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### MEMORANDUM

**TO:** Oneida Business Committee  
**FROM:** Jo Anne House, Chief Counsel  
**DATE:** August 3, 2015  
**SUBJECT:** Genskow – Petition – Recording Subcommittees

You have requested a legal review regarding a petition submitted by Madelyn Genskow. The petition contains six resolutions. The legal opinion will review only the resolution identified above. The Enrollment Department has verified a sufficient number of signatures on the petition.

The resolution contains three Whereas sections.

- "...the Business Committee in 2014/2015 has started allowing meetings where just the Officers-Chair, Vice-Chair, Treasurer and Secretary meet to discuss topics[.]"
- "...these meetings have not been recorded which has caused confusion[.]"
- "...in 2008, two Officers signed a contract for \$575,000 without the consent of the full Business Committee and when it was discovered the Full Business Committee decided to cancel the Contract[.]"

Whereas sections are intended to provide legislative history and background regarding why the resolution is brought forward. Whereas sections are not enforceable.

The resolution contains one Resolve sections.

- "...any sub Committee of the Business Committee must be voice recorded and the recordings kept in records management."

To draft this opinion, I have reviewed prior actions of the General Tribal Council, Tribal law, policies and procedures, and various other resources. This opinion is broken into sections to address the following issues raised in the resolution – subcommittees and the 2008 contract.

#### "Subcommittees"

The resolution alleges that the Oneida Business Committee has authorized the officers to be a "subcommittee" and that because those meetings are not recorded this has resulted in confusion. These Whereas sections are inaccurate in regards to the "Officer meetings" being a subcommittee, the subjects presented in those meetings, and that they should be tape recorded. This section of the opinion will review the Open Records and Open Meetings Law, identify subcommittees of the Oneida Business Committee, and clarify the establishment and intent of the Officer's meetings.

### *Open Records and Open Meetings Law*

The Open Records and Open Meetings Law was established to, “...advance the principle of open government by providing access to information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees[.]” *Section 7.1-1*. The law is written to be, “...construed with a presumption of public access for Oneida Tribal members and Tribal employees, consistent with the conduct of governmental business.” *Section 7.1-2*. However, the law also recognizes that there are circumstances, “...where the public’s right to a document is outweighed by the public interest in keeping such documents confidential.” *Section 7.4-1*. The law identifies 12 specific types of records that are excluded from public access in section 7.4-1. In addition to the specific records, the law also recognizes that other laws may restrict access to records; such as the Audit Law and the Personnel Policies and Procedures, for example. Finally, the law does not require that entities provide for recording meetings.

Access to meetings and participation in the government activities is addressed in Sub-Chapter II of the law. The purpose of the law regarding meetings is identified as, “...the policy of this Tribe is that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.” *Section 7.12-1*. To implement this purpose, the law directs that, “...all meetings of the Tribe shall be publicly held in places reasonably accessible to members of the Tribe and shall be open to members at all times unless otherwise expressly provided by law.” *Section 7.12-2*. This exception to open meetings is identified in section 7.17-1 as follows – “Closed meetings sessions, or executive sessions, are permissible, if they relate to personnel matters or contract discussion or other exceptions enumerated in section 7.4-1[.]”

Subchapter II, the meetings portion of the Open Records and Open Meetings law, applies to “governmental bodies.” This term is defined as any board, committee or commission of the Tribe, excluding the Child Protective Board, the Trust Committee, the Judiciary in limited circumstances, and the Gaming Commission. The law does not apply to subcommittees of boards, committees or commissions.

A subcommittee is not defined in any existing law of the Tribe. Robert’s Rules of Order, section 50, identifies a subcommittee as consisting of members of the larger committee. Since the Oneida Business Committee is subject to the Open Records and Open Meetings law, it could be interpreted that subcommittees of the Oneida Business Committee would be under the same constraints. This opinion adopts this position in the analysis presented.

The Open Records and Open Meetings law does not require boards, committees or commissions to record the meetings. This is also not required by the Comprehensive Policy Governing Boards, Committees and Commissions. Recording meetings, when it occurs, is done to assist in developing the minutes for the meeting. The minutes then become the official record of any action taken. The recording serves no purpose after the minutes are adopted.

### *Subcommittees*

The Oneida Business Committee recognizes “standing committees” and lists them on the Tribe’s website – Audit Committee, Community Development Planning Committee, Finance Committee and Legislative Operating Committee. Each of these entities was created in a unique manner.

Of these standing committees, only the Finance Committee has no delegated authority to authorize action. The Finance Committee reviews requests and makes recommendations in the form of motions. Those motions carry no authority until such time as the Oneida Business Committee has received and “approved” the minutes. That approval of the Finance Committee minutes is the only circumstance in which approval of the document results in approval of all the actions contained in the document. All other standing committees submit minutes for acceptance and information. They are delegated authority to take action within the scope of that delegated authority.

*Audit Committee.* The Audit Committee was created through by-laws adopted by the Oneida Business Committee and charged with managing the internal and external auditing functions of the Tribe. In 1998 the Oneida Business Committee adopted the Audit Law to formalize these functions and delegated authorities. The Audit Committee is made up of members of the Oneida Business Committee and an appointed Tribal member. This entity provides direction to the Internal Audit Department by authorizing internal audits, approving internal audit reports, and approving the external audit contracts.

Audit Committee meetings are confidential closed meetings as designated in the Audit Law. These meetings generally involve review of internal audit reports, findings, requests for audits, and discussions with Tribal personnel regarding audited departments. There are minutes taken and approved for each meeting. The minutes are forwarded to the Oneida Business Committee which are received and accepted in executive session.

*Community Development Planning Committee.* The Community Development Planning Committee was created by the Oneida Business Committee on February 25, 2009, is made up of appointed Oneida Business Committee members. This standing committee was intended to be a round-table for the broadest input on community development and community projects. This is one of four standing committees presented to the Oneida Business Committee. The other two were the Quality of Life, Resources, and Finance and Business. The Quality of Life standing committee has only recently become active and scheduling meetings.

Community Development Planning Committee meetings are recorded, except for executive session. There are minutes taken for each meeting which are submitted to the Oneida Business Committee in open session. The minutes are accepted for the record.

*Finance Committee.* It is not clear when the Finance Committee was created. The Finance Committee is made up of members of the Oneida Business Committee, the Tribal Treasurer, Chief Financial Officer/designate, and one Tribal member who is also an elder. The committee receives information regarding certain types of financial activities and the Community Fund. After review and discussion, the committee makes a motion to approve or deny the request. The minutes are then forwarded to the Oneida Business Committee for approval. No action of the

Finance Committee to approve or deny a request is valid until acted upon by the Oneida Business Committee.

Finance Committee meetings are recorded, except for executive session. There are minutes taken for each meeting which are submitted to the Oneida Business Committee in open session. As identified above, the minutes are approved to authorize the actions in the minutes to be carried out.

*Legislative Operating Committee.* The Legislative Operating Committee was created in 1991 with the adoption of the Administrative Procedures Act. It is made up of the Council Members of the Oneida Business Committee and is delegated responsibility regarding drafting, amending, and maintaining the laws of the Tribe. The Legislative Operating Committee was ‘reauthorized’ under the Legislative Procedures Act.

Legislative Operating Committee meetings are recorded, except for executive session. There are minutes taken for each meeting which are submitted to the Oneida Business Committee in open session. The minutes are accepted for the record.

There are no other listed standing committees or subcommittees of the Oneida Business Committee. Members of the Oneida Business Committee do participate as liaisons, representatives or delegates in various external entities of the Tribe. These are not considered subcommittees or standing committees. Further, members of the Oneida Business Committee are appointed to task forces or groups to work on a specific subject matter, a historical example would be land claims. These are also not considered subcommittees of the Oneida Business Committee.

*“Officer’s Meetings”*

In July 2000, the General Tribal Council adopted a resolution which directed re-organization of the Tribal government. Because the resolution had not been properly noticed to the membership for the General Tribal Council meeting, the Chair had ruled that resolution out of order. The Oneida Business Committee adopted resolution # BC-8-02-00-B, *Interpretation of July 22, 2000 Special General Tribal Council Action Regarding Re-Structure ‘Plan B’*. This resolution re-affirmed the Chair’s ruling at that meeting and the Oneida Business Committee had determined that it was not able to carry out an action in violation of tribal laws and rules.

This remained in place until resolution # BC-9-28-11-D was adopted which rescinded the Oneida Business Committee resolution # BC-8-02-00-B. The result was that the Oneida Business Committee was now required to implement Plan B adopted in July 2000. However, at the same time, the Oneida Business Committee also recognized that it was not possible to simply implement an action that was over ten years old and did not recognize the changes that had taken place since that time. The Oneida Business Committee reported out to the General Tribal Council on at least two occasions its actions in regards to implementing a re-organization plan.

The Oneida Business Committee did take some immediate action by adoption of resolution # BC-9-28-11-E. This resolution removed the position of General Manager and some related positions from the organizational structure. In addition, they took action to remove the position

of Chief of Staff and related positions from the organizational structure. These actions required other steps to be taken to implement supervision of the direct reports which had expanded to include all Division Directors.<sup>1</sup> This responsibility was delegated to the Chairman, or in his absence, the Vice-Chairman.

The 2014 elected Oneida Business Committee made two determinations. First, that re-organization was going to become a priority. Second, that supervision of the large number of direct reports was unwieldy for a single officer. As a result, the Oneida Business Committee adopted resolution # BC-10-22-14-A, *Setting Supervision and Management of Direct Reports to the Oneida Business Committee*.<sup>2</sup> This resolution delegates to the officers of the Oneida Business Committee joint responsibility to supervise direct reports by majority vote, preferably by consensus. The meetings regarding this joint responsibility have been informally titled “Officers Meetings.” To provide direction regarding this supervision, the Oneida Business Committee adopted two Standard Operating Procedures on January 14, 2015 – *Complaint Process for Direct Reports to the Business Committee* and *Disciplinary Process for Direct Reports to the Oneida Business Committee*.

The Vice-Chairwoman’s assistant is designated as providing administrative management of the Officers Meetings. This involves receiving complaints, requests, reports and other issues to be placed on the schedule for the Officers Meetings. This schedule is maintained on-line showing each topic presented, the action taken, which officer is responsible for follow-up, and the recommended action. A report is then generated which the Vice-Chairwoman submits to the Oneida Business Committee agenda in executive session as needed.

Officers meetings are not recorded. They are scheduled for the purpose of managing employment related activities. As a result, if the officer’s meetings were a committee meeting, they would be exempt under the Open Records and Open Meetings law. However, these are not committee, standing committee or subcommittee meetings. Notwithstanding the above, there is a record of the materials and actions maintained by the Vice-Chairwoman’s assistant regarding officers meetings.

### **2008 Contract**

The resolution alleges that “two officers of the Oneida Business Committee signed a contract for \$575,000 without the consent of the full Business Committee and when it was discovered the Full Business Committee decided to cancel the contract.” A review of contracts in 2008 identified only one contract close to that amount. The contract was with Strateglobe, LLC, contract # 2008-0662. Research identifies that the Whereas above is incorrect, the information is set forth below.

In 2007 the Human Resources Department contracted with Valliant, Inc. to conduct a wage study and organizational job description analysis in order to bring the Tribe’s grade/step wage chart up

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<sup>1</sup> There were other positions which became direct reports as a result of this action. For simplicity, this opinion will refer to the Division Directors as inclusive of all other direct reports.

<sup>2</sup> This resolution was amended by resolution # BC-11-26-14-C to include direct reports that had been left off the original resolution.

to market standards. On December 5, 2007, as a result of the Valliant, Inc. compensation study, the following motions were made.

“Motion by Patty Hoeft to approve the Compensation Philosophy statement, “the Oneida Tribe is committed to providing a fair and equitable compensation package enabling the Tribe to build a world class organization embracing our core values in support of our vision and mission,” seconded by Trish King.”

“Motion by Trish King to approve the Four Wage Scales: Non-Exempt, Exempt, Teachers, Professionals as presented, seconded by Paul Ninham.”

“Motion by Paul Ninham to direct the JET team to bring back an implementation plan within thirty days inclusive of: a communication plan that celebrates a compensation philosophy and a plan that’s based on market; final report on minimums; 3% wage adjustment recommendations; accrual of vacation and personal time; and labor code, seconded by Melinda J. Danforth.”

On February 5, 2008, the Oneida Business Committee received the implementation plan and made the following motion.

“Motion by Patty Hoeft to accept the Implementation Plan of Initial Phase, Next Phase, Mid Term Phase, Long Term Phase and Communication Plan, seconded by Trish King.”

As a result of the approval of the compensation plan, the Human Resources Director began attempting to identify a vendor which could fully implement the compensation plan which required a strong performance measurement and review element. The Human Resources Department director reviewed the vendor list of the Tribe as well as the Indian Preference vendor list and determined that there was only one vendor on the list which could implement the project. Strateglobe, LLC is a licensed vendor with the Tribe and recognized as an Indian preference vendor. In addition, Strateglobe is a federal Section 8(a) minority business. The company had been previously utilized to provide an analysis of the Tribe’s Print Shop.

The Strateglobe, LLC contract was presented by the Human Resources Department for legal review on April 15, 2008. All contracts entered into by the Tribe are forwarded for a legal review by the Law Office and the sent to Purchasing Department for a review of the deliverables and contracting process. The legal review looks for consistency in the terminology, conflict with Tribal laws, and waivers of sovereign immunity. In addition, in 2008, if a contract is entered into with a beginning date before the legal and Purchasing Department review, it was forwarded to the Tribal Secretary’s Office. The Tribal Secretary would place the monthly report in the Oneida Business Committee agenda and the direct reports (General Manager, Gaming General Manager, Chief of Staff, Chief Financial Officer, and Chief Counsel) would be directed to report on why the contract was presented in violation of the policies and procedures and how this would be avoided in future contracts.<sup>3</sup>

The legal review identified that the Strateglobe, LLC contract was in appropriate legal form. The 16 month contract was set up in two phases. The purpose of the contract was to identify, tailor to

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<sup>3</sup> This report is now presented from the Law Office to the direct reports. If trends are identified, the assigned attorney is expected to follow-up with the Tribal employee and direct report to correct the problem.

the Tribe's needs, and implement an electronic performance management system. Phase 1 would review the organization, identify market based best practices, establish base level requirements for the performance management system and identify at least two different electronic systems that would meet the Tribe's needs. Phase 2 would involve training the organization on the new performance management system, monitoring the implementation and review the results of the initial implementation with the Human Resources Department.

The contract was forwarded for review by the Purchasing Department and ultimately was approved to be entered into. The contract was signed by the Human Resources Director and the vendor on April 16, 2008. The Human Resources Director sent the contract to the Purchasing Department to develop the Purchase Order. The request included the following documents.

- Purchase Order which identified the contract, the payment schedule and contained the authorizing signatures.
- The signed contract.
- The Oneida Business Committee minutes from February 2008 approving implementation of the project.
- The Human Resources Director memo explaining how the vendor was identified and the sole source justification.

This contract, a memo explaining the process by which the sole source and budgeted contract was identified, and the Oneida Business Committee meeting motions of February 5, 2008 approving the project was forwarded with a Purchase Order for setting up the vendor payment in the Tribe's accounting system.

Under the Independent Contractor Policy in place in 2008, sign-off authority to obligate funds were set in different increments. A budgeted sole source contract required approval by the Area Manager, General Manager, Tribal Treasurer and the Finance and Appropriations Committee. Although, the Purchase Order Form identified a different set of approvals – Area Manager, General Manager, and Treasurer. There is no clear indication of why additional signatures were required on the Purchase Order Form.<sup>4</sup> Based on the Independent Contractor Policy, these signatures were not approval of the contract, but were intended to verify that the action followed the proper processes for identifying a vendor, obtaining appropriate reviews, and budgeting. The Purchase Order Form contained signatures from the Human Resources Area Manager, the General Manager, the Treasurer and the Vice-Chairwoman.<sup>5</sup>

Because the start date of the contract was on April 14, 2008, we referred the contract to the Tribal Secretary's Office. This referral was placed on the May 14, 2008, Oneida Business Committee meeting agenda as a part of the Chief Counsel report. The following motion was made.

“Motion by Patty Hoefft to direct the General Manager to bring back an explanation of the Strateglobe contract of \$575,000.00 to the May 28<sup>th</sup> Business Committee meeting and the explanation should include reasons for using Sole Source, seconded by Ed Delgado.”

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<sup>4</sup> Different Treasurers have interpreted this responsibility based on their understanding of the applicable laws, policies, adopted job descriptions and constitutional responsibilities.

<sup>5</sup> A review of the Finance Committee minutes submitted to the Oneida Business Committee for the period of January 2008 to April 2006 identified no references to this contract.

A review of the May 28, 2008, Oneida Business Committee packet does not identify any materials regarding report on Strateglobe, LLC. However, the minutes contain the following motion.

“Motion by Patty Hoeft to direct the Treasurer to provide a report on a monthly basis to the Business Committee listing all contracts and purchases that are \$250,000 or more starting June 25, seconded by Vince DelaRosa.”<sup>6</sup>

On June 11, 2008, the Oneida Business Committee, in open session, discussed a request from Ed Delgado, Council Member, to review the Strateglobe, LLC contract. The following motion was made.

“Motion by Kathy Hughes to approve the request that the Oneida Business Committee have access to the Strateglobe LLC contract for information, seconded by Vince DelaRosa.”

At that same meeting, in Executive session, the materials identify that the General Manager had provided notice that the Strateglobe LLC contract had been terminated effective June 13, 2008. The following motion was made.

“Motion by Kathy Hughes to accept the Strateglobe contract update as FYI with the contract terminated as of June 13, 2008, seconded by Paul Ninham.”

The General Manager and Human Resources Manager utilized alternative resources to identify, approve and implement a performance management system and the remainder of the compensation system. Most of these activities occurred using in-house personnel.

### **Analysis**

The proposed resolution contains three Whereas sections which identify reasons for implementing the single Resolve section. This Resolve requires that all subcommittees of the Oneida Business Committee record meetings and maintain that recording in Records Management.<sup>7</sup>

As identified above, the Whereas sections are inaccurate. The officers meetings are not a subcommittee of the Oneida Business Committee. The officers meet as a supervisor to direct report to address personnel related issues. The actions in these meetings are maintained in documented form and can be reviewed by the officers. As needed, reports and requests are submitted to the Oneida Business Committee in executive session. For this particular set of actions, regardless of where the minutes or reports are stored, the actions remain confidential in accordance with the Open Records and Open Meetings law and the Oneida Personnel Policies and Procedures.

The officers are governed in their supervisory capacity by resolution # BC-10-22-14-A, as amended by resolution # BC-11-26-14-C, and two adopted Standard Operating Procedures

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<sup>6</sup> At the June 25, 2008, meeting the report on this item by the Treasurer requested the implementation date be pushed back a month.

<sup>7</sup> Records Management is responsible for managing long-term record storage on behalf of the Tribe. However, the records remain the responsibility of the “custodian” of the records as identified in the Open Records and Open Meetings law. It is presumed that a Standard Operating Procedure or other delegation of authority is in place regarding Oneida Business Committee meeting records which remain the responsibility of the Tribal Secretary.



governing complaints and grievances. If further direction is needed to avoid confusion, it would be more appropriate to develop clarifying standard operating procedures which would guide processes rather than recording meetings. Recording meetings simply provides a record of past discussion and does not provide direction on how to proceed in the future.

The last Whereas identifies a 2008 contract regarding a contract presumably arguing that if a subcommittee meeting had been recorded that the contract would not have been entered into by the officers. However, this Whereas is also incorrect. The contract was actually entered into by the Human Resources Manager to implement a project approved by the Oneida Business Committee at a meeting of the Oneida Business Committee. The signatures of the officers were, under the Independent Contractor Policy in place at that time, for the purposes of verifying the appropriate procedures were taken to identify the vendor and the funds to pay the vendor were budgeted. Further, the Oneida Business Committee did not terminate the contract. As the record identifies, the contract was terminated by the Human Resources Manager and reported on to the Oneida Business Committee by the General Manager. Notwithstanding the errors in the third Whereas, the actions regarding the contract which occurred in a meeting of the Oneida Business Committee were recorded in the minutes, however the discussion was not recorded since that occurred in executive session.

The Resolve directs that any meeting of a subcommittee “of the Oneida Business Committee” must be recorded. This should be subject to an exception for executive session discussions. The purpose of executive session is limited to specific authorized topics under the Open Records and Open Meetings law. The purpose of not recording executive session is to allow a candid and open discussion regarding matters generally related to personnel, litigation and contracts. If such conversation were recorded, the parties may be reluctant to have a full discussion of the topic. However, the action to be taken as a result of the discussion is recorded in the minutes, and the documents presented regarding the subject are maintained in a confidential manner.

Further, the Resolve may be unnecessarily limiting. It refers only to the Oneida Business Committee. However, it may be that there are boards, committees, and commissions that create subcommittees for specific subjects. For example, the Election Board has created subcommittees to review and update Standard Operating Procedures. If subcommittees are directed to be recorded, it may be appropriate to remove the specific reference to the Oneida Business Committee.

Finally, the Resolve may also be unnecessarily narrow. As drafted this only applies to subcommittees. However, as identified above, there is no requirement that any board, committee, commission, the Oneida Business Committee or even the General Tribal Council record (whether audio or video) meetings. It may be that the proposed resolution presumes in error that this directive exists in some form.

### **Conclusion**

If considered for adoption by the General Tribal Council, the Whereas sections in the proposed resolution should be deleted as they contain erroneous information. Further, if considered for adoption, the General Tribal Council may want to consider deleting reference to the “Oneida Business Committee” in the Resolve. However, the resolution does not adequately address how

confidential matters and other restricted topics (such as personnel matters) will be exempt from the resolution. It is presumed that this resolution recognizes existing law, policy and actions protecting confidentiality. With this presumption in place and the corrections identified above made, the resolution would take a simple majority vote to adopt.

It is recommended that if the General Tribal Council wishes to make such a directive, that it considers the following motion.

Motion to direct the Oneida Business Committee to amend the Open Records and Open Meetings Law and the Comprehensive Policy Governing Boards, Committees and Commissions to require that meetings of boards, committees, commissions, standing committees, subcommittees, and task forces be recorded recognizing the exceptions in section 7.4-1 of the Open Records and Open Meetings Law.

This motion would allow the Oneida Business Committee to draft the appropriate language to incorporate into these laws and policies, make amendments to by-laws of existing boards, committees and commissions, and make directives to task forces to record meetings. This motion would require a simple majority vote to adopt.

If you have further questions, please contact me.