


“Open Government” in New York

Navigating Open Meetings Law and Freedom of Information Law

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Open Meetings Law



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Basics of NY Open Meetings Law (OML)

- The most basic premise of New York Open Meetings Law is that Meetings of Public Bodies must be Open to the public.
- The NY Legislature's intent regarding OML is as follows:
To maintain a democratic society by ensuring that “**public business be performed in an open and public manner**” such that citizens in New York “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.”
- In short, Public Bodies are to conduct their business only:
 - In an open and transparent manner,
 - **So citizens can be aware of and observe** not only the **decisions** of the public body, but also the **deliberations**.
 - Caution - Public bodies sometimes to try short-circuit the open deliberations requirement, instead focusing only on the requirement that decisions be made in public.
 - However, both are required to be conducted in public. Notably, often it is the deliberations that are most helpful in understanding the position of the public body, not the ultimate decision. [What vs. Why].

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Critical Definitions

- Public Bodies subject to the OML include:
 - "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** ... or committee or subcommittee or other similar body of such public body."
 - Examples include:
 - Town Board, Planning Board, Zoning Board, Ethics Board, School District, Library Board
 - Includes Committees made up solely of members of a Public Body.
- Public Bodies do NOT include:
 - Non-Governmental Entities
 - IE, PTA, "Friends of Town of Somewhere Parks"
 - Generally, those which are advisory in nature only (unless comprised solely of members of a Public Body).
 - Ct. of Appeals - "It has long been held that the mere giving of advice, even about governmental matters, is not itself a governmental function."
 - E.g., Historic Advisory Committee, Ethics Advisory Committee, Conservation Advisory Board, Task Force

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Critical Definitions


- A **Meeting** of a Public Body is:
 - "any 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."
- Court of Appeals on a Meeting subject to OML:
 - Any gathering** of a quorum of a public body for the purpose of conducting **public business** is a meeting subject to the OML.
 - Not only is a formal vote subject to OML, but the preliminary action of a public body, including the entire **decision-making process, is also subject to OML.**

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Critical Terms and Concepts


- A **Quorum** of a Public Body occurs where a majority of the members comprising a public body come together.
- Voting / Action** – In order to take action or make an affirmative vote, a majority of the number of seats comprising the body (not the number of members then present) would need to vote affirmatively.
- Minutes** – A record of Open Meetings. Shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon.
 - Must be made available to public within two weeks from the date of such meeting.
 - Approval required?
 - Verbatim?


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Proper Notice and Related Issues


- In order for a meeting to be properly conducted pursuant to the OML, it must be duly **noticed** and **open** to the public.
- Where a meeting is scheduled **at least one week in advance**, public notice setting forth both the **time and place** of the meeting must be 1) given to the news media as well as 2) "conspicuously posted in one or more **designated** public locations" at least **72 hours prior** to such meeting.
 - Specific, designated and consistent posting.
 - Does not require actual publication as a legal notice.
 - Unlike a Public Hearing.
 - No need to purchase an ad or pay a fee.
 - No agenda is required by OML, (but not prohibited).
 - The COOG has opined that the public body has not failed in providing notice even where, after giving such notice to news media, said news media does not print, publish or otherwise advertise such notice
 - Minimally, only **Time and Place!**
- Where a meeting is scheduled **less than a week in advance**, such notice of time and place shall be given **"to the extent practicable" at a "reasonable time prior thereto."**
- Where the public body has the ability to do so, notice shall also be "conspicuously posted on the public body's internet website,"






Proper Notice – Meetings Scheduled Far in Advance


- Where a series of meetings have been scheduled in advance (i.e. a schedule), the posting of such schedule once and the transmittal of the schedule to the news media on one occasion would satisfy the notice requirements.
- Additional notice would only be required where a special or additional meeting is held, or the time and/or place of a meeting is changed.
- Thus, where a board establishes a schedule of meetings early in the year at an organizational meeting, it may post that schedule once (both in a public place and, where able, on its website) and also transmit that schedule to the news media on one occasion and it will have met the notice requirements of the OML for all such scheduled meetings.





Sufficient "Openness" of a Public Meeting

- Openness (or transparency) of a Public Meeting** requires:
 - 1) All reasonable efforts be made to ensure that meetings are held in a facility which can **adequately accommodate members of the public** who wish to attend such meeting,
 - 2) All reasonable efforts will be made to ensure that the facility used allows for **barrier-free access to the physically handicapped**,
 - 3) The meeting shall be open to **being photographed, broadcast, webcast, or otherwise recorded and/or transmitted** by audio or video means, and
 - 4) **Records of the public body** which are the subject of the meeting shall be made available, upon request therefore, to the extent practicable, either prior to the meeting or during the meeting. Such records shall be posted on the public body's website, where practicable.



Case on Proper Notice and Openness:
Frigault v. Town of Richfield Planning Board

- **Facts:**
- **Notice of Meeting:**
 - Board provided proper, (advertised) notice.
 - Wind turbine project planned to be a focus.
 - Town Hall as place of Meeting.
 - Time at 7pm.
- **Meeting Night:**
 - Public turnout too large for Town Hall.
 - Announced relocation to church two blocks away.
 - Note placed on the door of Town Hall indicating the new meeting place.
 - Meeting commenced one hour later at the church.
- **Claim:**
 - Since meeting occurred at different time and place than as advertised, OML violation.



Case on Proper Notice and Openness:
Frigault v. Town of Richfield Planning Board

- **Court:**
- **Lower Court** – OML violated – time and location differ from that advertised.
- **Appellate Court** - No Violation:
 - Open to general public.
 - Reasonable efforts to ensure adequate accommodations to the public
 - The Board's efforts at changing the location were aimed at satisfying the very provisions of the OML.
- Announcing new location and posting address of new location on doors of Town Hall where the original meeting was advertised, was reasonable.
- Even if a technical violation, the result is that resolutions at the meeting could be voided "for good cause shown."
 - However, in that the board changed the meeting location to satisfy, not frustrate, the OML, no good cause to void.



Exceptions to the OML –
Not all meetings of a Public Body are subject to OML.

- **Executive Session** - Certain exceptions allow public business to be conducted in private "executive sessions" outside of an Open Meeting.
- An Executive Session may only be entered in to, **from a duly noticed Open Meeting**, for an **articulated** reason which is specifically enumerated in the OML, including:
 - Matters which will endanger public safety if disclosed;
 - Matters which may disclose the identity of a law enforcement agent or informant;
 - Certain information related to law enforcement investigations;
 - Information relating to proposed, pending or current litigation;
 - Collective bargaining negotiations;
 - Medical, financial, and employment history of a specific person;
 - Matters dealing with the hiring, promotion, demotion or termination of a specific person;
 - Matters dealing with examinations; and
 - Certain matters dealing with real property.

Exceptions to the OML –

Not all meetings of a Public Body are subject to OML.

Attorney/Client Privileged Meeting

- Members of a public body may meet in private, without the need for noticing a public meeting, in order to seek legal advice from their attorney.
- Communications within such a meeting must generally comprise confidential communications protected by attorney-client privilege and, and are exempt from the OML.
- Thus, in order to obtain legal advice, and only for purposes of obtaining legal advice, a public body may meet in private, completely outside of a public meeting, with legal counsel.
- This is distinct from an executive session, which may only be entered into during a public meeting for specific, enumerated reasons.



Meetings for Other than Public Business

- Whether a meeting is formal or informal or whether it will result in action is not the test for whether the OML applies.
- Rather, the test is whether a quorum of a public body is present to conduct public business.
- Therefore, informal conferences, agenda sessions, debriefing meetings, pre-meetings and workshops where the subject(s) to be discussed involve public business (applications, the budget, code changes, issues in the local municipality, etc.) and where there is a quorum of the public body are all meetings subject to the OML.
- However, where a quorum is present but not to discuss public business, compliance with the OML is not necessary.
 - For example, social gatherings, where members of a public body gather with the intent of socializing, as opposed to discussing public business, are not subject to the OML because the purpose is to socialize, not public business.
 - Retreats which are not intended to deal with public business, but instead are conducted for the purposes of team building, interpersonal relationships and communication skills are not meetings governed by the OML.
 - Additionally, gatherings for the purposes of education, where members gather not to conduct public business, but instead for the purposes of gaining education, training or team/communications skills, are not subject to the OML.
- Caution -Meetings conducted for purposes other than public business, i.e., social gatherings for socializing, retreats for teambuilding, and gatherings for education, must truly be conducted for those non-public reasons. During such a non-public meeting, should a majority of the members of a public body begin to discuss public business as a group, they would be in violation of the OML for failure to notice and hold an open public meeting.



Electronic Communications and the OML

- A public body must be cautious to avoid "a situation where a group of members constituting a majority function or act, collectively, as a body, outside of a properly publicly noticed meeting, such as via electronic communications.
- E-Meetings (such as over chat rooms, instant messenger, etc.) are not permitted, even with public notice.
 - Only duly noticed live meetings with video conferencing permitted.

Impermissible Emails Include:

- 1. All emails which result in a decision or vote by the public body.

Emails Which are Likely to be Impermissible Generally Include:

- 1. Emails between a majority of members of a public body, wherein a majority of the members of public body have responded by offering information, knowledge, expertise and/or points of view on a certain subject of public business.
- 2. "Serial" email communications where a majority of members of a public body have addressed certain public business in a series of emails between different members.

Permissible Emailing Generally Includes:

- 1. Emails between two members of a public body (not violative of the above standards).
- 2. A series of emails between a majority of members of a public body, wherein less than a majority of the members of public body have responded by offering information, knowledge, expertise or points of view on a certain subject of public business.
- 3. Emails addressing housekeeping issues.
- 4. Emails between any number of members of a public body not addressing public business (i.e., social emails).



The Right to Speak and Meeting Rules

- Note that the OML primarily is concerned with the openness of the meeting and the right for the meeting to be observed, **not with the general rights of the public to speak.**
 "... the Open Meetings Law clearly provides the public with the right to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy"
- Thus, some municipalities provide opportunities (not required by the OML) for the public to speak to the public body at designated times / portions of the agenda.
- **Meeting Rules** are encouraged to be adopted in order to consistently and transparently govern public meetings. Rules regarding public participation should be reasonable and treat members of the public equally.
- Topics for Public Participation in Meeting Rules: sign up, time limit, decorum/courtesy, etc.
- Other Items to be addressed by Meeting Rules: Rules of Order, Agenda Requirements, etc.
- Note – Unlike the OML, Public Hearings deal strictly with the right to speak.

Compliance and Enforcement

- If a court determines that a public body failed to comply with OML, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated the OML and/or declare the action taken in relation to such violation void . . .
- If the court determines that a public body has violated the OML, the court may require the members of the public body to participate in a training session concerning the obligations of the OML . . .
- An unintentional failure to fully comply with the notice provisions required by OML shall not alone be grounds for invalidating any action taken at a meeting of a public body.
- Costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party.
- If a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall award costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held.

Freedom of Information Law



Basics of NY Freedom of Information Law (FOIL)

- The premise of New York Freedom of Information Law is similar to that of OML – that government should be conducted in an open and transparent manner.
- FOIL requires that **agency records** be made **available to the public**.
- The NY Legislature's intent regarding FOIL is as follows:
 - "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."

Critical Terms and Concepts

- **Record:** "Means any information kept, held, filed, produced or reproduced **by, with or for** an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."
- Records include all media/format types, such as paper, microfilm, emails, audio files, videos, cloud-based data, etc.
- A record is not required to be created in order to respond to a FOIL request (i.e., a list of all people who have been employed by the Town over the past 50 years).
 - However, if software permits the creation of a record with reasonable effort, it should be provided.
 - i.e. Your accounting software permits you to print a list of all engineering firms paid within the past year by clicking a few buttons.
- Information is not necessarily a record.
 - i.e., how many people are employed by the Town?
 - vs. – Please provide a roster of persons employed by the Town.'
- Records should be provided by the agency electronically where reasonably able. Physical copies may require reimbursement. Records may also be made available for inspection only.

Presumption of Access

- **NY COOG – "FOIL is based upon a presumption of access."** Thus, all records shall be accessible, except for records or portions thereof which fall within a specific category of deniable records.
- Unless an entire record may be withheld, where a record contains deniable information (such as a social security number [thus constituting an unwarranted invasion of personal privacy]), the deniable information shall be **redacted**, and the remainder of information shall be provided.
- Where a record may be denied/withheld, typically, the decision to withhold is a discretionary one – it **may** be withheld, but is not **required** to be withheld (except for certain records, such as social security numbers).

Request for Records, the Records Access Officer and Timing

- Each agency must appoint one or more persons as **Records Access Officer**.
 - The records access officer has the duty of coordinating FOIL responses.
 - An agency may require that a FOIL request be made in writing (email counts).
 - The law requires one to "reasonably describe" the record requested.
 - When locating the records in question essentially involves "a search for the needle in the haystack," an agency is not required to engage in that degree of effort. However, the responsibility of identifying and locating records largely rests with municipality.
 - The law also provides that agencies must accept requests and transmit records via email when they have the ability to do so.
- Timing of Responses**
- An agency must 1) **grant access to records**, 2) **deny access in writing**, or 3) **acknowledge the receipt of a request within five business days of receipt of a request**.
 - When an acknowledgement is given, it must include an **approximate date within twenty business days** indicating when it can be anticipated that a request will be granted or denied.
 - If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of 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.

Records Which May be Withheld


- **A. Records which are specifically exempted from disclosure by state or federal statute:**
 - **Examples include:**
 - Attorney/Client Privileged Records
 - Easier to manage where, at least for particularly sensitive information, the record contains a provision that it is "attorney/client privileged."
 - Should be those records which comprise legal advice.
 - Often includes emails.
 - Records pertaining to a particular student (Per 20 USC 1232g) that would identify said student.
 - Records which would disclose the identity of an applicant or recipient of public assistance (Section 136 of Social Services Law)

Records Which May be Withheld

- **B. If Disclosed Would Constitute an Unwarranted Invasion of Personal Privacy:**
 - **Includes, but not limited to:**
 - Employment, medical or credit histories or personal references of applicants for employment;
 - Medical Records;
 - Lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
 - When disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it (i.e., salary requirements of an applicant)
 - Disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency (i.e., death in the family);
 - Workers' compensation records
 - Other Information . . .
 - **Consent by the subject person would cure any personal privacy issue.**
 - **Request by the person who is subject to the privacy issue does not raise privacy issue.**


Records Which May be Withheld

- **C. If Disclosed Would Impair Imminent Contract Awards or Collective Bargaining Negotiations**
- **D. Are Trade Secrets / Or Submitted to an Agency By a Commercial Enterprise that Would Cause Substantial Injury to the Competitive Position of the Subject Enterprise if Disclosed.**
 - “[A] trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.” *Restatement of Torts*
 - “[T]he subject of a trade secret **must be secret and must not be of public knowledge** or of a general knowledge in the trade or business.” *Kewanee Oil Co. v. Bicron Corp.*
 - “As established in *Worthington Compressors v. Costle* (662 F.2d 45, 51 [DC Cir]), whether substantial competitive harm exists for purposes of FOIA’s exemption for commercial information turns on the **commercial value of the requested information to competitors and the cost of acquiring it through other means.**
 - Note - The Court of Appeals has held that **a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available.**

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Records Which May be Withheld

- **E. Information Compiled for Law Enforcement Purposes Which, if Disclosed, Would:**
 - i. interfere with law enforcement investigations or judicial proceedings;
 - ii. deprive a person of a right to a fair trial or impartial adjudication;
 - iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
 - iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
- **F. If Disclosed, Could Endanger the Life or Safety of Any Person**

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Records Which May be Withheld

- **G. Are Inter-Agency or Intra-Agency Materials Which are Not**
 - Statistical or Factual Tabulations or Data,
 - Instructions that Affect the Public,
 - Final Agency Policy or Determinations, or
 - Audits.
- e.g., emails conveying an opinion(s) between agencies or employees within the same agency, a draft, notes comprising an opinion.

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Records Which May be Withheld

- H. Examination Questions or Answers . . .
- I. If Disclosed, Would Jeopardize Security of Information Technology Assets.

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Denial and Right to Appeal

- Where a record is denied, or constructively denied for failure to respond, an appeal may be filed.
- A written denial shall inform the requestor of the right of appeal.
- An appeal shall be filed in writing within 30 days of denial to the head, chief executive or governing body (or such other person designated to hear appeals).
- The appeal shall be answered in writing with 10 business days of receipt thereof, either providing in writing the reasons for denial or providing the record(s) sought.
- Should a denial be issued on appeal, the requestor may file an Article 78 proceeding in Court to continue the appeal.
- The agency may be required to pay attorneys fees on appeal should the Court determine that either:
 - 1) The citizen prevailed and the agency did not respond within the time limits, or
 - 2) The citizen prevailed and the agency had no reasonable basis for denial.

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Miscellaneous FOIL issues

- Fees:
 - An agency may charge 25 center per photocopy up to 9x14.
 - Where copies requested are larger than 9x14, the agency may charge the actual cost of the copy.
 - Where a large volume of records is requested, the agency can charge the actual cost of reproducing the records (bound volumes, videos, storage media [USB drive] etc.).
 - Where a request is so voluminous that it takes an agency more than 2 hours to prepare, extract or generate electronic data, the agency may charge for the employee's time.
 - If this is the case, advise the requesting party PRIOR to incurring any charges.
- Solicitation
 - An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes.

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Thank You.

Donald A. Young, Esq., a Partner with Boylan Code, practices primarily in the Municipal Law and Land Use groups. He regularly advises on complex land use and municipal issues, often working with public officials and staff, technical consultants such as engineers and real estate developers. In addition, he has become a popular presenter around the State of New York.

Mr. Young has experience in a wide variety of areas dealing with land use, including, for example, advising on SEQOR in relation to a variety of complex developments, counseling on rezoning applications and special permits, addressing site plan and subdivision issues, advising on variance issues, and addressing code enforcement matters. Furthermore, he has drafted, revised and implemented a wide range of legislation, including zoning ordinances, solar regulations, wind turbine regulations, sign regulations and moratoria. He has also implemented and assists with managing sewer, water and drainage districts.

Mr. Young has advised local legislative bodies, such as Town Boards, on a variety of municipal issues, including capital acquisition and financing, implementation of planned development districts, open meetings law and ethics. He also represents various Planning Boards and Zoning Boards of Appeals. He serves as legal counsel to a variety of municipalities in New York.

Mr. Young is a Board Member of the NY Planning Federation and regularly speaks at its annual conference. He is an accomplished speaker, presenting on behalf of the Association of Towns at a variety of summer schools, as well as a numerous annual conferences on behalf of the Association in New York City. In addition, Mr. Young has spoken on behalf of the National Business Institute and has spoken to and offered training to public officials at various town halls around New York.

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