

## COMMITTEE ON OPEN GOVERNMENT

STATE OF NEW YORK  
DEPARTMENT OF STATE  
ONE COMMERCE PLAZA  
99 WASHINGTON AVENUE  
ALBANY, NY 12231-0001  
TELEPHONE: (518) 474-2518  
FAX: (518) 474-1927  
WWW.DOS.NY.GOV/COOG/

### COMMITTEE MEMBERS

ROANN M. DESTITO  
PETER D. GRIMM  
M. JEAN HILL  
KATHY HOCHUL  
HADLEY HARRIGAN  
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MEREDITH S. WEILL

### CHAIRPERSON

FRANKLIN H. STONE


### EXECUTIVE DIRECTOR

ROBERT J. FREEMAN

December 6, 2018

### VIA EMAIL

TO: Rachael Fauss ([rachael@reinventalbany.org](mailto:rachael@reinventalbany.org))

FROM: Robert J. Freeman, Executive Director 

CC: Kathy Wylde ([kwylde@pfnyc.org](mailto:kwylde@pfnyc.org)),  
John Kaehny ([jkaehny@reinventalbany.org](mailto:jkaehny@reinventalbany.org)),  
Gene Russian ([grussian@nypirg.org](mailto:grussian@nypirg.org))  
Adira Siman, ([asiman@pfnyc.org](mailto:asiman@pfnyc.org))  
Patrick Foye ([PFoye@mtahq.org](mailto:PFoye@mtahq.org))  
Amy Paulin ([PaulinA@nyassembly.gov](mailto:PaulinA@nyassembly.gov)),  
Michael Benedetto ([benedettom@nyassembly.gov](mailto:benedettom@nyassembly.gov))  
Michael Gianaris ([gianaris@nysenate.gov](mailto:gianaris@nysenate.gov))  
Freddy Ferrer ([FFerrer@mercuryllc.com](mailto:FFerrer@mercuryllc.com))

RE: Advisory Opinion

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.

I have received your correspondence in which you seek an advisory opinion concerning the status of the Metropolitan Transportation Sustainability Advisory Workgroup (the "Workgroup") under the Open Meetings Law.

The Workgroup is a statutory creation described in the latest budget enactment. According to subdivision (1) of that statute, the Workgroup "shall consist of ten members", including two each appointed by the Governor, the Speaker of the Assembly and the majority leader of the Senate, as well as one each by the Mayor of New York City, the Chairman of the MTA and the Commissioners of the New York City and New York State Departments of their respective Departments of Transportation. Subdivision (2) states that the Workgroup "shall undertake a review of the actions and measures that are necessary to provide safe, adequate, efficient, and reliable transportation within the city of new york and the metropolitan commuter transportation district within any available resources and shall review and make recommendations" regarding a variety of issues relating to public transportation within the region mentioned. Subdivision (3) requires that the Workgroup "shall, on or before December 31, 2018, by a majority vote approve and issue a final report and recommendations" to the Governor, legislative leaders, the Mayor of New York City and the MTA.



Department  
of State

In this regard, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) of that statute defines the phrase "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."

Judicial decisions indicate generally that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. I note that one of the decisions cited in your correspondence in support of the contention that advisory bodies are not subject to the Open Meetings Law, Daily Gazette v. North Colonie Bd. Of Educ., 67 AD2d 803 (1978), was effectively reversed by means of amendments to that statute enacted in 1979.

In the decisions cited above, none of the entities were designated *by statute* to carry out a particular duty and all had purely advisory functions. More analogous to the Workgroup is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body, also created by law, the Medical Advisory Committee, to advise the then Commission of Social Services, and it was found to constitute a "public body" subject to the Open Meetings Law.

In its determination, the court concluded that "the giving of advice by the Committee either on their own volition or at the request of the Commission is a necessary governmental function for the proper actions of the Social Services Department" (*id.*, 511-512).

Also significant is a decision rendered by the Court of Appeals, the state's highest court, in which it was found 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 Socy. for Prevention of Cruelty to Animals v Board of Trustees of State Univ. of N.Y.*, 79 NY2d 927, 929)...

“It may be that an entity exercising only an advisory function would not qualify as a public body within the purview of the Open Meetings Law...More pertinently here, however, a formally chartered entity with officially delegated duties and organizational attributes of a substantive nature, as this Association, Inc. enjoys, should be deemed a public body that is performing a governmental function (*compare, Matter of Syracuse United Neighbors v. City of Syracuse*, 80 AD2d 984, 985, *appeal dismissed* 55 NY2d 995)” [*Smith v. CUNY*, 92 NY2d 707; 713-714 (1999)].

In sum, because the Workgroup is a creation of law, it is required by law to focus on critical governmental tasks and is required to carry out a governmental function, based on the direction of judicial decisions, it would appear that it constitutes a “public body” required to comply with the Open Meetings Law.

I hope that I have been of assistance.