Code §§ 6-9A-1 *et seq.* Op. Att'y Gen. (July 17, 1986).

EXCEPTIONS:

Even if a meeting of the governing body of a public agency is involved, the meeting may be closed to the public under limited circumstances pursuant to W. Va. Code § 6-9A-4 (1999). Generally speaking, the exceptions for employment matters, personal or medical information, licensing or disciplinary proceedings require an open meeting if the person being discussed requests one. The remaining exceptions deal with public safety and security, law enforcement, financial transactions, prizes or awards, and matters which are confidential by law or rule of court.

The West Virginia Supreme Court of Appeals has yet to address any of the exceptions to the Open Meetings Act for which an executive session may be held, as set forth in W. Va. Code § 6-9A-4. However, the Court did hold, in *State ex rel. Marshall County Commission v. Carter*, 225 W. Va. 68, 689 S.E.2d 796 (2010), that the audio recording of an executive session held under the exception for personnel matters was not privileged from discovery in an employment discrimination case:

> The provision of the Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1 to 6-9A-12, that recognizes a specific and limited right of governing bodies to meet in an executive session which is closed to the public is not intended to prevent the legitimate discovery in a civil action of matters discussed in an executive session which are not otherwise privileged.

Syl. pt. 4, *State ex rel. Marshall County Commission v. Carter*, *supra*.

Other statutes may also provide a specific exception from the Act for certain proceedings of otherwise "public" bodies. A list of these statutes is attached as an Appendix for your reference. If no specific statutory exception applies, the meeting should be open to the public.

NOTICE:

A **county board of education** may adopt bylaws fixing the time and place of regular meetings of the board [consistent with the provisions of W. Va. Code § 18-5-4 (2001)]. In the absence of other authority, all regular meetings of a county board of education should be held at the office of the board provided by W. Va. Code § 18-4-7. 49 Op. Att'y Gen. 363 (April 5, 1962) (opinion rendered prior to enactment of the Open Governmental Proceedings Act).

The adoption of rules requiring the posting of the time, place and, under some circumstances, the purpose of **county commission** meetings at the courthouse door a reasonable time prior to the meeting will satisfy W. Va. Code §§ 6-9A-1 *et seq.* 57 Op. Att'y Gen. 238 (June 23, 1978).

A **State agency** would be in compliance with the Open Meetings Act, W. Va. Code § 6-9A-3, by promulgating and filing with the Secretary of State's Office a rule requiring the agency to file with the Secretary of State (1) a schedule of the times and places of regular meetings, and (2) notice of the time, place and purpose of each special meeting called by the agency. Such a procedural rule must be promulgated in compliance with the provisions of the State Administrative Procedures Act, W. Va. Code Chapter 29A, and filed in the State Register. Although no specific amount of **advance notice** is required by W. Va. Code § 6-9A-3, such notice should be given as soon as practicable in each case. No advance notice is required in the event of an emergency requiring immediate official action. An agency is free to furnish other kinds of notice in addition to that provided to the Secretary of State. 58 Op. Att'y Gen. 32 (November 20, 1978).

SPECIAL MEETINGS:

A **county board of education** may hold a special meeting at a school building or other place not in the vicinity of the board office, when special circumstances indicate the advisability of same. The time, place and purpose of such meeting should be set forth in the call to board members, and no business other than that included in the call should be transacted at such special meeting. [*See* W. Va. Code § 18-5-4 (2001).] If a board of education considers it to be in the public interest to hold a meeting at some place in the county other than at the board office, any action taken at such a meeting should be ratified at the next board meeting held at the established office of the board. 49 Op. Att'y Gen. 363 (April 5, 1962) (opinion rendered prior to enactment of the Open Governmental Proceedings Act).

ENFORCEMENT:

West Virginia Code § 6-9A-6 (1999) provides that any **civil action** seeking to enjoin or annul a decision made in violation of the Act must be commenced within 120 days "after the action complained of was taken or the decision complained of was made." In *Boggess v. Housing Authority of the City of Charleston*, 273 F. Supp. 2d 729 (S. D. W. Va. 2003), the federal district court granted summary judgment for the defendants on a count alleging violations of the Open Governmental Proceedings Act, because the plaintiff did not file her complaint within 120 days after the actions complained of, and it was thus barred by the **statute of limitations**.

Proof of an intent to violate the Open Meetings Act is not required to establish that the Act was violated. There is **no blanket "good faith" defense** for failing to comply with the statute. *McComas v. Board of Education of Fayette County*, 197 W. Va. 188, 196, 475 S.E.2d 280, 288 (1996). The seriousness of the violation, the intent of the parties involved, and the possible effects are the most important considerations in fashioning an appropriate remedy, which may include setting aside any decision made in violation of the Act. However, a court may uphold a decision if later action by the public body corrects the prior violation.

Although a finding of an intentional violation was required in order to award attorney fees and expenses under W. Va. Code § 6-9A-6 (1993) to persons who sued to enforce the Act, that is no longer required under the 1999 amendments. Under the new Act, the **prevailing party may be awarded fees and expenses** "unless the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust." W. Va. Code § 6-9A-7(b) (1999). Similarly, a person who brings a frivolous complaint under the Act in bad faith with the intent to harass or delay, may be ordered to pay the governing body's attorney fees and expenses.

Non-compliance with the requirements of the Act may also give rise to **criminal penalties**. Among its defenses to a suit seeking to enforce an alleged settlement of a grievance case, a board of education claimed that settlement negotiations with the plaintiff, based upon an offer approved during an executive session of the board, were not binding because the proposed settlement was not included in the agenda for that meeting. Finding no true "meeting of the minds" with respect to the terms of the settlement, the Supreme Court declined to enforce the putative agreement. However, the Court cautioned the board regarding the agenda requirements found in W. Va. Code § 6-9A-3 (1999) and the criminal penalties prescribed by W. Va. Code § 6-9A-7(a) (1999) for open meetings violations. *Sprout v. Board of Education of the County of Harrison*, 215 W. Va. 341, 599 S.E.2d 764 (2004).

The Supreme Court in *Peters v. County Commission of Wood County*, 205 W. Va. 481, 519 S.E.2d 179 (1999), also observed that the Open Governmental Proceedings Act provides both civil and criminal remedies for its violation.

The adoption of a rule for the posting of notices of **county commission** meetings is mandated by the Open Meetings Act (W. Va. Code § 6-9A-3), and, as such, is not subject to attack under the provisions of W. Va. Code § 6-9A-6 (1978). 57 Op. Att'y Gen. 238 (June 23, 1978).

In *Wetzel County Solid Waste Authority v. West Virginia Division of Natural Resources*, 184 W. Va. 482, 401 S.E.2d 227 (1990), the West Virginia Supreme Court of Appeals recognized that a settlement agreement entered into by a public body during an executive session, in violation of W. Va. Code §§ 6-9A-1 *et seq.*, had been held to be void *ab initio* by a circuit court. Noting that the effect of the lower court's order was to enjoin and annul any subsequent actions pursuant to W. Va. Code § 6-9A-6 (1990), the Supreme Court held that the DNR could not rely on the settlement agreement for regulatory purposes.

ATTORNEY-CLIENT CONSULTATIONS:

Although not specifically excepted from the Open Meetings Act, the West Virginia Supreme Court of Appeals has held that privileged communications between a public agency and its attorney are exempted from the open meetings requirement of the Act. In *Peters v. County Commission of Wood County*, 205 W. Va. 481, 519 S.E.2d 179 (1999), the Court said such meetings may be closed to the public only when a majority of the members present of the governing body vote to go into executive session, and the notice and written minutes requirements of the Act are followed. However, a public agency may not close an otherwise open meeting merely because its attorney is present.

Discussions regarding pending litigation without an attorney present do not appear to be proper subjects of closed executive sessions pursuant to the Act. *State ex rel. Affiliated Construction Trades Foundation v. Vieweg*, 205 W. Va. 687, 701 n. 7, 520 S.E.2d 854, 868 n. 7 (1999). Additionally, in *McComas v. Board of Education of Fayette County*, 197 W. Va. 188, 199-200, 475 S.E.2d 280, 291-92 (1996), the Court noted cases from other jurisdictions holding that otherwise privileged conversations between board members and their attorney may violate the Open Meetings law if any decisions or deliberations take place.

FEDERAL LAW:

The federal equivalent of the State Open Meetings Act is the 1976 "Government in the Sunshine Act," codified as 5 U.S.C. § 552b, which applies to federal executive branch agencies. Subsection (b) of the federal act provides that "every portion of every meeting of an agency shall be open to public observation" unless a specific statutory exception applies. The act further prescribes public announcement of all meetings, and requires a certification by the agency's attorney that a specific exemption applies before a meeting may be closed. The West Virginia Supreme Court of Appeals has not yet compared the provisions of the federal act to those of the State Open Meetings Act.

RESOURCES

If you would like additional information about the materials in this booklet, or if you have questions concerning the Act, please feel free to call or write our Office at:

Office of the Attorney General
State Capitol, Room 26-E
1900 Kanawha Boulevard, East
Charleston, WV 25305-0220

Phone (304) 558-2021, Fax (304) 558-0140

This handbook is also online: http://wvago.gov/pdf/OpenMeetingsHandbook2006.pdf

Questions about notices by State executive branch agencies under the Open Meetings Act should be directed to:

Administrative Law Division
Secretary of State's Office
Building 1, Suite 157-K
1900 Kanawha Boulevard, East
Charleston, WV 25305-0771

Phone (304) 558-6000, Fax (304) 558-0900

Executive branch agency meeting notices may also be filed online:
http://www.sos.wv.gov/administrative-law/Pages/online-meeting-notices.aspx.aspx

Requests for advisory opinions should be made to:

West Virginia Ethics Commission
Committee on Open Governmental Meetings
210 Brooks Street
Suite 300, Lee Building
Charleston, WV 25301

Phone (304) 558-0664, Fax (304) 558-2169
Toll-free (866) 558-0664
ethics@wv.gov

For a summary of the open meetings law see:
http://www.ethics.wv.gov/openmeetings/Pages/default.aspx

Ethics Commission opinions on the Open Governmental Proceedings Act may be found at: http://www.ethics.wv.gov/advisoryopinion/Pages/OpenMeetingsOpinions.aspx

APPENDIX

Matters or agencies to which the Open Meetings Act applies, by statute:

W. Va Code § 3-10-3a(h)	--	Judicial Vacancy Advisory Commission
W. Va. Code § 4-13-4(b)	--	West Virginia Sesquicentennial of the American Civil War Commission
W. Va. Code § 5B-2C-2(g)	--	West Virginia Academy of Science and Technology Council
W. Va. Code § 5-22A-4(c)	--	Design-Build Board
W. Va. Code § 5A-11-2(f)	--	Public Land Corporation
W. Va. Code § 8-23-3a(2)	--	Joint and cooperative undertakings by certain hospitals involving public funds
W. Va. Code § 16-5Q-2(a)	--	Catastrophic Illness Commission
W. Va. Code § 16-13A-4(e)	--	Public Service Districts for Water, Sewerage and Gas Services
W. Va. Code § 16-29H-5(d)	--	Health Enhancement and Lifestyle Planning Advisory Council
W. Va. Code § 18B-12-3(3)	--	Higher Education Research Corporations
W. Va. Code § 19-2F-6(c)	--	West Virginia Beef Industry Council
W. Va. Code § 20-1-17(b)	--	Natural Resources Commission
W. Va. Code § 22-11-7b(b)	--	Meetings between DEP and any interested party to make decisions regarding rules governing water quality standards or variances
W. Va. Code § 22C-3-22	--	Solid Waste Management Board
W. Va. Code § 22C-4-7(d)	--	County and Regional Solid Waste Authorities
W. Va. Code § 28-7-1	--	Interstate Commission for Adult Offender Supervision (with certain exceptions)
W.Va Code § 29-1-3(b)(3)	--	Commission on the Arts
W.Va. Code § 29-1-5	--	Archives and History Commission
W. Va. Code § 29-1H-1	--	Appalachian States Low-Level Radioactive Waste Commission (with certain exceptions)
W. Va. Code § 29-21-15(b)	--	Public Defender Corporations
W. Va. Code § 29-27-4(b)	--	National Coal Heritage Area Authority
W. Va. Code § 29A-1-4(a)	--	Administrative Proceedings Act; meetings convened to deliberate or make a decision as to the form and substance of a rule
W. Va. Code § 30-7-18(c)	--	Registered Professional Nurses; Nursing Shortage Study Commission
W. Va. Code § 30-30-3(e)(7)	--	Board of Social Work Examiners
W. Va. Code § 48-17-101 & -107	--	West Virginia Support Enforcement Commission
W. Va Code § 49-8A-1	--	Interstate Commission for Juveniles (with certain exceptions)
W. Va. Code § 49-9-15(d)	--	Missing Children Information Act; Clearinghouse Advisory Council

Statutory <u>exemptions</u> from the provisions of the Act:

W. Va Code § 3-1A-5(e)	--	State Election Commission meetings regarding public campaign financing for individual Supreme Court candidates
W. Va. Code § 3-12-10(i)	--	State Election Commission meetings regarding eligibility for public campaign funds
W. Va. Code § 5-20-5	--	Governor's Commission on Willow Island; executive sessions authorized
W. Va. Code § 18-2E-5(m)(1)	--	Discussion by State Board of Education of schools to be subject to on-site reviews by Office of Education Performance Audits
W. Va. Code § 9-5-15	--	Medicaid program; discussions of trade secrets, drug rebate amounts and manufacturer's pricing
W. Va. Code § 11-10A-10(g)	--	Office of Tax Appeals; hearings
W. Va. Code § 12-7-11	--	Jobs Investment Trust Fund; trade secrets, commercial, financial or personal information
W. Va. Code § 15-5-4(d)	--	West Virginia Disaster Recovery Board; meetings held by telephone conference upon occurrence of a disaster requiring immediate action
W. Va. Code § 18B-12A-4(e)	--	Higher Education; Centers for Economic Development and Technology Advancement
W. Va. Code § 23-1-1b(E)	--	Workers' Compensation; fraud and abuse unit
W. Va. Code § 23-2C-3(e)	--	Employers' Mutual Insurance Company
W. Va. Code § 24-1-7	--	Public Service Commission; deliberations
W. Va. Code § 29-12-5	--	Board of Risk and Insurance Management; financial or personal information of an insured
W. Va. Code § 29-12B-5(a)	--	Medical Malpractice Advisory Panel; financial or personal information of an insured
W. Va. Code § 29A-1-4(b) & (c)	--	Administrative Procedures Act; discussions of proposed rules when neither a quorum nor the convening of governing members is required
W. Va. Code § 31-15-22	--	West Virginia Economic Development Authority; trade secrets, commercial or financial information
W. Va. Code § 31-18-27	--	West Virginia Housing Development Fund; trade secrets, commercial, financial or personal information
W. Va. Code § 31-18D-10	--	West Virginia Affordable Housing Trust Fund; personal or financial information
W. Va. Code § 32-4-407(b)(5)	--	West Virginia Securities Commission; civil and criminal investigations
W. Va. Code § 33-41-8(c)(10)	--	Insurance Fraud Unit
W. Va. Code § 33-20F-4(d)	--	Physicians' Mutual Insurance Company