# Coat of ArmsSTATE OF NEW YORK DEPARTMENT OF STATE

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# FOIL AO 5423

E-Mail:

September 12, 2014

TO: Seth Gilboord (sgilboor@MAIL.NYSED.GOV)

FROM: Robert J. Freeman, Director Dear Mr. Gilboord:

I have received your letter in which you sought our views concerning the effect of the Non-Profit Revitalization Act of 2013 (“the Act”) on certain library boards of trustees and their obligation to comply with the Open Meetings Law (OML).

By way of brief background, as you are aware, the OML applies to public bodies, and those entities are generally governmental entities. Many libraries, although characterized as public libraries, are not governmental entities, but rather are not-for-profit corporations. An “association” library, for example, according to §253(2) of the Education Law, “shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will deed of trust…” The same provision states that “the term ‘free’ as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located.” Those entities, notwithstanding their corporate or non-governmental status, are required to comply with the OML pursuant to §260-a of the Education Law, which states in relevant part that meetings “of a board of trustees of a public library system, public library or free association library….shall be open to the general public” and that “Such meetings shall be held in conformity with and in pursuance of article seven of the public officers law”, which is the OML.

As you suggested, various provisions of the Act, which became effective on July 1 of this year, are inconsistent with the OML.

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Most significantly, §708(b) of the Not-for-Profit Corporation Law (NPCL) states that a board or committee may, “[u]nless otherwise restricted by the certificate of incorporation or by- laws”, may take action “without a meeting if all members of the board or committee consent to the adoption of a resolution authorizing the action”, and that “consent may be written or electronic.” Paragraph (c) of the same section states that “any one or more members of the board or any committee thereof who is not physically present at a meeting of the board or a committee may participate by means of a conference telephone or similar communication equipment or by electronic video screen communication”, and that “[p]articipation by such means shall constitute presence in person as long as all persons participating in the meeting can hear each other at the same time…”

For purposes of the ensuing remarks and in consideration of the clear intent of §260-a of the Education Law, the phrase “public body” as it appears in the OML will be construed to include library boards subject to §260-a.

Based on the language of the OML and judicial precedent, members of entities subject to that statute may not vote by phone or written communication, such as a written proxy or via email.

By way of background, as amended in 2000, §102(1) of the Open Meetings Law defines the term “meeting” to mean “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.” Based upon an ordinary dictionary definition of “convene”, that term means:

"1. to summon before a tribunal;

2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, or a convening that occurs through videoconferencing. I point out, too, that

§103(c) of the Open Meetings Law states that “A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates.”

The amendments to the Open Meetings Law in my view clearly indicate that there are only two ways in which the members of a public body may cast votes or validly conduct a meeting. Any other means of conducting a meeting or voting, i.e., by telephone, by mail, or by e- mail, would be inconsistent with law.

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As indicated above, the definition of the phrase “public body” refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

"Whenever three of 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, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, 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 the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, voting and a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has “gathered together in the presence of each other or through the use of videoconferencing.” Only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that neither a public body nor its members individually may take action or vote by means of telephone calls or e-mail.

In an early decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

“...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as ‘the official convening of a public body for the purpose of conducting public business’ (Public Officers Law §102[1]). Although ‘not every

assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], \*\*\*informal conferences, agenda sessions and work sessions to invoke the provisions of the statute when a quorum is present and when

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the topics for discussion and decision are such as would otherwise arise at a regular meeting’ (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner was formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 Affd 45 NY2d 947).

“The issue was the Town’s policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were ‘present’ and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a ‘meeting’ circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law...”

More recently the Appellate Division nullified action taken by a five person Board, two of whose members could not participate. Two other members met and a third participated by phone. Those three voted, but the Court found that the OML prohibited voting by phone and nullified the action taken [Town of Eastchester v. NYS Board of Real Property Services, 23 AD2d 484 (2005)].

Additionally, I direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

“It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote by phone, by mail, or by e-mail.

The issue, in short, involves whether the Open Meetings Law or the Act should apply. In our view, it is clear that the OML applies, and that any other conclusion would defeat the clear intent of the State Legislature via its enactment of §260-a of the Education Law.

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The Act applies generally to non-profit entities, according to McKinney’s Rules of Statutory Construction, §32, may be characterized as a general law. Section 260-a of the Education Law applies to particular non-profit entities, specifically non-profit, non-governmental public libraries governed by a board of trustees and may be characterized for purposes of this analysis as a “special statute.” Based on §32, a special statute prevails over a general law.

In the context of your inquiry, it is our opinion that §260-a when coupled with the OML takes precedence and prevails over the Act. Again, a contrary conclusion would all but eliminate the accountability that the State Legislature sought to guarantee by means of the enactment of that statute.

I hope that I have been of assistance.