

**MINUTES OF THE PUBLIC SESSION OF THE
FEBRUARY 27, 2018
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
HELD AT
540 BROADWAY
ALBANY, NEW YORK**

Chair: Michael K. Rozen (NYC)

Members: Robert Cohen (NYC)
James E. Dering (ALB)
Marvin Jacob (WebEx)
Seymour Knox, IV (BUF)
Gary J. Lavine (WebEx)
J. Gerard McAuliffe, Jr. (ALB)
David J. McNamara (BUF)
Barry C. Sample (WebEx)
Dawn L. Smalls (NYC)
George H. Weissman (WebEx)
James A. Yates (ALB)

**Members
Absent:** None

Staff: Seth H. Agata, Executive Director
Monica J. Stamm, General Counsel
Martin L. Levine, Deputy General Counsel
Andrew Bechard, Director of Lobbying
Keith C. St. John, Director of Ethics
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
Stephanie Blattmachr, Deputy Director of FDS
Michael Sande, Deputy Director of Ethics Guidance
Meghann Hennigan-Cohen, Deputy Director of Education
Erin Lynch, Associate Counsel
Patrick E. Coultry, Chief Investigator
Peter J. Smith, Investigator
Richard Coraggio, Investigator
Lori Donadio, Principal Investigative Analyst
Katherine Santandrea, Secretary to the Commission

I. CALL TO ORDER

Chair Rozen called the February 27, 2018 meeting to order and welcomed new commissioner, David J. McNamara. Chair Rozen stated that going forward he will be serving as the Chair of the Commission, rather than Acting Chair.

II. APPROVAL OF MINUTES – PUBLIC SESSION

January 30, 2018

A motion was made by Commissioner Smalls, seconded by Commissioner McAuliffe, to approve the minutes from the Public Session of the January 30, 2018 Commission Meeting. The motion was approved by unanimous vote.

III. REPORT FROM STAFF

Outreach Update

Executive Director Seth Agata gave an update on outreach activities stating that on February 6, 2018, he and General Counsel Stamm conducted a small seminar for NYU Law School faculty regarding JCOPE and ethics. Executive Director Agata is scheduled to speak to the Association of the Bar of the City of New York, Government Ethics and State Affairs Committee on March 21, 2018. An ethics reminder will be going out regarding the rules governing Public Officials attending conferences and the guidelines and Advisory Opinions that address those provisions. The Commission's annual report is being produced, and lobbying statistics are being tabulated. Copies of the annual report will be distributed to the Commissioners once the draft is complete.

Hiring Update

General Counsel Stamm stated that announcements for several positions have been posted, and the Commission has filled four positions across the training unit, the FDS compliance unit and in the lobbying division, which brings the total of JCOPE employees to fifty-five. There are two vacancies still to be filled, a compliance auditor and an assistant filing specialist in lobbying.

IV. APPLICATION FOR EXEMPTION FROM SOURCE OF FUNDING DISCLOSURE REQUIREMENTS

New York Civil Liberties Union

General Counsel Stamm stated that the Commission received an application from the New York Civil Liberties Union (NYCLU) on January 16, 2018 requesting an exemption from the disclosure for all of its sources of funding pursuant to 19 NYCRR Part 938.4(b), for the period of July 1 - December 31, 2017. Executive Director Agata stated that the motion for the Commission to consider is whether to grant the exemption. The Commission also must establish a record of the discussion and vote. If the Commission does not carry a vote to grant the exemption, a letter needs to be sent to NYCLU stating findings and conclusions, and the reasons for the denial.

Director of Lobbying Andrew Bechard stated that NYCLU provided several documents from this year which they provided as evidence of what they described as “hostile correspondence,” including 13 holiday cards, one birthday card, one postcard, 12 letters, and four assorted photos or posters that include statements like “may this be the year you go out of business,” “you’re a disgrace to America,” and “hoping soon you will be gone.” The NYCLU application further relates that during the past year, an ACLU employee was the target of harassment and death threats on social media, and includes details on 10 other incidents of hostility at other state affiliates other than NYCLU. NYCLU’s legal arguments are the same as in prior applications.

General Counsel Stamm reminded the Commission that under the Commission’s regulations, for applications by 501(c)(4) organizations, the issues to consider are if the applicant can show its “primary activities involve areas of public concern that create a substantial likelihood that disclosure of its Source(s) will cause harm, threats, harassment or reprisals to the Source(s) or individuals or property affiliated with the Source(s).” Factors the Commission will consider when determining whether this showing has been made include, but are not limited to, the factors identified in paragraphs (a)(1)-(5) of Section 938.4 of the regulations.

Commissioner Yates recused himself on this matter, but indicated that after the vote he would have comments with respect to the generic issue as to what the law says and how it should be interpreted.

Commissioner Weissman stated that his understanding of the statute, and what the Commission should consider, is what effect these threats, complaints or harassments had on NYCLU. The new information includes other “state affiliates” which indicates that it was not directed at NYCLU. Commissioner Weissman questioned the probative value of looking at information that doesn’t directly affect NYCLU. In looking at the question of NYCLU’s donors, there was no harassment relating to the donors. He stated that groups from all sides of the political spectrum raise money in New York, suggesting NYCLU could not establish that its viewpoints were unwelcome here.

Commissioner Smalls referred to a footnote in the NYCLU application noting the possibility of a long-term or short-term exemption, and asked if the different timeframes have different standards or burdens. General Counsel Stamm stated that there are legal arguments in the application regarding whether the Commission is interpreting the law incorrectly, and that, among other things, the application should not be considered based on the last six months, but rather the nature of the organization and types of threats and harassments that they have faced, generally.

General Counsel Stamm also noted that one of the factors that the Commission will consider is evidence of harm, threats, harassment, or reprisals directed against organizations or individuals holding views similar to those of the Sources or Client Filer. Evidence from state affiliates is something the Commission can consider and give whatever weight it deems appropriate. General Counsel Stamm went on to restate the five nonexclusive factors in Section 938.4(a) of the regulation.

Commissioner Weissman stated that he does not believe that NYCLU’s application meets any evidentiary standard.

Chair Rozen explained that the Commission should take two separate votes: whether or not the Commission grants an exemption; and if so, what the timeframe for such exemption should be. Commissioner Smalls made a motion to grant an exemption, Commissioner Cohen seconded the motion. Chair Rozen, Commissioners Dering, McAuliffe, Smalls, Cohen, and Sample voted in favor of the motion. Commissioners Jacob, Knox, Lavine, McNamara, and Weissman opposed the motion. Commissioner Yates recused himself of the matter. The motion did not carry with a vote of 6-5-1; the need for a second vote was mooted.

Commissioner Yates stated that in the drafting and negotiation of the statute, the need for privacy was considered based on caselaw addressing not whether a donor would be injured, but whether the protection of a First Amendment right to freedom of association would be impacted. Namely, the issue was whether or not source privacy was needed to protect against a chilling, or even a bar, on the right to associate in membership and express ideas. Commissioner Yates went on to say that if there is a threat to an organization, and that threat is the reason people will not become members because their names and identity are going to be disclosed, then that impact on a controversial organization's ability to operate is what the Commission should be considering, and not whether there has been a threat to a donor. He further stated that the Supreme Court case law talks about "reasonable probability"; the Commission's regulations call for a "substantial likelihood"; and he does not believe a higher standard should be considered because it would endanger the validity of a determination by this Commission.

Commissioner Lavine stated that the vote was based upon various elements, including; impact of threats, threats against staff or property, and the Supreme Court holdings. The application was evaluated based upon the facts and circumstances, and the law as the Commission understands it. He believes that a case has not been made for granting an exemption, particularly in light of the purpose of the statute, i.e., to reveal the sources of funding of lobbying activities. Commissioner Jacob stated that the statute refers to donors' sources of funding and does not refer to organizations.

Chair Rozen noted that his vote in favor of the application would only have been to grant a six-month exemption, in order to allow for further consideration of the contention made by NYCLU that no applicant could meet the standard set by the Commission, a concern some Commissioners have raised in the past. The Chair stated that the Commission should debate this issue again whenever the next exemption application is received.

V. NEW AND OTHER BUSINESS

N/A

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

A motion was made by Commissioner McAuliffe, seconded by Commissioner Yates, 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

General Counsel Stamm stated that during the Executive Session, the Commission authorized steps in several investigative matters and discussed several investigative matters.

The Commission is looking for candidates to serve as Hearing Officers. If anyone is interested, please contact JCOPE General Counsel.

VIII. MOTION TO ADJOURN THE PUBLIC MEETING

Upon motion made by Commissioner Smalls, seconded by Commissioner McAuliffe, the Public Session was adjourned by unanimous vote.