

COMMITTEE ON OPEN GOVERNMENT

STATE OF NEW YORK
DEPARTMENT OF STATE
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CHAIRPERSON

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EXECUTIVE DIRECTOR

SHOSHANAH BEWLAY

By electronic mail only

March 25, 2020

Linda Baldwin, General Counsel
New York State Department of State
Office of Counsel
One Commerce Plaza, 99 Washington Avenue
Albany, NY 12231-0001

Re: *Request for Advisory Opinion on Behalf of New York State Cemetery Board*

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Ms. Baldwin:

You seek an advisory opinion regarding the application of the New York State Open Meetings Law (“OML”), the quorum requirements of New York State General Construction Law (“GCL”) § 41, and Governor Andrew M. Cuomo’s New York State Executive Order 202.1 (the “Order”), to meetings of the New York State Cemetery Board (the “Board”). Specifically, you ask whether the Board may achieve for legal purposes a quorum by telephone for its meetings while the Order is effective.

By way of brief background, the Board was created pursuant to Article 15 of the New York State Not-for-Profit Corporation Law, is a “public body” as that term is defined in the OML, and accordingly is required to comply with the OML. The Board consists of three ex-officio members: the New York State Secretary of State, New York State Attorney General, and New York State Commissioner of Health, or their designees.

In general and in the absence of the Order, which is discussed below, the OML and the GCL require that voting and action by a public body may occur only at a meeting during which a quorum has physically, or virtually by videoconference, convened. Section 102(1) of the OML defines the term “meeting” as “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.” The term “quorum” is defined in § 41 of the General Construction Law as:

Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held . . . , shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty.



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In summary, therefore, prior to the issuance of Executive Order 202.1, a valid meeting of a public body could occur only when a majority of the total membership of that body – a quorum – had “gathered together in the presence of each other or through the use of videoconferencing.” However, on March 13, 2020, Governor 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. The Order provides, in relevant part:

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.

In the Committee’s view, the plain language of the Order temporarily suspends the requirement that otherwise exists pursuant to the provisions of the OML and GCL discussed above that members of the Board be physically convened or convened by videoconferencing in order to achieve a quorum and conduct the public business of the Board. The Order similarly may fairly be read temporarily to suspend the OML requirement that notice of the meeting include the physical location of each Board member who is participating by telephone or similar means.

Thank you for your inquiry.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay

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SHOSHANAH BEWLAY

By electronic mail only

March 26, 2020

Patrick J. Cremo
Supervising Attorney & Records Access Officer
NYS Workers' Compensation Board
328 State Street
Schenectady, NY 12305

Re: *Request for Advisory Opinion on Behalf of New York State Workers' Compensation Board*

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Mr. Cremo:

You seek an advisory opinion regarding the application of the New York State Open Meetings Law ("OML"), the quorum requirements of New York State General Construction Law ("GCL") §41, and Governor Andrew M. Cuomo's New York State Executive Order 202.1 (the "Order"), to meetings of the New York State Workers' Compensation Board (the "Board"). Specifically, you ask whether the Board may for its April 2020 meeting convene remotely by teleconference or videoconference without livestreaming the audio or video to the public while the Order is effective.

By way of brief background, the Board was created pursuant to § 140 of the New York Workers' Compensation Law ("WCL"), is a "public body" as that term is defined in the OML, and accordingly is required to comply with the OML. The Board consists of thirteen members who are appointed by the governor by and with the advice and consent of the senate.

In general, and in the absence of the Order, which is discussed below, the OML and the GCL require that voting and action by a public body may occur only at a meeting during which a quorum has physically, or virtually by videoconference, convened. Section 102(1) of the OML defines the term "meeting" as "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." The term "quorum" is defined in § 41 of the GCL as:

Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held . . . , shall constitute



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a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty.

In summary, therefore, prior to the issuance of the Order, a valid meeting of a public body could occur only when a majority of the total membership of that body – a quorum – had “gathered together in the presence of each other or through the use of videoconferencing.”

In your correspondence, you reference 12 N.Y.C.R.R. 300.27(i) (the “Board Rule”) and ask whether the Board Rule is consistent with the requirements of the OML, GCL and the Order. The Board Rule provides:

[a]t any regular or special meeting of the Board, Board members, the Chair and Vice Chair may, at the discretion of the Chair, convene by electronic means, including but not limited to, teleconferencing and videoconferencing. The means of attendance shall be duly recorded in the minutes of the meeting by the secretary.

In the view of the Committee (and absent the Order, which, again, is discussed below), the Board Rule is inconsistent with the requirements of the OML and GCL in that it allows Board members to participate in meetings by teleconferencing without video in derogation of the requirements of both referenced laws.

You also note in your correspondence that “[t]he Board does not webcast its meetings, but makes video available on its webpage within 24 hours.” However, § 103(f) of the OML requires that

Open meetings of an agency or authority shall be, to the extent practicable and within available funds, broadcast to the public and maintained as records of the agency or authority. If the agency or authority maintains a website and utilizes a high speed internet connection, such open meeting shall be, to the extent practicable and within available funds, streamed on such website in real-time, and posted on such website within and for a reasonable time after the meeting. For the purposes of this subdivision, the term “agency” shall mean only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

The Committee believes that the WCB is an “agency” as that term is defined in § 103(f) of the OML. Further, the WCB maintains a website and, based on information and belief, “utilizes a high speed internet connection.” As such, the Committee believes that the OML specifically requires that the WCB stream its meetings on its website “in real-time.” Again, these requirements appear in the underlying provisions of the OML and therefore generally apply to the WCB.

You also ask whether informal guidance issued by the Committee in early March 2020 validates the Board Rule and your plan to record and later post the meeting video/audio to the WCB website. In early March 2020, the Committee received numerous inquiries relating to the possible “waiver” of the “in-person” requirements of the OML. In response to those inquiries and before the issuance of the Order, staff of the Committee prepared informal guidance to distribute upon request to public bodies and their representatives. The Committee was clear in its informal guidance that it does not have jurisdiction to grant waivers from the legal requirements contained in the OML, or from any legal requirement. The Committee’s informal guidance accordingly does not validate the Board Rule or the Board’s plan not to livestream its April 2020 meeting.

Moreover, on March 13, 2020, Governor 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. By operation of New York Law, the Order supersedes any provisions of New York laws addressed therein and supersedes (and moots) the informal guidance previously offered by the Committee. The Order provides, in relevant part:

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.

In the Committee's view, the plain language of the Order suspends the requirement that otherwise exists pursuant to the provisions of the OML and GCL discussed above that members of the Board be physically convened or convened by videoconferencing in order to achieve a quorum and conduct the public business of the Board. In other words, Board member participation by telephone without video is permissible under the Order. However, the suspension of this requirement appears to be expressly contingent upon the Board affording the public the ability contemporaneously to view or listen to such proceeding – *i.e.*, livestreaming the audio or video to the public – and upon the Board recording and later transcribing the meeting. In our view, the Order does not suspend the "livestreaming" requirement set forth in § 103(f) of the OML for agencies required to comply with that section, and in fact appears to strengthen during its pendency that underlying provision of law for all public bodies regardless of whether they are required to comply with OML § 103(f).

Thank you for your inquiry.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay

SVB/cao