Center for Judicial Accountability, Inc. (CJA)

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

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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=W6A1oFlX7_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=8QPgyYjcmxQ [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 Larraine 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=qkxd5QlJz4l 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.

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