



**Committee on
Open Government**

New York State Open Government Laws During Declared Disaster Emergency

April 20, 2020



Public
Officers
Law
Article 7,
§§ 100-11



Public
Officers
Law
Article 6,
§§ 84-90

Intent of the Open Meetings Law

- 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.”

New York State Response to the Novel Coronavirus

On March 13, 2020, Governor Andrew M. Cuomo, in response to a disaster emergency declared pursuant to New York State Executive Law § 28, issued [Executive Order 202.1](#) suspending certain aspects of the OML relating to in-person attendance.



Executive Order 202.1

March 13, 2020

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.



Executive Order 202.1

March 13, 2020

The Order did not prohibit public bodies from allowing in-person attendance at their meetings.

Gave discretion to the public bodies to act in their constituents' best interests.

However...

New York State Response to the Novel Coronavirus

In subsequent Executive Orders, the Governor directed that large gatherings of individuals be cancelled.

Executive Order 202.3

March 16, 2020

Governor directed that “any large gathering or event (concert, conference, worship service, performance before a large audience, etc.) shall be cancelled or postponed if more than fifty persons are expected in attendance, at any location in New York State until further notice.”

This directive has been extended until at least May 7, 2020, pursuant to Executive Order 202.14.

Executive Order 202.10

March 23, 2020

“Non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events) are canceled or postponed at this time.”



Effect of EOs on OML

OML § 102(1)

“Meeting” means 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.

Executive Order 202.1

Authorizes meetings to be held remotely by conference call or similar service. The Order suspends the requirement of the OML and § 41 of the General Construction Law that members of the body be physically convened or convened by videoconferencing in order to achieve a quorum and conduct the public business. Teleconferencing is permitted.



Effect of EOs on OML

OML § 103

Open meetings and executive sessions.

(a) Every meeting of a public body shall be open to the general public...

(b) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped ...

(c) A public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe at any site at which a member participates.

(d) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings.

EO 202.1

Authorizes
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Effect of EOs on OML

OML § 104

Public notice.

¶¶ 1, 2, & 6: requires notice of the time and place of a meeting

“4. 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.”

Executive Order 202.1

Authorizes public bodies to hold meetings “without permitting in public in-person access to meetings...”

In our view, if in-person attendance is barred by the public body in compliance with the Order, the Order suspends the body’s obligation to identify the location from which members are participating and suspends the obligation to “state that the public has the right to attend the meeting at any of the locations.”

Effect of EOs on OML

Instead of providing a meeting location in the meeting notice, public bodies should provide instructions to the public for remotely accessing the meeting through teleconference, videoconference, webcast, broadcast, or other similar mechanism.

Reminder: § 104(5) of the OML states: “If a meeting will be streamed live over the internet, the public notice for the meeting shall inform the public of the internet address of the website streaming such meeting.” This requirement is not suspended by the EO.



New Requirements

EO 202.1 suspends certain aspects of the OML, but establishes new requirements for the duration of the Order:

- Must allow contemporaneous remote access to the public
- Public Bodies must record and *later transcribe* their meetings
 - Transcription does not have to be performed by a stenographer or professional service.
 - Can be performed by an employee or electronically by the remote access service.
 - No time limit for preparing the transcript.

Advisory Opinions Issued

Staff of the Committee have recently prepared two advisory opinions regarding the effect of EO 202.1 on the OML. The opinions are available on the [Committee website](#) and address:

- How EO 202.1 affects the ability to obtain a quorum
- The requirement for contemporaneous remote access by the public in lieu of in-person public attendance.

Intent of the Freedom of Information Law

“The people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public’s business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.” Public Officers Law § 84.



No Suspension by Executive Order

Use best efforts to balance the health and welfare of government employees with the need for public accountability.

- Email: if the RAO is working from home, ideally he or she has remote access to the agency's network in order to acknowledge requests and, if possible, start the process of gathering records, etc. In the view of the Committee, "New York State on PAUSE" is a factor that can be considered when determining whether a response date is reasonable.
- "Snail" mail: if the RAO is working from home, but other agency staff are physically present in the agency offices, that staff should, if possible, scan copies of the FOIL requests to the RAO for processing. If no staff is physically present in the office, a staff member should be designated to process incoming FOIL mail a minimum of once per week.
- If all employees are prohibited from entering agency office space, it is our opinion that the request can be considered "received" at the point which employees are permitted to re-enter the space. If this is this case, a notice to that effect, letting the public know that FOIL responses sent by mail during that period will not be acknowledged until the prohibition ends, should be posted on the agency webpage.



Questions??

- ANYONE may contact our office by phone or email with questions (government employees, members of the public, media representatives, etc.).
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