

**MINUTES OF THE PUBLIC SESSION OF THE
JANUARY 28, 2020
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)
Colleen C. DiPirro (WebEx)
William P. Fisher (ALB)
Marvin E. Jacob (WebEx)
Gary J. Lavine (NYC)
David J. McNamara (WebEx)
George H. Weissman (WebEx)
James A. Yates (NYC)

Members

Absent: Daniel J. Horwitz
James W. McCarthy

Staff: Monica J. Stamm, General Counsel
Martin L. Levine, Deputy General Counsel
Stephen J. Boland, Director of Administration
Keith C. St. John, Director of Ethics
Emily Logue, Acting Director of Investigations and Enforcement
Walter J. McClure, Director of Communications and Public Information Officer
Carol Quinn, Deputy Director of Lobbying Guidance
Michael Sande, Deputy Director of Ethics Guidance
Meghann E. Hennigan, Deputy Director of Education
Melinda Funk, Deputy Director of Financial Disclosure
Kavita Bhatt, Associate Counsel
Kristin Abreu, Associate Counsel
Jennifer Bliss, Associate Counsel
Patrick E. Coultry, Chief Investigator
Carolina Rivera, Investigator
Kelly A. McCready, Confidential Clerk

I. CALL TO ORDER

Chair Rozen called the January 28, 2020 meeting to order.

II. APPROVAL OF MINUTES – PUBLIC SESSION

December 17, 2019

A motion was made by Commissioner Dering, seconded by Commissioner Fisher, to approve the minutes from the Public Session of the December 17, 2019 Commission Meeting, as amended on page 2 to reflect that Commissioner Fisher seconded to the motion to enter into Executive Session. The motion was approved by unanimous vote.

III. REPORT FROM STAFF

Outreach Update

Deputy General Counsel Martin Levine stated that on January 16, 2020 the annual Financial Disclosure Ethics Officer Forum was held for 44 attendees, either live or via WebEx. The Fall/Winter newsletter was issued on December 19, 2019. On February 5, 2020 the Commission is hosting a training program on the comprehensive lobbying regulations and the lobbying filing application. The training will be at the Concourse in the Empire State Plaza. Presently there are 230 people pre-registered, with space for more attendees. For those who cannot attend, the training will be videotaped and posted to the JCOPE website.

Third Quarter Financial Report

Deputy General Counsel Martin Levine advised the Commission that the Governor's proposed budget for FY 2020-21 included an appropriation for JCOPE of \$5.582 million. This is unchanged from current levels.

Director of Administration Stephen Boland gave the third quarter financial report, reporting that as of December 31, 2019, the Commission has spent \$1,398,000 for the quarter, including \$1,189,000 on personal services and \$209,000 in non-personal services.

This year, the Commission has spent, in total, \$3,489,000 in personal services or 75% of the budget allowance, and \$497,000 on non-personal services, or 54% of the budget allowance. The total spent year-to-date is \$3,987,000, or 72% of the budget.

Commissioner Weissman asked how the budget will allow for raises. Deputy General Counsel Levine stated that staff have told the Department of Budget that the cost of living increases and performance advances next year will likely put the Commission in a deficit position.

IV. REGULATIONS

Deputy General Counsel Levine stated that staff is proposing revisions to the Commission's Lobbying Regulations – the first set of comprehensive lobbying regulations in 40 years of lobbying oversight. The proposed revisions reflect some of the experiences over the last year and come in the form of editorial cleanup, policy issues that staff would like to reconsider, and technical compliance issues. The actual regulatory text is being finalized and will be distributed over the next few weeks. After the Commission approves a draft, a formal rulemaking process, with public notice and comment will begin. Deputy Director of Lobbying Guidance Carol Quinn gave an overview of some of the prominent proposed changes to the regulations.

- Social Media – Personal social media posts are presumptively not reportable lobbying by an individual or by an organization and are only reportable if the person is hired to run a lobbying campaign through their personal social media platforms.
- Grassroots Lobbying - No individuals will be required to be listed as individual lobbyists based on grassroots lobbying activity alone. This is because when talking about grassroots lobbying, the lobbying message is public – and the focus is not on the individuals behind it, but instead on who is paying for the Grassroots Lobbying message.

Commissioner Yates asked if a board member for a not-for-profit who neither expends nor receives money is called a “designated lobbyist” and needs to be listed in the grassroots lobbying efforts. Deputy Director Carol Quinn stated that while no individuals would be

required to be listed for grassroots lobbying, if such a person engaged in direct lobbying, they would have to be listed (provided the organization or board in which they sit expends more than \$5,000 for lobbying activities). Commissioner Yates objected to the proposition that an unpaid individual could be required to be listed as a lobbyist. Deputy General Counsel Levine noted that the Lobbying Act is unambiguous about the requirement that any person who engages in lobbying activities on behalf of the organization is required to be disclosed on the statement of registration. Commissioner Yates stated he would like further discussion because it seems that it should be that the person acted at the behest of, or in coordination with the entity. Otherwise, he would be better off being a member than a board member. General Counsel Monica Stamm stated that staff will present the regulations to the Commission for further discussion and action at a future meeting. Deputy Director Quinn presented the following issues.

- Designated Lobbyist – The regulations clarify that a person can designate themselves to lobby on their own behalf. Likewise, organizations can designate a person to lobby on its behalf (including board members).
- Contractual Client – The regulations clarify that a contractual client is the party who enters into the agreement with the lobbyist, but not necessarily the entity that pays the lobbyist (sometimes the Beneficial Client pays).
- Coalitions – The regulations will clarify that contributions to coalitions include not only funds but also resources (or incurring expenses on behalf of the coalition). It will also clarify that a contribution to the coalition makes you a member of the coalition.
- Staff is also considering revising the Source of Funding Regulations at Part 938 to exclude contributions that are both specifically earmarked for activities outside of New York State and restricted from use in general funds, and to clarify that anonymous sources are not allowed.

V. **ADVISORY OPINIONS PURSUANT TO EXECUTIVE LAW §94 AND THE LOBBYING ACT**

Deputy Director of Ethics and Guidance Michael Sande stated that the proposed opinion discusses the gift restrictions that apply to public officials, and lobbyists, and their clients, and how the restrictions apply to indirect gifts. An indirect gift is one that is made or offered to a third party rather than directly to a public official. This could be a gift that is offered or given to a person, an entity, a charitable organization, the public, or the state itself or an arm of the state, upon a public official's direction, designation, or recommendation, or on the official's behalf.

This Opinion does not change or extend existing law. The Opinion discusses the currently existing and long-standing gift restrictions in the Public Officers Law at § 73(5); the Lobbying Act at § 1-m, and their attendant regulations at Title 19 of the New York Code of Rules and Regulations, Parts 933 and 934, respectively. Existing law clearly prohibits arranging to have a third party receive a gift that is meant to influence a public official.

This Opinion explains how the Commission analyzes potentially violative third-party gifts under the applicable statutes and regulations, i.e., generally, direct gifts are analyzed by examining the surrounding circumstances to see if a reasonable inference can be made that the gift was intended to influence the public official, or to reward the official for some action or decision already taken.

Identifying a gift to a third party includes a similar analysis regarding intent to influence, but also requires examining the circumstances surrounding the gift to investigate whether the gift was made at an official's direction, designation, recommendation, or on an official's behalf. The proposed opinion sets forth a non-exhaustive list of circumstantial factors that are relevant to such a determination. These factors include the nature and substance of the solicitation; the nature and purpose of the gift; the nature and purpose of the third-party recipient; the public official's knowledge of the identity of the donor; the nature of the gift offeror's official business, if any, that is pending before the public official; the extent and nature of any nexus between the solicitation and the pending business; and the offeror's history of making similar gifts.

Moreover, the restrictions on gifts are not limited to personal solicitations. Under the law,

a state official cannot knowingly use or permit an intermediary to solicit an otherwise impermissible gift. An intermediary could be someone whom the public official has designated, authorized, or knowingly permitted to act on their behalf. The gift restrictions apply when the facts clearly demonstrate that an intermediary is, by all appearances, acting for a public official.

These factors are not ranked, and no one factor is dispositive. While in any specific case one or more factors may emerge as particularly important or persuasive, such matters will be determined, case-by-case, upon a “totality of the circumstances” basis. It is staff’s hope that this Advisory Opinion will be a resource to those who consider soliciting a gift to a third party or making a gift to a third party identified by a public official or using an intermediary to solicit a gift.

Commissioner Weissman expressed concern regarding language related to 501(c)(3) organizations, so that it does not appear that they get a pass. General Counsel Monica Stamm noted that the language in question (“...as a general matter if a long-standing charity, a 501(c)(3) organization will likely overcome the presumption[.]”), was added due to a concern about chilling charitable contributions. For example, it could cover community events that elected officials attend for longstanding charities and other types of well-established charitable entities. Under most circumstances, contributions to these events will overcome the presumption, but it is the totality of circumstances that are reviewed. Depending on the pending business of the donor, and the nature of the solicitation and the nexus, it might not overcome the presumption. The idea of the language was to give some comfort to those organizations who are asked to contribute to the Red Cross, a blood drive, or some local cause. Commissioners Weissman and Lavine continued to express concern with the term “long-standing charity” and that the language stating that gifts 501(c)(3) will be subject to less scrutiny. Commissioner Cohen argued that the language is merely describing an analysis that the staff would undertake if presented with a question, *i.e.*, one of the factors might be the charity in question, and how long the charity has been established, but this factor is not dispositive. Commissioner Cohen suggested that the language could be revised to read: “[a] gift given to a charity formed under section 501(c)(3) of the Internal Revenue Code would be more likely to comply with the

regulations as a prohibition, the longer it has been in existence.” Chair Rozen suggested staff come back with language that might address these questions. Commissioner Yates noted that per Section 73(5) of the Public Officers law, even if a gift is given by someone other than a lobbyist or a client, if a public official receives a gift under circumstances under which it would be reasonable to infer that it was intended to influence that public official, then that is wrong too. The Commission has to be careful with the definition of “interested source” because it creates a potential situation in which a public official receives an impermissible gift from a party that is not a registered lobbyist or client. General Counsel Stamm stated that under the circumstances where the public official who receives a gift was not aware that the individual or entity that gave him or her the gift was an interested source, the Commission would consider whether to pursue a violation of law as an enforcement matter, as it would have to be knowing and intentional. Commissioner Cohen asked if anyone has come forward with concern about the use of or definition of the term “interested source” over the years that it has been in the regulations. General Counsel Stamm answered that the Commission has not received that specific question, but since Commissioners have raised concerns about the language of the advisory opinion staff will revisit the opinion and Commissioners can contact staff to address concerns. Staff will represent the modified version at the February meeting.

VI. NEW AND OTHER BUSINESS

Commissioner Lavine noted that when the tenure of a Commissioner ends, staff requests that all Commission documents be returned. Most recently that request was made to former Commissioner Garcia. General Counsel Stamm explained that the practice dates back to 2012, that after any Commissioner has left the Commission, staff requests they either return any confidential documents in their possession or confirm in writing that they have destroyed any such documents. It is a practice; not a rule of the Commission. Commissioner Lavine asked if this practice was discussed with Deputy State Inspector General Spencer Freedman subsequent to his issuing his letter to the Commission, and whether staff has had any interaction with the Inspector General since the last meeting. General Counsel Stamm said that she has not had any conversations with the IG on these issues since the last meeting. Commissioner Lavine asked if there is going to be discussion of the recommendations in the IG’s letter or of any legislative proposals. General Counsel

Stamm stated that staff is constantly thinking about potential reforms to the laws and has ongoing discussions about those.

Commissioner Lavine offered the following potential legislative changes:

1. The Inspector General should have a term of office to ensure dispassionate objective investigations. In the alternative, consideration should be given to the proposal of the then-State Investigation Commission that the Office of the Inspector General should be abolished and folded into a new ethics and enforcement commission (which would also replace JCOPE).
2. Make confidentiality protocols regarding what the Commission can divulge with respect to the Commissions deliberations less restrictive. Specifically, the Commission should have the same prerogative that the appellate divisions have under § 90(10) of the Judiciary Law to divulge confidential matters for good cause. The Commission should be able to divulge any confidential matter that is deemed appropriate if there is good cause.
3. Financial Disclosure exercises – The Commission is now getting 30,000 submissions and the Legislature should consider a bifurcated approach, meaning the top tier policy makers in State administration and government would be identified and file a long form and everybody else would file a short form.

Commissioner Lavine moved that staff consider these proposals and report back at the next meeting. Chair Rozen stated that a formal motion is not required, but staff will report back at the next Commission meeting.

VII. MOTION TO ENTER INTO EXECUTIVE SESSION PURSUANT TO EXECUTIVE LAW

§ 94(19)(B)

A motion was made by Commissioner Lavine, seconded by Commissioner Fisher, to enter into Executive Session. The motion was approved by unanimous vote.

VIII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

Chair Rozen stated that in Executive Session, the Commission discussed litigation matters, authorized steps in several investigative matters and discussed several other investigative matters.

IX. MOTION TO ADJOURN THE PUBLIC MEETING

Upon motion made by Commissioner Yates, seconded by Commissioner Dering, the Public Session was adjourned by unanimous vote. Commissioner DiPirro was not present during this vote.