



West Virginia

P O Box 3952

Charleston WV 25339-3952

(304) 345-9246

www.acluww.org

July 29, 2022

Senate President Craig Blair
Room 227M, Building I
State Capitol Complex
Charleston, WV 25305
Craig.blair@wvsenate.gov

Sent via email

Dear Senate President Blair:

It has come to our organization's attention that the legislature is enforcing a blanket ban on photography in the Senate gallery in violation of the West Virginia Open Governmental Proceedings Act (hereinafter "the Act"). *See* W. Va. Code § 6-9A-1 *et seq.* Such a ban not only violates state law -- it promotes poor policy that discourages the public from meaningful participation in the legislative process.

I. THE ACT

Sunshine laws like the Act are intended to create greater transparency in government. The purpose of the Act is to promote "open government" and to allow 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." W. Va. Code § 6-9A-1.

The Act applies to certain meetings of all levels of municipal and state government within West Virginia. *See* W. Va. Code § 6-9A-2(4); *see also* § 6-9A-2(7) (defining the scope of the Act to include any administrative or legislative unit of state, county, or municipal government). The Act defines meetings to include those convenings "for which a quorum is required to make a decision or to deliberate toward a decision on any matter which results in an official action." W. Va. Code § 6-9A-2(5). *See also Appalachian, Power Co. v. Public Serv. Comm'n*, 253 S.E.2d 377, 381 (W. Va. 1979). The assemblage of the legislature on the Senate and House floors falls squarely under the purview of the Act.

The Act contemplates the broadcast, recording, and photography of meetings. *See* W. Va. Code § 6-9A-9. A public body may only regulate the placement and use of equipment necessary to broadcast photography, film, or record a meeting to prevent "undue interference" with the meeting. *Id.* Further, the Act specifically provides that "the ordinary use of the equipment may not be declared to constitute undue interference." *Id.*

II. THE PROHIBITION OF PHOTOGRAPHY IN THE SENATE GALLERY

Signs posted in the Senate gallery state that there is a “no flash photography” policy. Members of the public informed our organization that they have been instructed not to take photos or video while in the Senate gallery.

Instructive in this matter is an Advisory Opinion released on January 3, 2019, by the West Virginia Meetings Commission Committee on Open Governmental Meetings. *See* Op. 2019-02, attached.

In the opinion, the Committee, which is charged with providing interpretations of the Act, considered a proposed ordinance that would prohibit private citizens from filming public meetings conducted in Winfield. *Id.* at 1. The Committee found, based on the plain language of the Act, that the adoption of such an ordinance would be in violation of the law. *Id.* at 2. In reaching its decision, the Committee noted that “[t]he use of recording equipment does not constitute undue interference under the Act simply because the public is operating it,” and that “the Act expressly precludes the City from claiming that the ordinary use of equipment to film a meeting constitutes undue inference . . .” *Id.* The Committee’s decision in the Winfield case is the most recent in a long line of opinions. *Id.* n. 1.

The Senate’s ban on photography is directly analogous to the ordinance considered by the City of Winfield. As the Act plainly states, the legislature may not declare that the ordinary use of equipment constitutes “undue interference.” *See* W. Va. Code § 6-9A-9. A blanket on photograph is in clear contradiction to the Act.

III. CONCLUSION

In enacting the laws relating to open governmental proceedings, the legislature stated:

[T]he 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.

W. Va. Code § 6-9A-1

This powerful statement holds true whether the assemblage is that of a city council or of the state legislature. We urge the Senate to immediately withdraw its ban on photography and video in the Senate gallery.

Sincerely,



Nicholas Ward
Staff Attorney, ACLU-WV

cc: Speaker Roger Hanshaw

Open Meetings Advisory Opinion No. 2019-02

Issued on January 3, 2019, by

The West Virginia Ethics Commission Committee on Open Governmental Meetings

Opinion Sought

The **City of Winfield** asks whether it may enact an ordinance prohibiting private citizens from filming public meetings under the Open Governmental Proceedings Act.

Facts Relied Upon by the Committee

The City of Winfield is considering an ordinance that limits the public's ability to film City Council meetings and other public meetings conducted at Winfield City Hall. The City will continue to permit the media to film and/or record public meetings. The meetings are also audio-recorded by the City, and minutes are prepared. For public order and the avoidance of undue interference, however, the City does not believe it should allow filming of meetings by the public.

The City does not wish to limit access to its meetings. The meetings are open to the public, and the public may request copies of audio-recordings and minutes of meetings.

Code Provisions Relied Upon by the Committee

W. Va. Code § 6-9A-9 provides:

(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.

Advisory Opinion

Based upon the plain language of the Open Governmental Proceedings Act ("Open Meetings Act" or "Act"), this Committee finds that the City may not enact an ordinance prohibiting the public from filming public meetings. Although the City suggests that the Act, at W. Va. Code § 6-9A-9, permits the media, but not the public, to film its meetings, this Committee disagrees.

W. Va. Code § 6-9A-9 governs the broadcasting or recording of meetings. W. Va. Code § 6-9A-9(b) affirmatively requires public agencies to allow the equipment necessary for broadcasting, photographing, filming or recording a meeting to be placed in the meeting room. This subsection does not qualify who is permitted to use such equipment, and it only allows public agencies to regulate its use for one reason, which is to prevent undue interference with a meeting. *Id.* Agencies are also prohibited from claiming that the ordinary use of such equipment constitutes undue interference with their meetings. *Id.*

The City states that it is seeking to avoid undue interference by prohibiting the public from filming its meetings. The use of recording equipment does not constitute undue interference under the Act simply because the public is operating it. The Act expressly precludes the City from claiming that the ordinary use of equipment to film a meeting constitutes undue interference, and it is wholly specious to conclude that the ordinary use of equipment to film a meeting no longer constitutes ordinary use because it is being used by the public as opposed to the media. W. Va. Code § 6-9A-9(b).

The Committee on Open Governmental Meetings therefore holds that as it pertains to the use of equipment necessary for broadcasting, photographing, filming or recording a meeting, a public agency may not prohibit anyone -- the public or the media -- from using such equipment unless it is to prevent undue interference with the meeting. Further, the public's ordinary use of such equipment alone may not be declared to constitute undue interference with a public agency's meetings.¹

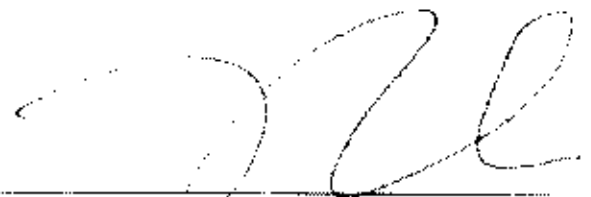
¹ The Committee's Opinion today is consistent with its prior Opinions addressing the subject. See Open Meetings Advisory Opinions 2001-07, 2005-08 and 2008-09. The Committee also notes that several other jurisdictions have determined that permitting citizens to record open meetings fulfills the policy of their respective open meetings laws. See Ky. Op. Att'y Gen. 96-OMD-143 (1996) (finding that a regulation, rule, or policy of a public body which uniformly prohibits the tape recording of a public meeting is arbitrary, capricious, restrictive and unreasonable and that a person should be permitted to tape record a meeting when it is non-disruptive); Mo. Op. Att'y Gen. No. 151-95 (Sept. 25, 1995) (finding that even though Missouri has no provision addressing whether citizens may record a meeting, the policy of its Open Meeting Law and decisions by other states demonstrate that a city council does not have the authority to prohibit citizens from unobtrusively videotaping an open meeting); 1991 Fla. Op. Att'y Gen. 87 (Apr. 26, 1991) (finding that while a board may adopt reasonable rules to ensure the orderly conduct of its meeting, rules prohibiting the use of nondisruptive tape recording devices would appear to be unreasonable and arbitrary and, therefore, invalid); Colo. Op. Att'y Gen. AG Alpha No. 79 (May 16, 1979) (finding that members of the public should be permitted to tape record meetings even though the Open Meetings Law is silent on the question of tape recordings by interested citizens or members of press); 38 Mont. Op. Att'y Gen. 29 (Feb. 13, 1979) (finding that the legislative policy announced in its Open Meetings Law would be furthered by allowing interested members of the public to mechanically record open meetings); and 38 Or. Op. Att'y Gen. 50 (Aug. 10, 1976) (finding that a governing body has no legitimate interest in prohibiting the making of a record of its public proceedings, and it accordingly has no more right to prohibit the unobtrusive use of

Finally, the Committee notes that the Act provides an example of the kind of finding that must be made to constitute undue interference:

[I]f 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.

W. Va. Code § 6-9A-9(b). Given the small size and non-disruptive nature of recording equipment today, the Committee finds it difficult to envision a scenario where the size of the meeting room cannot accommodate both the equipment to film a meeting as well as everyone present. Even if such a good faith finding can be made, the Act nonetheless forbids a complete prohibition on the use of such equipment, instead providing that a public agency may require that the equipment be pooled. *Id.*; See also 1996 N.D. Op. Att'y Gen. 38 (1996) (finding that another example of undue interference may occur when numerous people film a meeting while roaming around the meeting room and that a city council may reasonably limit the areas of the room from which a meeting may be filmed).

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.



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

a recording device, than to prohibit the manual taking of notes, or to prohibit the subsequent reporting of what was said).