



**Committee on
Open Government**

The Open Meetings Law: An Overview and Update

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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 (OML) 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 have the right “to attend and listen to the deliberations and decisions that go into the making of public policy.”



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.”

This definition was amended to include the highlighted language in December of 2021 and again in February 2022.

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? Is that statutory function more than merely providing advise?
- In the alternative, is the entity purely advisory in nature with no statutory duties or 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.”



Chapter 56 of the Laws of 2022

- On April 9, 2022, Governor Hochul signed Chapter 56 of the Laws of 2022 relating to the New York State budget for the 2022-2023 state fiscal year. Included in the bill is an amendment to the OML to expand the use of videoconferencing by public bodies to conduct open meetings, *under extraordinary circumstances*, regardless of a declaration of emergency. This provision will be in effect until July 1, 2024 unless extended by the Legislature.
- The new provision is not meant to change or curtail what has always been permitted for or required of public bodies in relation to compliance with the OML. Public bodies may continue to operate now as they did *before* the onset of the pandemic in early 2020 when the “in person” aspects of the OML were first suspended. In other words, we believe that if a public body was permitted to do it before the pandemic, this law does not change that. As noted above, this law is intended to expand, in extraordinary circumstances only, the ability of public bodies to meet using remote access technology.

Chapter 56

- Two ways to use videoconferencing technology to conduct an open meeting
 1. Connecting multiple physical locations that are open to in-person public attendance.
 2. Allowing a member of a public body to participate from a private location through videoconferencing under extraordinary circumstances.

Chapter 56

If a public body is using the first type of video conferencing (connecting multiple physical locations open to the public), the new Section 103-a of the OML does not apply.



Chapter 56

Section 103-a(2)(a):

A public body may, in its discretion, use videoconferencing to conduct its meetings pursuant to the requirements of this article **provided that a minimum number of members are present to fulfill the public body's quorum requirement in the same physical location or locations** where the public can attend and the following criteria are met...

Quorum

Members who are participating from a physical location that has been properly noticed and is open to in-person public attendance **do** count toward a quorum and may fully participate and vote.

Members who are videoconferencing from a remote location that is not open to in-person public attendance **do not** count toward a quorum. They **may**, however, fully participate and vote if a quorum has otherwise been met.



Chapter 56

...the governing board of a county, city, town or village must adopt a local law, or a public body must adopt a resolution, or the senate and assembly must adopt a joint resolution, **following a public hearing**, authorizing the use of videoconferencing:

- (i) for itself and its committees or subcommittees; or,
- (ii) specifying that each committee or subcommittee may make its own determination;
- (iii) provided however, each community board in a city with a population of one million or more shall make its own determination



Chapter 56

the public body must establish written procedures governing member and public attendance consistent with this section, and such written procedures shall be conspicuously posted on the public website of the public body...



Chapter 56

members of the public body must be physically present at any such meeting unless such member is unable to be physically present at any such meeting location **due to extraordinary circumstances**, as set forth in the resolution and written procedures adopted pursuant to the OML, including disability, illness, caregiving responsibilities, or any other significant or unexpected factor or event which precludes the member's physical attendance at such meeting;

Chapter 56

except in the case of executive sessions, the public body shall ensure that members of the public body can be **heard, seen and identified**, while the meeting is being conducted, including but not limited to any motions, proposals, resolutions, and any other matter formally discussed or voted upon....

Chapter 56

...the minutes of the meetings involving “extraordinary circumstances” videoconferencing shall include which, if any, members participated remotely and shall be available to the public pursuant to section one hundred six of the OML.



Chapter 56

if “extraordinary circumstances” videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, where the public can view and/or participate in such meeting, where required documents and records will be posted or available, and identify the physical location for the meeting where the public can attend...



Chapter 56

the public body shall provide that each meeting conducted using “extraordinary circumstances” videoconferencing shall be recorded and such recordings posted or linked on the public website of the public body within 5 business days following the meeting, and shall remain so available for a minimum of 5 years thereafter. Such recordings shall be transcribed upon request.

Chapter 56

if “extraordinary circumstances” videoconferencing is used to conduct a meeting, the public body shall provide the opportunity for members of the public to view such meeting via video, and to participate in proceedings via videoconference in real time where public comment or participation is authorized and shall ensure that videoconferencing authorizes the same public participation or testimony as in person participation or testimony.



Chapter 56

a local public body electing to utilize
videoconferencing to conduct its meetings
must maintain an official website

(See OML 103-a(1) for definition of “local
body”)



Chapter 56

OML 103-a(3):

The in-person participation requirements of 103-a(2)(c) shall not apply during a state disaster emergency declared by the governor or a local state of emergency proclaimed by the chief executive of a county, city, village or town, if the public body determines that the circumstances necessitating the emergency declaration would affect or impair the ability of the public body to hold an in-person meeting.

Chapter 56

OML 103-a(4):

No later than January 1, 2024, the Committee on Open Government, shall issue a report to the governor and the legislature concerning the application and implementation of this amendment and any further recommendations governing the use of videoconferencing by public bodies to conduct meetings pursuant to this section.

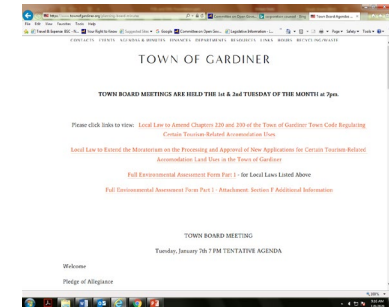
Chapter 56

OML 103-a(5):

Open meetings of any public body that are broadcast or that use videoconferencing shall utilize technology to permit access by members of the public with disabilities consistent with the 1990 Americans with Disabilities Act (ADA), as amended, and corresponding guidelines. For the purposes of this section, "disability" shall have the meaning defined in Executive Law Section 292.

Notice

- Date, Time, and Location and, if appropriate, 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.
- if “extraordinary circumstances” videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, where the public can view and/or participate in such meeting, where required documents and records will be posted or available, and identify the physical location for the meeting where the public can attend.



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 OML to require that records to be discussed at an open meeting be made available, to the extent practicable:

- upon request and
- posted online, at least 24-hours before the meeting if the agency maintains a regularly and routinely updated website and utilizes a high speed internet connection.
- 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
- Agency may, but not required to, spend additional moneys to implement this section
- Does not apply to records discussed in executive session

Minutes

- Must include: Motions/Proposals/Resolutions/Any matter formally voted upon and the votes thereon
- If “extraordinary circumstances videoconferencing is used, must include which, if any, members participated remotely
- 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 minutes 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 OML 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:

“For purposes of this subdivision 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 a member is participating remotely as authorized under Section 103-a.
- 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”

The Word “Personnel” does not appear anywhere in the OML

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”

Exemptions

- Section 108 of the OML - 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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