



**State of New York  
Department of State  
Committee on Open Government**

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**OML AO 5639**

*By Electronic Mail Only*

July 15, 2021

*The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.*

Dear:

I am writing in response to your request for an advisory opinion regarding whether the requirements of the Open Meetings Law (OML) apply to a public hearing held by the New York State Senate Ethics Committee.

The OML governs “meetings” of “public bodies.” The term “meeting” is defined 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.” OML § 102(1). The right to participate by videoconference includes the right to count toward a quorum and to vote. The term “public body” 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 committee or subcommittee or other similar body of such public body.” *Id.* § 102(2) (emphasis added). Given this definition, it is our view that a Committee of the New York State Senate constitutes a “public body” subject to the requirements of the OML.

We understand that some have raised a question whether a Committee hearing constitutes a “meeting” for purposes of the OML. There are, in our view, both differences between a “hearing” and a “meeting” and instances in which a “hearing” and a “meeting” overlap. In a Court of Appeals decision rendered in 1978, the Court held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a “meeting” subject to the OML, regardless of whether there is an intent to take action or the characterization of the gathering. *See Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh*, 45 N.Y.2d 947, 948-49 (1978). The Court affirmed a decision of the Appellate Division that dealt specifically with so-called “work sessions” and similar gatherings during which there was merely an intent to discuss but no intent to take formal action. The appellate court held that:

We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to form action. Formal acts have always been

matters of public records and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute.

*Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh*, 60 AD2d 409, 415 (2d Dept. 1978); *cf. Clark v. Lyon*, 537 N.Y.S.2d 934, 935 (3d Dep't 1989) (finding that legislature made "reasonable efforts" to comply with mandate in Pub. Off. L. § 103(b) that "meetings and hearings" be held in "barrier-free" public locations). Given this judicial precedent, it is and has consistently been our view that a hearing conducted by a quorum<sup>1</sup> of a public body, such as the Senate Ethics Committee, constitutes a "meeting" subject to the requirements of the OML. See [OML-AO-5509](#) (2016) ("when a majority of a public body conducts a hearing, it has been advised that the hearing is also a meeting" and subject to the requirements of the OML).

The legislative declaration of the OML provides that 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." OML § 100 (emphasis added). This right to observe includes the right to attend and listen to the deliberations of public bodies at *any* remote location from which a member of a public body participates in the meeting. *Id.* § 103(c).<sup>2</sup> As a prerequisite for a member of a public body to participate and/or vote by videoconference, the OML therefore requires that the public be provided with "an opportunity to attend, listen and observe at any site at which a member participates." OML § 103(c).

For this reason, the statutory notice of the open meeting must include all of the locations of the meeting at which any member is participating, including the location(s) of the member(s) participating by videoconference: "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.*" *Id.* § 104(4) (emphasis added). This is true even if members of the public body are participating by videoconference from a "private" location such as a home or while on vacation.

In March 2020, in conjunction with his declaration of a disaster emergency associated with the spread of Covid-19, the disease caused by SARS-CoV-2, Governor Andrew M. Cuomo suspended this "in person" requirement of the OML in Executive Order 202.1 to ensure that open meetings could continue to occur without jeopardizing public health. During the pendency of the Governor's EO 202.1, many public bodies convened virtually (including from private locations such as members' homes) and members of the public could participate in these meetings only by viewing a live stream or listening-in remotely. However, on June 25, 2021, the Governor rescinded Executive Order 202.1, ending the declared disaster emergency and the suspension of the OML "in person" requirements. Accordingly, on or after June 25, 2021, a member of a public body wishing to form a part of the quorum for or cast a vote in a meeting subject to the Law by held by videoconference (*i.e.*, Zoom) may do so only if the public is permitted to be physically present with the member at the member's location.

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<sup>1</sup> We have also consistently advised, however, that a public body need not have a quorum present in order to conduct a hearing, and where less than a majority of members of the public body are present (in person or by videoconference) for a hearing, such hearing is not a meeting subject to the OML. See [OML-AO-5509](#) (2016).

<sup>2</sup> Section 41 of the New York State General Construction Law includes a reference to videoconferencing in its definition of the word "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."

In summary, now that Executive Order 202.1 is no longer in effect, the notice of any meeting held pursuant to the requirements of the OML must again include the following when the public body is using videoconferencing<sup>3</sup>:

- A statement that videoconferencing will be used;
- The exact location from which *every* member of the public body is participating; and
- A statement that the public has the right to attend the meeting at *any* location from which a member of the public body is participating.

Members of the public body who are participating by videoconferencing also have the right to attend, participate, and vote in executive session.

Thank you for your inquiry.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay

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<sup>3</sup> Since the rescission of Executive Order 202.1, there is no longer any authority for a public body to conduct a meeting by *teleconference* or for a member of a public body to participate or vote in a meeting by teleconference. Judicial decisions dealing with votes taken by telephone have found the votes to be a nullity. See, e.g., *Town of Eastchester v. NYS Board of Real Property Services*, 23 A.D.3d 484, 486 (2d Dep't 2005) (invalidating actions taken by telephone vote); *Cheevers v. Town of Union* (Supreme Ct. Broome Co. Sept. 3, 1998) (unreported opinion) (same).