

NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS

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Commission Meeting of November 17, 2020
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Appearances: Michael K. Rozen, Chair

Commissioners:

Robert Cohen
James E. Dering
Colleen C. DiPirro
William P. Fisher
Daniel J. Horwitz
Marvin E. Jacob
Gary J. Lavine
James W. McCarthy
David J. McNamara
George H. Weissman
James A. Yates

Staff:

Monica J. Stamm, General Counsel
Martin L. Levine, Deputy General Counsel
Walter J. McClure, Director of Communications and Public
Information Officer
Keith St. John, Deputy Counsel and Director of Ethics
Carol Quinn, Deputy Director of Lobbying
Stephen J. Boland, Director of Administration
Michael Sande, Deputy Director of Ethics
Megan Mutolo, Associate Counsel
Lori A. Donadio, Principal Investigative Analyst
Alexandrea Nuwer, Intern
Timothy Willox, Intern

IT Staff - Tanya Smith
OGS Media Services - Amaury Corniel

1 Walter McClure: Okay Mr. Chair, the audio is fixed,
2 you can restart.

3 Chair Rozen: Good morning. Welcome to the November
4 2020 meeting of the New York State Joint Commission on Public
5 Ethics. Thanks to everyone for joining us today. As we have
6 since the onset of the COVID pandemic, we will once again hold
7 this meeting using video conferencing technology. The public
8 session is accessible on JCOPE's website to watch via
9 livestream. As a reminder, it's important that only one person
10 speak at a time. In addition, I ask that when you do speak
11 you identify yourself, so that we have a clear record. We
12 will take votes by a modified roll call to ensure that everyone
13 is counted. Martin will call for votes in favor of a motion
14 and record everyone he can see on the screen or in-person.
15 Remaining Commissioners will be recorded by roll call. Please
16 remember to mute your phone when you're not planning to speak.
17 Thank you, let's move to item two on the agenda, approval of
18 the minutes from the October Public Session behind attachment
19 A. Any questions or comments? Hearing none.

20 Commissioner Weissman: Moved.

21 Chair Rozen: Thank you.

22 Commissioner Dering: Second, Dering.

23 Chair Rozen: Thank you. Martin.

1 Martin Levine: On the minutes, all in favor please
2 raise your hand. Okay, I see Dering, Fisher, Weissman,
3 Horwitz, McNamara, Yates, and Rozen.

4 Chair Rozen: Whoever is moving things around mute
5 yourself if you are not speaking please.

6 Martin Levine: Commissioner Cohen?

7 Commissioner Cohen: Yes.

8 Martin Levine: DiPirro?

9 Commissioner DiPirro: Yes.

10 Martin Levine: Jacob?

11 Commissioner Jacob: Yes.

12 Martin Levine: Lavine?

13 Commissioner Lavine: Yes.

14 Martin Levine: McCarthy?

15 Commissioner McCarthy: Yes.

16 Martin Levine: 12, motion passed.

17 Chair Rozen: Thank you. Item three, report from
18 staff.

19 Monica Stamm: Hi, we'll start, this is Monica Stamm,
20 we'll start with outreach updates. We plan to get out an ethics
21 reminder in the next few weeks on using knowledge and expertise
22 after leaving state employment, in consideration of the post-
23 employment restrictions. On December 10, we are holding an
24 ethics officer forum to discuss the Public Officers Law
25 implications for state agencies that have quote, unquote,

1 embedded contractors, who in some cases are located at the
2 state office performing the same work as state employees. And
3 again, that is going to be held on December 10 for ethics
4 officers, and we expect to get out our Fall/Winter newsletter
5 in December, hopefully before the next meeting of the
6 Commission. That's the outreach update. If there aren't any
7 questions, I will move onto our budget request. We received
8 the call letter from the Division of Budget on, about a few
9 weeks ago, seeking that all agencies reduce their requests by
10 5% percent from last year's appropriation. Our appropriation
11 for fiscal year 2021 was \$5.582 million. We submitted a request
12 for fiscal year 21-22 for \$5.302 million, reflecting that 5%
13 reduction. It is a reduction of \$279,100. We planned for this
14 and can absorb the loss for next year. If there aren't any
15 questions, I will move on. Just a brief update, as we have
16 discussed the Commission has a committee that has been
17 addressing questions related to confidentiality and records
18 access review. The Commission has, the committee reported to
19 the full Commission, and the Commission has directed staff to
20 move forward with the committee's proposal. Staff is preparing
21 the revised rulemaking for its records access regulations to
22 make more information available concerning financial disclosure
23 statements, including that extensions are pending and that
24 exemptions have been granted. Obviously not detailing anything
25 relating to the exemptions but just that there are redactions

1 or exemptions with the filing. Staff hopes to initiate the
2 rulemaking at the December meeting during public session. In
3 addition, staff is working to incorporate the committee's
4 proposals relating to its investigations into its internal
5 control procedures, and hopes to begin working those through
6 issues through, with the Commission in December during
7 Executive Session, with the intention that the Commission can
8 publicly announce legal and policy determinations after it's
9 made those determinations in executive session. The committee
10 will continue to meet to address ongoing questions.

11 Chair Rozen: Any comments, questions? Okay, item four
12 behind attachment B, Monica?

13 Monica Stamm: Yup, that will be Carol Quinn.

14 Chair Rozen: Okay.

15 Monica Stamm: Carol you're muted. Carol you're muted.

16 Carol Quinn: Okay, here we go, now you can hear me?

17 Walter McClure: Fine, yup.

18 Carol Quinn: Okay thanks. I'm Carol Quinn. So the
19 rulemakings you have before you are absolutely identical to the
20 revised rulemaking that you approved at the October meeting.
21 We're asking for an emergency adoption today on both of these
22 rulemakings for 938, source of funding, and 943, lobbying, in
23 order for them to be in place for the next biennial period

1 which begins, which is 2021-22 beginning this January. This is
2 just really to give proper notice to filers who will need to
3 start filing. The new rules will be in effect for January 1 and
4 cover lobbying activity in the 21-22 biennial period, so that
5 is applicable to the 21-22 registrations, the bimonthly reports
6 that are due March 15 and the client semi-annual reports that
7 are due July 15 of 2021. The public comment period on the
8 revised rulemaking will end on December 25, or really 26, so we
9 do expect to bring these rules back to you for formal permanent
10 adoption. Barring any substantial revisions, we're hoping that
11 that will be in early 2021, possibly at the January Commission
12 meeting. But today, we are seeking the emergency adoption of
13 the same rules that you put forward from the revised rulemaking
14 in order to have them in place and to give filers proper notice.

15 Chair Rozen: Any questions or comments? Okay, then I
16 need separate motions for each of these, so let's start with
17 the lobbying regs behind attachment B. Can I have a motion
18 please?

19 Commissioner Weissman: Moved.

20 Martin Levine: Commissioner Weissman.

21 Chair Rozen: Thank you.

22 Commissioner Dering: I will second.

23 Chair Rozen: Thank you. Martin?

1 Martin Levine: On the lobbying regs part 943, all in
2 favor please raise your hand. I see all in Albany, I see one,
3 two, three, four. Okay I see Dering, Fisher, Weissman, Horwitz,
4 McNamara, Yates, and Rozen, Cohen?

5 Commissioner Cohen: Yes.

6 Martin Levine: DiPirro?

7 Commissioner DiPirro: Yes.

8 Martin Levine: Jacob?

9 Commissioner Jacob: Yes.

10 Martin Levine: Lavine.

11 Commissioner Lavine: Yes.

12 Martin Levine: McCarthy?

13 Commissioner McCarthy: Yes.

14 Martin Levine: Twelve, motion carries.

15 Chair Rozen: Okay, and for the source of funding regs
16 behind attachment C, can I have a motion there please.

17 Commissioner Dering: I'll move it, Dering.

18 Commissioner Weissman: Weissman seconds.

19 Chair Rozen: Thank you, thank you, Martin.

20 Martin Levine: On part 938, all in favor please raise
21 your hands. One, two, three four. I see Dering, Fisher,
22 Weissman, Horwitz, McNamara, Yates, and Rozen, thank you,
23 Cohen?

24 Commissioner Cohen: Yes.

25 Martin Levine: DiPirro?

1 Commissioner DiPirro: Yes.

2 Martin Levine: Jacob?

3 Commissioner Jacob: Yes.

4 Martin Levine: Lavine?

5 Commissioner Lavine: Yes.

6 Martin Levine: McCarthy?

7 Commissioner McCarthy: Yes.

8 Martin Levine: Okay, that's twelve, motion carries.

9 Chair Rozen: Okay, thank you. Item five under new and
10 other business. Commissioner Yates, you had something you want
11 to raise?

12 Commissioner Yates: Sorry, I had you on mute. Thank
13 you. I have prepared a resolution, which was included in the
14 packet along with some explanatory materials. Just to keep it
15 short, in essence the following: The Executive Law allows us
16 to delegate certain matters to staff between meetings. The law
17 is very clear that we cannot delegate to staff matters which
18 require a vote of the Commission. Back in 2012, a resolution
19 was adopted, that was before I was a member, but I have no
20 complaint with that resolution. The resolution allowed staff
21 to render informal advice if an affected person called for
22 advice between meetings, and that's good. There is nothing in
23 the statute that explicitly describes or talks about informal
24 advice, but as a practical matter I think that's a good thing.
25 The law also, the law and our regulations, also provide for

1 formal advice. The difference between formal advice and
2 informal advice is consequential. If the Commission votes on
3 something and gives formal advice, then that is a bar to
4 subsequent disciplinary actions or even criminal
5 investigations, it's a complete cover. The law provides that
6 those formal opinions may be published, if they go to an
7 executive official, must be published if they are given under
8 the legislative law to a legislator or a candidate for the
9 legislature. The, unfortunately, oh, excuse me, just to
10 continue a second. There are certain actions that under the law
11 require Commission approval. One of those is permission to
12 engage in outside income, for a public officer to draw in
13 outside income or to engage in certain outside activities. So,
14 for example, if a person's going to earn, a public officer's
15 going to earn more than \$5000 of outside income, then they must
16 get approval, not only from their employer but also from the
17 Commission. That approval must come from the Commission, not
18 from a staff member. Now, the resolution that was adopted in
19 2012, it is a good resolution, it allows for informal opinions
20 by staff. It says nothing about issuing formal opinions and it
21 says nothing about giving the requisite approval for outside
22 income or outside activities. Those matters are still left to
23 the Commission. Unfortunately, over time, a practice has
24 evolved where from time to time, people looking to engage in
25 outside activity or to draw outside income, go ahead and ask

1 for an informal opinion from the staff. So, the question has
2 arisen whether or not those informal opinions, a) are binding
3 on the Commission as though they had been formal opinions and
4 b) whether or not they constitute the approval that is required
5 under the law to engage in that activity in the first place.
6 I think the law is pretty clear that since we can't delegate
7 those decisions to staff that an informal opinion cannot
8 constitute the approval by the Commission of outside activity,
9 and does not constitute a formal opinion, which would be
10 published, and which would be binding. However, I think there
11 is a misapprehension by certain covered individuals and when
12 they receive an informal opinion that somehow or other, they
13 have met the requirement of getting approval and that somehow
14 or other that's binding and cover or protection. So just to
15 clear up any ambiguity so that people really understand what
16 happens when they seek an informal opinion by staff, this
17 resolution wouldn't change the authority that have been
18 previously delegated, but it would be notice to the public that
19 yes, you can seek an informal opinion, as you did in the past,
20 but it is not going to be binding and it is not a formal
21 approval and it is not a formal advisory opinion. And, even
22 more so, tied into that is the fact that not on every occasion,
23 as the Commission itself or all the Commissioners, been advised
24 of the informal opinions that were given. So somehow or other,
25 at the very least, the Commissioners ought to know about the

1 informal opinions and the Commissioners should fulfill their
2 responsibly of either approving or disapproving outside income
3 or activities when it's required and also elect to either
4 publish or not publish, as the law provides, the formal advisory
5 opinion that's given, if it is given. So I have in the packet,
6 and you've seen and I am not going to restate it word for word,
7 basically that is that the old resolution and it says, the old
8 resolution's fine but if there is an informal advisory given,
9 then the person should be advised that it does not constitute
10 the formal approval that is required under the law and it
11 doesn't and it is not a formal opinion, which is binding on the
12 Commission. I make that as a motion. I don't know if anyone
13 wants to second it or not.

14 Chair Rozen: Before we get there, let's ask if there
15 is any comment from any of the other Commissioners.

16 Commissioner Lavine: Well, if I may Mr. Chairman, can
17 I ask a few questions of our staff?

18 Chair Rozen: Yup, go ahead.

19 Commissioner Lavine: I want to make sure I understand
20 what the current practice is per the 2012 resolution and if I
21 am parsing this in a way that is not accurate, please bring it
22 up right away. Number one, on outside activity requests that
23 is made by a constitutional officer, which is to say one of the
24 four statewide elected officers or an agency head of a

1 department, are those being granted without a vote of the
2 Commission?

3 Monica Stamm: That is correct. The practice of staff,
4 under the delegation as it has been interpreted by this
5 Commission since 2012, and the delegation is nearly identical
6 to the delegation in 2007, and that was the practice of the
7 Commission on Public Integrity, and it is my understanding that
8 this was also the practice under the State Ethics Commission,
9 for staff to handle outside activity requests as part of the
10 informal guidance that was delegated to staff, and no vote of
11 the Commission were required. That has been the practice for
12 my entire experience at JCOPE.

13 Commissioner Lavine: Let me now move to a request to
14 participate in some activity that results in income other than
15 state employment exceeding \$5000. Is the application for
16 income activity subsumed within the process to approve outside
17 activity, or is that a separate consideration and disposition?

18 Monica Stamm: Our interpretation, and our
19 predecessor's interpretation, was that approval of outside
20 activity was treated the same as all other informal guidance,
21 I am not sure if that's your question. And the regulations
22 treat, require Commission approval, the same language, for all
23 policy makers who engage in income over, outside activities
24 with income over \$5000, as well as some other things. So, the
25 outside activity regs require Commission approval for both

1 policy makers and, as you say, the constitutional Officer's and
2 the agency heads. It is in 932.5(a) and (b).

3 Commissioner Lavine: Yes, so my follow up question to
4 the General Counsel is, is it staff's position that approvals
5 for outside income activity can be disposed of informally by
6 staff the same way that a generic outside activity request can
7 be disposed of? In other words, the Commission is not involved.

8 Monica Stamm: Yes, it is staff's position, and it's
9 also been the position of all of the prior Commissioners and
10 prior staff of our agency and our predecessors. There has been
11 no distinction made between agency heads and constitutional
12 officers and other policy makers, and the language in the regs
13 doesn't really make the distinction between them. Both are
14 subject to Commission approval. The only distinction is that
15 you need also the approval of your appointing authority. And
16 so, for the case of the constitutional officers and the agency
17 heads, since they are the heads, the Commission is the only
18 entity that approves those activities, but this remains within
19 the discretion of the Commission. The Commission can change the
20 delegation, but it has always been the interpretation of the
21 delegation to include that authority as part of the delegation
22 of informal guidance to staff.

23 Chair Rozen: Am I right that we voted on this last
24 time, in the last hearing, correct?

25 Monica Stamm: Yes (inaudible).

1 Commissioner Yates: I respectfully disagree.

2 Chair Rozen: Can I finish?

3 Commissioner Yates: Yes.

4 Chair Rozen: Thank you. Did we or did we not vote,
5 Monica, last meeting, on changing the delegation authority and
6 did we not, fail to pass that motion to change, last time, yes
7 or no?

8 Monica Stamm: Yes, there was a motion about the
9 delegation at the last meeting and it did not carry.

10 Commissioner Yates: May I be heard on that?

11 Chair Rozen: Yeah, please.

12 Commissioner Lavine: Well, if I may Mr. Chairman.

13 Commissioner Yates: I would like to be heard on
14 that, Gary.

15 Chair Rozen: One at a time, one at a time, Gary, I
16 may have cut you off so if I did, I apologize. Why don't you
17 finish, and Commissioner Yates will go after that?

18 Commissioner Lavine: I certainly want to hear what
19 everyone has to say but I just want to understand what the
20 current practice is to set the basis for the ensuing discussion.
21 I'll redirect to our general counsel. Is it the current
22 practice, I gather it is the current practice that informal
23 opinions are issued by the staff without a deliberation and
24 approval of the Commission, and in some instances, the
25 Commission, the Commissioners may not even be notified that the

1 opinion has been rendered, is that the case? Although you keep
2 a log of them, do I understand all that correctly?

3 Monica Stamm: Yes, right. The practice has been that
4 we handle informals, there is a log available, if Commissioners
5 have asked questions, they have had access to the log. We
6 currently give you the log for the officials that you have
7 asked to see the log for, and these have been handled by staff.
8 However, as you know, certain high-profile matters have been
9 brought to the Commission's attention when staff is considering
10 them, but the staff has had the authority, and that is how it
11 has been interpreted to resolve those and provide the guidance.
12 That's been the practice, again, here for my entire time here
13 since 2012, and it is my understanding that the Commission on
14 Public Integrity and the State Ethics Commission handled it the
15 same way.

16 Commissioner Lavine: Now, with respect to so-called
17 formal written opinions, is it staff's position those in the
18 current practice protocol must be deliberated upon by the
19 Commission and approved by a vote of the Commission?

20 Monica Stamm: By vote of, I didn't hear what you
21 said, by vote of eight, that has been this Commission's
22 practice. The Commission and our predecessors have always
23 reserved the power to do advisory opinions. It's only delegated
24 to staff informal guidance. Formal advisories would require a

1 vote and are put and posted on the Commission's website in a
2 redacted form.

3 Commissioner Lavine: Now, with respect to the
4 categories that you have enumerated of informal action by the
5 staff or stated another way, action by the staff without
6 deliberation and approval by the Commission, would the outside
7 activities subsumed within that would be requests to earn
8 income above \$5000 and also informal opinions? Have I
9 summarized this correctly?

10 Monica Stamm: Yes, I think so. I am just not sure if
11 all informal, staff have provided guidance, what we call
12 informal guidance which includes approval of outside activities
13 as well as honoraria in some cases, travel, and other guidance
14 under our regulations. Staff has done that without consulting
15 the Commission, in most instances, and as I mentioned we do
16 bring certain high-profile matters to the Commission's
17 attention routinely.

18 Commissioner Lavine: Now, I want to draw attention
19 to a phrase, without consultation with the Commission.
20 Nonetheless though, has there been on occasion consultation
21 with respect to the rendering informal action or action by the
22 staff with individual Commissioners?

23 Monica Stamm: We have brought them to the attention
24 of the entire Commission, with the exception of one matter in
25 which I was not involved. Based on the delegation of authority,

1 the Chair was involved and I was not involved. But other than
2 that, we bring the matters to the attention of the full
3 Commission, like I mentioned, with respect to certain high-
4 profile matters.

5 Commissioner Lavine: Right, but for example with
6 regards to requests from policymakers, whether it is the
7 constitutional officer, an agency head, or some other
8 designated policy makers, the staff would render an action
9 without full Commission consultation or formal approval. But
10 my question is has there been occasion within the last 36 months
11 in which staff has taken an action with a consultation with one
12 or more Commissioners individually?

13 Monica Stamm: I am not sure I understand your
14 question. With the exception of the one matter with which you
15 are familiar, that I was not involved in, the chair was, we
16 don't normally consult with Commissioners with respect to our
17 routine guidance that we provide. When we brought it to the
18 attention of the Commissioners, we've had discussions with many
19 Commissioners, including you, about those issues. We've gotten
20 emails from Commissioners about those issues that we've brought
21 to the full Commission's attention. But that has been dependent
22 on which Commissioners sort of bring it up with us. But we
23 notify the full Commission when we have those. Otherwise, the
24 Commission tends not to be involved with the informal guidance
25 that we provide on a regular basis.

1 Commissioner Lavine: Well, before we get to the
2 motion in chief, on this fellow traveling matter, Mr. Chairman,
3 if I may express myself I, of all people, who have availed
4 myself to great edifying effect with informal discussion with
5 our staff, they are always professional, and always acute. I'm
6 actually a strong advocate of Commissioners having informal
7 consultation with the staff on any matter. And with respect to
8 the Chair I believe it is desirable, and actually necessary,
9 that there be a consultation with you on all sensitive matters.
10 There is no question about your integrity, and I said it behind
11 your back, which is the sincerest form of compliment.
12 Nonetheless though, I want to say on this particular subset of
13 the discussion, Mr. Chairman, if a policymaker asks for an
14 opinion, assuming that the judge's motion doesn't prevail, and
15 we continue with this approach from the staff in taking action
16 without the Commission, if there is a consultation on one of
17 these actions by staff with an individual Commissioner, that
18 the full Commission be notified. Thank you for letting me take
19 a few moments.

20 Chair Rozen: Yeah, no problem and Commissioner Yates,
21 we will come to you in one second. But let me just respond to
22 that. First of all, Gary, thank you, as always for the
23 compliment. I am happy to accept it, not behind my back, but
24 directly, face-to-face, and I appreciate that. Secondly to the
25 extent that, and I want to be clear about my own personal view

1 here. To the extent that the Commission wants to revisit the
2 delegation of authority that has been in place for many years,
3 whether in a limited fashion or in a more broad-brush fashion,
4 I'm perfectly willing to engage in those discussions. I think
5 we should do it in executive session and when and if we come
6 to a conclusion, we can determine whether it is appropriate to
7 bring it to public attention. Nevertheless, we have in front
8 of us something put forward by Commissioner Yates, and I am not
9 attempting to put words in your mouth here, Commissioner, I
10 believe, my view is that we have already voted on this, and we
11 have failed to pass it but please do give me your
12 interpretation.

13 Commissioner Yates: Yeah thank you, I would like to
14 address that. First of all, the matter was raised without any
15 analysis, background, or information last time it was raised,
16 and it was a different motion. It was a motion by Commissioner
17 Lavine that was limited only to outside activity requests by
18 the four statewide elected officials and agency heads. It
19 didn't address the broader matter that this, that my motion
20 addresses, which is the delegation of authority generally and
21 notice to the public what's delegated and what's not delegated.
22 So, they're different motions, that is number one. Number two,
23 I included in the packet and gave everybody at least a week's
24 notice of all of the background information that wasn't
25 available last time. Number three, the maker of the motion

1 last time at first, it wasn't even a motion. The person who
2 raised it was Gary Lavine, Commissioner Lavine and he himself
3 when it was clear that we didn't have all the information we
4 needed withdrew, and asked for, his motion was for more
5 information and for discussion at the next meeting, this
6 meeting. However, notwithstanding that, a member or two of the
7 Commission went ahead, knowing and even announcing that they
8 were against the idea of amending the regulation or dealing
9 with Commissioner Lavine's motion, which was confined to the
10 four, to the elected statewide officials, went ahead and made
11 the same motion. And if you look at the minutes which we just
12 approved, the motion that was made by Commissioner Fisher and
13 seconded by Commissioner Horwitz, both of whom were clear that
14 they intended to make a motion and then vote against it, went
15 ahead and said that if the motion was to require that outside
16 activity requests from the four statewide elected officials and
17 agency heads be brought to the Commission for a vote. That is
18 not the same as my motion. So, and the vote by the way, was six
19 to six, and I think we all know that six to six vote is not
20 dispositive or binding or precedential in any way. So, my motion
21 is different, it's broader, with the background information we
22 didn't have last time which Commissioner Lavine sought but was
23 unable to obtain during that meeting and it was a different
24 motion and the vote was six to six, so it is not binding. And
25 then finally, I really sincerely hope that nobody would suggest

1 that merely because we had an uninformed and incomplete
2 discussion last time, and then a motion made by people who did
3 not want done in the resolution that failed six to six, that
4 somehow or other that binds us in perpetuity from ever looking
5 at whether or not people was apprehending the current authority
6 that exists under the existing 2012 regulations. And lastly,
7 the thing that I've got that I must point out is Monica, excuse
8 me, our counsel, has on several occasions today said that this
9 was always the interpretation. I'm sorry but I've only been on
10 the Commission since, for three or four years, not ever since
11 2012 but I never, ever remember there ever being a discussion
12 where the Commissioners approved this, either implicitly or
13 explicitly. It may be that it was always staff's interpretation
14 that they had more authority then they really do have, but it
15 was never the Commission's discussed and approved decision that
16 staff had more authority than I believe they're entitled to.

17 Chair Rozen: Thank you. So let me say a couple of
18 things and then I'll open it up to everybody else here. I
19 received your request to put this on the public agenda and
20 agreed to do so, which is why we're here talking about it, so
21 any suggestion that I, or anybody else, is attempting to stifle
22 your motion is absurd, on its face.

23 Commissioner Yates: Ok, good.

24 Chair Rozen: A. B, I do not, so when you move this,
25 I am telling you now that I will vote against it, not because

1 I am not willing to entertain a Commission discussion of, and
2 if it carries by the necessary number of votes, a revision of
3 the delegation of authority that has been in place for many
4 years, But because I do not accept on its face, your assertions
5 of what the law says and doesn't say. Not because I don't
6 think that your voice is to be respected. To the contrary,
7 Commissioner Yates, I have the upmost regard for you and your
8 views on what the law, especially in this area, says and doesn't
9 say. Having said that, we know full well that since most of
10 us here are lawyers that what law actually says is in the eye
11 of the finder of fact, and you are, I believe, in your
12 resolution, quite adamant about stating what you believe the
13 law to state, which I don't agree with you on. I don't think
14 the law says what you say it says, and I respect your
15 interpretation of it, but that is all that it is. Because you
16 speak about it forcefully doesn't make it more valid then if
17 you spoke about it less forcefully or frankly, whether anybody
18 else spoke about their own interpretations of the law whether
19 consistent with or corollary to or against your own
20 interpretation thereof. So, I do not, because I do not accept
21 your interpretation of the law, and because I don't think that
22 what you have proposed is in the functioning Commission's best
23 interest, I will vote against it once its moved, which I expect
24 that it will be, but I want to reiterate that I am not opposed
25 to taking up a discussion in executive session with the

1 Commission on whether we should, and if so, to what extent,
2 alter the delegation of authority. Anybody else want to be
3 heard on this?

4 Commissioner Yates: I do want, just as a point of
5 order, I guess. I was not leveling any criticism of you. I
6 think you do a terrific job as Chair and I thank you for putting
7 this on the public session agenda as I asked. What I was
8 responding to, forcefully, if that is the word you want to use,
9 was the assertion that somehow or other last month's vote
10 precluded consideration of this motion. Thank you.

11 Chair Rozen: Okay. Commissioner, it is hard for me
12 to see, I see some hands, but I really would hope you can help
13 me as to who is, I see Commissioner McNamara directly in front
14 of me, Commissioner Horwitz, Commissioner Fisher also had hands
15 up. Is there anybody else that I do not see that wants to be
16 heard? Alright, so Commissioner McNamara go ahead, you can go
17 first.

18 Commissioner McNamara: Okay, thank you, Chair. So,
19 I don't desire to revisit the delegation as I understand its
20 limits. I am just more interested in knowing whether staff is
21 observing its limits. So as I understand it, we receive a
22 request for approval of outside activities, and then the staff,
23 pursuant to the delegation, responds to that request for
24 approval of outside activities, and within the limits of the
25 delegation, a response to that request for approval has to come

1 in the form of informal guidance. And it has to come in the
2 form of informal guidance based upon prior precedent. They
3 can't create the guidance from whole cloth. There has to be
4 some guidance to support it. And my question is really one of
5 process. So when the staff responds to the request for approval
6 in the form of informal guidance, does the response indicate
7 that it is informal guidance? Does it indicate that it is being
8 issued pursuant to the delegation of authority to issue
9 informal guidance, and is there any disclaimer about the extent
10 of the effect of that informal guidance with respect to approval
11 of outside activities?

12 Monica Stamm: So, Commissioner, I will try and
13 answer your questions. Staff fully understands the limits of
14 the delegation and, with respect to informal guidance, it's
15 very careful to make sure that if it is giving guidance, that
16 is relying on precedent, and brings to the attention of the
17 Commission any matters that are unprecedented. As I mentioned
18 at the last Commission meeting, over the course of the history
19 of this agency and its predecessors, many of these questions
20 have been addressed and we have created a model by which, an
21 analytical model, by which to answer the question. So, staff
22 follows that, we have an ethics division with attorneys in that
23 division and they handle these requests daily. And we have the
24 attorney of the day program in which they do so. And they have
25 discussions and review these, review our guidance, they look

1 at our advisory opinions, and they give guidance based on what
2 our precedent says. We don't make a distinction in how we handle
3 outside activity requests from other forms of guidance. In our
4 practice, we treat them all the same. We are looking for whether
5 or not there is prior precedent on point and applying that
6 precedent to the request. The guidance that we give does have
7 some disclaimers, as we have discussed with the Commission over
8 the years, we now make it very clear that when it is an informal
9 opinion, it is said that this is staff's opinion. There are
10 limitations that are made clear that we are relying on the
11 representations that are made by the individual requesting the
12 guidance and if it turns out that those representations are not
13 accurate, then the guidance cannot be used as some kind of a
14 defense if we were to pursue some kind of an enforcement action.
15 So, there are some limitations and there are some language in
16 there. If the Commission would like to take a look at some of
17 those letters and wants to work with staff on revising some of
18 that language, that would be helpful, and we would open to
19 that. The language in the letters has evolved. As I have said,
20 we recently made changes at the Commission's request to make
21 it very clear that it is staff that is issuing the guidance and
22 that it is limited to the individual that is making the request,
23 because the informal guidance is not public and is not posted
24 on the website. So, a lot of that is in there, but again we are
25 open to submitting some of these letters, some of the more

1 recent letters to the Commission for review and you could help
2 us, you know, edit and revise the standard language however you
3 see fit. It does not reference the delegation. That has not
4 been part of the practice of this Commission. If that is
5 something the Commission wants us to include, we are happy to
6 include that. And again, any other edits or revisions the
7 Commission wants.

8 Commissioner McNamara: Thank you, Monica. I would
9 just suggest to the Commission that staff develop a template
10 for rendering informal guidance that includes specific
11 reference to the fact that it's guidance that's being issued
12 pursuant to the delegation, reference the limits of the effect
13 of that guidance, and that to me should resolve the issue.
14 It's really a matter of what the legal effect of the informal
15 guidance is.

16 Chair Rozen: Thank you, Commissioner. Commissioner
17 Fisher.

18 Commissioner Fisher: So, what I wanted to say at
19 this point in the discussion is that I agree with Commissioner
20 Yates that his motion is different than my motion from the last
21 meeting. I think mine was very specific to an action that
22 Commissioner Lavine recommended, which would apply the changes
23 that we would make only to outside activity approval requests
24 made by the four statewide elected officials and department
25 heads. So that is more narrow and different than what

1 Commissioner Yates has put forward and that we have had a chance
2 to review in advance of this meeting. So that is all I want to
3 say at this point but I would like the opportunity, if and when
4 Commissioner Yates's motion is seconded, to have a period of
5 debate, and at that point I would like to state my views on
6 whether to adopt this resolution or not.

7 Chair Rozen: Okay, thank you. Commissioner Horwitz.

8 Commissioner Horwitz: Thanks, Mr. Chairman. My
9 apologies to everybody. My audio and video isn't great today,
10 so if there's feedback or a problem, please tell me. So, after
11 we achieved the, I appreciate the thoughtfulness and care in
12 which you have taken this issue up, which is not, certainly is
13 in keeping with the way you approach all these issues. But, as
14 the Chair said, you know, the lawyers, many of us are lawyers,
15 and we do look at the law and often we agree and often we have,
16 somethings we have a different view of what the law requires
17 and in this case I happen to agree with the Chair. So, I think
18 that there are two things, or three things, that I think are
19 important, especially because we are having this discussion and
20 appropriately so, in the public session. The first is one, I
21 think, for the broader public to understand, that in the thirty
22 years that the Commission, and its predecessors have been
23 following the practice that we are discussing today, which is,
24 and we touched on this in our meeting last month, you know, to
25 dispense informal advice to, you know, anybody who holds a

1 public office in the state to call us and seek informal advice.
2 Yet it appears, you know, often, I think our staff gets calls
3 about questions about what happens when people are preparing
4 to leave the government and what the rules are. So I think one
5 of the things that is very important here is, and I think
6 Commissioner Yates you touched on it, is that to the extent
7 that the staff is speaking and dispensing advice about the
8 Public Officers Law and our ethics laws, that advice is not a
9 cover, and has never been a cover, to our Commission and any
10 other predecessor agency's ability to enforce violations of the
11 law. And what I mean by that is, and we have and I don't
12 remember whether or not you were a member of the Commission,
13 but in my time on the Commission I can think of at least two
14 instances where the Commission ended up bringing enforcement
15 actions because the state employee or the state public official
16 either didn't fully disclose information to the staff when they
17 sought advice, or they twisted it and tried to use and twist
18 the advice, the proper advice that was given, as a defense to
19 a violation of the Public Officers Law, and the Commission,
20 rightfully, did not stand for that and we ended up successfully
21 prosecuting enforcement claims against those public Officers
22 for the informal advice that's been given. And fortunately, it
23 doesn't happen very often, unfortunately, frankly, it shouldn't
24 happen at all, but it does happen. But I think the message I
25 think is we need to think about the way that the Commission's

1 predecessor agencies have approached the issue of informal
2 advice doesn't mean that we are somehow, we are left without
3 the ability to prosecute violations of the Public Officers Law,
4 so that is the first point I wanted to make. The second point
5 I want to make is really just more informational because I
6 think as you have said, Commissioner Yates, we did have a
7 somewhat attenuated discussion about this, there was a colloquy
8 with the staff. Some of the Commissioners were asking
9 questions, staff I think you know did their best to answer, as
10 they always do, and I think that everybody has had a chance to
11 reflect, but I think that you know there are you know some
12 additional considerations that we touched on that bear comment,
13 you know, today. One is what I have already said, which is that
14 you know the Commission's and its predecessor agencies have
15 been following this practice of staff giving informal advice
16 dating back to 1989. That is number one. Number two, you know
17 there are tremendous number of people who rely on that advice.
18 And, if to the extent that Commissioners, like Commissioner
19 McNamara, you know, believes that you know we should see the
20 criteria, the formal criteria to follow, giving the advice out,
21 and whatever the caveats are provided, I don't think, I think
22 that that is a good suggestion, but I do think that the staff,
23 you know, follows a protocol, and I think they follow that
24 protocol listening to the advice that is being sought is, what
25 the advice is, what is the question. They give thought to what

1 that answer should be based on the Commission's precedent on
2 the law, and I think that we've heard there is a process for
3 documenting what the questions are and how they are responded
4 to, as I think a number of people alluded to today, at least
5 in some instances, particularly in the higher profile ones,
6 that many Commissioners, you know, are aware of those requests
7 and have, as Commissioner Lavine said, you know, a healthy
8 discussion with the staff about what's been going on. So, there
9 is no, if you would, hiding the ball, in that respect. And
10 then, I think the last point that I want to make is, and forgive
11 me, this may be a little bit in the weeds, but to the extent,
12 you know, Commissioner Yates has raised a question about the
13 legal authority for the staff to dispense informal advice,
14 because of, you know an interpretation, this, again I believe
15 he has in good faith of our laws, particularly 94(16), you
16 know, there are a number of instances where to follow
17 Commissioner Yates's object to and conclusions, if the statute
18 is (inaudible) as Commissioner Yates want to read it, then
19 we the Commissioners would have to do the following things. We
20 would have to provide ethics training programs. We would have
21 to provide notices of fail to file the financial disclosure
22 forms and notices of delinquencies. These are the other things
23 that we have delegated to the staff where Commissioner, to read
24 your interpretation of the law, because there isn't an explicit
25 delegation provision, the staff wouldn't be able to engage in

1 that. So, and I don't mean to make light, you know, of the
2 nature of your proposal or even your interpretation, but I do
3 want to point out that there is basis in the law for our
4 delegation to the staff of dispensing informal advice. So again
5 thank you for indulging for a few minutes, I welcome the
6 discussion and unfortunately, Commissioner Yates, I am not
7 going to support this motion if you get a second because in all
8 candor, I think our staff and the staff that we've had before
9 does a terrific job of handling requests for outside advice
10 from any member of the public employ. Thank you, Mr. Chairman.

11 Chair Rozen: Commissioner Dering.

12 Commissioner Dering: I want to add just some
13 comments that I had made the last time too. I think one thing
14 that is important with regard to the requests is the speed with
15 which the staff responds to them. So, I think a couple things.
16 The track record of the staff in terms of addressing these
17 issues has been outstanding and very remarkable. I think that,
18 from what I've seen over time, as a member of the Commission
19 and then previously as the general counsel of a state agency,
20 the JCOPE staff is incredibly thorough with regard to their
21 analyses, and what I have seen also is they take very seriously,
22 looking back on past precedent, and I think their analysis
23 really is outstanding. And I think that from the standpoint
24 of public officers, whether it is a statewide elected official
25 or whether it's an individual who has been designated a

1 policymaker, one thing that is key is that not only do they
2 get, you know, thoughtful, you know, thorough advice but also
3 that they get it on a timely basis. And I think that if we were
4 to change the process whereby the Commission, in essence, took
5 over the work that is currently being performed by staff, I
6 think a few things would happen. Number one, we just don't
7 have the expertise that the staff do. We would be relying upon
8 their expertise. You know, we would be taking on a full-time
9 job, I'd say, and I just don't see a reason to change what's
10 been working very well.

11 Commissioner Cohen: Mike, this is Rob Cohen. Can I
12 just chime in and I just want to add on to what Jim said.

13 Chair Rozen: Please, go ahead.

14 Commissioner Cohen: As a former staff member, as a
15 former staff member, I just want to say that if we had to, if
16 staff had to rely, or if the Commission had to approve every
17 single piece of written guidance that comes out of the
18 Commission, that the staff would normally send out, it would,
19 things would come to a halt. And quite frankly, I can assure
20 you that people would simply, that there would be no reason to
21 seek advice from the Commission because, as Commissioner Dering
22 so rightly pointed out, it would just take too long. And so I
23 think the law here, notwithstanding Commissioner Yates's own
24 view of it, the law here is, and the, what I believe the
25 interpretation of the law is, is one that actually works in

1 reality, and one that acknowledges the reality of the
2 Commission's role, and the staff's role, and the public's need
3 to get timely responses. And I don't want to put staff on the
4 spot here, but I just wondering if anyone on staff has some
5 general sense of how many written pieces of what we're calling
6 informal guidance are put out each year. Whether it's outside
7 activity requests, informal opinions, travel, honoraria. Does
8 the staff have, and I apologize for not asking staff to maybe
9 get those numbers before this meeting but if you just have
10 general sense of how many pieces of written guidance are put
11 out each year, I think it might be helpful for, so some
12 Commissioners get a sense of the workload that we're talking
13 about.

14 Monica Stamm: Sure, I mean, Keith or Michael, you
15 should jump in if you have them. My understanding is that staff,
16 you know, handles roughly you know, 40 plus informals per month
17 in a typical month. We report on this in the annual report and
18 break it down by how many outside activities and how many other
19 types of guidance that staff has issued, but does that sound
20 about right, Keith, Michael, it's about 40 or so a month?

21 Keith St. John: 40 or 50. I mean I'd say, give or
22 take a few, but around 50 a month easily.

23 Commissioner Yates: If I may, Mr. Chair.

24 Commissioner Cohen: Thank you, so you're talking
25 about 500 written pieces of, 500 written pieces of guidance

1 that right now do not require a formal action by the Commission
2 that, under a different interpretation, might require that and
3 I just think that's a formula, that, that's just a different
4 way, that is just a way to hamstring the Commission, and it
5 would nullify, I think, a lot of the good the Commission does
6 in providing advice and guidance to people who want to do the
7 right thing, and they come to us, wanting to do the right thing,
8 and seeking guidance to do the right thing, and most people
9 want that guidance in a timely and efficient way, because they
10 need to move on with their lives and live their lives and do
11 what they need to do for themselves and still abide by the
12 Public Officers Law. And with that I will go back on mute.

13 Keith St. John: I might add, this is Keith St. John,
14 with respect to the fifty or so a month requests for guidance,
15 again, that's really limited to just the state officers, the
16 four elected, statewide electeds and agency heads. When we
17 factor in the rest of our population the policy makers then we
18 are well in excess of probably a hundred a month, in total
19 requests for guidance.

20 Commissioner Cohen: Thank you, thank you very much.

21 Chair Rozen: Commissioner Yates?

22 Commissioner Yates: Yes, I, unfortunately, I think
23 the last three speakers, or Commissioners who spoke, address
24 an issue which is not addressed by my motion. I said at the
25 beginning, and I will repeat it again, that we have previously

1 delegated the authority to make informal advisory opinions, and
2 it is a good thing, and I want to keep it. And even though the
3 statute is not explicit about language about that, and
4 Commissioner Horwitz somehow or another has turned that into
5 an argument that I am against informal advice, I'm not. The old
6 delegation allowed informal advice. As Commissioner Rozen
7 pointed out, informal advice is a good thing. What my motion,
8 if you read it carefully, does, it does not take away the
9 ability to give informal advice. What it does is very similar
10 to what Commissioner McNamara and Commissioner Horwitz earlier
11 said they would like to do. And that's why I am not sure they,
12 if they oppose the motion, why they would. All my motion is
13 this and it says keep the practice that you have, but when you
14 give advice advise people, tell them, that its informal advice,
15 it doesn't constitute the formal advice that would be written
16 and voted upon by the Commission, and that it is informal
17 advice, so that, caveat emptor, so the person who gets that
18 advice knows that they're receiving informal advice, but not a
19 Commission's formal opinion. And in that regard, I would like
20 to ask staff a question, and that is, since for me the
21 distinction, and I think the law is clear that there is a
22 difference between informal advice and formal advice, is it
23 staff's position a) that if informal advice is given, that
24 that's binding upon the Commission later on even if a majority
25 of the Commissioners disagree, and b) the statute's very clear

1 that we can publish advisory opinions, is it the position that
2 if they give approval that the Commission is powerless to
3 publicize or even know about the opinions?

4 Monica Stamm: So, Commissioner Yates, I actually
5 think your first question is a really good one. We talked about
6 it briefly at the last Commission meeting and I think that this
7 is a source of a lot of confusion. So but can I just ask one
8 question, because the draft delegation that you provided seems
9 to take away the delegation for staff to give guidance on
10 outside activity and outside activity approval. Is that what
11 you intent in your delegation because that's how it looks to
12 me so, I just, if we could clarify that?

13 Commissioner Yates: My, and once again, and I can't
14 say this, I can't repeat it enough, in my mind there is a
15 difference between informal advice and approval and formal
16 advice and approval. The formal advice or approval is required,
17 it can't be delegated away by the Commission, because it
18 requires a vote of the Commission, and going back to
19 Commissioner Lavine's earlier point, I think what aggravates
20 the situation is that the Commission's not only not taking a
21 vote on the informal advice but is not even aware of most
22 instances. So, I think that that means that at the end of the
23 day, that the distinction between formal and informal advice
24 needs to be clear and that someone who receives the advice
25 should know that they're receiving informal advice.

1 Monica Stamm: Okay, so, if I understand, it sounds
2 like you're, on the bottom of the first page of your delegation,
3 you are just trying to distinguish between formal and informal
4 and not trying to say that informal, that staff can't give
5 informal guidance on outside activities.

6 Commissioner Yates: I think staff should give
7 informal advice. I think the staff should give informal advice
8 and they should let the consumer know that it is informal staff
9 advice.

10 Monica Stamm: So then one of your questions was
11 about whether or not staff's informal guidance is binding on
12 the Commission, and as we've discussed at the last meeting, I
13 think that the Commission could reverse staff if it chose to
14 do so. I think what the Commission needs to discuss is what
15 that actually practically would mean, because when staff gives
16 informal guidance, people rely on it and take steps and
17 measures, and so the Commission could conclude that staff
18 reached the wrong conclusion and that something for example
19 would be a conflict. Or that a gift would be a violation of
20 the law, but the gift is probably already been accepted, the
21 trip has probably already been taken, the employee may have
22 already left state service or accepted a job in state service
23 in reliance on staff's guidance. So when we talk about that the
24 Commission isn't bound, I think it would be helpful if you
25 could talk about what that means to you in terms of, what, if

1 the Commission could reverse after staff provides a decision,
2 what is the import, what is the impact on the individual who
3 has requested the guidance? Are you saying that they can't then
4 have a defense? I think that would be helpful to talk through.

5 Commissioner Yates: Okay, I am very glad to answer
6 staff's questions, and I will and then I will go back and once
7 again, ask staff to answer my question. So first, I will answer
8 your question and that is, enough of us are attorneys here that
9 know that if, that anyone that relied upon that advice,
10 especially if it's based on precedent, would have a very, very,
11 very good defense, if anyone were to raise it here in the
12 Commission or in any other setting. We all know that good faith
13 reliance upon advice by one of the staff members here, would
14 be almost tantamount to a defense, absent out other factors,
15 such as the staff being really wrong or having been misadvised.
16 I go back to the question I asked you. Unfortunately, I either
17 didn't hear the answer or you didn't answer, and that is, take
18 for instance if there were a distinct, an informal bit of
19 advice, that had been given in the last year. If the Commission
20 looked at it and thought that that was wrong or even if the
21 Commission thought that is was right, and wanted to publish it,
22 is the Commission divested of its authority to either correct
23 an opinion that's wrong, or divested of the option it has under
24 the law of publishing an opinion?

1 Monica Stamm: No, I don't think that the Commission
2 is divested of that ability, but it has to be done in a way
3 that protects the confidentiality, so the practice under 94(16)
4 has always been that when the Commission gives guidance, even
5 when it is formal, it redacts the names of the requestor and
6 any identifying information and so it's presented as a generic
7 advisory opinion. And that is the way that the Commission has
8 done that. So, I think that the Commission can always, you
9 know, clarify a legal issue, issue an advisory opinion that
10 takes a position on a legal issue. That is what the Commission
11 has done for years.

12 Commissioner Yates: So then that goes back to
13 Commissioner Lavine's earlier point and that is ,if there are
14 some opinions that have been given, in the last I think he said
15 thirty six months, I don't know whatever time period was
16 important to the other Commissioners, then there is no problem
17 with us taking a vote to publish them, subject to redaction,
18 because that's an option that we have under the law.

19 Monica Stamm: Well, I think if the Commission was
20 going to issue a new advisory opinion, that's how it would do
21 it, so it wouldn't take the staff's decision and make it public.
22 It would write the new advisory opinion and stating the position
23 the Commission wants to take and make that public. That, you
24 know the Commission has to vote on the opinion and issue it,
25 and so that's how that would be. What's been in practice is,

1 for example, we recently had this, you know where the, where
2 staff gave advice, and this is something that they're advised
3 of in the informal guidance, if, if they don't agree with
4 staff's interpretation, then they can seek an advisory opinion.
5 So, the Commission has tended to, you know, has tended to rely
6 on the individual to seek an advisory opinion rather than to
7 take an opinion that comes in and make it a formal advisory
8 opinion. It's usually at the request of the individual, do we
9 want the Commission to weigh in, and that way the individual
10 has the option of withdrawing their request or bringing it to
11 the Commission. So, whenever we get something, for example,
12 that would implicate the full Commission, you know, people
13 understand that it's going to be a public opinion.

14 Commissioner Horwitz: Mr. Chairman. Mr. Chairman.

15 Chair Rozen: Yes.

16 Commissioner Horwitz: I just want to respond briefly
17 to some of the comments that Commissioner Yates has raised
18 about his motions.

19 Chair Rozen: Please.

20 Commissioner Horwitz: I mean I think one of the
21 things that helps to, about what is sort of, you know, what is
22 underscoring this discussion is there seems to be implicit that
23 somehow that the advice that our professional staff, and I
24 underline, underscore, put in bold letters, the word
25 professional, because these are men and women who spend every

1 day dealing with public ethics, the Public Officers Law,
2 they're experts, that's why they work for us. You know, some
3 of us, you know, I think all of us you know make a very good
4 faith effort to try to make sure we understand (inaudible) that
5 the staff deal with. But the staff deals with these issues
6 every single day. And to the extent that we delegate, as we
7 must, because as Commissioner Dering and Commissioner Cohen
8 pointed out, we can't spend all of our time on JCOPE. That's
9 why we have a staff. So, to the extent that we are asking
10 questions about how our staff carries out a function
11 that, (inaudible) was saying, you know, we deal with every day,
12 and our staff and the staff before this staff for thirty years
13 has been dealing with these issues. So one thing I think that
14 bothers me a little bit that somehow, despite, you know again,
15 people say that they are understaffed, I have great respect for
16 them, but yet in this particular instance, we are scratching
17 our heads saying to ourselves, well, gee, we're really not sure
18 about the advice that the staff is dispensing so we need to
19 have, you know a new procedure. And I am not sure one is called
20 for, number one. Number two, and as I said before, I don't
21 have any problem with the staff explaining to us, as
22 Commissioner Rozen says, in Executive Session, what the factors
23 are, how they go about their due diligence and dispense advice,
24 that'd be a helpful discussion to have, so that's my first
25 point. The second thing is that we operate with the idea that

1 people should want to come to us and ask us for advice. We want
2 to encourage the people who work in the state to call our staff
3 and say, you know, I've got a situation and I'm not really sure
4 what to do or what the law is. I'm leaving, or my cousin got a
5 job, you know, in another agency, or I've seen something that's
6 been bothering me that one of my coworkers has (inaudible). We
7 want to encourage people to come forward, and if we get into a
8 situation where somebody calls up and asks for advice, I am
9 thinking of taking a job, and I am thinking about working for
10 this particular company, what are the rules about, you know,
11 leaving service and appearing in front of the state again, or
12 appearing before my agency again. And I mean, if our staff has
13 to go through all that and at the end we give some disclaimer,
14 oh, by the way, screw it up or, even though I'm telling what I
15 believe the law is, the Commission can still come after you.
16 You know (inaudible) gives out, how, will we have a drop in the
17 amount of people seeking our advice. And I come back to the
18 point I made earlier, which is we can, and have, prosecuted
19 people for violations of the Public Officers Law even after
20 they've gotten advice from the staff. One, we always have that
21 authority, if the staff get it wrong, and I don't think they
22 do, but if they get it wrong, we can go after somebody.
23 Notwithstanding whether the defense will be rock solid or not,
24 number one. Number two, the likely scenario, and the one that
25 we've encountered, is when the wrongdoer takes advice and

1 either withholds information from the staff and doesn't tell
2 them the full story or they've lied and the staff is unaware
3 of those misrepresentations and gives advice, that's the
4 circumstance that's more likely to come up, and Commissioner
5 Yates, you know from your experience, you know as a practicing
6 litigator and from sitting on the bench, you know full well
7 that under those circumstances, mounting a defense of reliance
8 becomes far more complicated when the defendant has withheld
9 or lied about information. So, I am not as concerned as you
10 are about what the impact of somebody relying on advice from
11 staff will mean about our ability to enforce the Public Officers
12 Law. And so again, I respect the spirit in which you are making
13 your motion. I still remain unpersuaded that this is something
14 that we need to do to memorialize with your motion and I'm
15 going to continue to oppose. Thank you, Mr. Chairman.

16 Chair Rozen: Okay does anybody else want to be heard
17 on this?

18 Commissioner Cohen: Yeah Mike this is Rob Cohen just
19 very briefly if I may.

20 Chair Rozen: Yup.

21 Commissioner Cohen: I just want to make clear to
22 the, some of the Commissioners who might be new here that
23 Commissioner Yates seems to be making a distinction between
24 outside activity requests and advisory opinions, but there is
25 no logical difference there. They're both, an outside activity

1 request is an informal advisory opinion that is interpreting
2 aspects of the Public Officer Law and Commission precedents.
3 It is, that's what an informal advisory opinion is. It is, an
4 outside activity request is just a subset of, it is a type of
5 informal advisory opinion, so there is nothing unique about
6 these outside activity requests within the realm of advisory
7 opinions generally. They we have just decided they're given
8 that name because outside activity requests tend to group
9 around a kind of similar sets of facts and a similar analyses,
10 but it's, you know, we have post-employment outside activity
11 requests, you know, they're not treated any different than any
12 other outside activity request just because they deal with the
13 post-employment restrictions in the Public Officers Law. So,
14 outside activity requests are informal guidance like any other
15 informal guidance. They're no different. That is just a point
16 I want to make for everyone's consideration.

17 Chair Rozen: Commissioner Weissman?

18 Commissioner Weissman: Yeah, thank you very much,
19 Mr. Chair. As maybe the person who inadvertently started this
20 when he asked a question and the question got rebuffed. I went
21 down the rabbit hole this month. I looked at 22 months of
22 activity in the log. That runs between 75 to 100 requests for
23 information per month, so what's that, 1700 to 2200. I can
24 tell you that staff does an excellent job. I can tell you that
25 in only one instance would we question a staff result, and I

1 think there were maybe four or five others that we would just
2 ask questions on, but that maybe because the log doesn't contain
3 enough information. Having said that, my view in looking at
4 Commissioner Yates's resolution was to take it in, not
5 necessarily a step further, but for staff to provide the
6 Commission with its determinations every month and we would
7 effectively approve it as a consent calendar, because based on
8 what I went through, we're not going to have a lot of questions.
9 And at the end of the day, that may ultimately give the subject,
10 you know whether or not we wanted to tell them that the
11 Commission approved it would be something different, and we
12 could discuss that, but we are not required to publish anything,
13 it is a may. And that's how I view Commissioner Yates's proposal
14 in taking it the next step.

15 Chair Rozen: Thank you, Commissioner Dering.

16 Commissioner Dering: No, I'm set, thanks.

17 Chair Rozen: Okay, anybody else? Alright,
18 Commissioner Yates, go ahead and move your proposal.

19 Commissioner Yates: Alright, I'll move the proposal.
20 I think one good point has been raised during the discussion
21 and if my language is unclear, I reiterate what its intent was,
22 and I would even entertain a modification. My intent was to
23 continue the practice of informal opinions, to continue the
24 practice of allowing people in good faith to rely on, them but
25 for people to be advised that an informal opinion is not a

1 formal opinion and to recognize the distinction between a
2 formal opinion and informal, and to make it clear that the
3 Commission still reserves the right to exercise its option to
4 publicize an opinion and to override the staff opinion. That's
5 the intent, and if the language is not clear enough, I will
6 entertain a motion to alter it, but that was the intent and I
7 think what is written in the motion.

8 Chair Rozen: Thank you. Is there a second?

9 Commissioner Lavine: Second.

10 Chair Rozen: Okay. Martin?

11 Commissioner Fisher: Before we vote could we have a
12 period of debate? I'd like to state my...

13 Chair Rozen: Yup, please go ahead.

14 Commissioner Fisher: So, I plan to vote against this
15 resolution, and there is two reasons and I would like to explain
16 them to my fellow Commissioners. First of all, I don't believe
17 that, and this is probably quibbling, but the fourth whereas
18 clause is, I don't believe, accurate about what Executive Law
19 § 94(6) does. So, as I read that section, and I'm not a lawyer,
20 but as I read it, it states a power of our Commission, it does
21 not state a requirement. But this whereas clause asserts that
22 this section requires us to act by majority vote, and maybe
23 that's the past practice, then maybe that's the precedent, but
24 I don't believe that that section of the statute requires us
25 to vote in order to render a formal opinion in response to a

1 request for one. My second reason for planning to vote against
2 this is the language of the resolution, which I believe goes
3 too far. The underline in section one of the resolution,
4 provided however that such advice shall not constitute the
5 advisory opinions authorized in executive law, the legislative
6 law, that all seems fine to me, but what comes next, I think,
7 is not supported by what the statute says, and what this
8 resolution says, in the absence of a majority vote by the
9 Commission in a written opinion endorsing such advice and shall
10 not be binding upon the Commission. I think the practical effect
11 of that language is going to be, no one is ever going to ask
12 us for an informal opinion, because of your language that says
13 shall not be binding on the Commission, it almost says don't
14 listen to this informal opinion because it can't be trusted,
15 we stand ready to reverse ourselves, or reverse our staff, so
16 it renders that pretty close to useless. So, for those reasons,
17 I don't believe that the statute does what the whereas clause
18 says, and I believe that there would be a negative impact on
19 our staff of the specific language in the resolution and the,
20 section one, the changes that amends paragraph sixteen of
21 resolution 12-02.

22 Chair Rozen: Thank you. Any other comments?

23 Commissioner Lavine: On the motion, Mr. Chairman. All
24 the discussion about the statute is very edifying. Let me
25 address it in terms of principle being compounded by the

1 statute. I cannot except the fundamental proposition that the
2 statute contemplates permanent abrogation of the Commissioner's
3 authority to approve outside activity by the four
4 constitutional officers and agency heads. Therefore, I am
5 strongly in favor of the resolution.

6 Chair Rozen: Thank you. Other comments?

7 Commissioner Jacob: May I?

8 Chair Rozen: Yes. Yeah, go ahead Marvin.

9 Commissioner Jacob: I think, we, with all respect
10 the resolution or the motion, seeks to pry these things apart,
11 but I've asked this of staff and I ask them again, the
12 resolution of 2012 carries forward the language in the statute
13 in paragraph sixteen, provided such delegation is in writing
14 and the specific powers to be delegated are enumerated. So, I
15 was there in 2012, as were several other Commissioners. The
16 powers that are enumerated in the resolution of 2012 is one
17 power, to render informal opinions or render opinions between
18 meetings based on precedents. There is another statute, and
19 that is paragraph seventeen. Seventeen deals with honoraria,
20 gifts, outside income, outside activity. That section is
21 likewise set forth in our resolution of December. But nowhere
22 in that resolution do we say that the powers of the Commission
23 enumerated in section seventeen are delegated to the staff.
24 Now that may be upsetting to people on the staff, but when a
25 statute requires that the specific powers that are to be

1 delegated be enumerated with the delegation, and you have a
2 general statement about opinions between meetings, as
3 Commissioner Lavine says, he is going to vote against this
4 because the notion that we delegated everything in section
5 seventeen where nothing has been enumerated in the delegation
6 involving section seventeen, and this is a pure question of
7 law. I recognize there are people who can differ with me, but
8 I am just reading the statute. There are two paragraphs, sixteen
9 and seventeen. Our delegation deals with sixteen, advisory
10 opinions. Our delegation never mentions anything that is in
11 seventeen as being delegated. And I have asked this of staff,
12 I ask them again, if the specific powers to be delegated are
13 to be enumerated, that is a statutory mandate and a statement
14 in our delegation of 2012, where in that delegation have we
15 ever delegated anything in section seventeen involving outside
16 activities and outside income? I would ask that of Martin,
17 I've asked it of Monica.

18 Monica Stamm: So, Commissioner my answer to you, I
19 don't think is going to resolve your question, but it is that
20 this Commission and our predecessors have interpreted informal
21 guidance, these informal letters, to cover all the forms of
22 guidance of the Commission. The outside activity regulations
23 date back to 1990, and they have been changed over the years,
24 but they date back that far, and the Commission and its staff,
25 and its predecessors, have interpreted the delegation of

1 informal guidance in 94(16) to cover all the forms of guidance,
2 not just outside activities, but honoraria, travel,
3 interpretation of the public service announcement regulations,
4 which the Commission issued. Seventeen authorizes the
5 Commission to issue regulations. 94(16) authorizes the
6 Commission to give guidance, and it's under 94(16) that the
7 Commission delegated the authority to staff to give informal
8 guidance. And again, this has been interpreted to cover all of
9 the guidance. If the Commission wants to specify the various
10 different types of legal questions the Commission is going to
11 delegate to staff to address, the Commission can do so, but it
12 is through the power to issue guidance that the staff answers
13 those questions.

14 Commissioner Jacob: Thank you for your answer,
15 Monica, and I respect your answer. It is a staff interpretation,
16 and that is what I heard on the phone before this meeting from
17 another staff member. But since it is a staff interpretation
18 of the statute, what Commissioner Yates and Lavine are dealing
19 with is, let's codify this a little better, maybe even beyond
20 what is before us today. Let's specify much better, so people
21 who seek our informal guidance, your informal guidance,
22 understand that what they get is valid but it's informal. But
23 I can't interpret these statutes and I can't conflate them as
24 you do. One deals with advisory opinions, the other deals with
25 entirely different actions of this Commission. Those were never

1 delegated, and that is my position and I will vote for
2 Commissioner Yates's motion.

3 Chair Rozen: Thank you, Commissioner. Anybody else?
4 Alright, Martin, I think we're at the roll call stage.

5 Martin Levine: On the motion to amend the delegation
6 as described in the materials provided by Commissioner Yates.
7 All in favor please raise your hand. I see Commissioners
8 Weissman, McNamara, and Yates in favor. Have I missed anyone?

9 Commissioner Jacob: Jacob.

10 Martin Levine: I apologize. Well, I didn't see you.

11 Commissioner Jacob: I'm sorry. My hand doesn't
12 appear through the phone.

13 Martin Levine: Okay, so I will call the roll for the
14 remaining Commissioners. Commissioner Dering?

15 Commissioner Dering: No.

16 Martin Lavine: Commissioner Fisher?

17 Commissioner Fisher: No.

18 Martin Levine: Commissioner Horwitz?

19 Commissioner Horwitz: No.

20 Martin Levine: Commissioner Cohen?

21 Commissioner Cohen: No.

22 Martin Levine: Commissioner DiPirro?

23 Commissioner DiPirro: No.

24 Martin Levine: Commissioner Jacob, you indicated you
25 were voting in favor?

1 Commissioner Jacob: Yes.

2 Martin Levine: Commissioner Lavine?

3 Commissioner Lavine: Yes.

4 Martin Levine: Judge McCarthy?

5 Commissioner McCarthy: Yes.

6 Martin Levine: And Chair Rozen?

7 Chair Rozen: No.

8 Martin Levine: That is one, two, three, four, five,
9 six in favor, and six opposed, motion fails.

10 Chair Rozen: Okay.

11 Commissioner Lavine: Mr. Chairman, Mr. Chairman.

12 Chair Rozen: Yes, Commissioner Lavine.

13 Commissioner Lavine: I have a motion. May I?

14 Chair Rozen: Please.

15 Commissioner Lavine: I move that all informal
16 opinions rendered by staff with respect to outside activity
17 within the last 36 months, to the constitutional officers or
18 agency heads, be put into a public domain immediately.

19 Chair Rozen: Is there a second to that motion?

20 Commissioner Weissman: May I ask a question?

21 Chair Rozen: Of course.

22 Commissioner Weissman: Can we do that? General
23 Counsel, can we do that?

24 Monica Stamm: I don't believe we can. You can't make
25 something that is confidential public, we've discussed this.

1 This is going to continue the debate about whether
2 confidentiality applies, I understand that. And Commissioner
3 Yates asked me questions relating to this earlier, but the
4 statute says when someone requests a formal advisory opinion,
5 and so I think this is a question the Commission could discuss,
6 and it has legal implications.

7 Chair Rozen: Look, we have a confidentiality
8 committee where we can take this issue up, and then Gary, if
9 you are willing to withdraw your motion, we can revisit it,
10 once we have had a chance to talk about, once we've had a chance
11 to talk about whether or not we can actually do that, even if
12 there were enough votes in favor of doing that, but that is up
13 to you, if you want to press forward with the motion or not.

14

15 Commissioner Lavine: Yes, I will withdraw the motion,
16 but on exiting for today, I want to observe, we now have a
17 practice in which staff is rendering the opinions. We are not,
18 the Commissioners are not, being consulted, generally, let
19 alone deliberating and voting. Now we can't put these informal
20 opinions rendered by staff into the public domain. I believe
21 that this is the worst of every aspect of service. But I will
22 withdraw the motion on your representation, Mr. Chairman.

23 Chair Rozen: Okay.

24 Commissioner Yates: Mr. Chair?

25 Chair Rozen: Yes, go ahead, Commissioner Yates.

1 Commissioner Yates: I don't think this requires a
2 formal motion, but I just want to raise it as a consequence of
3 this stymied vote. Our website, under the attorney of the day
4 section, says that the attorney of the day renders opinions
5 both formal and informal. I don't think we need a motion on
6 this, I am asking staff, or whoever set up the website, to
7 strike the word formal from that because it's just the wrong
8 advice.

9 Monica Stamm: We'll take care of that.

10 Chair Rozen: Okay. Anything else that anybody wants
11 to raise before we move into executive session?

12 Commissioner DiPirro: Mr. Chairman, its Commissioner
13 DiPirro if I could ask one question.

14 Chair Rozen: Yes, of course, go ahead Commissioner.

15 Commissioner DiPirro: I apologize, number one I am
16 not an attorney, and number two, I am one of the newer members
17 of the Commission but would we get notified, Commission members
18 get notified of a recommendation by staff relative to outside
19 income does that afford us, individually or collectively, the
20 right to have an opinion about that, and if we have an opinion
21 and forward it, would staff take that under consideration? Or
22 by the time we're notified is it already a done deal?

23 Monica Stamm: So, Commissioner DiPirro, I just want
24 to clarify, most informal guidance that staff provides is done
25 without notifying the Commission. The Commission, of course,

1 could always ask to see the log, but again, on a daily basis,
2 we're giving out that informal guidance.

3 Commissioner DiPirro: That's only for the four
4 statewides?

5 Monica Stamm: It's not even, it hasn't always been
6 every matter, because some of them are de minimis or not very
7 material, but when we do bring it to the Commission's attention,
8 of course, we are seeking Commission guidance, there is an
9 opportunity for the Commission to asks questions.
10 Commissioners, nearly half the Commissioners have given us
11 their view on some of these matters or have asked for additional
12 information, not just about outside activities, which has
13 happened, you know, from time to time over the last eight years
14 that we have come to the Commission about outside activity
15 requests, but over the years, we've also come on other issues
16 that we've brought to the Commission's attention. So of course,
17 when the Commissioners, you know, give us their thoughts or
18 recommendations we take that into consideration. Staff spends
19 a lot of time looking at the guidance in trying to apply it,
20 raising the issues, and asking for more information.

21 Commissioner DiPirro: Thank you for the
22 clarification.

23 Chair Rozen: Okay, I heard somebody else.

24 Commissioner Lavine: Mr. Chairman.

25 Chair Rozen: Yes, Gary, go ahead.

1 Commissioner Lavine: The last two meetings, there has
2 been a discussion regarding an executive order exempting so-
3 called volunteers assisting the Executive Chamber in responding
4 to the public health emergency from the provisions of the Public
5 Officers Law. The request was made to ascertain from the
6 Executive Chamber who is, who has been exempted, within the
7 ambit of the executive order. Do we have a response from the
8 Executive Chamber?

9 Monica Stamm: So, Commissioner Lavine, just to
10 clarify, what I was directed to ask was whether they have a
11 process to keep track of that information, and I have relayed
12 that request and I've received a response and their question
13 is, you know, they're considered the Commission's request and
14 they want to under know under what legal authority the
15 Commission is requesting this information.

16 Commissioner Lavine: Mr. Chairman, if I may, it's now
17 obvious that the Executive Chamber does not wish to divulge
18 this information. In the last discussion we've had for an hour
19 none of the arguments in favor of the proposition that action
20 in responding to the constitutional officers would be
21 timeliness of a response, but the adverse is obviously not true
22 if we make an inquiry.

23 Chair Rozen: Okay.

24 Commissioner Yates: I have a follow-up question to
25 Monica on that.

1 Chair Rozen: Sure.

2 Commissioner Yates: If there is an obvious conflict
3 of interest that we see in the actions of a volunteer, someone
4 who is self-dealing, giving themselves a contract worth a
5 million dollars without any kind of basis, if that's happening,
6 and if a person complains to the Commission, do you interpret
7 the executive order as precluding us from having the ability
8 to investigate whether that complaint about an obvious conflict
9 of interest?

10 Monica Stamm: No, I don't, and as with any matter,
11 one of the first steps when we get a complaint is that we would
12 ask the Commission to authorize us to have communications and
13 we would want to have the authority to speak to the chamber to
14 find out whether or not they've given guidance to this volunteer
15 or if their agency had given guidance to the volunteer and, you
16 know, under the executive order. The Commission would have to
17 also make a separate independent determination, regardless of
18 the executive order, you know, volunteers typically aren't
19 covered by the Public Officers Law, so we would have to consider
20 that. So I think there is always a lot of questions when we
21 have an actual case that is in front of us and it, just because
22 an individual is not subject to the Public Officers Law,
23 certainly doesn't mean that there might not be other laws that
24 might apply to their conduct that other agencies can also
25 enforce. So, I think the problem will be if someone is

1 determined to be covered by the executive order whether or not
2 the Public Officers Law can be applied to them. And I think the
3 answer to that would probably be no. But again, I would have
4 to see the specific facts and circumstances and we'd have to
5 understand what, if any, guidance that individual had been
6 given about the application of the executive order.

7 Chair Rozen: Anybody else? Alright, can I have a
8 motion to enter into Executive Session, please?

9 Commissioner Dering: I'll move, Dering.

10 Chair Rozen: Thank you.

11 Commissioner DiPirro: DiPirro seconds.

12 Chair Rozen: Thank you, Martin, thank you
13 Commissioner.

14 Martin Levine: On the motion to move into executive
15 session, all in favor raise your hand please. I see Dering,
16 Fisher, Weissman, Horwitz, McNamara, Yates, and Rozen.
17 Commissioner Cohen?

18 Commissioner Cohen: Yes.

19 Martin Levine: DiPirro?

20 Commissioner DiPirro: Yes.

21 Martin Levine: Jacob?

22 Commissioner Jacob: Yes.

23 Martin Levine: Lavine?

24 Commissioner Lavine: Yes.

25 Martin Levine: McCarthy?

1 Judge McCarthy: Yes.

2 Martin Levine: Motion carries.

3 Chair Rozen: Thank you.

4 [The Commission went into Executive Session]

5 {Chair Rozen left the meeting during Executive Session and
6 Commissioner Dering served as chair for the remainder of
7 Executive Session and Public Session.}

8 [The Commission returned to Public Session]

9 Walter McClure: Alright, Mr. Chair, we're back in
10 public session.

11 Commissioner Dering: Thanks, and Monica, can you
12 please summarize what we discussed in executive session?

13 Monica Stamm: Sure. We discussed litigation matters
14 and legal issues pertaining to financial disclosure statements,
15 we granted an application for exemption from the post-employment
16 restrictions pursuant to Public Officers Law § 73(8-b), and we
17 authorized steps in several investigative matters, closed one
18 matter, and discussed several other investigative matters.

19 Commissioner Dering: Unless there is something else
20 is there a motion to adjourn?

21 Commissioner Weissman: Moved.

22 Commissioner DiPirro: So moved.

23 Monica Stamm: Commissioners Weissman and DiPirro.

1 Martin Levine: On the motion to adjourn, all in favor
2 please raise your hand. I see Commissioners Dering, Fisher,
3 Weissman, Horwitz, and Yates. Cohen?

4 Commissioner Cohen: Yes.

5 Martin Levine: DiPirro?

6 Commissioner DiPirro: Yes.

7 Martin Levine: Jacob?

8 Commissioner Jacob: Yes.

9 Martin Levine: Lavine?

10 Commissioner Lavine: Yes.

11 Martin Levine: McCarthy?

12 Commissioner McCarthy: Yes.

13 Martin Levine: Motion carries.

14 Commissioner Dering: Have a great Thanksgiving.

15