

West Virginia's Open Governmental Proceedings Act

CCAWV Annual Meeting
Canaan Valley Resort & Conference Center
July 26, 2021

Howard Seufer
hseufer@bowlesrice.com



1

Open Governmental Proceedings Act

West Virginia Code § 6-9A-1 through 12



2

The "Sunshine Law"



3

History

- Enacted in 1975
- Amended in 1978, 1979, 1987, 1993, 1999, 2006, 2013, 2018



4

The 4 Pillars of the Legislative Intent

W. Va. Code 6-9A-1

- 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
- Openness fosters preparation and public input which allow government agencies to more closely tailor actions and policies to public needs
- Informed people retain control over the instruments of government
- Openness, public access, and a desire to improve government operations do not require nor permit every meeting to be a public meeting



5

Not Covered: Gatherings That Are Not Meetings

W. Va. Code 6-9A-2(4)(A) through (E)

- Making adjudicatory decisions
- On site inspections
- Political party caucuses
- General discussions with no intent to lead to action
- Discussions of meeting logistics and procedures



6

Also Not Covered

W. Va. Code 6-9A-3

- Open/closed meetings expressly and specifically provided by other provisions of law



7

The Act Does Cover:

- Meeting notice: When, where, how
- Meeting conduct: Speakers, good order, voting, media
- Meeting minutes: Contents and access
- Executive sessions: Grounds and procedure
- Violations: Civil and criminal penalties and consequences
- Education and interpretation



8

The Meaning of Meeting

W. Va. Code 6-9A-2(4)

- The convening of a governing body
- Of a public agency
- For which a quorum is required
- To make a decision or deliberate toward a decision on any matter which results in official action
- Telephone meetings?
 - Special requirements must be met



9

The Key Question: Is it a Meeting?

- Is it a “meeting” under the Sunshine Law when more than a quorum participates in:
 - information sessions?
 - work sessions?
 - committee work?
 - parking lot conversation?
 - telephone tag?
 - e-mail discussions?
 - polling?



10

Meeting Notice: When, Where, How

The intelligent exercise of the right to know depends on notice



11

Meeting Notice: When, Where, How

W. Va. Code 6-9A-3

- Every public body must have a policy providing for making available to public and news media, in advance, the
 - Date, time, place, and agenda of all regularly scheduled meetings
 - Date, time, place and purpose of all special meetings
- Exception: In the event of an emergency requiring immediate official action
 - File a meeting notice at any time prior to meeting stating:
 - The date, time, place, and purpose of the meeting
 - The facts and circumstances of the emergency



12

Meeting Notice: When, Where, How

- How much notice? According to the W. Va. Open Governmental Meetings Advisory Committee, the minimum requirements are:
 - For bodies which meet twice or less per month:
 - 3 business days notice of regular meetings
 - 2 business days notice of amendments to regular meeting agendas
 - 2 business days notice of special meetings
 - For bodies that meet more often:
 - 2 business days notice of regular meetings
 - Otherwise, the same as above



13

A Word About Agendas

- At a regular meeting, the body may not deliberate or take action upon an item that was not on the agenda
- At a special meeting, the body may not deliberate or take action upon an item that was not a stated purpose in the notice of meeting
- Items on the agenda must be described with sufficient flexibility, but may be worded to give clear notice of flexibility
 - Unacceptable: "New business," "Old business," "Other business," "Personnel matters"
- Topics not on the agenda that come up during "delegations" may be listened to but not acted upon



14

Meeting Conduct: Speakers, Good Order, Voting, Media

Open meetings are required even when logistical and other challenges occur, but the challenges can be surmounted



15

Meeting Conduct: Speakers, Good Order, Voting, Media

W. Va. Code 6-9A-3, 8, 9

- Presumption: Open meetings
- Radio and television: Placement and use, pooling
- Crowded meetings: Attendance and presentation rules
- Disruption: The right to attend is not the right to disrupt
- The "15 minute" rule
- Action by reference; written ballots



16

Meeting Minutes: Contents and Access

Attendees can verify that what they think happened did happen, and non-attendees can learn what happened



17

Meeting Minutes: Contents and Access

W. Va. Code 6-9A-5

- Minimum contents:
 - Meeting date, time, and place
 - Name of each member present and absent
 - Each motion and other measure proposed, by whom, and the disposition
 - The results of all votes and, upon request of a member, the vote of each member, by name
- Optional matters
- Executive sessions exception: two approaches



18

Meeting Minutes: Availability

- Approved minutes must be publicly available by the close of business on the first business day after the next regular meeting
 - But if material changes are needed to the draft minutes, then by the close of the third business day following the next regular meeting
- A different rule applies to bodies that regularly meet twice a week
 - Approved minutes of both meetings must be available the next week by the close of the first business day following the second regular meeting
 - If material changes are needed, then by the close of the third business day rather than the first



19

Executive Sessions: Grounds and Procedure

Carves out exceptions to the public's right to know when exceptions will serve purposes deemed more important



20

Executive Sessions: Grounds and Procedure

W. Va. Code 6-9A-4

- No wholly secret meetings. You must at least convene and adjourn in public.
- No decisions in executive session
- What is a decision?
- Discretion to go into executive session



21

The Justifications for Executive Session

- War and riot
- Personnel matters and *hearings* (specific personnel matters, not policy matters)
- Disciplining a student
- *License and certification actions*
- *A person's physical or mental health*
- Unwarranted invasion of a person's privacy
- Crime prevention; law enforcement
- Security personnel/devices
- Property transactions, construction plans, investments & commercial competition, IF publicity would harm public interest
- Secrecy of prizes and awards
- Settlements
- Matters rendered confidential by law



22

The Procedure for Going Into Executive Session

- Not determined by the agenda
- The ONLY valid way:
 - Motion adopted in public session, stating the reason:
 - Identify "the authorization" under the statute for going into executive session
 - Pointer: be as specific as you can without negating the very reason that confidentiality is warranted
 - Presiding officer's announcement of the authorization to the public and the body



23

Executive Sessions: Issues Under the Act

- Individuals may force a public session in the case of:
 - Personnel matters and hearings
 - Disciplining a student
 - Specific license and certification actions
 - A person's physical or mental health
- Exceptions to the Act's "no decision" rule?
 - Disciplining a student
 - Settlement



24

Executive Sessions: Consultation with an Attorney?

- W. Va. Code 6-9A-4(b)(11): Nothing in this article permits a public agency to close a meeting that otherwise would be open, merely because an agency attorney is present
- *Peters v. County Commission of Wood County (1999)*: Privileged communications between a public body and its attorney may be closed to the public, but only by
 - A majority affirmative vote of the members
 - In accordance with the notice requirements of 6-9A-3
 - If the written minutes requirements of 6-9A-5 are observed



25

Violations: Civil and Criminal Consequences

To insure compliance with the Act



26

Violations: Civil and Criminal Consequences

W. Va. Code 6-9A-3, 6, 7

- Civil Remedies:
 - Compel compliance, enjoin non-compliance
 - Nullify decisions
 - Order future compliance
 - Attorney fees and expenses
 - Bond issue exception
 - Recorded in minutes
- Criminal Penalties:
 - Misdemeanor
 - First offense: fine not to exceed \$500
 - Subsequent offenses: fine of between \$100 and \$1,000



27

Education and Interpretation

To facilitate compliance with the Act



28

Education and Interpretation

W. Va. Code 6-9A-10, 11

- Committee on Open Governmental Meetings
 - A committee of the W. Va. Governmental Ethics Commission
 - <http://www.ethics.wv.gov/openmeetings/Pages/default.aspx>
 - Advisory opinions
 - Binding on the requesting party
 - Immunity if act in good faith on the opinion, or on an opinion regarding another body
 - Confidentiality
 - Phone: 558-0664; 1-866-558-0664



29

Education and Interpretation

W. Va. Code 6-9A-12

- The Attorney General compiles open meetings statutes, case law, summaries and interpretations
- The Clerk of the County Commission must
 - provide the compilation to each elected official within the jurisdiction
 - make the material available to appointed public officials
 - provide a copy or summary to newly appointed or elected persons within 30 days of when they take the oath of office or, as to appointees, when they begin their term



30
