

**MINUTES OF THE PUBLIC SESSION OF THE
FEBRUARY 25, 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)
William P. Fisher (ALB)
Daniel J. Horwitz (NYC)
Marvin E. Jacob (WebEx)
Gary J. Lavine (NYC)
David J. McNamara (BUF)
George H. Weissman (WebEx)
James A. Yates (NYC)

Members

Absent: Colleen C. DiPirro
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
Patrick E. Coultry, Chief Investigator
Carolina Rivera, Investigator
Lori A. Donadio, Principal Investigative Analyst
Kelly A. McCready, Confidential Clerk

I. CALL TO ORDER

Chair Rozen called the February 25, 2020 meeting to order.

II. APPROVAL OF MINUTES – PUBLIC SESSION

January 28, 2020

A motion was made by Commissioner Dering, seconded by Commissioner Weissman, to approve the minutes from the Public Session of the January 28, 2020 Commission Meeting. The motion was approved by unanimous vote. Commissioners Cohen and Horwitz were not present for the vote.

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

Proposed Advisory Opinion on Gifts to Third Parties

General Counsel Monica Stamm explained that staff has revised the Proposed Advisory Opinion, based on the discussion at the last meeting and comments received from Commissioners. In response to a comment from Commissioner Jacob, staff moved the text from a footnote into the body of the opinion. This change reflects that the Public Officers Law applies to state officers and employees only. The Public Officers Law gives the Commission jurisdiction over local lobbying but not over local officials.

Commissioner Yates stated that the gift regulations created the term “interested source”, which is not referenced in the statute. The statute only prohibits a gift to a public officer where under the circumstances it is reasonable to infer that the gift was intended to influence, unless the gift is from a lobbyist and then there is a presumption the gift is improper. The regulations go further and state that if you are an interested party, which goes beyond lobbyists to any entity with state business, the gift is banned. Commissioner Yates questioned whether the regulations impermissibly shift the burden of proof on the interested party to overcome the presumed unlawful activity, which constitutes a misdemeanor. Commissioner Yates doesn’t believe the Commission has authority by regulation to presume a misdemeanor and shift the burden of proof. Commissioner Yates

does not have an issue with the “interested party” designation or the presumption in the analysis for an ethical violation, but has a problem with shifting the burden on a misdemeanor prosecution.

General Counsel Stamm understands Commissioner Yates’ concern but stated that the regulations were promulgated in 2014 to provide guidance and a framework for analysis for regulated parties; the regulations do not create an independent violation but rather set forth the Commission’s interpretation of the law. The burden is not shifted to the respondent in an enforcement action; the Commission bears the burden of proving the violation of law. If the Commission feels that the regulations require further discussion, at a future date, it could revisit the four sets of regulations that use the term “interested source”. The advisory opinion is relying on the regulations that were previously and lawfully adopted by the Commission and currently are in effect.

Commissioner Yates would appreciate a footnote that made it clear that the presumption in the regulations is not intended to create a presumption or shift the burden of proof in a criminal case. Commissioner Jacob asked why Commissioner Yates differentiates the criminal from the ethical with respect to the propriety of burden shifting. At that time, the regulations were fully vetted by the Commission, went through the SAPA process, comments were received, and staff worked with the Legislative Ethics Commission. After analyzing them thoroughly, the regulations were adopted. Commissioner Yates stated it is fair for regulatory bodies in enforcing the statute to consider whether or not a gift to a public official is from an “interested source” as a factor, but should also consider if the recipient was aware that the gift was from an interested source. Commissioner Yates and Jacob continued to raise concerns about shifting the burden to the respondent by creating a presumption of illegal activity that is not in the statute other than for lobbying entities.

General Counsel Stamm explained that if the Commission wants to reconsider the regulations it can, but the burden of proof is established in the Administrative Procedure Law and Penal Law with respect to what prosecutors must establish. If the Commission wants to add a footnote, it will not change the import of the opinion.

Commissioner Yates said that there are a lot of people with an interest in legislation and regulations who are not lobbyists, and the Commission should not criminalize the receipt of a gift based on a presumption just because the giver happens to have an interest in legislation or a regulatory matter.

Commissioner Yates stated that he will vote no on the Advisory Opinion unless the issue is resolved. Chair Rozen tabled the matter for further consideration.

IV. REGULATIONS

Proposed Amended Comprehensive Lobbying Regulations

Deputy General Counsel Martin Levine stated that, as discussed at the January meeting, the Commission has considered a year of experience with the lobbying regulations and has prepared proposed revisions that reflect concerns raised by the regulated community and also address technical cleanup and filing issues. There are some substantive policy changes that staff believes warrant public discussion and an administrative rulemaking. Deputy Director of Lobbying Guidance Carol Quinn explained that assuming the Commission decides to go forward with the rulemaking, staff anticipates that it would be effective January 1, 2021, which is the start of the next biennial period. The big changes are to Direct and Grassroots Lobbying, Social Media, and clarification to definitions of Designated Lobbyist, Contractual Client and Coalitions.

- Direct Lobbying – the proposed change clarifies that individual lobbyists must be listed on filings except when the organization uses its own social media platforms to directly lobby a Public Official. In that case, the activity is reportable, but no individual lobbyist would need to be listed on the filing.
- Lobby Days – The proposed change eliminates a special section on Lobby Days but keeps the main principles that apply. Lobby Day activities are incorporated into the principles of Direct Lobbying.

- If an employee or Designated Lobbyist or a Board Member speaks to Public Official at a Lobby Day, they are required to be listed as individual lobbyists, but their mere presence is not direct contact on Lobby Days.
 - Volunteers or mere members of an organization are not required to be listed as an individual lobbyist.
- Grassroots Lobbying – The proposed change clarifies that no individual lobbyist is required to be listed based on the Grassroots Lobbying only, except for the following:
 - A retained lobbyist that can be identified as speaking for the client;
 - In a social media context, if the person is specifically retained for their personal social media activities, they would have to be listed as an individual lobbyist.
- Social Media – The proposed change clarifies that lobbying conducted by an organization using its social media platform is reportable by the organization only. No individual lobbyists need to be listed.
- Personal Social Media – The proposed change clarifies that personal social media use by an individual is presumptively not reportable unless the person is retained specifically for their social media activities. If a person is retained to lobby using their social media platform, that person becomes a retained lobbyist who would list themselves as an individual lobbyist for the paying client.
- Designated Lobbyist – The proposed change clarifies that you can designate yourself to lobby on your own behalf and that board members of an organization who engage in lobbying are considered designated lobbyists.

Commissioner Yates stated that although the definition of “designated lobbyist” was changed, it does not address his concern, which was raised repeatedly over the last 10 months. The definition now says that a designated lobbyist is a person selected, appointed, named, or otherwise intending to lobby on behalf of themselves or the organization, and would include a board member, whether compensated or not. Commissioner Yates does not agree that an uncompensated board member of a not-for-profit that neither incurs nor expends any money but has direct contact with a legislator, even though they are not acting

in coordination with, or at the behest of, the organization that spent \$5000, is a lobbyist and needs to be listed on the registration.

General Counsel Stamm explained that the language is in the existing regulations and that Commissioner Yates is suggesting a change to the current position. The current rule is that an unpaid board member who engages in activity to influence elected officials on pending legislation needs to be listed on filings. The Commission weighed the burden on the individual who serves on a board, versus the disclosure about their meetings with state officials on pending decisions, including legislation. If the Commission wants to change its position, then staff can propose new language.

Commissioner Yates proposed amending the language to provide that in the case of an uncompensated board member who engages in lobbying activity, that person is a designated lobbyist if he/she is acting at the request or behest of or in coordination with the lobbying organization. General Counsel Stamm explained that this language is currently used in the definition of beneficial client, and staff added that language as part of the regulatory process in response to public comments pertaining to incidental beneficiaries, which originally could have included parties who had nothing to do with the lobbying effort, but stood to benefit from the change in the law. The same concern is not present to board members who lobby because they are intentionally engaging in the meetings with the state officials. That said, the Commission should certainly consider Commissioner Yates' concern as part of the rulemaking process. Staff believes the proposed language might create problems in policing filings because the Commission would have to know and/or prove that the lobbying board member had an agreement or communication with their organization.

Commissioner Fisher stated that it seems that this definition only affects board members of a lobbying organization, so he does not believe it is an undue burden and believes it is good governance for the board members to understand that there is a higher level of scrutiny on their interaction with legislators. Since money is being spent by their organization to influence legislators, all the board members who engage in lobbying

meetings with legislators and the details of their lobbying activities should be publicly reported.

Deputy Director Carol Quinn explained the following technical changes:

- Contractual Client – The proposed change clarifies that a Contractual Client is the entity that signs the lobbying agreement and often pays the lobbyist, but a Beneficial Client could also be the entity that pays the lobbyist.
- Coalitions – The proposed change clarifies that the definition includes entities that pool funds and resources and that a member of a Coalition includes anyone who provides funds or resources to the Coalition (including donating services and incurring expenses).

Proposed Amended Source of Funding Regulations

Deputy Director Quinn explained that the proposed changes would: (1) exclude from the Source of Funding disclosure any contributions that are specifically earmarked for activities outside of New York State and restricted from use in general funds; and (2) clarify that anonymous sources are not allowed.

Chair Rozen tabled the discussion for further consideration.

V. NEW AND OTHER BUSINESS

Chair Rozen read the following statement:

I, along with my fellow Commissioners, am frequently frustrated by the confidentiality restrictions in the Executive Law which prevent us from publicly disclosing more information about the work of the Commission. These restrictions limit the Commission's ability to correct uninformed and false statements, mistaken impressions, and baseless conjecture reported in the media about such work.

The Commission has repeatedly suggested amendments to the law to allow the Commission the flexibility to disclose more information and respond to questions regarding investigations, particularly when allegations are already in the public domain.

Instead of seeking new statutory language, I am forming a committee to revisit the Commission's interpretation of the existing provisions in the Executive Law and amend the Commission's regulations relating to Access to Publicly Available Records.

In addition, this Committee will undertake a review of the Commission's procedures that protect the confidentiality of its records and proceedings, including the recent recommendations of the Office of the Inspector General.

I will be contacting Commissioners over the next few days to serve on the Committee and hope to move forward with a proposed rulemaking in the next few months.

Commissioner Lavine stated he has some observations having served on the Commission for its entire existence.

Dressed up in the guise of confidentiality, a culture of secrecy permeates certain quarters of state government, perpetuated by a cult of secrecy. The culture of secrecy was not initiated by the current administration, nor is it unique to it.

Despite decades of reform to expose state government to what Brandeis called the disinfectant of sunlight, secrecy persists.

Confidentiality has its important place. But the propensity for unwarranted secrecy has persisted since long ago and we should be vigilant in resisting it.

Ironically, this commission has been both frustrated by the secrecy of other agencies and itself an enabler of gratuitous opacity.

The commission has experienced the disingenuous prosecutor who in private demands we stand down from investigation, but in public attacks the commission for being ineffective.

The commission has experienced the secrecy of the attorney grievance machinery. Even as a state enforcement agency, the commission cannot divulge if the commission has made a complaint against an attorney. If no action—or action short of a public sanction—is taken, only the most cryptic—and deliberately opaque—explanation is proffered. How can ethics enforcement be effectively coordinated if the commission must go to court under the Judiciary law to have information shared with it.

Most striking is the commission's experience with the Inspector General: imperious, operating in secret, akin to a latter-day Star Chamber.

When we turn to a detached view of the commission, we find the quintessential exemplar of the secrecy culture—propounding in court proceedings the proposition that secrecy is paramount and refusing to divulge its votes although the statute permits it to do so.

Secrecy has reached a new zenith of absurdity with the commission being told that information our staff has is off-limits to commissioners. I have asked if a request has been made for my FDS. That's secret. I have asked if the IG has asked for the FDS of any commissioner. That's secret.

To the extent our statute gives the commission latitude to reform itself, it should move vigorously to do so. I made this proposal at the last meeting and urge immediate action.

The statute itself should be closely scrutinized as well as the IG statute. So far, only palaver has emanated from the legislature. The temporary president of the Senate and the speaker have not even filled their vacancies.

The so-called investigation of the leak engendered more cynicism and further undermined the credibility of ethics guidance and enforcement.

I cannot fathom how the commission can credibly preach ethics and enforce ethics, without policing itself. As Commissioner Weissman says: "we're supposed to be an ethics commission."

Commissioner Lavine moved to adopt an interpretation of our statute that permits the commission: i) by majority vote; and ii) for good cause to divulge information to the public.

Chair Rozen opposed the motion, not because he agrees or disagrees with it substantively but at this juncture it is premature, and instead suggests that Commissioner Lavine's comments prior to the motion suggest a willingness and desire to serve on the committee that he is establishing. Commissioner Lavine stated he withdraws the motion but believes that a deadline should be established and that a preliminary report should be submitted by the committee for the next Commission meeting.

Commissioner Lavine moved that the interpretation of the Commission's records access policy be changed to preclude denial of any information to commissioners. Commissioner Weissman seconded the motion and stated that he believes under FOIL, the subject of a records request can ascertain information about the request and identity of the requestor. Commissioner Horwitz asked if the motion was about access to FDS reports. General Counsel Stamm explained that Commissioner Lavine had previously asked if his FDS had been requested and by who. Staff explained that JCOPE's policy, as well as that of its predecessor, is that the information is not disclosed to any filer if their FDS has been requested, or by whom. Commissioner Horwitz confirmed with General Counsel Stamm

that the policy protects the integrity of a whistleblower complaint or the confidentiality of an investigation by a law enforcement agency, to ensure that the target does not get tipped off to the investigation. Commissioner Horwitz said he would not vote for the motion for that reason.

Commissioner Lavine asked if this Commission has adopted the policy. General Counsel Stamm explained that it is not an explicit rule or regulation - the record access regulations set forth what information is disclosed, and that information about FDS requests is not included. Those regulations were adopted by the Commission through the SAPA process, but that policy can be changed. Commissioner Horwitz suggested that the issue be taken up by the committee the Chair is creating. Chair Rozen stated that he would like to know more about what other agencies do before he would vote in favor, so he believes the motion is premature.

Commissioner Lavine withdrew the motion but asked if he asked if the State Inspector General has requested any of the commissioner's FDS, will he get an answer. General Counsel Stamm explained that she would be more comfortable discussing the documents produced to the Inspector General's office in the Executive Session.

Commissioner Yates stated that he, along with Commissioners Jacob and Weissman, has repeatedly expressed concern about the absence of the appointments made by the Senate Democratic Leader, which hampers the work of the Commission; appointments are statutorily required to be made within 30 days of a vacancy. Vacancies left open are in effect a "no" vote on any attempt to investigate a matter. Those same members who do not fill their appointments criticize the Commission and are now pushing for amendments to restructure JCOPE.

Commissioner Jacob stated that the statute establishing this Commission provides for 14 members and the Commission is now operating with 12. The 12 members consist of six appointments made by the Governor. The legislative appointees are not complete because there are two vacancies, one created by Commissioner Dawn Smalls about a year ago, and

the other an Assembly appointment, which is rather recent. The statute creates a perfect balance, wherein the governor appoints a chair and balances that with eight legislative appointees. When the Commission is deadlocked on a 6-6 or a 7-6 vote, the statute's objective is frustrated. It takes eight Commissioners to pass anything, including appointing an Executive Director. The Commission gets criticized for not taking any action, yet the very same people criticizing the Commission do not make sure that the Commission is fully constituted with 14 members.

Legislative Recommendations

General Counsel Stamm explained that based on the timing left for meeting and the fact that a committee is being created, staff would be inclined to table the discussion for a future meeting.

Proposed Meeting Schedule

The proposed meeting schedule is included to be reviewed by Commissioners to see if they have any conflicts, and if so, to let staff know before the final schedule is included in next month's agenda.

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

§ 94(19)(B)

A motion was made by Commissioner Yates, seconded by Commissioner Horwitz, to enter Executive Session. The motion was approved by unanimous vote.

VII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

Commissioner Dering presided over this portion of the meeting. General Counsel Stamm stated that in Executive Session, the Commission discussed litigation and personnel matters, granted two applications for exemption from the post-employment restrictions pursuant to Public Officers Law § 73(8-b), approved one settlement agreement, commenced two Substantial Basis Investigations and authorized steps in several investigative matters, closed one matter and discussed several other investigative matters.

VIII. MOTION TO ADJOURN THE PUBLIC MEETING

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