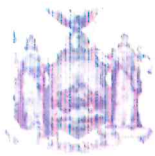


Ker Walter public comment

Executive



**State of New York  
Department of State  
Committee on Open Government**

One Commerce Plaza  
99 Washington Ave.  
Albany, New York 12231  
(518) 474-2518  
Fax (518) 474-1927

**OML AO 5645**

*By Electronic Mail Only*

November 16, 2021

*By E-mail Only: [shempstead@cortland-co.org](mailto:shempstead@cortland-co.org)*

Savannah Hempstead  
Clerk, Cortland County Legislature

The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Hempstead:

I am writing in response to your request for an advisory opinion regarding the application of the Open Meetings Law (OML) to gatherings of a quorum of the County Legislature at legislative committee meetings. Specifically, you have asked whether members of a County Legislature who are not members of a legislative Committee may participate in discussions of Committee business without transforming a Committee meeting to a meeting of the full Legislature.

For purposes of this opinion, I will use the Cortland County Legislature (the Legislature) and the Finance and Administration Committee (the Committee) as a basis for a hypothetical fact pattern. The Legislature consists of seventeen members representing seventeen legislative districts within the County. The Committee consists of seven County legislators.

The OML governs meetings of public bodies, including governing bodies, and committees and similar bodies consisting of members of governing bodies. Section 102(2) of that statute defines the phrase "public body" to 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 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.

Accordingly, both the Legislature and the Committee are "public bodies" as that term is defined by the OML. A quorum consists of a majority of the total membership of a body is measured as if there are no absences or vacancies. See General Construction Law § 41. As such, because the Legislature consists of seventeen members, its quorum is nine members. Based on the information available on the County website, the Committee consists of seven members and, therefore, its quorum is four.

Because the Committee is a public body, its meetings must be open to all members of the public, including members of the governing body who are not members of a committee. The courts have broadly interpreted the statutory definition of "meeting": "the official convening of a public body for the purpose of conducting public business." OML § 102(1). In a landmark decision rendered in 1978, the Court of Appeals, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be open to the public, whether there is an intent to act and regardless of the manner in which a gathering may be characterized. See *Orange County Publications v. Council of the City of Newburgh*, 45 N.Y.2d. 947, 949-50 (1978). The Court of Appeals affirmed the finding of the lower court, which held that:

We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute.

*Orange County Publications v. Council of the City of Newburgh*, 60 A.D.2d. 409, 415 (2d Dep't 1978). The court further held, with respect to a body's attempt to characterize a meeting as "informal," that:

The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body.

*Id.*

Hempstead  
November 16, 2021  
Page 3

Based upon this judicial precedent, we believe that when a majority of a public body gathers to discuss public business, any such gathering whether characterized as "formal" or "informal" would ordinarily constitute a "meeting" subject to the OML. As such, if a quorum of the full Legislature has gathered at a Committee meeting for the purpose of discussing County legislative business (even if that business is limited to the subject matter designated to the Committee), that gathering in our opinion constitutes a meeting of the full Legislature.

Stated another way, members of the Legislature who are not members of the Committee may attend the Committee meeting, but if the intent is for the meeting to be a "Committee" meeting and not a meeting of the "Legislature," the non-Committee members should not be involved in the discussion of Committee business. Non-Committee legislators should only be permitted to comment in the same way that members of the general public are permitted to comment.<sup>1</sup>

I hope this information is helpful. <sup>1</sup>

Sincerely,

Kristin O'Neill  
Assistant Director

---

<sup>1</sup> In your inquiry, you referenced a 2004 advisory opinion (OML AO 3784) and asked whether if it was still valid. There are aspects of this opinion that are, in our view, inconsistent with the statutory definition of meeting and with the judicial precedent discussed herein. The author of the 2004 opinion wrote: "[i]nherent in the definition [of meeting] is the notion of intent, and a key issue often involves whether there is an intent on the part of a public body to convene for the purpose of conducting public business collectively, as a body." However, as discussed herein, the Court of Appeals in *Orange County Publications* held that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether there is an intent to act and regardless of the manner in which a gathering may be characterized. In our opinion, intent is not the key issue. Further, it is not clear from the 2004 opinion whether the author was taking into consideration the possibility of active participation in the deliberative process by non-Committee members. The opinion we offer today distinguishes between attendance as a member of the public and participation as a member of the Legislature.

