



Committee on
Open Government

NEW YORK STATE
DEPARTMENT OF STATE

COMMITTEE ON
OPEN GOVERNMENT

Your Right to Know

NEW YORK STATE
OPEN GOVERNMENT LAWS



The Committee

The Committee on Open Government is responsible for overseeing implementation of the Freedom of Information Law (Public Officers Law §§ 84-90) and the Open Meetings Law (Public Officers Law §§ 100-111). The Freedom of Information Law (FOIL) governs rights of access to government records, while the Open Meetings Law (OML) concerns the conduct of meetings of public bodies and the public right to attend those meetings. The Committee also oversees implementation of the Personal Privacy Protection Law.

The Committee is composed of 11 members, five from government and six from the public. The five government members are the Lieutenant Governor, the Secretary of State, whose office acts as secretariat for the Committee, the Commissioner of the Office of General Services, the Director of the Division of the Budget, and one elected local government official appointed by the Governor. Of the six public members, at least two must be or have been representatives of the news media.

FOIL directs the Committee to provide advice to agencies, the public and the news media, issue regulations which have the force and effect of law, and report its observations and recommendations to the Governor and the Legislature annually. Similarly, under the OML, the Committee issues advisory opinions, reviews the operation of the law, and reports its findings and recommendations annually to the Legislature.

As secretariat for the Committee, the Department of State has appointed an Executive Director manage the day-to-day operations of the Committee, including the provision of legal advice, opinions and guidance to Committee members and the general public. The Executive Director has been authorized by the Secretary of State to hire and manage a legal staff to assist with these operations and duties.

When questions arise under either FOIL or the OML, the Executive Director and her staff provide written or oral advice and attempt to resolve controversies in which rights may be unclear. Since its creation in 1974, the Committee has prepared more than 25,000 written advisory opinions at the request of government, the public and the news media. In addition, the Executive Director and her staff have provided hundreds of thousands of verbal opinions by telephone. The Executive Director and her staff also provide training and educational programs for government, public interest and news media organizations, as well as students on campus.

Opinions prepared since early 1993 that have educational or precedential value are maintained online, identified by means of a series of key phrases in separate indices created in relation to FOIL and the OML.

The indexes can be accessed at the following links:

FOIL Advisory Opinions – <https://opengovernment.ny.gov/freedom-information-law-foil-advisory-opinions>

OML Advisory Opinions - <https://opengovernment.ny.gov/open-meetings-law-oml-advisory-opinions>

Each index to advisory opinions is updated periodically to ensure that interested persons and government agencies have the ability to obtain opinions recently rendered.

The website also includes the following:

- The text of the Freedom of Information Law;
- Rules and Regulations of the Committee on Open Government (21 NYCRR Part 1401);
- Model Rules for Agencies;
- Sample Request for Records;
- Sample Request for Records via Email;
- Sample Appeal;
- Sample Appeal When Agency Fails to Respond in a Timely Manner;
- FOIL Case Law Summary;
- Frequently Asked Questions regarding FOIL;
- The text of the Open Meetings Law;
- Model Rules for Public Bodies;
- An Article on Boards of Ethics;
- OML Case Law Summary;
- Frequently Asked Questions regarding OML;
- The text of the Personal Privacy Protection Law (only applies to State Agencies);
- You Should Know, regarding the Personal Privacy Protection Law.

If you are unable to locate information on the website and need advice regarding either FOIL or the OML, feel free to contact:

Committee on Open Government, NYS Department of State
One Commerce Plaza
99 Washington Ave Ste 650
Albany, NY 12231
(518) 474-2518 (telephone) / (518) 474-1927 (facsimile) / coog@dos.ny.gov

Freedom of Information

The Freedom of Information Law (FOIL) affirms your right to know how your government operates. It provides rights of access to records that reflect governmental decisions and policies that affect the lives of every New Yorker. The Law authorized the creation of the Committee on Open Government.

Scope of the law

All agencies are subject to FOIL and the Law defines “agency” to include all units of state and local government in New York State, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of local government in the state (Pub. Off. L. (“POL”) § 86(3)).

The term “agency” does not include the State Legislature or the courts. For purposes of clarity, “agency” will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts, which will be discussed later.

What is a record?

All records are subject to the FOIL, and the law defines “record” as “any information kept, held, filed, produced or reproduced by, with or for an agency . . . in any physical form whatsoever.” POL § 86(4). It is clear that items such as audio or visual recordings, data maintained electronically, and paper records fall within the definition of “record.” An agency is not required to create a new record or provide information in response to questions to comply with the law; however, the courts have held that an agency must provide records in the form requested if it has the ability to do so. For instance, if the agency can transfer data into a requested format, the agency must do so upon payment of the proper fee.

Accessible records

FOIL is based on a presumption of access, stating that all records are accessible, except records or portions of records that fall within one of the below categories of deniable records. POL § 87(2).

An agency may decline to produce records or portions thereof that:

- (a) are specifically exempt from disclosure by state or federal statute;
- (b) would if disclosed result in an unwarranted invasion of personal privacy;
- (c) would if disclosed impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(e) are compiled for law enforcement purposes and which if disclosed would:

- i. interfere with law enforcement investigations or judicial proceedings, provided however, that any agency, which is not conducting the investigation that the requested records relate to, that is considering denying access pursuant to this subparagraph shall receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relative to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) could if disclosed endanger the life or safety of any person;

(g) are inter-agency or intra-agency communications, except to the extent that such materials consist of:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government;

(h) are examination questions or answers that are requested prior to the final administration of such questions; or

(i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

(j) [Deemed repealed Dec. 1, 2024] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

(k) [Expires and deemed repealed Dec. 1, 2024] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.

(l) [Expires and deemed repealed Sept. 20, 2025] are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.

(m) [Expires and deemed repealed July 1, 2022] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-b of the vehicle and traffic law.

(n) [Expires and deemed repealed Dec. 1, 2024] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-d of the vehicle and traffic law.

(o) [Expires and deemed repealed Sept. 12, 2024] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-e of the vehicle and traffic law.

(p) [See also, par. (p) below.] are data or images produced by an electronic toll collection system under authority of article forty-four-C of the vehicle and traffic law and in title three of article three of the public authorities law.

(p) [Expires and deemed repealed Sept. 6, 2024; See also, par. (p) above.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-d of the vehicle and traffic law.

(q) [Expires and deemed repealed Dec. 1, 2024] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred seventy-four-a of the vehicle and traffic law.

(r) [Expires and deemed repealed Oct. 6, 2026; See also, pars. (r) below.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-e of the vehicle and traffic law.

(r) [Expires and deemed repealed Dec. 1, 2026; See also, pars. (r) above and below.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-f of the vehicle and traffic law.

(r) [Expires and deemed repealed Dec. 1, 2025; See also, pars. (r) above.] are photographs, microphotographs, videotape or other recorded images or information and data prepared under authority of section three hundred eighty-five-a of the vehicle and traffic law.

The categories of records that an agency may decline to produce generally involve the potentially harmful effects of disclosure. They are based in great measure upon the notion that disclosure would in some instances “impair,” “cause substantial injury to,” “interfere with,” “deprive,” “endanger,” etc.

One category of records an agency may decline to disclose that does not deal directly with the effects of disclosure is exception (g), which deals with inter-agency and intra-agency materials. The intent of the exemption is twofold. Written communications transmitted from an official of one agency to an

official of another or between officials within an agency may be withheld as exempt insofar as they consist of advice, opinions or recommendations. For example, an opinion prepared by staff which may be rejected or accepted by the head of an agency need not be made available. Statistical or factual information, on the other hand, as well as the policies and determinations upon which an agency relies in carrying out its duties, are available unless a different exemption applies.

There are also special provisions in the law regarding the protection of trade secrets and critical infrastructure information. Those provisions pertain only to state agencies and enable a business entity submitting records to state agencies to request that records be kept separate and apart from all other agency records. When a request is made for records falling within these special provisions, the submitter of such records is given notice and an opportunity to justify a claim that the records would if disclosed result in substantial injury to the competitive position of the submitter's commercial enterprise. A member of the public requesting records may challenge such a claim.

Generally, the law applies to existing records. Therefore, an agency need not create a record in response to a request. Nevertheless, POL § 87(3) requires that each agency must maintain the following:

- (a) a record of the final vote of each member in every agency proceeding in which the member votes;
- (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and
- (c) a reasonably detailed current list by subject matter of all records in possession of an agency, regardless of whether the records are accessible.

Protection of privacy

One of the exceptions to rights of access referenced earlier states that records may be withheld when disclosure would result in "an unwarranted invasion of personal privacy." POL § 87(2)(b).

Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when upon presenting reasonable proof of identity, people seek access to records pertaining to themselves.

When a request is made for records that constitute a list of names and home addresses of natural persons (*i.e.*, not corporations or individuals acting in a

business capacity) or its equivalent, the agency is permitted to require that the applicant certify that such list will not be used for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists to any other person for the purpose of allowing that person to use such list for solicitation or fund-raising purposes. POL § 89(3)(a).

Since 2010, agencies have been prohibited from intentionally releasing social security numbers to the public. POL § 96-a.

How to Obtain Records

Subject matter list

As noted earlier, each agency must maintain a “subject matter list.” POL § 87(3)(c). The list is not a compilation of every record an agency has in its possession, but rather is a list of the subjects or file categories under which records are kept. It must reference all records in possession of an agency, regardless of whether the records are available. You have a right to know the kinds of records agencies maintain.

The subject matter list must be compiled in sufficient detail to permit you to identify the file category of the records sought, and it must be updated annually. Each state agency is required to post its subject matter list online. An alternative to and often a substitute for a subject matter list is a records retention schedule. Schedules regarding state and local government outside of New York City are prepared by the State Archives; those applicable in New York City are prepared by the NYC Department of Records and Information Services.

Regulations

Each agency must adopt standards based upon general regulations issued by the Committee. These procedures describe how you can inspect and copy records. The Committee regulations and a model designed to enable agencies to easily comply are available on the Committee website. See [Regulations of the Committee on Open Government and Model Rules for Agencies](#).

Designation of records access officer

Under the Committee regulations, each agency must appoint one or more persons as records access officer. The records access officer has the duty of coordinating the agency response to public requests for records in a timely fashion. In addition, the records access officer is responsible for ensuring that agency personnel assist in identifying records sought, make the records promptly available or deny access in writing, provide copies of records or

permit you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certifying either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot be found after diligent search.

The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Requests for records

An agency may ask you to make your request in writing. See Sample Request for Records, below. The law requires you to “reasonably describe” the record in which you are interested. POL § 89(3)(a). Whether a request reasonably describes records often relates to the nature of an agency filing or recordkeeping system. If records are kept alphabetically, a request for records involving an event occurring on a certain date might not reasonably describe the records. Locating the records in that situation might involve a search for the needle in the haystack, and an agency is not required to engage in that degree of effort. The responsibility for identifying and locating records sought rests to an extent upon the agency. If possible, you should supply dates, titles, file designations, or any other information that will help agency staff to locate requested records, and it may be worthwhile to find out how an agency keeps the records of your interest (*i.e.*, alphabetically, chronologically or by location) so that a proper request can be made.

The law also provides that agencies must accept requests and transmit records requested by email when they have the ability to do so. These days, few agencies will not have an email system and accordingly must accept requests and provide records using this method.

Within five business days of the receipt of a written request for a record reasonably described, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied, which must be reasonable in consideration of attendant circumstances, such as the volume or complexity of the request. The approximate date ordinarily cannot exceed 20 business days from the date of the acknowledgment of the receipt of a request. If an agency determines that it needs more than 20 business days to grant a request in whole or in part, the agency acknowledgment must explain the reason and provide a specific date within which it will grant a request in whole or in part.

When an agency delays a response beyond 20 business days, the delay must be reasonable in relation to the circumstances of the request.

If the agency fails to abide by any of the requirements concerning the time within which it must respond to a request, the request is deemed denied, and the person seeking the records may appeal the denial. For more information, see [Explanation of Time Limits for Responding to Requests](#).

Fees

An agency must make copies of records available on request. Except when a different fee is prescribed by statute (an act of the State Legislature), an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to nine by 14 inches. POL §87(1)(b)(iii). An agency may charge fees for copies of other records based upon the actual cost of reproduction. There may be no basis to charge for copies of records that are transmitted electronically; however, when requesting electronic data, there are occasions when the agency can charge for employee time spent preparing the electronic data.

Denial of access and appeal

Unless a denial of a request occurs due to a failure to respond in a timely manner, a denial of access must be in writing, stating the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to determine appeals by the head or governing body of the agency. You may appeal within 30 days of a denial. Upon receipt of the appeal, the agency head, governing body or appeals officer has ten business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of appeals and the determinations thereon must be sent by the agency to the Committee on Open Government. POL § 89(4)(a). A failure to determine an appeal within 10 business days of its receipt is considered a denial of the appeal.

You may seek judicial review of a final agency denial by initiating a proceeding pursuant to Article 78 of the Civil Practice Law and Rules. When a denial is based on an exception to rights of access, the agency has the burden of proving that the record sought falls within the claimed exemption(s). POL § 89(4)(b).

FOIL permits a court, in its discretion, to award attorney fees to a petitioner when the court finds that they have substantially prevailed and the agency failed to respond to a request or appeal within the statutory time. An award of

attorney fees is mandatory when the petitioner has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

Access to Legislative Records

Section 88 of FOIL applies only to the State Legislature and provides access to the following records in its possession:

- (a) bills, fiscal notes, introducers' bill memoranda, resolutions and index records;
- (b) messages received from the Governor or the other house of the Legislature, as well as home rule messages;
- (c) legislative notification of the proposed adoption of rules by an agency;
- (d) transcripts, minutes, journal records of public sessions, including meetings of committees, subcommittees and public hearings, as well as the records of attendance and any votes taken;
- (e) internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;
- (f) administrative staff manuals and instructions to staff that affect the public;
- (g) final reports and formal opinions submitted to the Legislature;
- (h) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the Legislature;
- (i) any other records made available by any other provision of law; and
- (j) external audits conducted pursuant to section ninety-two of the legislative law and schedules issued pursuant to subdivision two of section ninety of the legislative law.

In addition, each house of the Legislature must maintain and make available:

- (a) a record of votes of each member in each session, committee and subcommittee meeting in which the member votes;
- (b) a payroll record setting forth the name, public office address, title and salary of every officer or employee; and
- (c) a current list, reasonably detailed, by subject matter of any record required to be made available by section 88.

Each house is required to issue regulations pertaining to the procedural aspects of the law. Requests for the listed records should be directed to the public information officers of the respective houses.

Access to Court Records

Although the courts are not subject to FOIL, § 255 of the Judiciary Law has long required the clerk of a court to “diligently search the files, papers, records and dockets in his office” and upon payment of a fee make copies of such items. Justice Courts are covered by § 2019-a of the Uniform Justice Court Act, which states that “records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public.”

Agencies charged with the responsibility of administering the judicial branch, such as, for example, the Office of Court Administration, are not courts and therefore are treated as agencies subject to FOIL.

Sample Letters
Requesting Records (Sample)

Records Access Officer
Name of Agency
Address of Agency
City, NY, ZIP code

Re: Freedom of Information Law Request

Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request records or portions thereof pertaining to (or containing the following) _____ (attempt to identify the records in which you are interested as clearly as possible). If my request appears to be extensive or fails to reasonably describe the records, please contact me in writing or by phone at _____ .

If there are any fees for copying the records requested, please inform me before filling the request (or: ... please supply the records without informing me if the fees are not in excess of \$____).

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,
Signature
Name
Address
City, State, ZIP code

Requesting Records by Email (Sample)

We suggest that agencies create an email address dedicated to the receipt of requests. It is recommended that you review the website of the agency maintaining the records that you seek in order to locate its email address and its records access officer. The subject line of an applicant's request should be "FOIL Request."

Dear Records Access Officer:

Please email the following records if possible (include as much detail about the record as possible, such as relevant dates, names, descriptions, etc.): OR

Please advise me of the appropriate time during normal business hours for inspecting the following records prior to obtaining copies (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.): OR

Please inform me of the cost of providing paper copies of the following records (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.). AND/OR

If all of the requested records cannot be emailed to me, please inform me by email of the portions that can be emailed and advise me of the cost for reproducing the remainder of the records requested (\$0.25 per page or actual cost of reproduction).

If the requested records cannot be emailed to me due to the volume of records identified in response to my request, please advise me of the actual cost of copying all records onto a storage device or other media.

If my request is too broad or does not reasonably describe the records, please contact me via email so that I may clarify my request, and when appropriate inform me of the manner in which records are filed, retrieved or generated.

If it is necessary to modify my request, and an email response is not preferred, please contact me at the following telephone number: _____.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name, address and email address of the person or body to whom an appeal should be directed.

(Name) (Address, if records are to be mailed).

Appeal A Written Denial (Sample)

Name of Agency Official

Appeals Officer

Name of Agency

Address of Agency

City, NY, ZIP code

Re: Freedom of Information Law Appeal

Dear _____:

I hereby appeal the denial of access regarding my request, which was made on _____ (date) and sent to _____ (records access officer, name and address of agency).

The records that were denied include: _____ (describe the records that were denied to the extent possible and, if possible, offer reasons for disagreeing with the denial, i.e., by attaching an opinion of the Committee on Open Government acquired for its website).

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs agencies to send all appeals and the determinations that follow to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,

Signature

Name

Address

City, State, ZIP code

**Appeal A Denial due to an Agency's Failure to Respond in a Timely Manner
(Sample)**

FOIL Appeals Officer

Name of Agency

Address of Agency

City, NY, ZIP code

Re: Freedom of Information Law Appeal

Dear _____:

*I requested (describe the records) by written request made on _____
(date). More than five business days have passed since the receipt of the
request without having received a response... or... Although the receipt of the
request was acknowledged and I was informed that a response would be given
by _____ (date), no response has been given. Consequently, I consider
the request to have been denied, and I am appealing on that basis.*

*As required by the Freedom of Information Law, the head or governing body of
an agency, or whomever is designated to determine appeals, is required to
respond within 10 business days of the receipt of an appeal. If the records are
denied on appeal, please explain the reasons for the denial fully in writing as
required by law.*

*In addition, please be advised that the Freedom of Information Law directs
agencies to send all appeals and the determinations that follow to the
Committee on Open Government, Department of State, One Commerce Plaza,
99 Washington Ave., Albany, New York 12231.*

Sincerely,

Signature

Name

Address

City, State, ZIP code

Open Meetings

The Open Meetings Law (OML) went into effect in 1977. Amendments that clarify and reaffirm your right to hear the deliberations of public bodies became effective in 1979.

In brief, the law gives the public the right to attend meetings of public bodies, listen to debates and watch the decision-making process in action. It requires public bodies to provide notice of the times and places of meetings and keep minutes of all action taken.

As stated in the legislative declaration of the OML (POL § 100):

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.

What is a meeting?

“Meeting” is defined as “the official convening of a public body for the purpose of conducting public business.” POL § 102(1). Courts have expansively interpreted this term. Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be open to the public, regardless of whether there is intent to take action, and regardless of the manner in which the gathering is or may be characterized. The definition also authorizes members of public bodies to conduct meetings by videoconference provided that certain requirements are adhered to. A meeting cannot validly be held by telephone or through the use of email.

Since the law applies to “official” meetings, chance meetings or social gatherings are not covered; however, should a quorum be present without having provided proper notice, the discussion should not pertain to public business. Also, the law is silent with respect to public participation. Therefore, a public body may permit the public to speak at open meetings, but is not required to do so.

What is covered by the law?

The law applies to all public bodies. “Public body” is defined to cover entities consisting of two or more people that require a quorum to conduct public business and perform a governmental function for the state, for an agency of

the state, or for public corporations, including cities, counties, towns, villages and school districts. See POL § 102(2). In addition, committees and subcommittees consisting solely of members of a governing body are specifically included within the definition. Consequently, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies and committees and subcommittees of those groups all fall within the framework of the law. Citizens' advisory bodies and similar advisory groups that are not created by law are not required to comply with the OML.

Notice of Meetings

The law requires that notice of the time and place of all meetings be given prior to every meeting. See POL § 104. If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than 72 hours prior to the meeting. Notice to the public must be accomplished by posting in one or more designated public locations and, when possible, online.

When a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Again, notice to the public must be given by means of posting in designated locations and online.

Videoconferencing

Public bodies may use videoconferencing technology to conduct their meetings in one of two ways.

Standard videoconferencing:

A public body may, under all circumstances, allow its members to attend from any physical location that is open to in-person public attendance. The locations from which all members will be attending, which must be open to the public, must also be included in the meeting notice.

Extraordinary Circumstances videoconferencing:

On April 9, 2022, Governor Hochul signed Chapter 56 of the Laws of 2022, which added § 103-a to the OML. Under POL § 103-a, effective June 9, 2022, and absent a declared statewide or applicable local disaster, a public body may act to allow members to attend a meeting by videoconference without opening the location to in-person public attendance under "extraordinary circumstances" only.

Each public body that wishes to allow for remote attendance by its members at locations that do not allow for in-person physical attendance by the public is

required to, after a public hearing, adopt a local law (governing bodies of counties, cities, towns and villages), adopt a joint resolution (New York State Senate and Assembly), or adopt a resolution (any other public body) authorizing such remote attendance, and must establish written procedures that set forth what they determine to be “extraordinary circumstances.” Chapter 56 includes a non-exhaustive list of examples of such circumstances, “including disability, illness, caregiving responsibilities, or any other significant or unexpected factor or event which precludes the member’s physical attendance at such meeting.”

Additionally, if a public body decides to meet under POL § 103-a, a minimum number of members must be present to fulfill the quorum requirement of the public body in a physical location or locations where the public can attend. Any member who participates at a physical location that is open to in-person attendance by the public (and which location has been included in the meeting notice) may count toward a quorum and may fully participate and vote in the meeting. If there is a quorum of members at a physical location or locations open to the public, the public body may properly convene a meeting; a member who is participating from a remote location that is not open to in-person physical attendance by the public may not count toward a quorum of the public body (but may participate and vote if there is a quorum of members at a physical location open to the public).

Finally, if a public body conducts a meeting leveraging POL § 103-a allowing a member to participate from a private location by videoconference based upon a determination of “extraordinary circumstances,” the public notice for the meeting must inform the public that such videoconferencing will be used and must include directions for how the public can view and/or participate (if participation is permitted) in such meeting.

Records to be discussed

If records that are scheduled to be discussed during an open meeting are available under FOIL or consist of a proposed resolution, law, rule, regulation, policy or any amendment thereto, the record is required to be made available “to the extent practicable” online, at least 24-hours before the meeting, and in response to a request to inspect or copy prior to or during the meeting.

When can a meeting be closed?

The law provides for closed or “executive” sessions under circumstances described in the law. It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded. See POL § 105.

To hold an executive session, the law requires that a public body take several procedural steps. First, the public body must make a motion during an open meeting to enter into executive session; second, the motion must identify “the general area or areas of the subject or subjects to be considered”; and third, the motion must be carried by a majority vote of the total membership of a public body.

A public body cannot close its doors to the public to discuss the subject of its choice, for the law specifies and limits the subject matter that is appropriate for executive session. The eight areas that may be discussed behind closed doors include:

- (a) matters which will imperil the public safety if disclosed;
- (b) any matter which may disclose the identity of a law enforcement agency or informer;
- (c) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
- (d) discussions regarding proposed, pending or current litigation;
- (e) collective negotiations pursuant to Article 14 of the Civil Service Law (the Taylor Law);
- (f) the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
- (g) the preparation, grading or administration of examinations; and
- (h) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

These are the only subjects that may be discussed behind closed doors; all other deliberations must be conducted during open meetings.

It is important to point out that a public body can never vote to appropriate public monies during a closed session. Therefore, although most public bodies may vote during a properly convened executive session, any vote to appropriate public monies must be taken in public.

The law also states that an executive session can be attended by members of the public body and any other persons authorized by the public body.

Note that item (f) is often referenced as “personnel,” even though that term does not appear in the grounds for holding executive sessions. Only when the

discussion focuses on “a particular person or corporation” in relation to one or more of the topics listed in that provision is an executive session permitted.

After the meeting — minutes

If you cannot attend a meeting, you can still find out what actions were taken, because the OML requires that minutes of both open meetings and executive sessions must be compiled and made available. See POL § 106.

Minutes of an open meeting must consist of “a record or summary of all motions, proposals, resolutions and any matter formally voted upon and the vote thereon.” Minutes of executive sessions must consist of “a record or summary of the final determination” of action that was taken, “and the date and vote thereon.” Therefore, if, for example, a public body merely discusses a matter during executive session, but takes no action, minutes of an executive session need not be compiled; however, if action is taken, minutes of the action taken must be compiled and made available.

It is also important to point out that FOIL requires that a voting record must be compiled that identifies how individual members voted in every instance in which a vote is taken. Consequently, minutes that refer to a four to three vote must also indicate who voted in favor, and who voted against. The law does not require the approval of minutes but directs that minutes of an open meeting be prepared and disclosed within two weeks. Agencies that maintain a website and use a high-speed internet connection must post meeting minutes (which may still be in draft form) on its website within two weeks of the date of the meeting, or within one week of an executive session.

Enforcement of the Law

What can be done if a public body holds a secret meeting? What if a public body makes a decision in private that should have been made in public? Any “aggrieved” person can bring a lawsuit. Since the law says that meetings are open to the general public, a person may be aggrieved if improperly excluded from a meeting or if an executive session was improperly held.

Upon a judicial challenge, a court has the power to declare either that the public body violated the OML and/or declare the action taken void. See POL § 107. If the court determines that a public body has violated the law, it has the authority to require the members of the public body receive training given by the Executive Director of the Committee or her staff. A court also has the authority to award reasonable attorney fees to the successful party. This means that if you go to court and you win, a court may (but need not) reimburse you for your expenditure of legal fees. If, on the other hand, the

court finds that a public body voted in private “in material violation” of the law “or that substantial deliberations occurred in private” that should have occurred in public, the court would be required to award costs and attorney’s fees to the successful party. A mandatory award of attorney’s fees would apply only when secrecy is the issue.

We note that an unintentional failure to fully comply with the notice requirements “shall not alone be grounds for invalidating action taken at a meeting of a public body.”

The site of meetings

As specified earlier, all meetings of a public body are open to the general public. The law requires that public bodies make reasonable efforts to ensure that meetings are held in facilities that permit “barrier-free physical access” to physically handicapped persons, and that meetings are held in rooms that can “adequately accommodate” the volume of members of the public who wish to attend. See POL § 103.

Exceptions to coverage by the law

Pursuant to POL § 108, the OML does not apply to:

- (1) judicial or quasi-judicial proceedings, except proceedings of zoning boards of appeals;
- (2) deliberations of political committees, conferences and caucuses; or
- (3) matters made confidential by federal or state law.

The law does not apply to proceedings before a court or before a public body that acts in the capacity of a court, to political caucuses, or to discussions concerning matters that might be made confidential under other provisions of law. For example, federal law requires that records identifying students be kept confidential. As such, a school board discussion of records that do or may identify a particular student would constitute a matter made confidential by federal law that would be exempt from the OML. Similarly, a meeting in which a public body’s attorney provides legal advice to the members of such body is exempt from coverage because an attorney’s provision of legal advice to a client is confidential as a matter of law.

Public participation and recording meetings

The OML provides the public with the right to attend meetings of public bodies, but it is silent concerning the ability of members of the public to speak or otherwise participate. Although public bodies are not required to permit the public to speak at their meetings, many have chosen to do so. In those instances, we have advised that a public body should do so by adopting reasonable rules that treat members of the public equally.

If a public body is leveraging “extraordinary circumstances videoconferencing” pursuant to POL § 103-a to conduct its meeting, the public body must provide the same opportunity for members of the public to view the meeting (and participate, if such body permits public participation), both by remote technology or in person, in real time.

Public bodies are required to allow meetings to be photographed, broadcast, webcast or otherwise recorded as long as the equipment used to do so is not disruptive or obtrusive. If the public body adopts rules regarding such activities, they must be reasonable and conspicuously posted, and be provided to those in attendance upon request. *See* POL § 103(d).



Committee on Open Government

NEW YORK STATE

Kathy Hochul
Governor

DEPARTMENT OF STATE

Robert J. Rodriguez
Secretary of State

www.opengovernment.ny.gov

Committee on Open Government NYS Department of State

One Commerce Plaza
99 Washington Ave
Albany, NY 12231

(518) 474-2518 Tel
(518) 474-1927 Fax

coog@dos.ny.gov

Revised May 2022