

# COMMITTEE ON OPEN GOVERNMENT

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April 29, 2019

Ms. Rachael Fauss  
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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. Fauss:

I have received your letter in which you sought an advisory opinion concerning the application of the Open Meetings Law (OML) to the MTA Capital Program Review Board (CPRB).

As you indicated, the CPRB was created pursuant to §1269-a of the Public Authorities Law, which in subdivision (1) of that statute is directed “to exercise the powers, duties and prerogatives...provided in sections twelve hundred sixty-nine-b and twelve hundred sixty-nine-c of this title.” Subdivision (2) of §1269-a states that the voting membership of the CPRB consists of four members appointed by the Governor. Among the four, one member each is recommended by the leaders of the Senate and Assembly and the mayor of New York City. The mayor’s representative, according to that provision, has limited voting authority.

Section 1269-b includes several aspects of power or authority to be exercised by the CPRB. Reference is made in subdivision (1)(a) of that section to “plans”, each of which “shall set system-wide goals and objectives for capital spending, establish standards for service and operations” and estimate the amount of capital spending each year and the expected sources of such funding.” Subdivisions (5), (6) and (9) of that statute give the CPRB the power to approve or disapprove various proposals regarding the financing of plans. In §1269-c, the CPRB is required to monitor the progress and expenditures relating to capital plans, “identify capital elements not progressing on schedule” and “ascertain responsibility” in those instances.

Based on the foregoing, I offer the following comments.

The OML is applicable to meetings of public bodies, and §102(2) defines “public body” to mean:



"...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 for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body" (emphasis added).

I believe that each of the ingredients necessary to determine that the CPRB is a "public body" is present with respect to that entity. It consists of more than two members, it can only function by means of a quorum based on §41 of the General Construction Law, and the provisions in the Public Authorities Law cited above clearly indicate that the CPRB performs a governmental function for the MTA, which is a public corporation.

In considering whether an entity is a public body, the Court of Appeals stated that:

"In determining whether an entity is a public body, various criteria and benchmarks are material. They include the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies.

"This Court has noted that the powers and functions of an entity should be derived from State law in order to be deemed a public body for Open Meetings Law purposes (see, Matter of American Society for Prevention of Cruelty to Animals v Board of Trustees of State Univ. of N.Y., 79 NY2d 927, 929)" [Smith v. CUNY, 92 NY2d 707, 713 (1999)].

The CPRB is a statutory creation, and it is empowered to carry out a variety of functions. That being so, again, in our view, it is clearly a public body required to comply with the OML.

You wrote that you "have been told" that the CPRB "conducts meetings and votes by phone. I am unaware whether that is so. However, In our opinion, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference.

Section 102(1) of the OML defines the term "meeting" to mean "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." Based upon an ordinary dictionary definition of "convene", that term means:

- "1. to summon before a tribunal;
2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In consideration of that definition and others, we believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the CPRB, or a convening that occurs through videoconferencing. We point out, too, that §103(c) of the OML states that "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates." These provisions clearly indicate that there

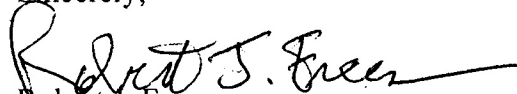
are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law. Further, every meeting of a public body must be preceded by notice of the time and place given in accordance with §104 of the OML.

There is no authority to take action outside of a meeting, nor is there any authority to attend a meeting by phone, to be counted for quorum purposes or to cast a vote by phone. In a judicial decision dealing with a vote taken by phone, the court found the vote to be a nullity (Cheevers v. Town of Union [Supreme Court, Broome County, September 3, 1998]), and in the only decision rendered after the enactment of the legislation pertaining to videoconferencing, it was determined that a vote cast via use of a telephone was a nullity (Town of Eastchester v. NYS Board of Real Property Services, 23 AD2d 484 [2005].)

Next, you asked whether “various materials given the CPRB by the MTA are considered public records subject to disclosure under FOIL”. FOIL pertains to all government agency records, including the kinds of communications to which you referred. However, those communications would fall within the exception regarding “inter-agency and intra-agency materials”, §87(2)(g) of FOIL. That provision serves potentially as a basis for denying access as well as requiring disclosure. In brief, portions of those communications consisting of advice, opinion, recommendation and the like may be withheld. Others consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations, or that are external audits must be disclosed, unless an exception other than §87(2)(g) may properly be asserted.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman  
Executive Director