MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

IN THE MATTER OF THE APPLICATION OF
NEIL SCHULDINER,
PETITIONER/PLAINTIFF,
FOR A JUDGMENT PURSUANT TO ARTICLE 78
AND ARTICLE 30 OF THE CIVIL PRACTICE LAW
AND RULES
-AGAINST-
THE CITY UNIVERSITY OF NEW YORK; THE
COLLEGE OF STATEN ISLAND; THE COLLEGE OF
STATEN ISLAND, ASSOCIATION, INC.; CHRISTOPH
KIMMICH AS CHANCELLOR OF THE CITY UNIVERSITY
OF NEW YORK; MARLENE SPRINGER, AS PRESIDENT OF
THE COLLEGE OF STATEN; AND CAROL JACKSON AS
VICE PRESIDENT FOR STUDENT AFFAIRS OF THE
COLLEGE OF STATEN ISLAND AND PRESIDENT OF THE
COLLEGE OF STATEN ISLAND ASSOCIATION, INC.,
RESPONDENTS/DEFENDANTS.

PART IAS III
INDEX NO. 8236/98
DATED: 9/13/99
BY: PETER P. CUSICK

By amended petition, Petitioner Neil Schuldiner seeks an order declaring that (1) respondent College of Staten Island Association ("The Association") is a public body as defined by Public Officers Law § 102 (2) and therefore subject to the Open Meetings Law, (2) the Association is an "agency" as defined by POL § 86 (3) and therefore subject to the Freedom of Information Law, and (3) the secret ballot conducted by respondents at the February 4, 1998 meeting violated POL § 87 (3). Petitioner also seeks an order (1) directing respondents to adhere to the requirements of the Open Meetings Law and the Freedom of information Law at all future meetings of the Association and (2) requiring respondents to maintain public records of the final votes of all members of the Association.

These issues have been answered squarely and directly in petitioner's favor by the Court of Appeals in Smith v. City University of New York, 92 NY2d 707, reargument den. 93 NY2d 889. Accordingly, the above-mentioned relief sought by petitioner is granted.

Two other issues raised by this petition were not addressed in Smith. The first is the question of the right to tape record the meetings of the Association. Petitioner and another attempted to tape record two meetings of the Association, but were asked to turn their recorders off after the Association voted to ban such recordings. The machines were small, unobtrusive, and noiseless. Some of the Association's directors expressed concern that the tape recordings could be used against them in litigation.

The blanket prohibition against the use of audio tape recordings is violative of the public policy embodied in the Public Officers Law (Mitchell v. Board of Education, 113 AD2d 924 (2d Dept.); see also, People v. Ystveta, 99 Misc 2d 1105). Accordingly, the relief sought, i.e. (1) an order declaring that the votes to bar tape recordings of the February 25, 1998 and March 11, 1998 of the Association violated the Open Meetings Law, (2) an order vacating those votes and declaring them void, and (3) enjoining respondents from prohibiting the use of hand-held tape recorders by persons present at Association meetings, is granted in all respects.

The remaining issue is that of attorney's fees and costs. Petitioner seeks this relief pursuant to Public Officers Law § 89 (4) (c), which provides that a Court may assess reasonable attorney's fees and other costs to a party by reason of the withholding of records. The withholding- of- a- record claim appears to be based solely on the decision of the Association at its February 4, 1998 to vote by secret ballot, thereby "failing in respondents' duty to maintain records reflecting the final vote of every member in every agency proceeding where the member votes."

While the vote by secret ballot was prohibited by the Public Officers Law, and a record of the vote of each member must be taken in the future, in fact no such record, save for the minutes of the meetings (Exhibits B,C, & D, Notice of Amended Petition) was made. Nothing in the Freedom of Information Law requires an agency to create new records in order to comply with FOIL requests (Gabriels v. Curiale, 216 AD2d 850). Thus there was a reasonable basis for withholding the record at the time the request was made (POL § 89 (4) (c) (ii)), because none existed.

Petitioner alternatively seeks attorney's fees based upon POL § 107 (2) which provides that reasonable attorneys fees in favor of the successful party may be awarded by the Court in its discretion, for violations of the Open Meetings Law.

At the time of the Association meetings in question, the Court of Appeals had not yet rendered its decision in Smith v. CUNY. In February and March of 1998, the prevailing authority on the subject was the First Departments' decision of July 24, 1997 in Smith, which held that college Associations such as respondent were not public bodies and not subject to the Open Meetings Law. Respondents had every right to rely on the state of the law as it then existed (Metscher v. Centerville Board of Education, 459 N.E. 2d 249), and consequently, it cannot be said that respondent's violation was either intentional or flagrant (Gordon v.Village of Monticello, 37 NY2d 124 ("Attorneys's fees should not be granted simply as a matter of course"); but see, Auburn Publishers Inc. v Netti, 229 AD2d 988).

For these reasons, that branch of the petition seeking attorney's fees and costs is denied.

Settle order and judgment in accordance herewith.

J.S.C.