

COMMITTEE ON OPEN GOVERNMENT

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August 10, 2020

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.

To Whom it May Concern:

The fundamental premise of the Open Meetings Law is that *any person who is interested in the deliberations of a public body may be present to view and listen to such deliberations as they occur*. In March, in recognition of the declared disaster emergency associated with the spread of COVID-19, the disease caused by the novel coronavirus, Governor Andrew M. Cuomo issued an executive order permitting public bodies to meet virtually to prevent the spread of the virus, as long as members of the public who wished to listen in and view the proceedings could do so contemporaneously with the holding of the meeting.

The Governor's Order provides:

Suspension of law allowing the attendance of meetings telephonically or other similar service:

Article 7 of the Public Officers Law, to the extent necessary to permit any public body to meet and take such actions authorized by the law without permitting in public in-person access to meetings and authorizing 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.

That executive order, called EO 202.1, has been extended multiple times and is currently in effect through September 4, 2020 (EO 202.55).

On April 15, 2020, the Governor issued another executive order concerning gatherings of people in public places, which provided:

Effective at 8 p.m. on Friday, April 17, 2020 any individual who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance.

That executive order also has been extended multiple times and is currently in effect through September 4, 2020 (EO 202.55).

Some public bodies may be ready to re-commence essential¹ meetings “in person.” However, such meetings must comply not only with the requirements of the Open Meetings Law but also with the Governor’s executive orders and other guidance concerning limitations on physical gatherings. Accordingly, any meeting of a public body covered by the provisions of the Open Meetings Law must permit any member of the public who wishes to attend in person to attend but must also comply with EO 202.17, as amended, and any guidance or regulation promulgated by the Governor’s administration or the New York State Department of Health.

What this means, in practical terms, is that if a public body is convening an essential meeting, the body must ensure that it adheres to social distancing, masking, and any other administration requirements, and if there is any question about whether it is able to maintain a safe space in which to hold an essential open meeting, it must provide a contemporaneous video or audio broadcast such that members of the public who cannot safely attend in person “ha[ve] the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed.”

The public body may not artificially limit attendance at its meetings – to do so would not be consistent with the requirements of the Open Meetings Law.

In my opinion, if a public body can possibly anticipate that any persons who may wish to attend a meeting governed by the provisions of the Open Meetings Law cannot be safely physically accommodated in the proposed meeting location pursuant to legal and regulatory restrictions, that public body is required to simulcast to the public, by either video or audio means, the proceedings of the meeting as they are occurring so that all members of the public who wish to “attend” may do so.

Thank you for your inquiry.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah V. Bewlay
Executive Director

SVB/fhs

¹ With respect to gatherings deemed “non-essential,” the Governor has directed further restrictions on indoor spaces: “fifty (50) or fewer individuals [may gather] for any lawful purpose or reason, so long as any such gatherings occurring indoors do not exceed 50% of the maximum occupancy for a particular indoor area, and provided that the location of the gathering is in a region that has reached Phase 4 of the State’s reopening, and provided further that social distancing, face covering, and cleaning and disinfection protocols required by the Department of Health are adhered to.” EO 202.45 (extended through August 20, 2020, in EO 202.53).