



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

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OML AO 5668

April 10, 2024

By email:

The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence.

Dear:

The Committee on Open Government (Committee) received your request for an advisory opinion “from the Committee on Open Government or related government agency that can make such rulings” as to whether the statewide Invasive Species Advisory Committee (ISAC) is a public body subject to the Open Meetings Law (OML) and whether it may allow its members to attend meetings remotely. In your e-mail you also state that ISAC is seeking an exemption from the OML. To be clear, neither the Committee, nor any other government agency of which we are aware, has the authority to waive a statutory requirement or exempt a public body from the requirements of the OML. Further, the Committee is authorized to offer advice and legal opinions regarding the OML but does not have the authority to issue “rulings.” Only the courts, through the initiation of a Civil Practice Law and Rules Article 78 proceeding in state supreme court, have enforcement authority in this regard.

The following represents the opinion of the Committee regarding the application of the OML to ISAC.

New York State Environmental Conservation Law § 9-1707(1) creates and establishes the obligations of ISAC.

There shall be established a New York invasive species advisory committee which shall provide information, advice and guidance to the council, including but not limited to providing assistance with the development of the four-tier classification system for nonnative animal and plant species.

Section 9-1707(2) specifies the membership composition of the Committee.

The commissioner and the commissioner of agriculture and markets shall select up to twenty-five at-large members with at least one member from each of the following: New York biodiversity research institute, New York state's land grant university, New York sea grant, a statewide organization formed to address invasive species, a statewide land conservation organization, a statewide agricultural organization, a nursery business, a boating organization, the darrin freshwater institute, the soil and water conservation districts, the natural heritage program, a New York state forestry school, a lake association, the New York city department of environmental protection, and a statewide local government organization.

Section 9-1705 defines the authority and duties of ISAC. In pertinent parts, § 9-1705 requires the Council to "regularly consult with the advisory committee" and to "submit[] to the legislature and the governor . . . a report, produced in consultation with the advisory committee, recommending a four-tier system for nonnative animal and plant species." There does not appear to be any mandate that the Council adhere to any advice or recommendations produced by ISAC during its "consultations." The Council is also permitted to consult with "any organization, educational institution, or governmental agency" in carrying out its duties. In our opinion, this language suggests that the Council would be free to disregard any information, advice or recommendations made by ISAC, if it so chooses.

Historically, judicial decisions have indicated that advisory bodies having no power to take final action, other than committees consisting solely of members of covered public bodies, fell outside the scope of the OML. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters[,] is not itself a governmental function." *Goodson-Todman Enterprises, Ltd. v. Town Board of Milan*, 151 A.D.2d 642, 643 (2d Dep't 1989); see also *Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force*, 145 A.D.2d 65, 67 (2d Dep't 1989); *New York Public Interest Research Group v. Governor's Advisory Commission*, 133 Misc.2d 613 (Supr. Ct., New York Co., 1986), *aff'd with no opinion*, 135 A.D.2d 1149, *motion for leave to appeal denied*, 71 N.Y. 2d 964 (1988).

However, notwithstanding this line of cases, courts have also held that not all bodies serving in an advisory capacity were exempt from the OML as distinct for various important reasons. In *MFY Legal Services v. Toia*, which involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services, the Court found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" and that "[t]herefore, the giving of advice by the committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department." 402 N.Y.S.2d 510, 511-12 (1977). Also significant in this regard is *Smith v. CUNY*, in which the Court of Appeals, the state's highest court, held:

In determining whether an entity is a public body, various criteria and benchmarks are material. They include the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies. . . . This Court has

noted that the powers and functions of an entity should be derived from State law in order to be deemed a public body for Open Meetings Law purposes It may be that an entity exercising only an advisory function would not qualify as a public body within the purview of the Open Meetings Law. . . . More pertinently here, however, a formally chartered entity with officially delegated duties and organizational attributes of a substantive nature, as this Association, Inc. enjoys, should be deemed a public body that is performing a governmental function.

92 N.Y.2d 707, 713-14 (1999).

Further complicating matters, subsequent to these rulings, in 2021 the New York State Legislature amended Section 102 of Public Officers Law. As amended, a public body is now 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. 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.*

OML § 102 (emphasis added). This amended definition of “public body” suggests the possibility that the legislature intended to reverse the judicial interpretations and law established in the above case holdings. In our view, however, the sponsor’s memorandum supports just the opposite: that the legislature did *not* intend to exclude from the definition a body previously covered by the Law:

Nevertheless, there are a number of bodies created by executive order or created to perform functions in the governmental decision-making process, that are not subject to the Open Meetings Law. Due to this, these bodies conduct business behind closed doors and have excluded interested parties who have attempted to attend its sessions. In keeping with recent legislative initiatives aimed at greater transparency, these bodies should be open to public scrutiny. The work of our state’s public bodies has a profound effect on the functioning of government and it is essential to our democratic process that members of the public are fully aware of and have the opportunity to observe the deliberations and decisions that go into the making of public policy. This legislation will ensure that those bodies which play a key role in the decision-making

process are covered by the Open Meetings Law, even if they do not have the authority to make final and binding decisions.

As with all expressions of legislative intent that introduce ambiguity into the interpretation of the plain language of a statute, as we have previously opined, this passage is not definitive and its language does not appear in the enacted statute. The fact that the legislature chose to redefine public body in this way, based on the plain language of the addition and the placement of this sentence within the OML, introduces ambiguity and, thus, uncertainty. See OML AO [5656](#). Prior to this amendment, the Committee had long opined, consistent with the two cases discussed above, that if the body was required to exist by state statute and served a statutorily required advisory role, a court would likely determine that such a body is a “public body” subject to the statutory requirements of the OML. Based on those considerations, and given the language of § 9-1707, the Committee would have previously opined that ISAC constitutes a public body as defined by OML § 102.

The Committee on Open Government always supports the most transparent processes possible, and given the uncertainty the amended legislative amendments created, we advise ISAC to continue holding its meetings in a manner consistent with the requirements of the OML.

Next, you inquire about allowing members of ISAC to attend and participate in meetings remotely. Assuming, arguendo, that ISAC is a public body, the OML only allows members of a public body to participate in a meeting via videoconference under one of two distinct provisions. The first allows members of public bodies to attend meetings by connecting multiple open physical location together through the use of videoconferencing. Section 104(4) states: “If videoconferencing is used to conduct a meeting, the 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.” Therefore, if a member discloses the location from which they will attend in the meeting notice and permits members of the public to attend from that location along with them, they may attend by videoconference. ISAC would not be under an obligation to permit members of the public to also attend remotely in that circumstance.

The second distinct provision authorizing videoconferencing is §103-a, which permits remote attendance of members of a public body under extraordinary circumstances as long as certain criteria are also met. In order to utilize §103-a, the public body must have held a hearing authorizing the use of §103-a and established written procedures for its use. Among other requirements, a quorum of the members must be present at a physical location that is open to the public and the member(s) attending purely remotely (without including his or her private location in the meeting notice) must be experiencing an “extraordinary circumstance.” If a member is attending a meeting using videoconferencing due to an extraordinary circumstance pursuant to §103-a, the entire meeting must be publicly accessible by videoconferencing and allow for remote public participation, if the body permits public comment. Section 103-a(2)(h) requires:

If 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

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ensure that videoconferencing authorizes the same public participation or testimony as in person participation or testimony.

The notice for such a meeting must include the remote platform link. Please see the following guidance document and previously issued advisory opinion. [Guidance, model resolution, model procedures re: Videoconferencing](#); AO [5641](#).

Thank you for your inquiry.

Sincerely,

/s/Christen L. Smith

Christen L. Smith