

## ADVISORY OPINION 2016-12

Issued on September 1, 2016, by

### THE WEST VIRGINIA ETHICS COMMISSION

#### OPINION SOUGHT

A **County Prosecutor** asks whether it is permissible for the County Commission to purchase a building from the Requester's mother-in-law to be used as office space for the Office of the Prosecuting Attorney.

#### FACTS RELIED UPON BY THE COMMISSION

The County Commission is leasing office space in a building from an S-corporation that is solely owned by the Requester's mother-in-law. The Commission is responsible for providing office space for the Prosecutor's Office. As there is inadequate space in the county courthouse, the Commission is leasing this office space which is close to the county courthouse for the Prosecutor's Office. The building is now for sale, and the County Commission would like to purchase the building and continue using it for the Prosecutor's Office.

The Requester states that he and/or his wife do not have a financial interest, direct or indirect, in his mother-in-law's corporation or the building's sales agreement. He and/or his wife do not have a financial relationship with his mother-in-law. They do not have any ownership interest in, or control over, the corporation. Further, they do not own property or other businesses with his mother-in-law and do not live in the same household as his mother-in-law. The Requester and/or his wife are not financially dependent on or in debt to his mother-in-law, and his mother-in-law is not financially dependent on or in debt to the Requester. The Requester states that his mother-in-law has made gifts to his wife and two adult children in the past.

The Requester states after he learned the building was for sale, he notified the County Commission of the proposed sale and the asking price. He did not have further discussions with the Commissioners nor offer legal advice to or attempt to influence the Commissioners in their decision of whether to purchase the building. The Requester indicated that he was willing to relocate the Prosecutor's Office to another suitable location. The Commissioners have kept the Requester apprised of the negotiations and their search for alternative space because this would directly affect the Requester.

The Requester advised the Commission that it would need to hire separate legal counsel to handle the purchase and that it should seek approval from the Ethics Commission before finalizing the purchase of the building.

## **PROVISIONS RELIED UPON BY THE COMMISSION**

W.Va. Code § 6B-2-5(b)(1) states, in relevant part:

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. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W.Va. Code § 6B-2-5(d)(1) states, in relevant part:

[N]o elected . . . official . . . or member of his or her immediate family . . . may be a party to or have an interest in the profits or benefits of a contract which the official . . . may have direct authority to enter into, or over which he or she may have control....

W.Va. Code § 6B-1-3(f) states, in relevant part:

“Immediate family”, with respect to an individual, means a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren and dependent parent or parents.

W.Va. Code § 61-10-15(a) states, in pertinent part:

It is unlawful for ... any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as ... [an] officer ..., he or she may have any voice, influence or control....

## **ADVISORY OPINION**

Both the Ethics Act, at W.Va. Code §§ 6B-2-5(b) and (d), and W.Va. Code § 61-10-15, a criminal misdemeanor statute, prohibit public servants from being a party to, or having a financial interest in, a public contract over which their public positions give them varying degrees of control.

The Ethics Act prohibits contracts between an immediate family member of a public official over which he or she may have direct authority to enter into or over which he or she may have control. The Ethics Act specifically defines “immediate family member” and this definition does not include parents-in-law.

The Ethics Commission has held in prior Advisory Opinions that a public official does not have a direct or indirect financial interest in a business owned by his parent-in-law based upon this familial relationship alone. For example, in Advisory Opinion 2014-17, a sheriff did not have a prohibited pecuniary interest in a contract under W.Va. Code § 6B-2-5(d) or W.Va. Code § 61-10-15 where there was no financial relationship between the sheriff or his wife and his father-in-law.

**Therefore, public contracts with a public official’s mother-in-law are not strictly prohibited.**

A public official’s family members and relatives who are not included in the definition of “immediate family member” may contract with the public official’s agency unless there is an actual financial relationship between the public official and the family member. For example, if a relative resides with the public official or if relatives own a business together or are co-sponsors of a loan, then the public official has a financial interest in the contracts of the relative. See Advisory Opinion 2012-03. By way of further example, unrelated, unmarried adults who live together have a financial interest in the employment of one another. See Advisory Opinion 2012-11

In the instant situation, the Requester and/or his wife do not have a financial relationship with the Requester’s mother-in-law. Gifts from the Requester’s mother-in-law to the Requester’s wife do not create prohibited financial interests under the Ethics Act or under W.Va. Code § 61-10-15.

**Therefore, the Requester does not have a prohibited financial or pecuniary interest in the building’s sales agreement and the purchase of the building by the County Commission is permissible under W.Va. Code § 6B-2-5(d) and W.Va. Code § 61-10-15.**

Finally, the Ethics Commission will consider the private gain provision of the Ethics Act at W.Va. Code § 6B-2-5(b). In Advisory Opinion 2014-17, the Commission stated that, “The private gain provision of the Ethics Act prohibits favoritism in the selection process by virtue of the familial relationship.” The Commission went on to state that it had not been made aware of any facts to suggest that the proposal is based on favoritism, but recommended that the Requester follow the requirements of the county bid process when selecting the business to award the contract.

Moreover, in Advisory Opinion 2013-52, the Ethics Commission stated that to ensure an arm’s length transaction in an Ambulance Authority’s purchase of land from an Authority member’s brother, the Requester in that situation “shall carefully evaluate and document the reasons why this particular land is most suitable to the Authority. Further, the

purchase price shall be based upon a reliable appraisal, and shall not exceed the fair market value of the property.” The Ethics Commission notes that these specific measures are not required in all instances. However, the Requester here states that he intends to advise the County Commission to follow this procedure to ensure an arm’s length transaction with his mother-in-law.

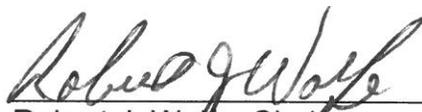
In the instant situation, the facts asserted by the Requester do not suggest that he used his office to influence the County Commission’s decision to purchase the building or its sales price. The Requester indicated that he was willing to relocate the Prosecutor’s Office to another suitable location and that he had advised the County Commission that it would need to hire separate legal counsel to handle the purchase.

**Therefore, the Ethics Commission has not been made aware of any facts to suggest that the building’s sales contract is based on favoritism by virtue of the familial relationship or that the Requester has used his position in violation of W.Va. Code § 6B-2-5(b).**

**In conclusion, it is permissible under the Ethics Act, at W.Va. Code §§ 6B-2-5 (b) and (d), and under W.Va. Code § 61-10-15 for the County Commission to purchase the building from the Requester’s mother-in-law to be used as office space for the Office of the Prosecuting Attorney.**

*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 W.Va. Code § 61-10-15 and the Ethics Act, at W.Va. Code § 6B-1-1 through W.Va. Code § 6B-3-11, 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.*

  
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Robert J. Wolfe, Chairperson  
WV Ethics Commission

## OPEN MEETINGS ADVISORY OPINION NO. 2016-02

Issued on September 1, 2016, by

### THE WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

#### OPINION SOUGHT

The **Pocahontas County Commission** asks whether its policy and procedures relating to posting agendas complies with the Open Governmental Proceedings Act.

#### FACTS RELIED UPON BY THE COMMITTEE

The Pocahontas County Commission has recently updated its policy and procedures (“policy”) for the issuance of meeting agendas for all regular, special and emergency meetings. The County Commission holds its regular meetings on the first and third Tuesdays of each month.

Agendas for regular meetings will be posted at the Pocahontas County Courthouse and made available in the County Commission Office no later than three business days before a regularly scheduled meeting.

Agendas for special meetings will state the date, time, place and purpose of the meeting and will be posted at the Pocahontas County Courthouse and made available in the County Commission Office no later than two business days before a scheduled special meeting.

Agendas for emergency meetings will state the date, time, place and purpose of the meeting and will be posted at the Pocahontas County Courthouse and made available in the County Commission Office as soon as possible after an emergency meeting has been declared.

The policy also states that Saturdays, Sundays, legal holidays and pre-scheduled days for closing the Courthouse are not considered business days for purposes of posting agendas. Additionally, agendas for regular and special meetings will be posted at the Pocahontas County Courthouse and made available in the County Commission Office by 4:30 p.m. on the day of the required notice period. The policy states that reasonable effort will be made to provide notice of all meetings to the local media after posting as soon as practical.

A complete copy of the policy is attached to this Advisory Opinion as Appendix A.

## CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W.Va. Code § 6-9A-2(2) reads as follows:

"Emergency meeting" means any meeting called by a governing body for the purpose of addressing an unexpected event which requires immediate attention because it poses:

- (A) An imminent threat to public health or safety;
- (B) An imminent threat of damage to public or private property; or
- (C) An imminent material financial loss or other imminent substantial harm to a public agency, its employees or the members of the public which it serves.

W.Va. Code § 6-9A-3 reads in relevant part:

- (a) 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.

...

- (d) 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.

...

- (h) In the event of an emergency a governing body may call an emergency meeting.
  - (1) The governing body of a state executive branch agency shall electronically file a notice for an emergency meeting with the Secretary of State, as soon as practicable prior to the meeting. Any other governing body shall notice an emergency meeting in a manner which is consistent with this article and the Ethics Commission Committee on Open Governmental Meeting's opinions issued pursuant to the authority of section ten of this article, as soon as practicable prior to the meeting.

- (2) The emergency meeting notice shall state the date, time, place and purpose of the meeting and the facts and circumstances of the emergency.

### **ADVISORY OPINION**

The Open Governmental Proceedings Act (“Act”) requires local governing bodies, including county commissions, to “make certain information available to the public and news media in advance of a meeting, including: (1) the date, time, place and agenda of all regularly scheduled meetings; and (2) the date, time, place and purpose of all special meetings.” Open Meetings Advisory Opinion 2006-15; W.Va. Code § 6-9A-3(d). The Act, however, does not specifically establish when meeting notices or meeting agendas of local governing bodies must be made available to the public. As the Act does not provide specific guidance, this Committee has established required time frames in which local governing bodies must post their meeting notices and agendas. See W.Va. Code §§ 6-9A-10 through 11 (authorizing this Committee to interpret the Open Meetings Act).

For regular meetings, local governing bodies that meet monthly or bi-monthly “may comply with the Act by making the meeting agenda available at least three business days before each regularly scheduled meeting.” Open Meetings Advisory Opinion 2016-15; *but see* Open Meetings Advisory Opinion 2007-09 (“[A] governing body of a public agency . . . which establishes a regular meeting schedule that involves meeting weekly, or more frequently, may comply with the Open Meetings Act by making a meeting agenda available to the public and the media at least two business days in advance of each regular meeting.”). In counting business days, the day of the meeting, Saturdays, Sundays and legal holidays are excluded. *Id.* Additionally, the deadline for making the agenda available is the close of business on the first day of the three business day requirement. Open Meetings Advisory Opinions 2004-13 and 2006-15. For example, in the absence of an intervening legal holiday, a governing body may issue notice of a regular meeting to be held on Tuesday no later than the close of business on the preceding Thursday. *Id.* Further, a local governing body may make the agenda available “by posting its meeting agenda for each regularly scheduled meeting in a public place . . . as well as having copies of the agenda available to be picked up at the same location during regular business hours.” *Id.* While governing bodies are encouraged to notify the media of meetings, the Act does not require direct notice to the media. Open Meetings Advisory Opinion 2012-01.

For special meetings, the Act requires that notice must include “the date, time, place and purpose.” W.Va. Code § 6-9A-3(d). “The ‘purpose’ of a special meeting is considered synonymous with the agenda for that meeting.” Open Meetings Advisory Opinion 2006-15. “In order to provide reasonable notice of a special meeting, the Board should post the meeting notice in the Board’s central office, in a place which is readily available to the public during normal working hours, at least two business days in advance of the meeting.” *Id.* Business days are calculated for special meetings in the same manner as they are for regular meetings.

**The Committee finds that the policy’s three-day notice period for posting agendas for regular meetings and two-day notice period for posting agendas for special meetings are consistent with the minimum requirements of the Act. The policy also properly excludes Saturdays, Sundays and legal holidays from the business day calculation. However, the policy fails to reflect that the day of the meeting is also to be excluded. Therefore, the Committee finds that the policy need be revised to exclude the day of the meeting from the regular and special meeting notice period calculation to satisfy the minimal requirements of the Act.**

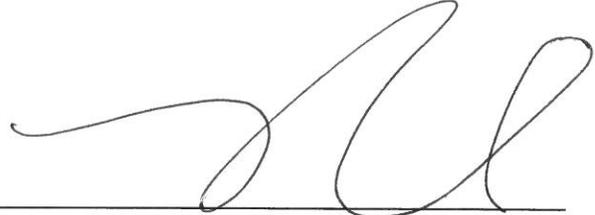
While Requester’s policy deals with agendas as opposed to providing notice, the Committee nonetheless takes this opportunity to remind Requester that its policy does not require regular meeting agendas to include the date, time and place of the regular meetings as its policy requires for special and emergency meeting agendas. A separate notice containing this information must be provided for regular meetings if it is not included in the regular meeting agenda. See Open Meetings Advisory Opinion 2016-15 (“When a governing body meets in accordance with a fixed schedule, such as the second and fourth Monday of each month, it may comply with the meeting notice requirement in the Act by annually posting notice of the date, time and place of these ‘regular’ meetings for the coming year, and keeping this notice posted throughout the year.”).

In addition to regularly scheduled meetings and special meetings, public agencies may hold emergency meetings. A “governing body shall notice an emergency meeting in a manner which is consistent with this article and the Ethics Commission Committee on Open Governmental Meeting’s opinions issued pursuant to the authority of section ten of this article, as soon as practicable prior to the meeting.” W.Va. Code § 6-9A-3(h)(1). “Any meeting notice issued, and the meeting minutes, must fully explain the purpose of the meeting and the facts and circumstances justifying an emergency meeting.” Open Meetings Advisory Opinion 2006-15; W.Va. Code § 6-9A-3(h)(2). Additionally, “[i]f an agenda is amended to accommodate action on an emergency matter, both the meeting agenda and the meeting minutes must explain the facts and circumstances of the emergency.” *Id.*

**In order to meet the minimum requirements of the Act, the Committee finds that the policy’s notice period for emergency meetings need be revised to provide that a governing body shall post an emergency meeting as soon as practicable prior to the meeting. The policy further needs be revised to require that the agenda explain the facts and circumstances of the emergency in addition to the date, time, place and purpose of the emergency meeting.**

Finally, the Committee notes that this Opinion, and any immunity which the governing body receives, will be limited to whether the policy is inconsistent with the Act. The Opinion will not address discretionary application of a rule to a specific situation. Having noted the limited scope of this Opinion, the Committee finds that the Commission’s policy, when including the changes outlined above, is not inconsistent with the Act.

*This Advisory Opinion is limited to questions arising under the Open Governmental Proceedings Act, W.Va. Code §§ 6-9A-1 through 6-9A-12, 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 as 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.*

A handwritten signature in black ink, consisting of a series of loops and curves, positioned above a horizontal line.

Lawrence J. Tweel, Chairperson  
Open Governmental Meetings Committee  
West Virginia Ethics Commission

# APPENDIX A

## POCAHONTAS COUNTY COMMISSION AGENDA POLICY AND PROCEDURES

The Pocahontas County Commission will hold its regularly scheduled meetings on the first (1<sup>st</sup>) and third (3<sup>rd</sup>) Tuesdays of each month at the County Commission Office located in the Pocahontas County Courthouse, 900 Tenth Avenue, Marlinton, West Virginia 24954 as follows: The first (1<sup>st</sup>) Tuesday meeting of each month shall begin at 8:30 am. and the third (3<sup>rd</sup>) Tuesday meeting of each month shall begin at 5:30 pm. Agendas for the Commission's regularly scheduled meetings shall be posted at the Pocahontas County Courthouse and also made available in the County Commission Office, no later than three (3) business days before a meeting by 4:30 pm. of the first day, except for emergency situations to be determined by the County Commission. Saturdays, Sundays and legal holidays, or pre-scheduled days for closing the Courthouse are not considered business days for purposes of posting agendas. Should a legal holiday or a pre-scheduled day for closing the Courthouse fall on one of the three (3) days as outlined above, then the agenda shall be posted one (1) day earlier by 4:30 pm. for each holiday or pre-scheduled closing of the Courthouse. When a meeting agenda has been issued three (3) or more business days in advance of a meeting, it may be amended up to two (2) business days before the meeting. Agendas may only be amended at the request of a County Commissioner, and once amended, will be posted in the same manner as the original agenda. Reasonable effort will be made to provide notice of all meetings to the local media as soon after posting as practical.

Agendas for special meetings, stating the date, time and place, and purpose of the meeting, shall be posted at the Pocahontas County Courthouse and also made available in the County Commission Office no later than two (2) business days before a meeting by 4:30 pm. of the first day. Saturdays, Sundays and legal holidays, or pre-scheduled days for closing the Courthouse are not considered business days for purposes of posting agendas. Should a legal holiday or a pre-scheduled day for closing the Courthouse fall on one of the two (2) days as outlined above, then the agenda shall be posted one (1) day earlier by 4:30 pm. for each holiday or pre-scheduled closing of the Courthouse. Reasonable effort will be made to provide notice of all special meetings to the local media as soon after posting as practical.

Agendas for emergency situations as determined by the County Commission, stating the date, time and place, and purpose of the meeting, shall be posted at the Pocahontas County Courthouse and made available in the County Commission Office as soon as possible after an emergency meeting has been declared, and reasonable effort will be made to provide notice of any such meeting to the local media as soon after posting as practical.

**All requests to be added to any County Commission agenda should be made by contacting the County Commission's Office not later than 4:00 pm. at least one (1) business day prior to the first (1<sup>st</sup>) day of posting, to allow sufficient time for approval by the Commission.**

Adopted by the Pocahontas County Commission on June 21, 2016