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OML AO 5658

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By Electronic Mail Only to: tcmitche@buffalo.edu

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 Mr. Mitchell:

The Committee on Open Government ("Committee") received your request for an advisory opinion regarding several aspects of the open meetings held by the NYS Office of Cannabis Management ("OCM"). As you know, we provided OCM with the opportunity to provide additional information in response to your concerns. The following opinion considers your concerns, the information provided by OCM, as well as information our office reviewed from the OCM website.

Notice

Public Officers Law § 104(1) requires public bodies to post the notice for open meetings seventy-two hours before the meeting, so long as the meeting is scheduled at least one week in advance. Meetings scheduled less than one week in advance must still be on proper notice, which must be provided at a "reasonable time prior" to the meeting. § 104(2). While there is nothing in the Open Meetings Law ("OML") expressly limiting the ability of a public body to schedule open meetings less than one week in advance, courts have found that doing so would be unreasonable unless there is some urgency concerning the need to do so. *See Previdi v. Hirsch*, 524 N.Y.S.2d 643, 645 (1988).

This opinion concerns two OCM meetings scheduled less than a week in advance. The first was on September 13, 2022, with notice provided on September 12, 2022, for the limited purposes of "considering a Limited Partnership Agreement (LPA) to be entered into the New York Social Equity Cannabis Investment Fund L.P, which was a time-sensitive matter." OCM represented the urgency in scheduling the meeting by stating: "[t]his LPA had not been approved by the Dormitory Authority of the State of New York (DASNY) or signed by the Director of the Division of Budget until September 7, 2022. The approval of this LPA by the Board would allow DASNY to take steps relating to the Conditional Adult-Use Retail Dispensary (CAURD) program dispensaries, requiring immediate attention by the Board."

Based on the available information, it is not clear why the approval of the LPA was, as of September 12, 2022, time sensitive or that as of September 12, 2022, it required the immediate attention of the Board such to justify a meeting within twenty-four hours. The "Ad Notice" available on the DASNY webpage regarding the NYS Social Equity Cannabis Investment Fund reveals that DASNY was authorized to create the Fund "in consultation with the OCM" pursuant to Chapter 58 of the Laws of 2022. Chapter 58, states, in relevant part, that "the authority shall report on the procurement and selection of the general partner. . . no later than December thirtieth, two thousand twenty-two and annually thereafter." This

reporting deadline suggests that OCM and DASNY still had approximately two months to procure and select the partner. However, if there were additional factors creating urgency about which OCM failed to make the Committee aware, the timeframe could have been reasonable.

The second meeting was scheduled less than a week in advance to discuss "recent developments in pending litigation and employee related matters" and notice was provided forty-eight hours before the meeting. OCM provided no details concerning why this meeting was emergent and had to be held less than a week from when it was scheduled. Generally, without such details, a meeting to discuss the referenced topics cannot in our opinion be considered urgent and should have been scheduled a week in advance on seventy-two hours of notice.

Ultimately, whether the circumstances justify a public body scheduling a meeting less than one week in advance and upon less than seventy-two hours of notice is a fact specific determination that can only appropriately be made by the judiciary. Public Officers Law § 107 grants "[a]ny aggrieved person . . . standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, or an action for declaratory judgment and injunctive relief" in state Supreme Court.

Public Comment

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. The Committee has long suggested that when public bodies decide to accept public comment, they should create rules regarding taking of comment which are reasonable and treat all members of the public equally. For example, public bodies may request that a person provide his or her name or other identifier in order to speak or otherwise participate relative to a meeting of a public body. However, identifying oneself by actual name should, in our view, be optional and public bodies should permit use of pseudonyms or anonymous public comment. Further, while the time each speaker is permitted to speak may be limited, the total time allotted to public comment should not be limited such that there is an artificial cut-off that could deprive someone of the right to speak if others are granted that right. If a public body decides to accept public comment, it must allow each person wishing to speak the time permitted under the rules regardless of how many people wish to be heard.

Guest speakers or persons with a particular interest or expertise may be allowed extended time or time to speak outside the public comment period. *See* OML AO 5210. Therefore, in my opinion, allowing an Assemblyperson or other public official, such as Dasheeda Dawson, more time to speak than that allotted to the public during public comment was likely consistent with the OML because it is not truly "public comment" but rather an invited expert or educator. Otherwise, the rules for public comment must treat everyone fairly and equally. In other words, with the exception of an invited expert or speaker on a topic of interest to the body, a body generally may not pick and choose which commentors will get extra time while limiting others to shorter periods of time. If the OCM seeks to limit comment to a two-minute period approved by the members, it should stop all speakers at the two-minute mark.

Limiting public comment to items appearing on an agenda would, in our view, be consistent with the OML. *See* OML AO 2896, 4024. However, you contend that the OCM requires members of the public to sign-up for comment limited to the content of an agenda but does not post the agenda with adequate time for an individual to determine whether he or she wishes to attend the meeting in-person and

provide comment.[1] Additionally, while the OCM states that online or written public comments are always accepted, the notices provide a time and date deadline by which comments must be submitted, presumably in order for the comments to be incorporated into the "official record of the meeting and be documented in the meeting minutes" for that particular meeting. For example, the December 19 notice for the meeting held on December 21 states: "[a]ll online comments must be submitted by 5 p.m. on Tuesday, December 20." However, you contend that the agenda was not available as of 4:45pm on December 20 and that a reporter informed you that it was posted at 4:55pm that day, providing a mere five minutes to review the agenda and submit relevant written comments. In my opinion, such a practice results in a chilling effect on public participation. If a public body decides to accept and incorporate written comments which relate to an agenda item into the record or minutes of a meeting, it should either make that agenda available at least twenty-fours hours before the meeting in compliance with § 103(e) or close the written comment period a reasonable time after the meeting. The OCM has in fact done just that: for its November 21 meeting, it closed the written comment period after the open meeting, presumable to permit additional people to submit their views in writing after the meeting had occurred.

Posting Documents

Public Officers Law § 103(e) requires public bodies to post any document available under FOIL, "as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting . . . to the extent practicable at least twenty-four hours prior to the meeting during which the records will be discussed." In our opinion, while the OML does not require public bodies to create an agenda, if it does so, an agenda would be a document available under FOIL which is scheduled to be discussed during the meeting. As such, agendas if they are used should be posted at least twenty-four hours prior to the meeting.

Posting Minutes, Recordings or Transcripts

OML § 106(1) states that "minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." There is no requirement that the written meeting minutes contain verbal or written public comment received. As you point out, some of the meeting notices indicate that the written comments received before a specified date and time will be incorporated into the "official record of the meeting and be documented in the meeting minutes." In other words, the OCM has represented that, notwithstanding a lack of requirement in the OML, comment received under the described circumstances will be incorporated into the minutes despite no requirement under the OML to do so. While it is unclear whether the comments reflected include both verbal and written comment, the minutes now available on the OCM webpage do reflect public comment.

Additionally, § 106(3) requires that minutes be available within two weeks of an open meeting. Public bodies which maintain a webpage and utilize a high-speed internet connection must post meeting minutes within the required timeframes. However, a body may post "unabridged video recordings or unabridged audio recordings or unabridged written transcripts" in lieu of posting the minutes. In such circumstances, minutes are still mandatory and must be available within the required timeframe to

[1]If a public body accepts public comment in-person and also offers a virtual, videoconference link because it is required to do so pursuant to § 103-a of the OML, it must also accept public comment through the virtual platform. POL § 103-a(2)(h).

anyone requesting them but need not be posted to the webpage. However, by definition, an "unabridged" recording or transcript must capture the entire open meeting, including public comment and post executive session motions to adjourn. OCM represents that the videos posted are unabridged recordings. There is no requirement that public bodies discuss written comment they receive before a meeting during the meeting, and as such any posted recordings or transcripts would not be required to include those comments. Written comments received by public bodies are, however, available as a "record" of the agency under FOIL.

Executive Session

The meeting transcript for the December 21, 2022, meeting reflects that the members entered executive session after approving a motion "to enter into Executive Session" which was "so moved" and "seconded." The motion did not identify the reason for the executive session in the motion; as such, the motion failed to inform the public that the topic or topics for discussion in such session fell under one of the enumerated grounds for entry into an executive session. Section 105 of the OML permits a public body to enter an executive session "upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered" and only for one or more of the enumerated purposes specified in paragraphs (a) through (h). Because those subjects are limited, a public body cannot conduct an executive session to discuss the subject of its choice.

Therefore, § 105 clearly states that a valid executive session requires (i) *a public meeting*, (ii) a motion identifying one or more of the enumerated purposes, and (iii) majority approval of the motion. The motion to enter an executive session must be sufficiently specific to inform the public that the topic or topics for discussion fall under one of the enumerated grounds for entry into an executive session. It is the opinion of the Committee that entering an executive session when any of these three procedural requirements is missing is inconsistent with the requirements of the OML. *See* OML AO 2212, 2276, 3618 for past consistent opinions.

Thank you for your inquiry.

Sincerely,

s/Christen L. Smith

Senior Attorney

cc: Patricia H. Heer, First Deputy General Counsel