

Ensuring Transparency and Avoiding Liability: A School Leader's Guide to Open Meetings and FOIL

40th Annual School Client Conference



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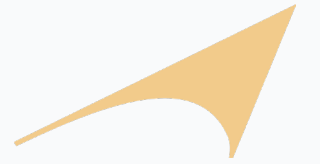


Agenda

- The Open Meetings Law (“OML”)
 - When it applies
 - Notice requirements
 - Public participation
 - Policy and constitutional considerations
 - Board confidentiality and communication

- The Freedom of Information Law (“FOIL”)
 - What it covers
 - Exemptions
 - Procedure
 - Fees
 - Electronic records

Open Meetings Law



- Found in Public Officers Law §§ 100 – 111.
- OML applies to any entity for which a quorum is required 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, or committee or subcommittee or similar body of such public body.
- “It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe that performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.” N.Y. Pub. Off. Law § 100.

Open Meetings Law Basics



- OML applies to “meetings” of a “public body” (i.e., board meetings, work sessions, and planning meetings).
- A meeting is the convening of a public body for the purpose of conducting public business.
- The public may only be excluded from properly convened executive sessions.

When the OML Does Not Apply



- Exempt meetings (Pub. Off. Law § 108)
 - Board acting in a quasi-judicial capacity (e.g., hearing student discipline appeal).
 - Discussion of matters made confidential by federal or state law (e.g., meeting with attorney protected by attorney client privilege).
- Casual Encounters
- Advisory Committees
- Board Retreats
 - Retreats include educational/training seminars, team building activities, or meetings to consider interpersonal relations.
 - When a quorum of the board gathers to receive training and/or education, and the purpose is limited to the process by which goals are adopted, that is not a meeting under the OML.
 - Setting goals is a meeting under the OML.

Committees



- The OML applies to meetings of committees that consist solely of board members (Pub. Off. Law § 102; NYS Dep't of State, Committee on Open Government OML-AO-5331 (Dec. 11, 2012); OML-AO-2588 (Mar. 28, 1996)).
- Advisory committees (not consisting solely of board members) that lack power to take final action are not subject to OML.
 - Exception: if the core makeup of the committee consists of board members, then the advisory committee may be subject to OML (NYS Dep't of State OML-AO-5068 (Mar. 18, 2011); OML-AO-4158 (Mar. 15, 2006)).

Notice of Meeting



- Education Law § 1606(3) provides any school board member may call a meeting with 24 hours' notice.
 - Good faith effort to give notice to each board member is required (*Matter of Colasuonno*, 22 Ed Dept Rep 215 (1982)).
- Board members may waive the right to 24 hours' notice (*Matter of Bd. of Educ. of UFSD No. 1 of the Town of Hume*, 29 St. Dep't Rep. 624 (1923)).

Publishing Notice of Meetings



- If a meeting is scheduled at least one week in advance, the notice must: (1) state the time and place, (2) be given to news media, and (3) be conspicuously posted in 1 or more locations at least 72 hours in advance.
- If the meeting will be livestreamed, the notice must include the web address.
- If the meeting is scheduled less than a week in advance, notice of the time and place must be given “to the extent practicable” and posted a reasonable time before meeting.
- Notice of the time and place should also be posted on the district’s website.

Videoconferencing



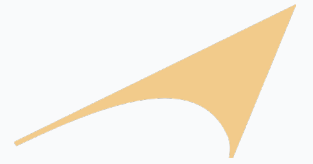
- 2 Ways to use Videoconference
 - Connecting multiple physical locations that are open to in-person public attendance.
 - This option has always been permitted.
 - Allowing a member of a public body to participate from a private location through videoconferencing under extraordinary circumstances.
 - Permitted after COVID-19

Videoconferencing – Section 103-a



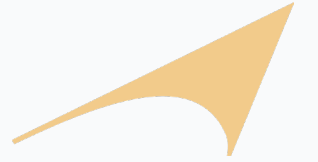
- In order to use videoconferencing pursuant to this law, a school board must adopt a resolution, following a public hearing, authorizing the use of videoconferencing.
- A quorum of the board is required to be in the same physical location.
- Any meetings using videoconferencing must incorporate technology to permit access by members of the public with disabilities.
- There are additional requirements under the law that must be followed.
- Extended until July 1, 2026.

Videoconferencing - Quorum



- Members who are participating from a physical location that has been properly noticed and is open to in-person public attendance do count toward a quorum and may fully participate and vote.
- Members who are videoconferencing from a remote location that is not open to in-person public attendance do not count toward a quorum, unless they meet the disability criteria.
 - They may fully participate and vote if a quorum has otherwise been met.

Is Public Participation Required by Law?



- School board meetings must be open to the public under both the Education and Open Meetings Laws. However, boards are not required to allow members of the public to speak at such meetings.
 - “Education Law Section 1708(3) merely provides that meetings of a board of education ‘shall be open to the public’; however, it does not confer a right upon a member of the public to speak at such meetings without the consent of the board.” *Appeal of Wittneben*, 31 Ed. Dept. Rep. 375 (1992)
 - “The OML ensures that the public has the right to observe the performance of public officials during open meetings but does not provide a right to public participation in open meetings. See POL § 100.” (OML-AO-5658 (January 20, 2023))

Should We Allow For Public Comment?



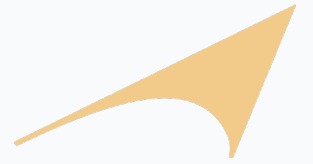
- The Commissioner of Education encourages school boards to allow citizens to speak on matters under consideration, whenever possible. (*Appeal of Wittneben*, 31 Ed. Dept. Rep. 375 (1992))
- Committee on Open Government encourages public comment
- Aides in transparency of board governance
- Political reasons and relationship with the public
- Has the possibility to become disruptive

Can Public Comment be Restricted?



- Public comment is really a “limited public forum” for purposes of the exercise of First Amendment rights and can be limited to certain topics while excluding other topics.
- Public bodies have the right to adopt rules to govern their own proceedings (e.g., Education Law Section 1709) (OML-AO-5296 (June 12, 2012))
- However, **any restriction must be reasonable and viewpoint neutral.** (OML-AO-5296 (June 12, 2012))

Why Restrict Public Comment?



- To maintain order so that the board can conduct business;
- To prevent the disclosure of confidential information (e.g., FERPA);
- To protect individuals from personal attacks; and
- To protect the district from litigation or liability (e.g., defamation).

Examples of What to Include in the Board Policy



- The BOE's expectations and protocols for public comment
 - Time limit for comments
 - Protocols for addressing board
 - Non-permissible topics (e.g., matters unrelated to the district, matters unrelated to the agenda, matters involving specific individuals)
 - Expectations of conduct (e.g., prohibit threats of violence, obscene or profane language, libelous statements, etc.)
 - Board president's responsibility and right to end an individual's comments for violation of the policy

Reasonable and Viewpoint Neutral Restrictions



- Excluding comments regarding particular students - Districts have a “compelling state interest” in protecting students’ privacy in order to comply with FERPA. (*Schuloff v. Murphy*, 1997 WL 588876 (E.D.N.Y. Sept. 17, 1997))
- While the Commissioner of Education has determined limiting public comment to residents only is permissible (since there is no statutory obligation to do so)(*Appeal of Martin*, 32 Ed. Dept. Rep. 381 (1992)), COOG opined that such restriction would likely be unreasonable. (OML-AO-4141 (February 24, 2006))
- COOG has opined that a limit on the amount of time allotted to a person who wishes to speak is permissible, so long as the limitation is reasonable. (OML-AO-4141 (February 24, 2006))
- COOG opined that there should not be a limit to the total time allotted to public comment such that there is an artificial cut-off that could deprive someone of the right to speak if others are granted that right. (OML-AO-5658 (January 20, 2023))

Reasonable and Viewpoint Neutral Restrictions (Cont.)



- The board can limit public comment to items appearing on an agenda. (OML-AO-5658 (January 20, 2023)).
- The board can limit the number of repetitive comments. (OML-AO-5296 (June 12, 2012)).
- The board can limit public comments that are offensive to reasonable people of ordinary sensibilities. (Id.)
- The board can extend public comment period.
- The board can announce that it will accept written comments and specify how written comments can be submitted.

Public Participation at Meetings



- Responding to inquiries from speakers
 - Generally, recommend that board members not interact with speakers.
 - The Board president should relay expectations at the beginning of the comment period.
- 3 instances when a response is recommended:
 - Comments made are not factual.
 - Inquiry can be answered by existing policy.
 - Topic warrants placement on a future agenda.

Reasonable and Viewpoint Neutral Restrictions (Cont.)



- Prohibition concerning signs, banners and visual displays hung, displayed, located, projected or placed anywhere inside the meeting room or building without prior express permission of the public body – the primary consideration should involve whether the extent to which those items may be obtrusive or disruptive in some manner.
- Restrict if –
 - Its presence blocks a person in attendance from observing the proceedings, or blocks a person's path to the meeting;
 - Violates fire code;
 - It includes obscene language.(OML-AO-5296 (June 12, 2012))

Public Participation at Meetings



- The public has the right to record meetings for broadcast by audio or video means (Pub. Off. Law § 103(d)).
- Audio recordings
 - Use of audio recorder may not cause public inconvenience, annoyance or alarm, or disturb the meeting.
- Video recordings
 - A board may regulate the use of cameras to ensure it doesn't interfere with the meeting.
 - Interference must be genuine.
- Boards may adopt reasonable rules governing use of cameras and recording devices.

Confidentiality



- Board members, officers, and employees may not disclose confidential information acquired by them in the course of their official duties (Gen. Mun. Law § 805-a(1)(b)).
- According to the NYS Commissioner of Education, matters discussed in executive session are confidential.

Confidentiality



- “[A] board member’s disclosure of confidential information obtained at an executive session of a board meeting would violate General Municipal Law § 805-a(1)(b).” *Application of the Board of Education of Middle Country Central School District*, 33 Educ. Dep’t Rep. 511, Decision No. 13,132 (1994).
- Section 805-a(1)(b) “clearly prohibits a board member from disclosing confidential information obtained at an executive session of a meeting of a board...” *Appeal of Henning*, 33 Educ. Dep’t Rep. 232 (1993).

Executive Session Confidentiality



- Disclosure of confidential information from executive session could lead to a board member's removal.
- Matters discussed in executive session that are not meant to be confidential do not constitute grounds for removal.
 - Example: *Appeal of Rivers*, 60 Ed Dept Rep, Dec. No. 17,989 (2021)- board member's disclosure of information from executive session about use of school facility for summer camp was not confidential so removal was reversed.
- Information received in executive session that is known or available to the general public is not confidential – *Application of Doe*, 61 Ed Dept Rep, Dec. No. 18,052 (2021)

Confidentiality



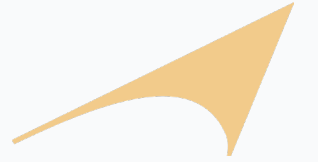
- Application of Nett and Raby
 - Commissioner held that an individual board member cannot be permitted to undermine the effective functioning of a school board by unilaterally disclosing information learned by the member in a properly convened executive session. The Commissioner found that a board member violated her fiduciary duties, her oath of office and General Municipal Law § 805-a(1)(b).

Application of Nett and Raby, 45 Ed. Dep't Rep. 259, Decision No. 15,315 (2005).

- Application for Removal of Paladino
 - Commissioner removed a board member for willful disclosure of confidential information obtained during an executive session.

Board of Education of the City School District of the City of Buffalo, 57 Ed. Dep't Rep., Dec. No. 17,147 (2017), aff'd, *Paladino v. Board of Educ. for the City of Buffalo Public Sch. Dist.*, 183 A.D.3d 1043 (3d Dep't 2020).

Board Communication - Voting



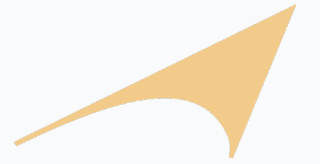
- Voting by phone, text, or email is generally not permitted.
- Voting via a series of emails or other simultaneous communications is not permitted. NYS Department of State, Committee on Open Government OML-AO-4534, (Dec. 14, 2007).
- If such a communication is the deciding vote, the action may be nullified. *Town of Eastchester v. N.Y. State Bd. Of Real Prop. Servs.*, 23 A.D.3d 484 (2d Dep't 2005).

Board Communication - Collective Decisions and Discussions



- A board may not engage in a series of e-mail, text message, or telephone communications where the conversation involves action taken by the board or results in a collective decision. Advisory Opinion - NYS Department of State, Committee on Open Government OML-AO-05420 (Sept. 4, 2014).
- Where an e-mail precipitates a series of exchanges among the members, or the members engage in instantaneous or simultaneous interactions and discussion, a "virtual meeting" might occur, which would constitute a secret meeting in violation of the Open Meetings Law. Advisory Opinion - NYS Department of State, Committee on Open Government OML-AO-4534, (Dec. 14, 2007).
- A series of phone calls that culminated in a letter that was later published on behalf of the board was determined to be a "meeting" in violation of the Open Meetings Law. *Cheevers v. Town of Union*, 1998 WL 35314685 (Broome Cnty. 1998).

Board Communication - Permitted Communications



Certain communications do not constitute a meeting and are permitted, provided that they do not result in a vote or collective decision.

- Transmission of information from a Board member having a particular interest or expertise to other Board members.
- Transmission of materials by the Superintendent of Schools to Board members prior to a meeting.
- Transmission or receipt of information to a list of recipients of email, listservs or the equivalent.

Board Communication - Intention

- Intent matters, and communications could result in a “virtual meeting” subject to the Open Meetings Law. *Matter of Goodson Todman Enter. V. City of Kingston Common Council*, 153 A.D.2d 103 (3d Dep't 1990).
- If there is intent to ensure the presence of less than a quorum at any given time in order to evade the Open Meetings Law, such activity would violate the law. Thus, a series of gatherings, each consisting of less than a quorum, in which the board members discuss public business, such meetings would run afoul of the Open Meetings Law. Advisory Opinion - NYS Department of State, Committee on Open Government OML-AO-3787 (May 4, 2004) *Tri-Village Publr. v. St. Johnsville Bd. of Educ.*, 110 A.D.2d 932 (3d Dep't 1985).
- Where the majority of the board communicates with the intent only to socialize, and such members do socialize without discussing matters of public concern, such communications would not be subject to the Open Meetings Law. "But an informal 'conference' or 'agenda session'" would fall within the Open Meetings Law, as it prohibits “the crystallization of secret decisions to a point just short of ceremonial acceptance”. *Orange County Publications, Div. of Ottaway Newspapers, Inc. v. Council of Newburgh*, 60 A.D.2d 409 (1978).

Consequences for Violating the Open Meetings Law

- Consequences if a court determines there was a violation of the OML (Pub. Off. Law § 107):
 - Determination that the public body violated law;
 - Void any action taken without prejudice to its reconsideration at a properly convened meeting;
 - Require the public body to participate in training sessions by committee on open government; and/or
 - Award costs and attorneys fees to the prevailing party.

Freedom Of Information Law ("FOIL")



- Who is subject to FOIL?
 - Any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office, or other governmental entity performing a governmental or proprietary function for the state or any one or more municipality thereof, except the judiciary or the state legislature. See N.Y. Pub. Off. Law § 86(3).

Freedom Of Information Law ("FOIL")



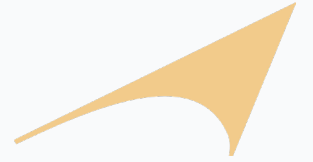
- What is subject to FOIL?
 - Any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes. See N.Y. Pub. Off. Law §86(4).
- FOIL only extends to **existing** documents– no duty to create documents or answer questions.
- Documents "**held for**" a public agency can be subject to FOIL.



FOIL Exemptions

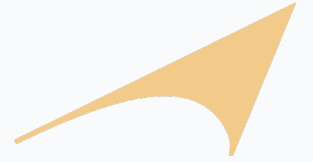
- § 87(2): Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, **except** that such agency may deny access to records or portions thereof that:
 - Are specifically exempted from disclosure by state or federal statute.
 - If disclosed would constitute an unwarranted invasion of personal privacy (as defined in § 89).
 - If disclosed would impair present or imminent contract awards or collective bargaining negotiations.
 - Are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.

FOIL Exemptions



- Are compiled for law enforcement purposes and which, if disclosed, would:
 - Interfere with law enforcement investigations or judicial proceedings.
 - Deprive a person of a right to a fair trial or impartial adjudication.
 - Identify a confidential source or disclose confidential information relating to a criminal investigation.
 - Reveal criminal investigative techniques or procedures, except routine techniques and procedures.
- If disclosed could endanger the life or safety of any person.
- Are inter-agency or intra-agency materials.
- Are examination questions or answers which are requested prior to the final administration of such questions.
- If disclosed, would jeopardize [an agency's] security of its information technology assets.
- Are data or images produced by an electronic toll collection system under authority of Article 44-C of the vehicle and traffic law and in title three of article three of the public authorities law.

FOIL Exemptions



- Unwarranted invasion of personal privacy
 - Public employees have a diminished expectation of privacy (for instance, salaries, gross wages, attendance records are public).
 - Personnel and discipline records are generally discoverable, with personal information redacted.
 - However, to the extent that records are “irrelevant to the performance of one’s official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy.” *Matter of Wool*, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977.
 - Unproven or unsubstantiated allegations against public employees may be withheld as personally private.
 - Records of one’s race, nationality, ethnicity, social security number, home address, phone number, or other personal information may be withheld.
 - Requests for lists of names and addresses of persons for solicitation or fund-raising purposes.
 - Agency may request a certification that a list of names and addresses will not be used for solicitation or fund-raising purposes and/or that the list will not be sold or distributed to another person for such purpose.



FOIL Exemptions

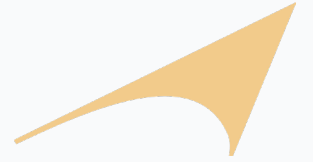
- Inter-agency or intra-agency materials which are not:
 - Statistical or factual tabulations or data
 - Instructions to staff that affect the public
 - Final agency policy or determinations
 - External audits, including but not limited to audits performed by the comptroller and the federal government
- The specific contents of inter- or intra-agency materials determine the extent to which they are deniable.

FOIL Timelines and Procedure (§ 89(3) –(4))



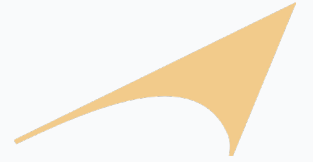
- After receiving a FOIL request, the public entity has **5 business days** to either:
 - Make the records available,
 - Deny the request in writing, or
 - Acknowledge receipt of the request and provide an approximate date by which it will be granted or denied.
- Within **20 business days**, the public entity must give a full response or estimate time when the records will be provided.
- Records must be provided on the medium requested, if reasonable. § 87(5)(a).

Voluminous Requests



- Generally, a public agency cannot deny a FOIL request because it is voluminous.
 - However, there are strategies to address voluminous requests.
 - Is there a “reasonable description” of the records requested?
 - A request for “any and all email” does not “reasonably describe” what is being sought. *FOIL-AO-18949*.
 - Do the records exist and/or can they be obtained with reasonable effort?
 - Agency staff are not required to engage in ***Herculean or unreasonable efforts*** in locating records to accommodate a request (e.g. entry by entry search of an entire directory). *FOIL-AO-18949; FOIL-AO-15751*
- Insufficient staff cannot be used as a basis to deny a request for a large amount of records if an outside service can be retained to perform the necessary work and the applicant agrees to pay the actual cost of reproducing the records.

Voluminous Requests



- The Third Department reversed the lower court's decision to grant access to certain documents and award attorney's fees because petitioner's Article 78 proceeding was premature, as agency's delays were reasonable and did not constitute a constructive denial.
- The Court clarified that an assessment of reasonableness requires consideration of "the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency and similar factors," and noted the respondent agency received over 1,250 FOIL requests in the last four months of the relevant period.
- The Court overturned petitioner's award of counsel fees because respondent acted in good faith by specifying a reasonable basis for the delay and promptly released the documents upon completing its review and not just in response to the litigation.
 - *Save Monroe Ave., Inc. v. New York State Department of Transportation*, 197 A.D.3d 808 (3d Dep't 2021)



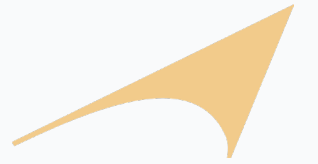
Fees

- In general, FOIL permits covered agencies to charge the following fees:
 - Paper copies - \$0.25 per page.
 - Electronic copies - only charge if it requires more than 2 hours of time to “prepare” records.
 - Charge hourly wage of lowest paid employee able to prepare records.
- Section 87(1)(b)(3) was amended to prohibit agencies from charging a fee for records where an electronic copy is already available from a previous request made within the past six months.
 - The agency can only charge a fee for the actual cost of a storage device or media if one is provided to the requester in complying with the request.

Electronic Records



- Texts and emails are generally subject to FOIL as they are “records.”
- “[E]lectronic communications, such as emails and texts that involve [municipal] business, whether stored on a government or personal device, constitute ‘records’ that fall within coverage of FOIL.” COG Opinion 19429.
- Texts and emails must be retrievable to be disclosed.



Electronic Records

- A district is not obligated to attempt to retrieve deleted texts that may only be recovered from a phone carrier.
 - COG Opinion 19673
- A district is not obligated to allow a requestor access to a district-owned device to review an email or text communication.
 - COG Opinion 19429
- Whether retrievable texts and emails must otherwise be disclosed depends on their content.

Electronic Records



- When communications (including texts and emails) are transmitted between or among government officers or employees, they constitute "intra-agency materials."
 - COG Opinion 19673
- Those portions of the materials consisting of advice, opinions, recommendations and the like may be withheld.
 - Other portions consisting of statistical or factual information, instructions to staff that affect the public, or that represent final agency policy or determinations must be disclosed under FOIL.
 - None of this makes emails, texts or the devices on which they are stored exempt from subpoena.

Questions?



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