



**Committee on
Open Government**

The Open Meetings Law: An Overview and Update on the Use of Remote Access Platforms

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CONTACT INFORMATION

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Public Officers Law
Article 7
Sections 100-111

Legislative Intent

When the Open Meetings Law was passed in 1976, the declared legislative intent stated:

- It is essential that public business be performed in an open and public manner and that the citizens be “fully aware of and able **to observe** the performance of public officials.”
- Citizens had the right “to **attend** and listen to the deliberations and decisions that go into the making of public policy.”

Emphasized language becomes important when considering Chapter 1 of the Laws of 2022.



Chapter 1 of the Laws of 2022

- On January 14, 2022, Governor Kathy Hochul signed into Law Chapter 1 of the Laws of 2022 amending Chapter 417 of the Laws of 2021 to authorize any public body (as that term is defined by § 102(2) of the OML) “to meet and take such action authorized by law without permitting in public in-person access to meetings and authorize such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed.”
- The language of the Law substantially mirrors former Executive Order 202.1 issued in March 2020. Guidance relating to that order can be found on the Committee on Open Government’s website under Open Meetings Law Advisory Opinions, key phrase “Declared Disaster Emergency.” (OML AO 5630, OML AO 5631, OML AO 5632)
- Chapter 1 will expire when the State’s declared disaster emergency (Executive Order 11) expires – currently April 15, 2022.
- Permissive – allows for remote meetings but does not require them.



Use of Videoconferencing

“Pre-COVID,” for a member to attend and participate via videoconferencing, the OML required first, that the public be provided:

“an opportunity to attend, listen and observe at any site at which a member participates.” (§103[c])

As Chapter 1 authorizes public bodies to meet and take action without permitting in public in-person access to meetings, public bodies are not currently required to comply with §103(c) of the Law.

Use of Videoconferencing “PRE-COVID”

Pre-COVID, notice of the meeting was required to include the locations of the meeting, including the location(s) of the member(s) who planned to attend via videoconferencing:

“If videoconferencing is used to conduct a meeting, public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting and state that the public has the right to attend the meeting at any of the locations.”(§104[4])

Currently under Chapter 1, if a public body chooses to prohibit in-person attendance, the notice **does not** need to include the locations from which members are attending and **does not** need to include the statement that “the public has the right to attend the meeting at any of the locations.”



Meeting Location Requirements

If a public body chooses to allow in-person attendance at its meetings, it must comply with the following provisions of the OML:

- “Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law.” (§103(b) of the OML)
- “Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings.” (§103(d) of the OML)



Public Bodies

The OML governs the conduct of meetings of public bodies and that term is defined as:

“any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body consisting of members of such public body or an entity created or appointed to perform a necessary function in the decision-making process for which a quorum is required in order to conduct public business and which consists of two or more members. A necessary function in the decision-making process shall not include the provision of recommendations or guidance which is purely advisory and which does not require further action by the state or agency or department thereof or public corporation as defined in section sixty-six of the general construction law.”



Public Bodies

- Have two or more people been given the authority to act collectively?
- Is quorum necessary to conduct business?
- Is the committee made up solely or primarily of members of the larger public body?
- Does the committee serve a State statutory function?
- In the alternative, is the entity purely advisory in nature with no statutory duties for final decision-making authority?



Definition of “Quorum”

“Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, **gathered together in the presence of each other or through the use of videoconferencing*** ...shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words “whole number” shall be construed to mean the total number which ... body ... would have were there no vacancies and were none of the persons or officers disqualified from acting.”

* Or in compliance with Chapter 1



Quorum

While Chapter 1 of the Laws of 2022 is in effect, members of a public body that participate “remotely by conference call or similar service” count toward a quorum, can fully participate, and can vote.

There does not need to be a majority of the total membership of the board in any one physical location for a quorum to exist. For example, when the 11-member Committee on Open Government meets, four members could be present in Albany, three in Buffalo, and three in New York City. In the alternative, all 11 members could participate via “conference call or similar service” from their own private locations and still be counted toward the quorum.

Definition of “Meeting”

The OML defines “meeting” as "the official convening of a public body for the purpose of conducting public business, **including the use of videoconferencing for attendance and participation** by the members of the public body.” (POL 102(1))

There is no authority for a public body to take action outside of a meeting.

* Or in compliance with Chapter 1 of the Laws of 2022



Are you having a Meeting?

- Is there a quorum present?
- To discuss public business?
- If yes, you are having a meeting, regardless of intent, or lack thereof, to take action, or characterization.

No Legal Distinction

- Workshop or work session, Agenda Session
- Regular meeting
- Informal gathering
- Pre-board meeting



Other Gatherings

- Site visit
- “Retreat” or educational seminar
- Attendance at committee meeting
- Social



Telephone Calls, Emails

- Definition of “meeting”
 - Requires physical presence or
 - Videoconferencing permitted
 - While Chapter 1 is in effect, teleconferencing is permitted
- Cannot conduct a meeting via e-mail
- Does not mean that members of the public body cannot share information via e-mail



Notice

- Date, Time, and Location (and/or instructions for virtual attendance) must be given:
- Prior to every meeting:
- To the media (do not need to purchase a legal notice)
- Placed in a designated physical location
- If agency/public body has an active website, must be posted on that website



Notice

- At least 72 hours prior to a meeting scheduled at least one week in advance.
- For meetings on short notice, notice must be given to the extent practicable at a reasonable time prior to the meeting.
- The courts have suggested that the propriety of scheduling a meeting less than a week in advance (and providing less than 72 hours notice) is dependent upon the actual need to do so.

RECORDS SCHEDULED TO BE DISCUSSED

On October 19, 2021, Governor Hochul signed into law Chapter 481 of the Laws of 2021 which amends § 103(e) of the Open Meetings Law to require that records to be discussed at a meeting be made available, to the extent practicable, upon request and posted online, at least 24-hours before the meeting. The obligation to make records available to the public upon request “prior to or at the meeting” and to post the records on the agency or public body website “prior to the meeting” has been in effect since February 2012. This amendment simply places a 24-hour minimum time frame for making those records available.



RECORDS SCHEDULED TO BE DISCUSSED

- Proposed resolutions, laws, rules, regulations, policies or any amendment thereto
- Records, or portions thereof, that are public under FOIL
- Shall be made available upon request, at least twenty-four hours prior to the meeting
- Shall be made available online at least twenty-four hours prior to the meeting if the agency maintains a regularly and routinely updated website and utilizes a high speed internet connection
- Agency may, but not required to, spend additional moneys to implement this section



Minutes

- Must include: Motions/Proposals/ Resolutions/Votes
- Executive Sessions: Only necessary if actions taken
- Must be available within:
 - Two weeks for open session
 - One week for executive session
- Does not matter whether records are unapproved or in draft form.

Minutes

- On November 8, 2021, Governor Hochul signed into law Chapter 587 of the Laws of 2021 which amends the Open Meetings Law to require agencies that maintain a website and use a high-speed internet connection **to post meeting minutes on its website** within two weeks of the date of the date of the meeting, or within one week of an executive session. The Law further states:

“unabridged video recordings or unabridged audio recordings or unabridged written transcripts may be deemed to be meeting minutes. Nothing in this section shall require the creation of minutes if the public body would not otherwise take them.”

Recording

- Any meeting of a public body that is open to the public shall be open to being photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means
- Agency is not obligated to record unless meeting is held pursuant to Chapter 1 of the Laws of 2022
- Agency may establish reasonable rules to limit disruption/interference (model rules available on COOG website)

Executive Session

- Defined in Section 102(3) of the Law as a “portion of a[n open]meeting not open to the public” (not prior to or separate from an open meeting)
- A motion must be made and voted upon during an open meeting
- Specificity of motion



Executive Session

- a. matters which will imperil the public safety if disclosed;
- b. any matter which may disclose the identity of a law enforcement agent or informer;
- c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
- d. discussions regarding proposed, pending or current litigation;
- e. collective negotiations pursuant to article fourteen of the civil service law;
- f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
- g. the preparation, grading or administration of examinations; and
- h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.



“PERSONNEL”

Don't Use this Word in Your Motion!

f. “the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation”



Public Participation

- Not required
- Can establish reasonable rules
- Implement fairly and consistently
- Hearings are not the same as meetings



Exemptions

- Section 108 of the Open Meetings Law - Second mechanism for meeting “behind closed doors”
- If an exemption applies, the OML does not – as if the OML does not exist
- Section 108 Exemptions:
 - judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals;
 - deliberations of political committees, conferences and caucuses;
 - any matter made confidential by federal or state law (e.g., discussions relating to students made confidential by FERPA; meetings with agency attorney covered by attorney client privilege)

Non-Compliance and Enforcement

- Enforcement is through the initiation of a CPLR Article 78 proceeding
- Court has authority to:
 - award costs and attorney's fees
 - Invalidate action
 - require training



Questions??

- ANYONE is welcome to contact our office by phone or by email with questions (government employees, members of the public, media representatives, etc.)
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