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Rachael Fauss
Reinvent Albany
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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.

Dear Ms. Fauss:

I am writing in response to your request for an advisory opinion, on behalf of Reinvent Albany and a number of other organizations, regarding the application of the Open Meetings Law (OML) to the Metropolitan Transportation Authority (MTA) Traffic Mobility Review Board (TMRB).

By way of background, the OML is applicable to public bodies, and §102(2) 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."

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body.

Several judicial decisions indicate generally that advisory bodies, other than those consisting of members of a governing body, that have no power to take final action fall outside the scope of the OML. 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." (GoodsonTodman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspaper 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)). In one of the decisions, Poughkeepsie Newspaper, *supra*, a task force was designated by the Mayor consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long-range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (*id.*, 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in



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fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law...'(id.).

In the decisions regarding advisory bodies cited above, none of the entities were created by statute to carry out a particular duty and all had purely advisory functions. When an entity is a statutory creation whose existence is preceded by approval of its existence by the Senate and the Assembly and final approval by the Governor, when it has specific statutory duties that must be accomplished, when it has two or more members, and when it can act only by means of a quorum, it is my opinion, and I believe that a court would concur, that such an entity constitutes a "public body" required to give effect to the OML.

For example, in MFY Legal Services v. Toia, 402 NYS 2d 510 (1977), the court held that the New York State Medical Advisory Committee, which advised the State Commissioner of Social Services, was subject to the OML. When issuing this decision, the court considered the following factors: 1) the advisory committee was created by statute; 2) its members were subject to Senate confirmation and served for three-year terms; and 3) in certain cases the Commissioner was prohibited from acting before he received the advice of the Medical Advisory Committee. In MFY Legal Services, the court opined that "the giving of advice by the committee... is a necessary governmental function for the proper actions of the Social Services Department." Id.

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...

"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)].

The TMRB is a statutory creation pursuant to Public Authorities Law §553-k. The members of the Board are appointed by the MTA and must meet certain statutory eligibility requirements (§553-k(1)). The Board is tasked with providing the Triborough Bridge and Tunnel Authority with recommendations regarding the Central Business District toll amounts (§553-k(2)). In addition, the TMRB is required by statute to review the MTA capital plan (§553-k(5)).

I note that the statute requires that the "recommendation shall be submitted to the board of the Triborough bridge and tunnel authority for consideration before the Triborough bridge and tunnel authority board may approve central business district toll amounts that may be established and adopted." In a manner very similar to the State Medical Advisory Committee discussed in the MFY Legal Services decision, the providing of the recommendation by the TMRB "is a necessary governmental function for the proper actions of the" Triborough Bridge and Tunnel Authority.

In our view, because the TMRB is a creation of law, is required by law to focus on critical governmental tasks and is required to carry out a governmental function, based on the direction in judicial decisions, I believe that it constitutes a "public body" required to comply with the Open Meetings Law. This requirement includes, but is not limited to, the obligation to open its meetings to the public in full compliance with §103 of the OML; provide notice of its meetings in compliance with §104; conduct executive sessions in compliance with §105; and prepare minutes in compliance with §106 of the Law.

The OML has been broadly interpreted by the courts. 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 convened open to the public, whether or not there is an intent to take

action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the OML. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated 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" (60 AD 2d 409, 415).

As such, in our view, the requirements of the OML apply to all meetings of the TMRB, not just those in which votes are taken.

Finally, you requested clarity regarding whether various materials given to the TMRB by the MTA are considered public records subject to disclosure under the Freedom of Information Law (FOIL). In response, I offer the following:

All records maintained by the MTA and, in our view, the TMRB, are records subject to the rights conferred by FOIL. FOIL is based on a presumption of access. All records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (p) of the Law. While not all records, or portions thereof, given to the TMRB by the MTA are necessarily going to be required to be disclosed, they are all subject to the rights of access conferred by the Law.

I hope this information proves useful.

Sincerely,



Kristin O'Neill
Assistant Director

cc: MTA Board of Directors