



The Governance Charter sets forth a noninclusive list of 14 areas of college policy, including curriculum and admission requirements, as to which the Senate is authorized to formulate new policy recommendations and review existing policies. The Charter prohibits additions or alterations to the divisions of Hostos College without the College Senate first approving those changes; and it provides that changes to the Charter may be proposed only by a member of the Executive Committee or a written petition signed by ten members of the College Senate.

The nine members of the Executive Committee and the nine members of the Committee on Committees are elected from the College Senate. The Executive Committee organizes the work of the Senate by scheduling and preparing the agenda for Senate meetings and transacts necessary business between Senate meetings. The Committee on Committees assigns all of the members to the Senate's 13 remaining standing committees, including the Academic Standards Committee (which determines student appeals of academic dismissals or matriculation decisions), the Admissions Committee (which implements college admissions policies) and the Scholarships and Awards Committee (which selects recipients of the Hostos Scholarships and other prizes). Appointments to the standing committees and a number of the decisions issued by the committees are final and nonreviewable. On May 24, 2001 petitioner Chong Kim, a Hunter College student, was denied entrance to a College Senate meeting during which several changes in the college curriculum were approved by secret ballot. On September 6, 2001 petitioner Aneudis Perez, a Hostos Community College student, was denied entrance to an Executive Committee meeting; Perez tried to hand an Executive Committee member a petition regarding an incident that had arisen months earlier during a political protest on campus. Neither of the two meetings had moved into executive session, though had the Senate or the Executive Committee needed to discuss confidential matters it could have done so (see Public Officers Law § 105).

Petitioners initiated an article 78 proceeding, arguing that the College Senate and the Executive Committee were subject to the Open Meetings Law and the Freedom of Information Law. Supreme Court granted the petition, but the Appellate Division reversed, concluding that the Senate was only an advisory body and thus outside the purview of the Open Meetings Law and the Freedom of Information Law. We agree with Supreme Court and now reverse the Appellate Division order and reinstate the judgment of Supreme Court. II. In enacting the Open Meetings Law, the Legislature sought to ensure that "public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy"

(Public Officers Law § 100). Similarly, the Legislature intended the Freedom of Information Law to guarantee "[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations" (Public Officers Law § 84). Thus, all "public bodies" are subject to the Open Meetings Law and all "public agencies" are subject to the Freedom of Information Law. Both provisions define, in part, organizations within their ambit as those that perform a "governmental function" (POL §§ 86 [3], 102). And in applying these laws, we construe their provisions liberally in accordance with their stated purposes (see *Gordon v Village of Monticello*, 87 NY2d 124, 127 [1995]; *Matter of Encore College Bookstores, Inc. v Auxiliary Service Corporation of the State University of New York*, 87 NY2d 410, 418 [1995]).

While an entity must be authorized pursuant to State law to be within the ambit of the Open Meetings Law and the Freedom of Information Law, not every entity whose power is derived from State law is deemed to be performing a governmental function. Certainly not all advisory bodies that issue recommendations to state agencies are performing governmental functions for purposes of compliance with the Open Meetings Law. Rather, in each case the court must undertake an analysis that centers on "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" (Matter of Smith v City Univ. of NY, 92 NY2d 707, 713 [1999]).

In Smith, for example, this Court concluded that the LaGuardia Community College Association, Inc. – a group of administrators, faculty members and students authorized to allocate student activity fees to various campus entities -- exercised a quintessentially governmental function and was thus subject to the Open Meetings Law. The association not only drew its powers from State law but also was a "formally chartered entity with officially delegated duties and organizational attributes of a substantive nature" (id. at 714). The group's governmental function was further evidenced by its operation "under protocols and practices where its recommendations and actions [were] executed unilaterally and finally, or receive[d] merely perfunctory review or approval" (id.). Here, we are persuaded that the College Senate and its Executive Committee similarly are exercising a quintessentially governmental function. The College Senate's organizational structure is set forth in the Governance Charter, which mandates that the Senate conduct business only if a quorum is present and that the Senate and its committees conduct meetings pursuant to Robert's Rules of Order Newly Revised. The members of the Senate elect representatives to the Committee on Committees, which has sole, non-reviewable authority to select members to the College Senate's other standing committees, some of which exercise non-reviewable power regarding disciplinary findings and punishments, academic disputes and scholarship awards. The Executive Committee schedules regular and special Senate meetings, determines what is appropriate Senate business, sets the agenda for the Senate meetings and conducts all business between Senate sessions.

Key to our conclusion in this case is the record evidence that the College Senate (which includes its Executive Committee) has been charged with a number of the responsibilities delegated by the Legislature to the CUNY Board and that the Senate functions as a proxy for the faculty councils authorized by the CUNY bylaws. The Senate is to recommend policy on all college matters to the Board. The Senate is explicitly imbued with the power to formulate new policy recommendations and review existing policies, forwarding those recommendations to the Board of Trustees in areas as far-reaching as college admissions, degree requirements, curriculum design, budget and finance; it is represented on all committees established by the College President; it is to review proposals for and recommend the creation of new academic units and programs of study; it must be consulted prior to any additions or alterations to the College's divisions; and it is the only body that can initiate changes to the College Governance Charter.

Under CUNY's comprehensive university governance scheme, the College Senate is the sole legislative body on campus authorized to send proposals to the CUNY Board of Trustees, and although the policy proposals must first be approved and forwarded by the College President, they overwhelmingly are. While the CUNY Board retains the formal power to veto recommendations of the College Senate, that does not in and of itself negate the Senate's policy-making role or render the Senate purely advisory. Realistically appraising the Senate's function, we

conclude that the Appellate Division erred in holding that the Senate was only an advisory body (contrast Snyder v Third Department Judicial Screening Committee, 18 AD3d 1100 [3d Dept 2005] [proceedings of Judicial Screening Committee not subject to the Freedom of Information or Open Meetings laws because its role is limited to providing information to appointing authority]). As Supreme Court held, "the college senate and the executive committee thereof constitute integral components of the governance structure of Hostos Community College. The senate and its executive committee perform functions of both advisory and determinative natures which are essential to the operation and administration of the college" (195 Misc 2d 16, 33 [Sup Ct, Bronx Cty 2002]). Whether the votes of the College Senate may be by secret ballot, however, is a separate question. The Open Meetings Law does not speak to balloting or voting procedures, requiring only that "[m]inutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon" (see Public Officers Law § 106 [1]). A final determination may easily be recorded in the meeting's minutes without an accounting of each participant's ballot. Though we construe the provisions of the Open Meetings Law liberally, we will not add a requirement to the text of the statute.

Under the Freedom of Information Law, however, a public agency must maintain "a record of the final vote of each member in every agency proceeding in which the member votes" (Public Officers Law § 87 [3] [a]). This requirement differs from the summary of a final vote mandated by the Open Meetings Law. The requisite record of the final vote of each member would be impossible were the final vote of each member anonymous or secret. Consequently, under the Freedom of Information Law, voting by the College Senate and the Executive Committee may not be conducted by secret ballot. Accordingly, the order of the Appellate Division should be reversed, with costs, and the judgment of Supreme Court reinstated.

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Order reversed, with costs, and judgment of Supreme Court, Bronx County, reinstated. Opinion by Chief Judge Kaye. Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith concur.

Decided November 17, 2005