

**MINUTES OF THE PUBLIC SESSION OF THE
FEBRUARY 28, 2017
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
HELD AT THE COMMISSION'S OFFICE LOCATED AT
540 BROADWAY
ALBANY, NEW YORK**

Acting Chair: Michael K. Rozen (NYC)

Members:

Robert Cohen (NYC)
Marvin Jacob (Webex)
Seymour Knox, IV (BUF)
Gary J. Lavine (ALB)
J. Gerard McAuliffe, Jr. (ALB)
David A. Renzi (Webex)
Hon. Renee R. Roth (NYC)
Dawn L. Smalls (NYC)
George H. Weissman (Webex)
Hon. Penny M. Wolfgang (BUF)

Members

Absent:

Hon. Eileen Koretz

Staff:

Seth H. Agata, Executive Director
Monica J. Stamm, General Counsel
Martin L. Levine, Deputy General Counsel
Stephen J. Boland, Director of Administration
Walter J. McClure, Director of Communications and Public Information
Officer
Pei Pei Cheng-deCastro, Director of Investigations and Enforcement
Emily A. Logue, Deputy Director of Investigations and Enforcement
Patrick E. Coultry, Chief Investigator
Peter J. Smith, Investigator
Michael Sande, Deputy Director of Ethics Guidance
Carol C. Quinn, Deputy Director of Lobbying Guidance
Leah Ramos, Deputy Director of Financial Disclosure Compliance
Meghann Hennigan, Deputy Director of Education
Erin R. Lynch, Associate Counsel
Stephanie Blattmachr, Associate Counsel
Deborah Novak, Secretary to the Commission

I. CALL TO ORDER

Acting Chair Michael Rozen called the February 28, 2017 Commission Meeting to order.

II. APPROVAL OF MINUTES – PUBLIC SESSION

January 31, 2017

A motion was made by Commissioner Roth, seconded by Commissioner Cohen, to approve the Minutes from the Public Session of the January 31, 2017 Commission Meeting. The motion was approved by unanimous vote of Acting Chair Rozen and Commissioners Cohen, Jacob, Lavine, McAuliffe, Renzi, Roth, Smalls, Weissman and Wolfgang. Commissioner Knox was not present for the motion.

III. REPORT FROM STAFF

Update on 2017-18 Budget

Executive Director Seth Agata stated that the Executive Budget submission for State Fiscal Year 2017-2018 is complete. The Executive has proposed funding the Commission at the same level as last year, \$5.582 million dollars. Also included as part of the Executive Budget submission are substantive Article VII bills which include Attachment B. This proposal would require elected municipal officials, individuals who serve as county managers, and chairs of boards of supervisors, who receive more than \$50,000 in annual compensation, to file a Financial Disclosure Statement (“FDS”) with JCOPE. JCOPE would be the repository for these filings, but any insufficient or defective filings would be handled by a local ethics body/city or the district attorney. The bill would authorize local legislative bodies to create financial disclosure statements with JCOPE’s approval which could be filed with JCOPE in lieu of the state FDS, found in Public Officers Law §73-a (which does not address local conflicts of interests). It is unclear whether or not JCOPE has any enforcement jurisdiction over these municipal employees, other than accepting the filings.

Both houses have passed the PEF M/C Pay legislation which implements the recently negotiated collective bargaining agreement; it has been sent to the Governor for action by Wednesday, the 6th. The impact of the bill is that it will raise the salaries of a number of state employees above the filing threshold set forth in POL §73-a. However, the bill does not amend the filing threshold in §73-a, so the number of financial disclosure filers will increase by an additional two to three thousand filers. If that bill raises such salaries before May 15th those individuals who now exceed the threshold will be required, by May 15th, to file a Financial Disclosure Statement. Commissioner Weissman asked if there had been outreach to prospective filers and agencies that would be impacted. Staff replied that outreach had already commenced with ethics offices in the agencies.

Update on Staff Draft of Legislative Proposals

At the last Commission meeting, a staff draft of legislative proposals was presented, and comments have been received from Commissioners and outside parties. Those comments will be incorporated into the next draft with annotations and will be provided before the next Commission meeting.

IV. REGULATIONS

Staff Draft of Comprehensive Lobbying Regulations (Sections 942.4 – 942.7)

Deputy General Counsel Martin Levine recapped for the Commission and explained that the review of the comprehensive lobbying regulations that began at the December meeting, will continue in stages, and then will be re-presented as an “amended draft” for the Commission’s consideration to commence formal rulemaking under the State Administrative Procedure Act. Deputy Counsel Levine covered the statutory definition of “lobbying”, exceptions to such definition, and the different forms of lobbying, including “direct” versus “grassroots” lobbying. Deputy Counsel Levine noted that questions have been raised with respect to the exceptions from the definition of lobbying which include participation at public proceedings, as well as participation in adjudicatory proceedings.

Also discussed was the question of how to account for employees of organizations who voluntarily participate in “lobby days”. An amendment to the regulations is being considered to exclude such participation from the employer’s reportable lobbying activity. Commissioner Jacob asked whether the Commission has the authority to exclude people, who on a lobbying day, voluntary or otherwise, meet with officials who are doing direct lobbying. Executive Director Agata explained that the statute defines a lobbyist as an individual or entity that is retained, employed or designated to lobby, and it is incumbent upon the agency to interpret what the statute says. Commissioner Smalls sought clarification about how the regulations would govern individuals involved in grassroots lobbying efforts, particularly involving social media, including the application of the \$5,000 threshold, and how registered parties would capture and quantify those types of lobbying efforts in their reporting. Deputy Counsel Levine indicated that additional guidance will be provided on how to account for the costs of social media activities.

APPLICATION FOR EXEMPTION FROM SOURCE OF FUNDING DISCLOSURE REQUIREMENTS

New York Civil Liberties Union

Deputy Director of Lobbying and Guidance, Carol Quinn explained that one application for exemption from disclosing its “Source of Funding” was received from the New York Civil Liberties Union. It is not an exemption for an individual source, but rather a blanket exemption from disclosing all sources of funding for the 2016 July-December Client Semi-Annual Report that was due January 15, 2017. The request is being made under §938.4(b) of the regulations.

Judge Wolfgang asked if there is precedent for granting an exemption such as other organizations that have been granted the same exemption. General Counsel Stamm provided some background on the Commission’s prior consideration of exemption applications, including the appeals to an independent hearing officer,

Judge Pratt, that were previously governed by the regulations. Commissioner Lavine noted that neither the Commission nor Judge Pratt, who overturned some of the Commission's determinations on appeal, had defined "substantial likelihood".

Deputy Director Quinn reported that no applications for exemption requests were received during the last filing period. This applicant filed its "Source of Funding" disclosure for the first half of 2016, and it is currently seeking exemption for the second half of 2016. The 2017 request incorporates the 2013 and 2015 requests, and evidence of threats or harm contained therein, the 2014 appeal letter and the 2014 appeal decision. There is a summary of evidence that was previously given to the Commission in 2013 and 2015. The 2017 application incorporates the old evidence and, in addition, includes new evidence (starting on page two, last paragraph) including actual and attempted threatening Facebook postings, threatening letters dated July, 2015 and September, 2016, and a reference to the "emerging political climate."

General Counsel Stamm explained that if the Commission does not grant the exemption, the Commission is required under the regulations to inform the applicant in writing that the application has been denied, and must include a statement of findings and conclusion with the reasons or basis for the denial. Accordingly, during the public discussion, the Commission must make a clear record of the reasons for any decision.

Commissioner McAuliffe stated that the only new evidence that is being presented for the last six months of 2016 is the letter of September, 2016. The other references in the application were for periods of time before the period for which they are requesting the exemption. Commissioner Weissman initially raised the issue, followed by Commissioner Renzi, that the only new evidence before the Commission appears to be the email and the handwritten letter that may or may not be from one individual who consistently opposes this

organization and perhaps other similar organizations. He noted that the evidence or communications provided do not target any source of funding, but rather the political entity or the not-for-profit itself. He posited that the granting of a blanket exemption must be supported by substantial evidence, and in this case, there is no evidence submitted by this applicant that demonstrates any likelihood of harm to any source.

Commissioner Cohen stated that the standard articulated in the regulations does not require that there be any evidence of present harm, threats, harassment or reprisals to the sources of funding. Specifically §938.4(a)(I) allows for threats, harassment or reprisals with respect to client filers, and is not limited to the sources. Commissioner Cohen asked the Commissioners to think broadly about the evidence the ACLU has put forth regarding the present threats. Since November, there has been a drastic change in the environment, and all reputable organizations which track incidences of racist attacks and anti-Semitism have reported a dramatic increase in such incidents.

Commissioner Smalls stated that the statute clearly makes allowances for exemptions in certain circumstances to protect people or interests, and questioned if groups similar to the American Civil Liberties Union were not accorded the benefit of the exemption, then who would be eligible for an exemption. The law intended that under certain circumstances, organizations would qualify for these exemptions. This Commission has never found that anyone has ever qualified for this exemption, and Commissioner Smalls suggested that in considering such applications in this manner, the Commission may be operating in a way that is contrary to basic language of the law.

Judge Wolfgang believes that in order to grant an exemption, the Commission's decision must be based on evidence and not the Commission's subjective opinions, and does not believe that one letter meets the standard.

Commissioner Lavine requested that the staff comment on the definition of “substantial likelihood of harm” as being more likely than not an event will occur. Executive Director Agata explained that the question becomes what is the quantum of proof or how much of a likelihood of threat do you have to provide to warrant an exemption. The regulations do not address how much evidence is enough to establish substantial likelihood. General Counsel Stamm explained that the standard of substantial likelihood is not typically “more likely than not”, which is a preponderance of evidence standard; substantial likelihood is generally less than that, similar to reasonable likelihood. This is an open issue for the Commission to address.

A motion was made by Commissioner Roth, seconded by Commissioner Smalls, to approve the application for exemption from source of funding disclosure requirements for New York Civil Liberties Union.

Chair Rozen requested that this motion be withdrawn to allow staff to consider some of the issues raised by the Commission and make a presentation at the next meeting. Commissioners Roth and Smalls withdrew their motions.

A motion was made by Acting Chair Rozen, seconded by Commissioner McAuliffe, to table the vote until the March Commission Meeting. The motion was approved by unanimous vote.

V. NEW AND OTHER BUSINESS

None

VI. MOTION TO ENTER INTO EXECUTIVE SESSION PURSUANT TO EXECUTIVE LAW §94(19)(b)

A motion was made by Commissioner Roth, seconded by Commissioner Knox, to enter into Executive Session pursuant to Executive Law §94(19)(b). The motion was approved by unanimous vote.

VII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

Acting Chair Rozen announced that, during the Executive Session, pursuant to Executive Law §94(19)(b), the Commission considered and approved two settlement agreements, commenced three investigative matters, discussed several other investigation matters, litigation and other personnel matters.

VIII. MOTION TO ADJOURN THE PUBLIC MEETING

A motion was made by Commissioner Cohen, seconded by Commissioner Smalls, to adjourn the Public Meeting. The motion was approved by unanimous vote of Acting Chair Rozen and Commissioners Cohen, Jacob, Knox, McAuliffe, Renzi, Smalls, Weissman and Wolfgang. Commissioners Lavine and Roth were not present for the motion.