

Center for Judicial Accountability, Inc. (CJA)

From: Watson, Cherise (DOS) <Cherise.Watson@dos.ny.gov>
Sent: Friday, November 8, 2019 4:38 PM
To: elena@judgewatch.org
Subject: FOIL: F2019-1399

Re: FOIL Extension

Dear Ms. Sassower:

This is in response to your FOIL request of "this is to request all records reflecting the process by which the position of executive director for the Committee on Open Government is to be filled..." It is taking significantly longer than anticipated to review our records and respond to your request.

The Department of State (DOS) is currently conducting a diligent search to determine whether records responsive to your request are available. The agency needs additional time to complete the response to this request, given the need for proper review and the limited resources available at the agency. We estimate the agency will complete its search for, and review of, any responsive records by December 24, 2019. We will notify you in writing if and when agency records are available for release.

Sincerely,

Cherise A. Watson
Assistant Records Access Officer
New York State Department of State

From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>
Sent: Thursday, October 03, 2019 12:59 PM
To: Watson, Cherise (DOS) <Cherise.Watson@dos.ny.gov>
Cc: Oneill, Kristin (DOS) <Kristin.ONeill@dos.ny.gov>; dos.sm.Coog.InetCoog <dosCOOG@dos.ny.gov>; Brown, Jonathan (DOS) <Jonathan.Brown@dos.ny.gov>; dos.sm.HRM.Recruitment <HRM.Recruitment@dos.ny.gov>
Subject: FOIL: (1) rules & regulations governing the Committee on Open Government's operations; (2) appointments of its members; (3) selection of its executive director

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TO: Department of State Records Access Officer Cherise Watson

Below is the September 25, 2019 e-mail of Committee on Open Government Associate Director Kristin O'Neill, not indicating any recipients, other than myself – albeit she is purporting to respond to my September 24, 2019 e-mail to her, to which I had cc'd you because of its FOIL requests.

It would appear, from Ms. O'Neill's e-mail, that the Committee on Open Government – now more than 40 years old – has NOT promulgated ANY rules and regulations governing its operations, as, for instance, pertaining to designation of a chair and establishing the position of executive director, let alone defining the delegations of power to each – or the delegation of power to an associate director, such as Ms. O'Neill. As reflected by Ms. O'Neill's above-attached September 30, 2019 e-mail, she does not bear the designation "acting executive director" – a designation presumably requiring Committee action.

Therefore, pursuant to FOIL, this is to request the Department of State's rules and regulations pertinent thereto – if, in fact, none have been promulgated by the Committee on Open Government itself.

Additionally, as Ms. O'Neill has not furnished any response to my below FOIL request for records reflecting "which Committee members are sitting *ex officio*, or by delegation, or by appointment and – if the latter – by which appointing authority and the expiration of their terms", I herein make that request of the Department of State, of which the Committee on Open Government is part.

Finally, this is to request all records reflecting the process by which the position of executive director for the Committee on Open Government is to be filled. The only thing thus far transparent is that it involves the Department of State's Bureau of Human Resources Management: <https://statejobs.ny.gov/public/vacancyDetailsView.cfm?id=73232>.

Thank you.

Elena Ruth Sassower, Director
Center for Judicial Accountability, Inc. (CJA)
www.judgewatch.org
914-421-1200

From: dos.sm.Coog.InetCoog <dosCOOG@dos.ny.gov>
Sent: Wednesday, September 25, 2019 8:17 AM
To: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>
Subject: RE: Thank you -- & further FOIL REQUESTS: Committee on Open Government' rules & regulations, info about its members & chair -- & website

Below is a calendar of events for the Department of State:
<https://www.dos.ny.gov/about/calendar.html>

Meeting Notices are posted here:
<https://www.dos.ny.gov/about/newsroom.html>

The Freedom of Information Law governs access to existing records and does not require an agency to honor "standing" or "prospective" requests for records.

Regulations promulgated by the Committee by the Committee on Open Government are available here, however, they do not govern the Committee's operations.

<https://www.dos.ny.gov/coog/regsc oog.html>

Kristin O'Neill

From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>

Sent: Tuesday, September 24, 2019 11:05 AM

To: Oneill, Kristin (DOS) <Kristin.ONeill@dos.ny.gov>; dos.sm.Coog.InetCoog <dosCOOG@dos.ny.gov>

Cc: Watson, Cherise (DOS) <Cherise.Watson@dos.ny.gov>; Brown, Jonathan (DOS) <Jonathan.Brown@dos.ny.gov>; dos.sm.HRM.Recruitment <HRM.Recruitment@dos.ny.gov>

Subject: Thank you -- & further FOIL REQUESTS: Committee on Open Government' rules & regulations, info about its members & chair -- & website

ATTENTION: This email came from an external source. Do not open attachments or click on links from unknown senders or unexpected emails.

Dear Ms. O'Neill –

Thank you for your prompt response. Please deem the FOIL request of today's date to which you have responded, as a standing request to be furnished with the written notice of the scheduling of the Committee's next meeting – or, alternatively, identify where the notice will be posted, so that I can know to check on a regular basis.

Also, kindly advise where I might find rules and regulations promulgated by the Committee pertaining to its own operations, presumably including the designation of a chair from among its members and their appointment of an executive director. Surprisingly, no such rules and regulations appear to be posted on the Committee's website: <https://www.dos.ny.gov/coog/index.html>.

Surprising, too, the Committee's website has no information readily-accessible about its members. Public Officers Law §89.1(a) identifies the Committee as consisting of:

“the lieutenant governor or the delegate of such officer, the secretary of state or the delegate of such officer, whose office shall act as secretariat for the committee, the commissioner of the office of general services or the delegate of such officer, the director of the budget or the delegate of such officer, and seven other persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly. The persons appointed by the temporary president of the senate and the speaker of the assembly shall be appointed to serve, respectively, until the expiration of the terms of office of the temporary president and the speaker to which the temporary president and speaker were elected. The four persons presently serving by appointment of the governor for fixed terms shall continue to serve until the expiration of their respective terms. Thereafter, their respective successors shall be appointed for terms of four years. The member representing local government shall be appointed for a term of four years, so long as such member shall remain a duly elected officer of a local government. ...”

As I recollect, during our September 16th phone conversation, I asked you about the Committee's members – and you directed me to the Committee's December 2018 annual report, posted on the website:

<https://www.dos.ny.gov/coog/pdfs/2018%20Annual%20Report.pdf>. However, the annual report only lists, alphabetically, the members' names, as part of the Committee's letterhead, these being: RoAnn M. Destito, Peter D. Grimm, M. Jean Hill, Kathy Hochul, Hadley Horrigan, Robert Mujica, Jr., Rosanna Rosado, David A. Schulz, Stephen B. Waters, Meredith S. Weill – with Franklin H. Stone identified as “Chairperson”.

The annual report provides no biographical information – nor even an indication as to which Committee members are sitting *ex officio*, or by delegation, or by appointment and – if the latter – by which appointing authority and the expiration of their terms. Shouldn't such basic information be posted on the Committee's website?

Kindly respond to the foregoing – including, if necessary, for pertinent records pursuant to FOIL.

Thank you.

Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)
914-421-1200
www.judgewatch.org

From: Oneill, Kristin (DOS) <Kristin.ONeill@dos.ny.gov>
Sent: Tuesday, September 24, 2019 10:15 AM
To: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>

Subject: RE: FOIL REQUEST: Records reflecting the date, time, and place of the Committee on Open Government's next meeting and its agenda

Good Morning Ms. Sassower,

I have received your request for an advisory opinion dated September 16, 2019 but have not had an opportunity to review and prepare a response.

In response to your request for records "reflecting the date, time, and place of the Committee on Open Government's next meeting and its agenda," I certify that the Committee on Open Government does not possess any records which are responsive to your request. When the next meeting is scheduled, notice of the meeting will be provided consistent with the requirements of the Open Meetings Law.

Kristin O'Neill

From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>
Sent: Tuesday, September 24, 2019 9:19 AM
To: Oneill, Kristin (DOS) <Kristin.ONeill@dos.ny.gov>; dos.sm.Coog.InetCoog <dosCOOG@dos.ny.gov>
Cc: Brown, Jonathan (DOS) <Jonathan.Brown@dos.ny.gov>; dos.sm.HRM.Recruitment <HRM.Recruitment@dos.ny.gov>
Subject: FOIL REQUEST: Records reflecting the date, time, and place of the Committee on Open Government's next meeting and its agenda

ATTENTION: This email came from an external source. Do not open attachments or click on links from unknown senders or unexpected emails.

TO: New York State Committee on Open Government/Assistant Director Kristin O'Neill

Please advise as to the status of my below September 16, 2019 e-mail to you, to which I have received no response.

According to Public Officers Law §89.1(a), the Committee on Open Government "shall hold no less than two meetings annually, but may meet at any time."

When is the Committee's next meeting? And have you informed its members of my September 16, 2019 e-mail, whose issue – the Committee's duty to render, or secure, an advisory opinion as to whether, pursuant to Article III, §10 of the New York State Constitution, Public Officers Law §108.2(b) is unconstitutional by its exemption of Senate and Assembly party conferences from the Open Meetings Law – surely warrants the Committee's meeting – and as immediately as possible.

To assist your response, I invoke Public Officers Law Article VI [FOIL] – of which the above-quoted §89.1(a) is part – to request records reflecting the date, time, and place of the Committee on Open Government's next meeting and its agenda. Pursuant to §89.3 thereof, your response is required "within five business days" of receipt of this request.

Thank you.

Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)
www.judgewatch.org
914-421-1200

From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>
Sent: Monday, September 16, 2019 2:37 PM
To: 'Oneill, Kristin (DOS)' <Kristin.ONeill@dos.ny.gov>; 'coog@dos.ny.gov' <coog@dos.ny.gov>
Cc: 'jonathan.brown@dos.ny.gov' <jonathan.brown@dos.ny.gov>; 'HRM.Recruitment@dos.ny.gov' <HRM.Recruitment@dos.ny.gov>

Subject: The Unconstitutionality of Public Officers Law §108.2(b) -- & the Test of Candidates seeking appointment as the New Executive Director of the NYS Committee on Open Government

TO: New York State Committee on Open Government/Assistant Director Kristin O'Neill

Following up our phone conversation this morning, below is my last e-mail to Committee on Open Government Executive Director Robert Freeman, dated March 9, 2017 and entitled "please advise when is the next meeting of the Committee on Open Government & confirm that my requests will be included on its agenda".

I have no record of any response from him. Please verify whether you have any record of a response – and, if so, forward same to me.

Based on the facts, law, and legal argument presented by my below March 9, 2017 e-mail, I hereby reiterate the requests therein made:

- (1) that the Committee on Open Government render an advisory opinion as to whether, pursuant to Article III, §10 of the New York State Constitution, Public Officers Law §108.2(b) is unconstitutional by its exemption of Senate and Assembly party conferences from the Open Meetings Law;
- (2) that the Committee on Open Government, alternatively and/or additionally, request an advisory opinion from the New York State Attorney General, whose duty it is to evaluate constitutionality;
- (3) that the Committee on Open Government request responses from the Senate and Assembly – particularly for information and documents pertaining to the "legislative process" underlying the introduction and enactment of the legislation that became Public Officers Law §108.2(b) – S.6284/A.7804 (May 1985) – including whether it

was cleared by the Legislature's Bill Drafting Commission or other legal counsel with respect to its constitutionality, in light of Article III, §10 of the New York State Constitution.

As responses to the foregoing three requests are an appropriate, if not dispositive, test of the fitness of ANY candidate seeking appointment as the Committee on Open Government's new executive director, I have contacted the Department of State's Bureau of Human Resources Management for information about the selection process, which you stated you did not know: <https://statejobs.ny.gov/public/vacancyDetailsView.cfm?id=73232>.

To assist you and everyone else, I have created a webpage on the Center for Judicial Accountability's website pertaining to my below March 9, 2017 e-mail, my immediately prior exchange of e-mail with Executive Director Freeman – and this. The direct link is here: <http://www.judgewatch.org/web-pages/searching-nys/committee-on-open-govt/nys-constitution-article3-sec10.htm>.

Finally, I would be remiss if I did not repeat what I stated to you and others, namely, that prior to my last conversation with Executive Director Freeman – on March 9, 2017, memorialized by my below e-mail – he had always been exemplary and professional in furnishing needed assistance pertaining to FOIL and the Open Meetings Law – and my contact with him extended back to 1995 and an advisory opinion he rendered pertaining to the Commission on Judicial Conduct's FOIL obligations: <http://www.judgewatch.org/correspondence-nys/1995/5-24-95-from-freeman.pdf>. He was one of the very, very few people in an important position of state government about whom I could say – and had said throughout more than two decades of contact – was actually doing his job.

Thank you.

Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)
www.judgewatch.org
914-421-1200

From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>

Sent: Thursday, March 9, 2017 3:04 PM

To: 'Freeman, Robert J (DOS)' <Robert.Freeman@dos.ny.gov>

Subject: please advise when is the next meeting of the Committee on Open Government & confirm that my requests will be included on its agenda

Bob,

Below is what I had written before our unsettling conversation this morning. As you have candidly conceded, there has never been – until now – a challenge to the constitutionality of Public Officers Law §108.2(b) based on Article III, §10 of the New York State Constitution – and you, yourself, were unaware of that constitutional provision until I brought it to your attention yesterday.

I respectfully submit that unless the Committee on Open Government believes that Article III, §10 does *not* render Public Officers Law §108.2(b) unconstitutional by its inclusion of Senate and Assembly party conferences – and I request the Committee furnish a statement and explanation to that effect, *if it so believes* – its duty is to take appropriate action: either by its own advisory opinion of unconstitutionality – or by a request for an advisory opinion from the Attorney General, whose duty it is to evaluate constitutionality.

As time permits, I will supplement and modify the below. Suffice to add – and as I discussed with you – Public Officers Law §108.2(b) is not only unconstitutional, *as written*. It is also unconstitutional, *as applied* – and that was the purpose

of my reading to you the extract from Eric Lane's law review article, "*Albany's Dysfunction Denies Due Process*" (Pace Law Review, Vol 30, Issue 3 – Spring 2010):

"As the Brennan Center reports evidence, the fundamental problem with New York's legislative process is the domination by majority leadership.^{Fn. 156} Such domination requires both committees and chamber consideration to be moribund, but leaders need some forum for communicating with members. This is the purpose of the closed, unrecorded, political conferences, most importantly those held by the majority party, which are typically led by the chamber leader. It is in these conferences and only in these conferences that bills are presented, discussed in earnest, and voted on. Without a majority vote of the majority party, no bill goes to the floor for final consideration. Conversely, virtually every bill that goes to the floor is passed.^{Fn.157} The conferences' privacy is to cover the fact that the discussions concern the politics of bills and not their substance. What else would explain the reasoning behind blocking public access to public business?^{Fn.158}

As noted above, this closed process is protected by statute. In 1985, after an appellate court determined that certain political caucuses in which the legislative business of a locality was conducted violated the state's open meeting law,^{Fn.159} the New York Legislature enacted an amendment to the law to protect the privacy of its political conferences without regard to — the subject matter under discussion, including discussions of public business.^{Fn. 160} About this provision, the New York Commission on Government Integrity wrote, [i]n our judgment, the public is entitled to make an informed decision about the quality of its representatives, and cannot do so if the significant deliberations of those representatives are held behind closed doors.^{Fn.161}

The use of party conferences as the *exclusive* venue for meaningful legislative discussion and voting removes any excuse for their appropriateness. ..." (at pp. 997-998, underlining added, italics in the original).

For more of what now Hofstra Law School Dean Lane had to say about the Legislature's closed-door party conferences and the rubber-stamp nature of its committees and floor proceedings, when he testified, in Manhattan, at the February 26, 2009 hearing of the Temporary Senate Committee on Rules and Administration Reform, the video of that hearing is here: https://www.youtube.com/watch?feature=player_embedded&v=W6A1oFIX7_Y. His testimony begins at 38 minutes. [see 44 minutes – 28 seconds].

Such reveals – and I also pointed this out to you – the erroneousness of the assessment in the Committee's 1985 Annual Report that, by contrast to the impact of Public Officers Law §108.2(b) on local legislative bodies:

"the change in the Law has virtually no impact upon the State Legislature. The capacity of the public and the news media to obtain information from the State Legislature remains as it was prior to the amendment..." (at p. 5)

This because – allegedly –

"...distinctions can be made between the State Legislature and legislative bodies with similar functions at the local government level. Perhaps most significant is the fact that the State Legislature is bicameral. Any legislation, before it is passed, must be printed and made public, for at least three days, pursuant to the State Constitution, before action can be taken. The legislation is reviewed by committees in the Senate and Assembly during open meetings, and then, potentially, by both houses of the Legislature. Further, the two houses of the Legislature often engage in a 'debate' regarding an issue, either on the floor or elsewhere. As such, the public has an opportunity to know that an issue has come before the State Legislature.

Also important is the fact that the activities of the State Legislature are followed by dozens of members of the news media who have the capacity to learn about legislation and report to the public. In addition, the public can express its views to the Governor prior to his action. Therefore, there are at least five opportunities, and often more, to express concern before legislation is enacted. ..." (at p. 4)

As to your own testimony before the Temporary Senate Committee on Rules and Administration Reform, at its February 10, 2009 hearing in Albany, the video is here:

https://www.youtube.com/watch?feature=player_embedded&v=8QPgyYicmxQ [at 2 hours-7 minutes]. The history you set forth with respect to the Public Officers Law §108.2(b) begins at 2 hours-18 minutes.

Again, please advise when the next meeting of the Committee on Open Government is and confirm that my above requests will be included on its agenda. I note that the "Contact" page of the Committee's website includes the following:

"To request an advisory opinion, please submit relevant facts and documents by mail or email. When appropriate, we will forward a copy of your request to the agency involved and invite the agency to submit additional information. Information of the advisory opinion will not be delayed pending receipt of information from the agency. Please note that it may take up to four months to receive an advisory opinion." (bold on your website).

Certainly, I would be most pleased if the Committee forwards a request to the Legislature for its response – particularly, if it includes a request for information and documents pertaining to the "legislative process" underlying the introduction and enactment of the legislation that became Public Officers Law §108.2(b) -- S.6284/A.7804 – including whether it was cleared by the Legislature's bill drafting commission or other legal counsel, with respect to its constitutionality, in light of Article III, §10, records of the discussions and votes in committee, and on the Senate and Assembly floor, including transcripts thereof, and the Governor's "message of necessity".

Suffice to say, I have already alerted you to what former Senator Nancy Lorraine Hoffmann had to say about its passage when she testified on February 6, 2009 before the Temporary Senate Committee on Rules and Administration Reform at its public hearing in Syracuse, supplying you with the link to the video: https://www.youtube.com/watch?feature=player_embedded&v=qkxd5QIJz4I and furnishing my transcription of what she said, at 11 min-19 seconds:

"So the very first bill that I introduced was, the number was S.3509 and I think it kept the same number for a number of years and it said open the closed-door party caucuses whenever public business is being discussed.

Now the reason that it was important to introduce that was because there had been a lawsuit brought by, I believe it was the New York Post and supported by the New York State Publishers Association, demanding access to the majority conference rooms under the premise that whenever public business was being discussed they should be allowed in.

Not only did the legislature not want to see this changed, when the matter came up for discussion in, of course, the closed-door party conferences, in 1985, **we were told in the Democratic conference by the minority leader that this was just a minor technical correction to the law** that would forever prevent our conference rooms from being invaded by the press, because, as Senator Orenstein, the minority leader, said at that

time: of course, we don't want people listening to our discussions, whether we are in the majority or the minority, this is just the way we do things. **And then he went so far as to say, the governor is prepared to sign it, it will come up with a message of necessity, meaning there would be no public notification before it arrived and, very importantly, he said, there doesn't need to be any discussion.**

So, as a freshman member of the Senate I sat in the Senate chamber when the bill came up and it was read in short title, which means there were only a couple of words and it would be indistinguishable to anybody who didn't know what it was from any routine piece of business and the gavel was about to come down when I found myself on my feet. And I stood on the floor, in full view of Senator Warren Anderson, the majority leader at that time, and I protested that we should not be sanctioning the concept of closed-door party conferences, in fact, we should be doing just the opposite and they should always be open whenever public business was being discussed. Party business is one thing, as long as people are willing to say, we are looking out for our political interest, right now the door can be closed.

But having made that statement, voting that way – and I'm proud to say that I was supported by a couple of members of my conference and even one member of the majority conference supported me at that time – the bill had passed unanimously in the Assembly and there were only the little handful, I believe, six dissenting votes, in the Senate. That made me, if I wasn't already, a marked woman and there was really no other reason to hide my disdain for the process..." (bold and underlining added).

Thank you -- & below is what I had already drafted when we spoke at about 11:20 a.m....

TO: Robert Freeman/Executive Director – Committee on Open Government

Following up our phone conversation yesterday, and pursuant to Public Officers Law §109, which charges the Committee on Open Government with issuing "advisory opinions...to inform public bodies and persons of the interpretations of the provisions of the open meetings law", this is to formally request an advisory opinion as to the constitutionality of Public Officers Law §108.2(b).

As you know, Public Officer Law §108.2(b) is the 1985 amendment to the Open Meetings Law that the Legislature rushed to enact, with a "message of necessity" from the Governor, to counter your April 11, 1985 advisory opinion in response to a request by the New York Post. According to the December 21, 1987 report of the NYS Commission on Public Integrity, collected with its other reports in a volume entitled Ethics Reform for the 1990's, your advisory opinion had concluded

"that caucuses held by a majority of the members of either house of the New York State Legislature for the purpose of conducting public business are subject to the Open Meetings Law. Legislative response to that interpretation was swift and dramatic. Less than six weeks later, the Rules Committee of the Senate and Assembly introduced a bill to overturn that opinion; the bill was passed by both houses a week later; Governor Cuomo signed it within 24 hours."

The Senate and Assembly bill – S.6284/A.7804 – that became Public Officers Law §108.2(b) exempts from the Open Meetings Law "deliberations of political committees, conferences and caucuses", which it defines as:

“a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to

- (i) the subject matter under discussion, including discussions of public business,
- (ii) the majority or minority status of such political committees, conferences and caucuses or
- (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations” (underlining added).

Such statutory provision cannot be constitutional, *as written*, because its inclusion of the Senate and Assembly DIRECTLY contravenes Article III, §10 of the New York State Constitution, which could not be more unequivocal:

“...Each house of the legislature shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy...” (underlining added).

In other words, Article III, §10 of the New York State Constitution EXPLICITLY MANDATES that Senate and Assembly “discussions of public business” be “open”, with a “journal” kept and published with respect thereto. As for the constitutionally permitted exceptions: “such parts as may require secrecy” and “the public welfare”, these are the basis for Senate and Assembly executive sessions – as to which notice and recording requirements are applicable – not applied to party conferences.

No statute can supersede a constitutional provision. Indeed, Public Officers Law §110, entitled “Construction with other laws”, itself reflects this, stating, in pertinent part:

“2. Any provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby.” (underlining added).

Article III, §10 of the New York State Constitution controls.

Elena Sassower, Director
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