



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

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**FOIL AO 19834
OML AO 5657**

October 17, 2022

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 unless otherwise noted.

Dear:

The Committee on Open Government (“Committee”) received your request for an advisory opinion addressing whether the Municipal Labor Committee (“MLC”) is a public body under the Open Meetings Law (“OML”) and an agency under the Freedom of Information Law (“FOIL”).

Public Body

The OML defines “public body” as

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 consisting of members of such public body or an entity created or appointed to perform a necessary function in the decision-making process for which a quorum is required in order to conduct public business and which consists of two or more members. A necessary function in the decision-making process shall not include the provision of recommendations or guidance which is purely advisory and which does not require further action by the state or agency or department thereof or public corporation as defined in section sixty-six of the general construction law.

POL §102(2). MLC is a not-for-profit entity, incorporated as a 501(c)(5) entity. Generally, not-for-profit organizations do not meet the definition of a public body. However, there are circumstances when not-for-profit organizations do fall within this definition. There are several factors to consider in assessing whether a not-for-profit organization is a public body subject to the OML, including how the entity was created, the degree of government control, whether it serves a governmental purpose, and what its powers or authority include. See *Smith v. City University of New York*, 92 N.Y.2d 707, 713 (1999).

The MLC was created originally through an agreement between New York City and labor unions but incorporated by reference and definition into the City Administrative Code. See NYCCBL §§ 12-303(k), 12-313. The definition specifically identifies the MLC as the entity created in the agreement and § 12-313 requires that the MLC permit any “certified employee organization” eligible for membership to join the MLC and grants the “Board of Collective Bargaining” oversight authority to “abrogate any rule of [MLC] relating to voting or eligibility for membership which it determines to be arbitrary or discriminatory.” A “certified employee organization” is defined in the Administrative Code as “any public employee organization . . . certified . . . [or] recognized. . . as the ‘exclusive bargaining representative’ of a bargaining unit.” *Id.* § 12-303(l).

The agreement identifies the MLC as “representatives of qualified organizations of city employees” and, under Section V, grants it the authority to create rules governing “membership eligibility, organizing and voting procedures of the MLC and the method of designating MLC members on the Board of the OCB.” The MLC rules and regulations state that its purpose is to “perform functions assigned to it” by the City Administrative Code. Membership in the MLC is open to any “certified employee organization” and all members are permitted to designate one individual who holds voting power on “all MLC matters.” See Rules 2.0, 3.0, 3.4, 4.0. The weight of each delegate’s vote within the MLC depends on the size of the organization that the delegate represents, and certain types of matters require two-thirds approval to pass. See Rules 4.2, 4.3. Additionally, the MLC has “officers” that comprise a steering committee the composition of which is specified in those rules. While one must be a “delegate of the Citywide Bargaining Representative” and at least two must be a “delegate representing the uniformed forces in the police, fire, sanitation, or corrections department,” the remaining “officers” are delegates of the union members and voted into position by the members according to voting rules. See Rule 5.0, 5.1, 5.4-5.6. A quorum is required and unless another rule applies, all actions must be by majority vote. See Rule 5.12.

As the name implies, the MLC is a committee comprised entirely of individuals representing public employee, or union, interests. Although the existence of the MLC is codified in the City Administrative Code, its structure and decision making includes no government involvement. None of its members or officers are appointed by the government. It is designed to essentially act as a union of unions engaged in collective bargaining with the government as an employer. Unions are not public bodies subject to the requirements of the OML.

According to the January 25, 2022, City of New York Office of Comptroller Financial Audit Report, the City contributes to the public employee benefit funds but “City officials do not regulate or administer the funds.” FN20-118S, p.7; Directive #12, NYC Office of the Comptroller. Based on the May 5, 2014, and June 28, 2018, agreement letters between MLC and the City, it appears that MLC manages and/or administers at least some of these funds for the benefit of the unions within its membership. Additionally, in the June 28, 2018, letter agreement, the MLC agrees to share non-personal data regarding benefit plans and the “assumptions utilized in determining expected savings for comparison” with the employer, the city. However, merely receiving government funds or sharing data with the government does not alone transform a not-for-profit organization into an organization that directly performs a governmental function or performs a necessary step in governmental decision-making.

While negotiations and collective bargaining agreements involve the expenditure of public funds, I believe it is a stretch to say that the MLC itself is body discussing and making decisions regarding governmental functions. Similarly, the fact that the MLC engages in data sharing with the city for the benefit of its membership does not transform its role into one that is a necessary function in the

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decision-making process. Without that information, both the government employer and the unions would still be making decisions regarding employee health plans and costs as it did, perhaps less efficiently, before these agreements took effect. Even considering the data sharing and benefit plan administration, it seems clear that the MLC role and purpose is to represent the interests of its union members, rather than carrying out a governmental function or to assist the government in making a decision.

In my opinion, the MLC is distinguishable from the public bodies at issue in the case law and advisory opinions that you believe support the conclusion that the MLC is a public body. For example, in *Smith v. CUNY*, “the Association, Inc.” was comprised of “administrators, faculty members and students” and the Dean of Student Affairs was the Association’s “presiding officer.” *Smith v. City University of New York*, 92 N.Y.2d 707, 711 (1999). The Association collected fees from students, which were maintained in an account separate from CUNY. *Id.* Inherent in that structure was the authority to distribute those funds. Despite the fact that the funds were student funds, decisions regarding those funds included CUNY officials and were for the purpose of student activities at a public college. Other authorities upon which you rely are similarly distinguishable.

Based on the details outlined above suggesting that the MLC is not comprised of any governmental authorities or public officers and that its primary purpose seems to be representing the interests of the bargaining units it is comprised of rather than a purpose or function for the government, I do not believe that the MLC is a public body subject to the requirements of the OML.

Agency

The Freedom of Information Law (“FOIL”) defines “agency” as

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 municipalities thereof, except the judiciary or the state legislature.

POL §86(3). For the reasons detailed above, I do not believe that the MLC is a governmental entity and do not believe that it performs a “governmental or proprietary function” for the government.

Sincerely,

s/Christen L. Smith

Senior Attorney