

**Minutes, May 15, 2012**

**Chair**

Ezra B. W. Zubrow

**Secretary**

Edward Herman

**Architecture & Planning**

Despina Stratigakos (Excused)

**Arts & Sciences**

William H. Baumer

Melvyn Churchill

Stephen Dyson

**Dental Medicine**

Mine Tezal

**Engineering & Applied Sciences**

Joseph Mollendorf

Adel Sadek

**Graduate School of Education**

Suzanne Miller (Excused)

**Law**

Martha McCluskey (Excused)

**Medicine & Biomedical Sciences**

Ranjiv Singh (Excused)

Teresa Quattrin (Excused)

**Pharmacy**

Alfred Reiman (Excused)

**Social Work**

Kathleen Kost

**SUNY Senators**

Adly Fam (Excused)

Jennifer Gottdiener (Excused)

Donald Grinde

Peter Nickerson

**University Libraries**

Michael R. Lavin

**Parliamentarian**

William H. Baumer

**Guests**

President--Satish K. Tripathi (Excused)

Professional Staff Senate --Ann Marie Landel

Provost (Interim)—Bruce McCombe (Excused)

1. **Quorum:** The Parliamentarian confirmed that an FSEC quorum is 13 people. FSEC, however, is empowered to act on time sensitive business and must report on these activities at the next meeting of the [Faculty Senate](#).
2. **Open Meetings Law:** Zubrow provided FSEC with a copy of an Advisory Opinion by the New York State Committee on Open Government, the state agency that oversees the Freedom of Information and Open Meetings Laws. (Appendix A) The Opinion states that FSEC is not subject to the Open Meetings Law because the Executive Committee is an advisory body.

“According to 8 NYCRR §331, the University Faculty Senate “shall be concerned with effective educational policies and other professional matters within the university.” It is my understanding that the Faculty Senate does not have the authority to make policy or otherwise take binding action. Similarly, the Articles of Organization of the Faculty Council of Community Colleges indicate that the Faculty Council is authorized to “focus on matters relating to community college faculty and make recommendations regarding academic concerns and issues, policies, and programs.” I have found no material indicating that its recommendations are or must be adopted. Based on the foregoing, I believe that a court would likely determine that neither the University Faculty Senate nor the Faculty Council of Community Colleges constitutes a public body or, therefore that either would be required to give effect to the Open Meetings Law.”

- FSEC discussed personnel issues in Executive Session.

**Appendix A**  
**Advisory Opinion of the Committee on Open Government**

State of New York  
Department of State  
Committee on Open Government

One Commerce Plaza  
99 Washington Ave.  
Albany, New York 12231  
(518) 474-2518  
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OML-AO-4566

February 20, 2008

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, unless otherwise indicated.

Dear

As you are aware, I have received your letter concerning the status under the Open Meetings Law of several entities operating within the State University. Please accept my apologies for the delay in response.

The entities at issue are the University Faculty Senate, the Faculty Council of Community Colleges, and the Student Assembly.

I have contacted the Office of Counsel at the State University to obtain information pertaining to those entities, and University Counsel, Nicholas Rostow, has advised that none are subject to the Open Meetings Law. Based on a review of the regulations pertaining to those entities and their functions, I agree that two do not appear to fall within the coverage of the Open Meetings Law; the remaining entity, however, is in my view required to comply with that statute.

By way of background, 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."

Based on the foregoing, a public body is, in my opinion, 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. I note, too, that the definition refers to committees, subcommittees and similar bodies of a public body. Based on judicial interpretations, if a committee, for example, consists solely of members of a particular public body, it, too, would constitute a public body. For instance, in the case of a legislative body consisting of seven members, four would

constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that body designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

With specific respect to your area of concern, 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 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 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 then Mayor Koch 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 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.).

On the other hand, if an entity consisting of two or members that functions as a body has the authority to take action, i.e., through the power to allocate public monies or make determinations, the Court of Appeals, the state's highest court, has held that the entity would constitute a public body subject to the Open Meetings Law. In a case dealing with a student government body at a public educational institution ("the Association, Inc."), the Court provided guidance concerning the application of the Open Meetings Law, stating 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). In the instant case, the parties do not dispute the CUNY derives its powers from State law and it surely is essentially a public body subject to the Open Meetings Law for almost any imaginable purpose. The Association, Inc. contends, on the other hand, that is a separate, distinct, subsidiary entity, and does not perform any governmental function that would render it also a public body.

"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). It is invested with decision-making authority to implement its own initiatives and, as a practical matter, operates under protocols and practices where its recommendations and actions are executed unilaterally and finally, or receive merely perfunctory review or approval...This Association, Inc. possessed and exercised real and effective decision-making power. CUNY, through its by-laws, delegated to the Association, Inc. its statutory power to administer student activity fees (see, Education Law §6206[7][a]). The Association, Inc. holds the purse strings and the responsibility of supervising and reviewing the student activity fee budget. (CUNY By-Laws §16.5[a]). CUNY's by-laws also provide that the Association, Inc. 'shall disapprove any allocation or expenditure it finds does not so conform, or is inappropriate, improper, or inequitable,' thus reposing in the Association, Inc. a final decision-making authority... [Smith v. CUNY, 92 NY2d 707; 713-714 (1999)].

According to 8 NYCRR §331, the University Faculty Senate "shall be concerned with effective educational policies and other professional matters within the university." It is my understanding that the Faculty Senate does not have the authority to make policy or otherwise take binding action. Similarly, the Articles of Organization of the Faculty Council of Community Colleges indicate that the Faculty Council is authorized to "focus on matters relating to community college faculty and make recommendations regarding academic concerns and issues, policies, and programs." I have found no material indicating that its recommendations are or must be adopted. Based on the foregoing, I believe that a court would likely determine that neither the University Faculty Senate nor the Faculty Council of Community Colleges constitutes a public body or, therefore that either would be required to give effect to the Open Meetings Law.

I believe, however, that the Student Assembly is a public body subject to the Open Meetings Law. Most significantly, 8 NYCRR §341.2(b) requires that the Student Assembly "shall provide...a procedure for electing the student member of the State University of New York Board of Trustees..." As you are aware, the Board of Trustees is the governing body of the University system, and §341.10(a) specifies that the president of the Student Assembly "shall...serve as the student member of the State University of New York Board of Trustees."

In short, through the exercise of its obligation to develop a procedure for the election of a member of the University's governing body, I believe that the Student Assembly performs a binding decision-making function regarding the membership and composition of the governing body. For that reason, the Student Assembly in my opinion constitutes a public body subject to the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Executive Director

