

Disclosure of Records Scheduled to be Discussed during Open Meetings

Section 103(e) of the Open Meetings Law

Newly enacted section 103(e) of the Open Meetings Law is the most significant change in that law in the past 30 years.

The amendment addresses situations brought to the attention of the Committee on Open Government on many occasions that led to the Committee's submission of recommendations to the Governor and the Legislature. Often a public body, may discuss an issue and refer, for example, to "page 3, second paragraph" of a record that the public has never seen. Even though the meeting is open to the public, those in attendance may have little understanding of the discussion.

The provision approved by Governor Cuomo earlier this year is the result of negotiations led by local government associations that are designed to reflect reality and to ensure that government agencies are not required to do the impossible. Great care was taken to ensure that the legislation would not involve an unfunded mandate.

When a record "is scheduled to be the subject of discussion by a public body during an open meeting", the legislation requires the public body, with reasonable limitations, to make the record available to the public prior to the meeting. Optimally, the record will be made available online; if that cannot be done, the record can be made available in paper form in response to a request.

Two categories of records fall within the coverage of the legislation: first, those that are accessible under the Freedom of Information Law (referenced as Article Six of the Public Officers Law in the legislation and known by many as "FOIL"); and second, "any

proposed resolution, law, rule, regulation, policy or any amendment thereto..."

The amendment clearly does not create an "unfunded mandate", for its last sentence states that an agency "may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision." That aspect of the legislation is based on the recognition that some units of government may not now have the resources, the technology or the expertise to post records on a website. The pace of change, however, is dramatic, and within a very few years, there will likely be few agencies that will be unable to meet the goals of the amendment, and posting records online will become the norm.

It is likely, too, that the legislation will, in the long run, save the government and the taxpayers' time, effort and money. The great majority of records are produced and stored electronically, and when they are posted on a website, most potential users of the records will have the ability and, in fact, prefer to review and obtain them online. When they do, there will be no need to attempt to gain access following the submission of a FOIL request. From the government's point of view, disclosure online will reduce or even eliminate the need to retrieve records, prepare photocopies, complete and maintain materials associated with charging fees for copies, or respond to requests. The records will simply be there for the taking.

The following questions are among those that have arisen so far.

Q. Where can an agency find assistance in developing and maintaining a website?

A. The Committee on Open Government website (found by googling "coog") includes a report that offers guidance and inexpensive solutions to agencies that may not have the expertise or technology at

present to fully realize the goals of the legislation. The report, "Evaluating the Importance of Technology and the Role of Information Providers within Local Governments in New York", is available under "News" on the Committee's homepage.

Q. The amendment states that agencies should make records scheduled to be discussed during open meetings "to the extent practicable as determined by the agency." What does that mean?

A. According to an ordinary dictionary definition, "practicable" means "feasible." "To the extent practicable" pertains to the ability to take reasonable steps through reasonable efforts to achieve the goals of the legislation. If a record scheduled to be discussed during an open meeting is not delivered to the clerk or other employee until a half hour prior to the meeting, it would not likely be "practicable" to post the record on a website in advance of the meeting. Similarly, it may not be practicable to honor a FOIL request for copies of the record in such a short period of time.

Q. In a similar vein, is there a specific time before a meeting that records must be posted or otherwise disclosed?

A. No. The legislation involves doing so based on what is reasonable and "practicable" in consideration of attendant facts and circumstances.

Q. What if the record or records scheduled to be discussed during an open meeting are voluminous, involving hundreds of pages that are submitted to an agency on paper - - must the agency scan the records and post them online?

A. Again, due to the volume of the materials and the effort needed to scan, it may not be practicable to do so, particularly if the records

come into the possession of the agency a short time prior to the meeting. On the other hand, if the records are prepared and submitted electronically, i.e., on an agency computer, via email or on a cd, posting them online may involve little effort and could eliminate time and effort associated with the preparation of paper copies.

Q. What if there are records scheduled to be discussed during an open meeting that include portions that may be deleted or redacted?

A. This goes to the heart of what may be "practicable". In some cases, it may be easy to redact portions of records while making the remainder available. For instance, if a database includes fields consisting of both accessible and deniable data that can be readily segregated electronically, those portions that are public might be posted without unreasonable effort. In others, those in which portions of records can only be redacted manually, and only then with substantial expenditure of time and effort, it may not be practicable to do so prior to a meeting.

Q. What if a record is posted online, but a member of the public wants a paper copy of the same record at the meeting?

A. In that situation, as in others in which records are requested, the agency is required to accommodate the applicant when it has the ability to do so. In this instance, the agency would be required to accept a FOIL request, but it could charge the appropriate fee for copies. If it is practicable to do so, the agency should provide copies at the meeting.

Q. Must agencies post records online, even though no request has been made to do so?

A. To accomplish the goals of the legislation, yes, an agency must do so when practicable. As indicated earlier, the report, "Evaluating the

Importance of Technology”, offers sources of inexpensive technical guidance.

Q. Does a request need to be made in writing prior to the meeting?

A. An agency can require that a request be made in writing, and it may accept verbal requests. Whether records are provided prior to or at the meeting depends on what is practicable.

Q. What if a person asks to inspect a record during an open meeting?

A. The agency may, but is not required to, provide access free of charge at the meeting.

Q. Must agencies make copies of records prior to meetings if there has been no request to do so?

A. While an agency may choose to prepare copies for distribution at a meeting, there is no obligation to do so unless a request has been made.

Q. If redactions have been made prior to posting online or the preparation of copies, but the agency has done so without having received a FOIL request, must the reason for the redactions be explained?

A. The reason for a denial of access must be given only in response to a FOIL request. While an agency may choose to offer the reason for a redaction that it posts or distributes absent a FOIL request, there is no obligation to do so.

Q. Items referenced on an agenda that are administrative in nature and often approved or adopted as part of a single, all-inclusive motion with one vote during an open meeting, such as vouchers, abstracts

involving expenditures, or other administrative matters that are routinely considered and acted upon without deliberation by a public body. Do they fall within the coverage of the amendment?

A. Maybe. The amendment focuses on records that “are scheduled to be subject of discussion.” If there is little or no likelihood that a discussion will be substantive or that it will not be the subject of discussion, the amendment would not apply. If a record is of a substantive nature that may warrant substantive consideration, it should be available prior to the meeting to honor the intent of section 103(e).

Q. Perhaps the most frequently asked question relates to the memoranda, research materials and similar documentation that might have been prepared in support of or opposition to a proposed resolution, law, rule, or policy, for example. Are records of that nature covered by the amendment?

A. No. Memorandum and other background materials are not the records that “are scheduled to be the subject of discussion”; the text, if it exists, of the proposed resolution, law, rule or policy would be the record scheduled to be discussed and made available when practicable to do so. Moreover, often memoranda and other background materials fall within the provision in FOIL concerning “inter-agency or intra-agency materials” [section 87(2)(g)]. Insofar as those materials consist of advice, opinion, recommendation and the like they may (but need not) be withheld. Unless those portions of the materials are effectively disclosed prior to or during open meetings, i.e. by reading them aloud or publicly explaining their content, an agency may continue to withhold them. It is emphasized, however, that portions of those materials consisting of statistical or factual information or that reflect existing policy are accessible to the public that must be disclosed on request, but not necessarily pursuant to the amendment.

Q. What about drafts?

A. A draft maintained by or for an agency is an agency record that falls within the coverage of FOIL and would constitute "intra-agency material." Again, the content of that material would ordinarily determine the extent to which it must be disclosed, or conversely, may be withheld. If the draft is a proposed resolution, law, rule or policy, and if it is scheduled to be the subject of discussion during an open meeting, it would fall within the coverage of the amendment and must be posted online or otherwise made available on request to the extent practicable. To the extent that it is not one of those items, but is scheduled to be discussed during an open meeting and consists of statistical or factual information or is reflective of existing policy and, therefore, would be available under FOIL, it, too, would be subject to disclosure under the amendment.

Q. Does the amendment include records such as those relating to persons who may be hired or firms that might be retained or hired by an agency to provide goods or services?

A. No. If a discussion may be conducted during an executive session, it can be assumed, unless a decision to the contrary is specified, that such records will not be scheduled to be the subject of open discussion. Consider the grounds for entry into executive session appearing in section 105(1) of the Open Meetings Law, particularly paragraph (f). The provision permits a public body to enter into executive session to discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, dismissal or removal of a particular person or corporation..."

With time, there will likely be more questions that are raised regarding the scope and obligations imposed by the new section 103(e). We will do our best to answer them quickly, reasonably, and in a manner consistent with the direction provided by the law. Compliance will increase confidence in government, encourage the public to participate more fully, precipitate constructive comments and recommendations, and generally enable the public to know more about what the government plans to do and is doing.