

POLICY ADVICE ON REQUEST

**ASSEMBLY STANDING COMMITTEE ON GOVERNMENTAL OPERATIONS
ASSEMBLY STANDING COMMITTEE ON LOCAL GOVERNMENTS
ASSEMBLY STANDING COMMITTEE ON CITIES**

**PUBLIC HEARING OCTOBER 25, 2021
IMPACT OF COVID-19 PANDEMIC ON OPEN MEETINGS LAW**

AGENCY: **New York State Committee on Open Government**

My name is Shoshanah Bewlay and I am employed by the New York State Department of State (Department) as the Executive Director of the New York State Committee on Open Government (Committee). The Department employs me and my staff to fulfill its obligation, found in Public Officers Law § 89(1)(a), as statutory secretariat to the Committee. Thank you for extending an invitation to the Committee to provide information on the important topic that brings you here today.

To fulfill the statutory role of the Committee, the Department as secretariat employs me and my staff to respond to written and phone queries from members of government, the public, and news media, by providing legal advice and guidance regarding the New York Freedom of Information, Open Meetings, and Personal Privacy Protection Laws. In addition, the Executive Director and her staff assist the members of the Committee to formalize and then make recommendations designed to improve open government laws in an annual report to the Governor and the State Legislature pursuant to Public Officers Law § 89(1)(b)(vi). The Committee's report will be provided to you on or about December 15 of this year, and although it is not yet finalized, it is very likely to contain one or more recommendations concerning the topics you are here to consider today.

Although I am not able to provide the Committee's formal recommendations on this topic at this time, I am able to provide my team's factual experience hearing feedback and concerns from many of your constituents on these issues since March 2020. The following is a summary of data relevant to potential changes to the Open Meetings Law sorted by type of constituent and collected by my team based on 2,082 calls, emails and letters since March 2020. The data may be useful for members of the Legislature as they identify problems, consider proposals and attempt to craft solutions.

1. Feedback from government agencies and other "public bodies" as defined in the Open Meetings Law (1,153 calls or emails):

Public bodies have nearly universally reported to my staff that the ability to hold meetings using a remote access platform has been extremely valuable and they would like for it to continue. Public bodies report that without this option, they would in most instances have been unable to convene a quorum and conduct public business since March 2020. Public bodies have also reported that it has become far easier than even before the pandemic to convene a quorum to schedule necessary meetings because they no longer have to accommodate the busy schedules of members who may not be able to attend a meeting at a particular physical location at a particular time.

Agencies report that they have seen a large uptick in public attendance and engagement generally in all meetings since before the pandemic – both remotely and in-person – since the option to participate remotely has been in effect. We have been told by multiple bodies that more members of

the public are showing up to meetings in-person and by videoconferencing than ever before; they attribute this increase to the easier and more flexible access they have to meetings now.

Agencies report that they are concerned about the requirement, now contained in Chapter 417 of the Laws of 2021, mandating the preparation of a transcript of an open meeting conducted, in whole or in part, using a remote access platform. They report that their concerns center on what they identify as extra expense and time associated with preparing a word for word transcript. Agencies report that they do not understand the reasoning behind the requirement when a recording and the preparation of minutes is also required. Chapter 417 is silent with respect to the method of preparation of the required transcript (is a stenographer required? Will enabling the transcription function of the remote access platform be sufficient?) and the timeline for its required creation.

Public bodies have nearly universally reported that, if they are permitted to continue to convene open meetings using videoconferencing or a remote access platform, their members object to having to open their personal remote locations (which may be their homes or vacation addresses) to the public, or to notify the public of the location from which they are videoconferencing. Members of public bodies universally report that they would prefer to be able to participate by videoconferencing (remote platform) without the requirement contained in the Open Meetings Law (currently suspended until January 15, 2022) mandating that they do so. This is particularly true while COVID-19 continues to pose a significant public health concern. At least one pending bill proposes amending § 103(c) of the Open Meetings Law to read: “A public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe at any *public* site at which a member participates.” Public bodies have asked us how the public body is to determine what constitutes a “public” site?

Government agencies also seek clarity regarding the process for determining whether meetings should be held in person, through a hybrid approach, or fully remotely. Public bodies would like to understand with greater specificity who has the authority to make these determinations. Relatedly, public bodies have asked whether, should the Legislature pass a bill permitting it, there will be a defined rule or process for making a determination to prohibit in-person attendance at meetings under certain circumstances.

Public bodies have identified concerns with what has come to be known colloquially as “Zoom bombing” – when disruptive attendees crash a meeting held on a remote platform and prevent the body from conducting business at all. Public bodies have asked if the law would be clarified to permit them to require pre-registration for remote attendees, even in an anonymous capacity, in an attempt to prevent these occurrences.

Finally, if videoconferencing is permitted in whole or part using remote access platforms, public bodies have reported confusion concerning the requirements in §§ 103(b) and 103(d). Public bodies would like clarity on which locations must be physically accessible and which must be large enough to contain any member of the public wishing to attend the meeting.

2. Feedback from members of the general public (720 calls or emails):

A majority of the members of the public from whom we have heard since March 2020 report that they appreciate the option to attend meetings virtually and would like to see it continue. Members of the public have expressed the following reservations to us, however:

Many members of the public are concerned about the process for hearing public comment or participation at meetings for such bodies that permit it. Specifically, members of the public report that they would like to see a requirement that, for bodies that permit public comment or participation, such permission apply to both in-person and remote attendees equally.

Many members of the public are concerned that, if a body is conducting a meeting using a remote access platform, they will be unable to attend any location of the meeting in person. These members of the public would prefer to maintain the option of attending meetings in-person. While most people understand the current need for limited in-person interaction, it is our understanding based on the feedback that the public would prefer to be able to choose between in-person and remote access.

Chapter 417 of the Laws of 2021 authorizes “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.” Many members of the public have expressed to us that the ability to listen only, without the ability to view a meeting, is insufficient. These members of the public have reported that they would rather go to a meeting in-person if the only remote option is to listen rather than to view.

Members of the public from areas of the state that are still awaiting widespread broadband access report that they have felt left out of the remote meetings movement. For areas of the state that remain unserved and underserved by high-speed internet access, accessing meetings using broadband access is not always a possibility.

Finally, we have heard from a few members of the public who object to the requirement that some remote access platforms impose of “pre-registration” before or “signing in” to a meeting, presumably to prevent the disruptive practice of “Zoom bombing” already mentioned. While many such remote access platforms do not require someone to insert their real name or email address, these members of the public are concerned that even providing an anonymous credential before being able to access an open meeting is inconsistent with the Open Meetings Law.

3. Feedback from members of the news media (209 calls or emails):

Members of the media have reported to us that they have many of the same concerns as members of the general public, with the following addition: some members of the news media have reported that they do not believe that public bodies should have the option to hold fully virtual meetings that do not allow for in-person access at any location where a member of the public body is participating. These members of the media report that they are concerned that fully remote meetings diminish accountability of accessibility to elected officials. These members of the media report that they would prefer, at a minimum, that a majority of members of a public body be present together at one or more physical locations that are open to the public, even if also taking advantage of using a remote access platform for additional public access and for the participation of a minority of members of the public body.