



**State of New York
Department of State
Committee on Open Government**

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By Electronic Mail Only

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The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear :

I am writing in response to your request for an advisory opinion as to whether “NYS Public Employment Organizations (*i.e.*, city and state employee unions) including New York State United Teachers (NYSUT) and Professional Staff Congress-CUNY (PSC-CUNY) subject to the Freedom of Information Law.” In our opinion, such organizations are not “agencies” as that term is defined by the Freedom of Information Law (FOIL) and, as such, are not required to comply with that Law.

FOIL governs access to “agency” records and the term agency is defined as:

any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.

Public Officers Law § 86(3). Civil Service Law § 201(5) defines “employee organization” as:

an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees, except that such term shall not include an organization (a) membership in which is prohibited by section one hundred five of this chapter, (b) which discriminates with regard to the terms or conditions of membership because of race, color, creed or national origin, or (c) which, in the case of public employees who hold positions by appointment or employment in the service of the board and who are excluded from the application of this article by rules and regulations of the board, admits to membership or is affiliated directly or indirectly with an organization which admits to membership persons not in the service of the board, for purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article.

You have specifically questioned whether NYSUT and PSC-CUNY are “agencies” subject to FOIL. According to their Internal Revenue Service (IRS) Forms 990 (“Return of Organization Exempt From

Income Tax”), both NYSUT and PSC-CUNY are recognized as Internal Revenue Code (IRC) § 501(c)(5) labor organizations. According to NYSUT’s [website](#):

NYSUT is a federation of approximately 1,325 local unions representing more than 600,000 members statewide. NYSUT members serve in a variety of capacities, including teachers, School-Related Professionals, academic and professional faculty in higher education, professionals in education and health care, municipal, county and state professionals, employees in libraries and nonprofit organizations, and retirees.

We note that in addition to representing public employees, NYSUT also represents private sector employees. See [Who We Are \(nysut.org\)](#).

PSC-CUNY’s [website](#) states:

The Professional Staff Congress is the union that represents 30,000 faculty and staff at the City University of New York (CUNY) and the CUNY Research Foundation. It is dedicated to advancing the professional lives of its members, enhancing their terms and conditions of employment, and maintaining the strength of the nation’s largest, oldest and most visible urban public university.

While we are unaware of any court ruling specifically relating to tax-exempt labor organizations, courts have previously addressed the application of FOIL to government-created or -controlled not-for-profit entities. Although not-for-profit corporations typically are not governmental entities and accordingly fall beyond the scope of FOIL, courts have found that the incorporation status of those entities is, alone, not determinative of their coverage under the Law. Rather, courts have considered the extent to which the entity performs a governmental function and/or whether there is governmental control over those corporations in determining whether they fall within the scope of FOIL. See *Westchester-Rockland Newspapers v. Kimball*, 50 N.Y.2d 575, 580-81 (1980); *Buffalo News v. Buffalo Enterprise Development Corporation*, 84 N.Y.2d 488, 491-93 (1994).

These employee organizations/labor organizations, which represent the interests of the *employees* of government agencies, are not, in our view, government agencies themselves. They do not function as a “governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof.” POL § 86(3). While public employees may serve on the governing bodies of the organizations, those individuals are elected by their members to serve; they are not appointed to the governing bodies by either the Governor or other local government leaders. Given this, it is our opinion that the public employment organizations representing New York State public (and sometimes private) employees are not subject to the requirements of FOIL.

I hope this is responsive to your inquiry.

Sincerely,

/Kristin O’Neill

Kristin O’Neill
Assistant Director