

OPEN GOVERNMENTAL MEETINGS ACT (OGMA)

Spring 2020

Overview

The Open Governmental Meetings Act (OGMA), also referred to as "the sunshine laws," is designed to foster an environment of public participation and transparency in governmental action to promote efficiency, ethics, and intelligent dialogue in making effective policy and correct decisions. An open government allows the public to educate itself about government decision-making through citizen participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government.¹

OGMA can be found in Chapter 6, Article 9A of the West Virginia Code. The statutory language is supplemented by advisory opinions from the West Virginia Ethics Commission, Committee on Open Governmental Meetings. While the advisory opinions do not carry the same force of law as the statute, they can offer an absolute defense against any civil or criminal lawsuit, if a governing body or member relies in good faith on a written advisory opinion.

What Constitutes a Meeting?

A meeting is the convening of a governing body of a public agency *where a quorum is required* to make a decision, or deliberate toward a decision, on a matter that results in official action. For example, if a governing body discusses an issue for one hour but does not vote on the issue, then at the next meeting discusses the same issue for two minutes and votes on the matter, the item should be on the agenda for both meetings. Meetings may be held by telephone conference or other electronic means so long as all meeting participants, including citizens, can hear those participating electronically or telephonically.

Meetings subject to OGMA do not include adjudicatory proceedings (i.e., grievance proceedings), on-site inspections, political caucuses, logistical discussions about meetings (i.e., "where should we hold the next meeting?"), or general discussions. General discussions are not subject to OGMA so long as the gathered members have no intention of discussing matters that might lead to official action. Examples include social, educations, training, informal, or ceremonial settings.²

Notice & Agenda

Notice and agenda must be posted three business days prior to a regular meeting and two business days prior to a special meeting. Notice and agenda for an emergency meeting should be posted as soon as practicable. Notice requires informing the public of the date, time, and place of a meeting.³ Agendas must list items expected to be discussed at a meeting with sufficient description for the public to understand what issues will be discussed. Only items on the agenda may be discussed at a meeting.⁴

Who is Subject to OGMA?

Governing bodies of public agencies are subject to OGMA. Public agencies are administrative or legislative units of state, county, or municipal government that exercise some portion of legislative power.⁵ Governing bodies, under OGMA, include members of town council, county commission, and planning commissions. For example, a governing body of a public agency would be the County Commission of Monongalia County.

Quorum

A quorum is the gathering of a simple majority, or more than 50 percent, of the constituent membership of a governing body, unless applicable law provides otherwise.⁶ Vacant positions are not calculated in determining a quorum.

Types of Meetings⁷

- **Regular:** a meeting of a governing body at which the regular business of the public is conducted.
- **Special:** a meeting of a governing body other than a regular or emergency meeting.
- **Executive Session:** any meeting or part of a meeting of a governing body closed to the public.
- **Emergency:** any meeting called by a governing body for the purpose of addressing an unexpected event that requires *immediate attention*.*

Notice and agenda must be posted where the public would typically look for such information. Ordinarily, the location will be local government offices, but might also include the post office or library where such information has historically been posted.

Meeting Minutes

Meeting minutes are the record of a meeting. Meeting minutes must include the date, time, and place of the meeting; name of each member present or absent; all motions, proposals, resolutions, orders, ordinances, and measures proposed, the person proposing the matter, and the matter's disposition; and the results of all votes.⁸ Meeting minutes are not a verbatim record of a meeting.

Meeting minutes should be approved and made available to the public immediately following the next regularly scheduled meeting or if modifications are needed, within three business days of the next regularly scheduled meeting.⁹

Media/Broadcasting

Public meetings may be digitally recorded. Media is permitted to record and photograph meetings, and may be asked to alter, but not cease, its efforts only as needed to accommodate the public at the meeting.¹⁰

Executive Sessions

Executive sessions occur when a meeting or portion of a meeting is closed to the public because sensitive information needs to be discussed. A majority vote is required to enter an executive session from an open meeting. The item to be discussed in an executive session must be listed on the agenda, but intent to discuss the item in an executive session does not have to be listed on the agenda. Because of the sensitive nature of items discussed in an executive session, meeting minutes are not required for the closed portion of a meeting. Examples of items allowed to be discussed in an executive session include the dismissal of a public employee, the sale of real property, pending litigation, or potential official investigations. A vote may not be taken in an executive session. Only once the governing body has reconvened in an open session should a vote be taken.¹¹

Correcting a Violation

Although no statutory "cures" for an OGMA violation are detailed, one advisory opinion states the following actions will rectify a violation:

- Matters to be reconsidered must be described in the notice or agenda;
- All voting members must be provided opportunity for full disclosure regarding the matter to be reconsidered;
- Citizens must be provided opportunity for public comment on the matter to be reconsidered; and
- An audio recording of the open portion of the meeting where reconsideration occurs must be saved as public record for six months.¹²

Guidance on OGMA compliance may be obtained by requesting an advisory opinion from the West Virginia Ethics Commission. A governing body may also seek advice and information directly from the executive director of the West Virginia Ethics Commission.

Footnotes

¹ W. Va. Code Ann. § 6-9A-1 (West 2019).

² *Id.* § 6-9A-2(5); W. Va. Ethics Comm. Ad. Op. 2001-34.

³ W. Va. Code Ann. § 6-9A-3.

⁴ W. Va. Ethics Comm. Ad. Op. 2011-03, Ad. Op. 2008-17.

⁵ W. Va. Code Ann. § 6-9A-2(4), (7) (West).

⁶ *Id.* § 6-9A-2(8).

⁷ *Id.* § 6-9A-2(2), (3), (9), (10).

⁸ *Id.* § 6-9A-5.

⁹ *Id.*; W. Va. Ethics Comm. Ad. Op. 2006-12, Ad. Op. 2011-01.

¹⁰ W. Va. Code Ann. § 6-9A-2(9) (West).

¹¹ *Id.* § 6-9A-2(3), 9A-4; W. Va. Ethics Comm. Ad. Op. 2000-15, Ad. Op. 2000-10, Ad. Op. 2013-06.

¹² W. Va. Ethics Comm. Ad. Op. 2011-01, Ad. Op. 2005-10.

¹³ *Id.* § 6-9A-3; W. Va. Ethics Comm. Ad. Op. 2010-02.

Calculating Days

In determining whether posting notice and agenda has been achieved, the correct number of days prior to a meeting, weekends, federal and state holidays, and the day of the meeting are not calculated. Local holidays, although they may be calculated, likely should not be if offices are closed and staff are not available to the public to answer questions about the meeting and meeting materials. The day of the posting is calculated.¹³