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Office of the Senior Vice Chancellor for Legal Affairs and General Counsel

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Requirements of the Open Meetings Law

The New York Court of Appeals recently decided *Perez v. CUNY*, a case holding that the New York State Open Meetings Law and the New York State Freedom of Information Law apply to the Hostos Community College Senate. (These statutes are codified in the Public Officers Law.) I know that a number of questions have been raised as to the meaning and implications of that decision. I am therefore taking this opportunity to update prior advisory memos on the key provisions of those statutes as they apply to various bodies at our Colleges.

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General Rule

Under the Open Meetings Law, the public has the right to attend any meeting of a public body. Any time a quorum of a public body gathers to discuss business, the meeting must be held in public, subject to the right to convene an executive session under certain limited circumstances. In addition, there must be prior notice of the meeting; the business of the meeting must be recorded in written minutes; and a record must be maintained of the final vote of each member of the public body on all matters on which a vote is formally taken. These requirements apply to meetings not only of the public body itself, but also to meetings of its committees, subcommittees and other similar bodies.

Definitions

Public Body:

Under the Open Meetings Law, a public body includes a group of two or more people that conducts public business and performs a governmental function for the State or an agency of the State. The statute also defines a public body to include committees and subcommittees of that body. The University's Board of Trustees is such a public body, as are the Board's standing committees.

Whether various entities at the individual colleges are public bodies subject to the Open Meetings Law must be determined on a case-by-case basis.

In *Smith v. CUNY* (1999), the New York Court of Appeals held that the LaGuardia Community College Association is a public body subject to the Open Meetings Law. The Court of Appeals determined that CUNY, through its Bylaws, had delegated to college associations its statutory power to administer student activity fees, and that the college association in that case exercised a real and effective decision-making power regarding the expenditure of these

funds. The Court rejected CUNY's argument that the college association was merely an advisory body, holding that the President's review of student activity fee expenditures was neither mandatory nor regularly exercised. The Court further reasoned that the President only had the authority to disapprove expenditures budgeted by the college association, and not to initiate appropriations, so that the association's decision not to appropriate monies was tantamount to a final determination of at least that kind of matter.

In *Wallace v. CUNY* (2000), a New York Supreme Court justice held that the University Student Senate is subject to the Open Meetings Law because, as in *Smith*, the USS allocated and expended its share of student activity fees. The University did not appeal this decision.

Most recently, in *Perez v. CUNY* (November 17, 2005), the New York Court of Appeals held that the Hostos Community College Senate and its executive committee are subject to the Open Meetings Law. The Court ruled that the College Senate exercises a quintessentially governmental function because under the College Governance Charter it has the power to formulate policy recommendations in a wide variety of areas delegated by the Legislature to the CUNY Board, especially those relating to academic matters. The Court also pointed to the Senate's authority to review proposals for and recommend the creation of new academic units and programs, its right to be consulted prior to any additions or alterations to the College's divisions and the fact that it is the sole body at the College that can initiate changes to the College Governance Charter. The Court also emphasized that the College Senate is the sole legislative body on campus authorized to send proposals to the CUNY Board of Trustees, noting that although the policy proposals must first be approved and forwarded by the College President, they overwhelmingly are. Thus, the Court concluded that the College Senate and its executive committee constitute integral components of the governance structure of Hostos Community College and perform functions of both an advisory and determinative nature.

The reasoning of the Court of Appeals in *Perez* makes the Open Meetings Law applicable to the University Faculty Senate and to each legislative body at a College that exercises the powers of faculty councils under Section 8.7 of the CUNY Board Bylaws. At some campuses, this body consists solely of representatives of the faculty and other instructional staff and is called the Faculty Senate, Faculty Council or Academic Senate. At other campuses, this body also contains representatives from the student body, non-instructional staff, alumni and/or the administration and is called the College Senate, College Council or Policy Council. In a few instances, there is both a college-wide body and a faculty body; questions as to which of those bodies (or both) is subject to the Open Meetings Law should be directed to me.

Under the reasoning of *Perez*, however, the Open Meetings law does not apply to search committees or P&B committees (at either the departmental level or above).

Meetings:

Pursuant to the statute, a meeting is the official convening of a public body for the purpose of conducting public business. Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened in public, whether or not there is an intent to take action and irrespective of the manner in which the gathering may be characterized. Consequently, work sessions, planning sessions, and informal meetings of a quorum of a public body have all been deemed to be subject to the Open Meetings Law.

While the courts have stated that private meetings of public bodies that do not involve a quorum are not subject to the Open Meetings Law, the courts have also recognized that a series of less than quorum meetings could be used by a public body to thwart the purposes of the Open Meetings Law, and hence be violative of the law.

There are very few reported court decisions that have concluded that specific meetings of a public body are not covered by the Open Meetings Law. In one case, a court determined that the collective bargaining sessions between a public employer and a public employee organization are not subject to the Open Meetings Law. Another decision dealing with this issue states that a dinner gathering sandwiched between two open meetings during which discussion of public issues was incidental to general social exchange between members of the public body did not violate the Open Meetings Law. In that same decision, the court found that a luncheon meeting, at which staff reported on public issues to the public body, was in violation of the statute. In a third case, the court held that a tour of proposed project sites by Public Service Commissioners did not constitute a meeting required to be open under the law.

Quorum:

The Open Meetings Law contains no definition of quorum, but Section 41 of the General Construction Law provides that a quorum consists of a majority of the whole number of persons who are charged with any public duty to be performed or exercised by them jointly or as a board or similar body and that the phrase "whole number" means the total number of the members that the board, commission, body or other group of persons would have if there were no vacancies and no one was disqualified from acting. That law goes on to provide that not less than a majority of such persons may perform or exercise such power, authority or duty. Thus, a majority of all the members of a public body must be present to constitute a quorum, and a majority vote of all members is required to take action on a matter within its authority. This provision trumps any contrary rule contained in the governance plan of any College or in Robert's Rules of Order. The stringency of the majority requirement for a quorum and for action may be mitigated by providing for alternate members who are authorized to vote or take other action in the absence of a regular member, but who do not count as part of the "whole number" of the body for the purpose of determining whether a quorum is present or a majority have approved an action.

Public Notice of Meetings

The Open Meetings Law requires that public notice of the time and place of any meeting of a public body that is scheduled a week or more in advance must be given to the news media and conspicuously posted in one or more designated public locations at least 72 hours before the meeting. In the case of meetings scheduled less than a week in advance, notice must be given at a reasonable time prior thereto. What is reasonable will, of course, depend on the circumstances, but notice should certainly be given as promptly as possible after the decision to hold a meeting has been made.

Notice to the news media may be given by mail, e-mail, telephone, or in person, depending upon the time element. A paid legal notice in a newspaper is not required. The college body should keep a copy of the notice (if it is in writing) or other evidence that the notice was given, along with a record of the persons or entities receiving the notice, in order to defend against any claim of an improperly noticed meeting. The college body should also keep a record of the content and location of the public posting(s).

Executive Sessions

The Open Meetings Law provides for closed or executive sessions under specific circumstances set forth in the statute. An executive session is not separate from an open meeting, but is a portion of an open meeting during which the public may be excluded. The statute itemizes the subjects that may be discussed in an executive session; most of them relate to matters that are not likely to be discussed at a meeting of bodies such as a college association or a faculty senate. They include issues of public safety and law enforcement, proposed or pending litigation, collective bargaining, the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation, the preparation, grading or administration of examinations and the proposed acquisition, sale or lease of real property or the proposed acquisition, sale or exchange of securities.

To close a meeting for executive session, a public body must take several steps. First, a motion must be made during an open meeting to enter into executive session. Second, the motion must identify the general area or areas of the subject(s) to be considered. Third, the motion must be carried by a majority vote of the total membership of the public body.

Exemptions from the Law

The Open Meetings Law does not apply to discussions concerning matters that might be made confidential under other provisions of state or federal law. For example, the Family Education Rights and Privacy Act (FERPA, or the Buckley Amendment) requires that records identifying individual students must be kept confidential, unless disclosure of such records has been consented to by the students and/or their parents. Accordingly, disclosure of personally identifiable data regarding students must not take place in an open meeting, unless the consent of the students and/or their parents has been obtained.

Minutes of Meetings

The Open Meetings Law requires that minutes of both open meetings and executive sessions be compiled and made available to the public.

Minutes of an open meeting must consist of a record or summary of all motions, proposals, resolutions, and any other matter formally voted upon and the vote thereon; such minutes must be available to the public within two weeks from the date of the meeting. Minutes of executive sessions must consist of a record or summary of the final action that was taken and the date and vote thereon; such minutes must be available to the public within one week from the date of the executive session. If a public body discusses a matter during executive session, but takes no action, minutes of an executive session need not be compiled.

Record of Final Votes

In addition, the Freedom of Information Law requires that a public agency must maintain a record of the final vote of each member in every agency proceeding in which the member votes. A public agency may use any effective means of recording the vote of each member, such as a roll call, signed written ballots or electronic "clickers". In order to minimize delay, especially on uncontroversial matters, several motions may be grouped together for a single vote and/or the chair may seek unanimous consent of the members present. Although the record of final votes is ordinarily contained in the minutes of a public agency, the Freedom of Information Law does not require that; it is sufficient if the agency maintains records of such votes and makes them available upon request.

Audio/Video Recording of Meetings

Courts have held that it is unlawful to ban outright the audiotaping or videotaping of meetings covered by the Open Meetings Law. However, such taping may be prohibited if, in the circumstances of the particular meeting, it is obtrusive and distracting. I recommend consulting with this office before prohibiting a recording of a meeting of a public body.

Enforcement

The Open Meetings Law provides that any aggrieved person may enforce the statute through a State court proceeding. If a court finds that the statute was violated, the court has the power to nullify in whole or in part any action taken in violation of the statute. In addition, a court has the discretion to award costs and reasonable attorney fees to the successful party.

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A copy of the full text of the Open Meetings Law is attached. Please feel free to call my office if you have any questions.

Frederick P. Schaffer

General Counsel and Vice Chancellor for Legal Affairs
