

**MINUTES OF THE PUBLIC SESSION OF THE
NOVEMBER 17, 2020
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
VIA WEBEX**

Chair: Michael K. Rozen (WebEx)

Members: Robert Cohen (WebEx audio only)
James E. Dering (Albany)
Colleen C. DiPirro (WebEx audio only)
William P. Fisher (Albany)
Daniel J. Horwitz (WebEx)
Marvin E. Jacob (WebEx audio only)
Gary J. Lavine (WebEx audio only)
James W. McCarthy (WebEx audio only)
David J. McNamara (WebEx)
George H. Weissman (Albany)
James A. Yates (WebEx)

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, Director of Ethics
Michael Sande, Deputy Director of Ethics
Stephen Boland, Director of Administration
Carol Quinn, Deputy Director of Lobbying Guidance
Megan Mutolo, Associate Counsel
Lori A. Donadio, Principal Investigative Analyst
Kelly McCready, Confidential Clerk

I. CALL TO ORDER

Chair Rozen called the October 27, 2020 meeting to order and noted that the meeting was being held using video conference technology and that the public session is accessible on JCOPE's website to watch via livestream. He also noted that all votes would be taken via a modified roll call.

II. APPROVAL OF MINUTES – PUBLIC SESSION

October 27, 2020

A motion was made by Commissioner Weissman, seconded by Commissioner Dering, to approve the minutes from the Public Session of the October 27, 2020 Commission Meeting. The motion was approved by a unanimous vote.

III. REPORT FROM STAFF

Outreach Update

General Counsel Monica Stamm stated that staff plan to issue an Ethics Reminder in the next few weeks on the use of general knowledge and expertise and the post-employment restrictions. On December 10, the Commission is holding an ethics officer forum to discuss the Public Officer's Law implications for state agencies that utilize "embedded contractors," or contractors who perform the same work as state employees, often located at the state offices. Staff also plans to issue the fall/winter newsletter in December, likely before the next meeting of the Commission.

Fiscal Year 2021-22 Budget Request

General Counsel Stamm stated that the Commission recently received the annual call letter from the Division of Budget. The Commission's appropriation for fiscal year 2020-21 was \$5.582 million. Staff submitted a request for fiscal year 2021-22 for \$5.302 million, which represents a five percent reduction (\$279,100), as requested by DOB of all agencies. Staff has prepared for this reduction and the Commission can absorb the loss next year.

Confidentiality and Records Access Review

General Counsel Stamm stated that consistent with Commission direction, staff is preparing a revised rulemaking for the records access regulations that will make more information available concerning financial disclosure statements, including information such as extensions that may be pending and whether exemptions were granted. Staff hopes to initiate the rulemaking in the public session at the December Commission meeting. Staff is also working to incorporate the committee's proposals into its internal control procedures for investigations and hopes to begin working through those issues with the Commission

in the executive session of the December Commission meeting. The committee will continue to meet to address ongoing questions.

IV. REGULATIONS

Proposed Emergency Amended Comprehensive Lobbying Regulations

Deputy Director of Lobbying Guidance Carol Quinn presented both the Source of Funding and Lobbying Rulemakings with a request for emergency adoption, so that the regulations will be in place for the start of the 2021-2022 biennial filing period. She stated that both rulemakings were previously approved at the last Commission meeting, with the public comment period ending on December 26, 2020. Staff expects to bring the revised rulemakings back to the Commission in January for formal permanent adoption.

A motion was made by Commissioner Weissman, seconded by Commissioner Dering, to approve the Proposed Emergency Amended Comprehensive Lobbying Regulations. The motion was approved by unanimous vote.

Proposed Emergency Source of Funding Regulations

A motion was made by Commissioner Dering, seconded by Commissioner Weissman, to approve the Proposed Emergency Amended Source of Funding Regulations. The motion was approved by unanimous vote.

V. NEW AND OTHER BUSINESS

Proposed Resolution

Commissioner Yates presented a proposed resolution that he had requested be included in the Commission materials, relating to the Commission's delegation of authority to staff. He stated that the Executive Law allows the Commission to delegate certain matters to staff, but the Commission cannot delegate to staff matters that require a vote of the Commission. Commissioner Yates stated that Resolution 12-02 allowed staff to render informal advice, which as a practical matter is a good thing, but there is a difference between formal and informal advice. Formal opinions issued by the Commission provide a cover or bar against subsequent disciplinary or criminal actions and may be published.

Under the law, there are certain actions that require Commission approval, including outside income. The 2012 resolution does not include delegation to staff to render formal opinions or approval of outside income or activity; formal opinions and outside activity approval must be voted on by the Commission. Commissioner Yates explained that his proposed resolution would not change the previous delegation, but it would notice the public that the informal opinions issued by staff are not binding on the Commission. He also stated that the Commissioners should be advised of staff's informal opinions and Commissioners should fulfill their obligation to approve or disapprove outside income and publish them as the law provides.

Commissioner Yates made a motion, as contained in the resolution, that all informal opinions rendered by staff should advise the person seeking the opinion that it does not constitute formal approval required under the law and is not binding on the Commission.

Commissioner Lavine and General Counsel Stamm discussed that for the four statewide elected officials and agency heads, as well as all other policy makers, it has been the practice at JCOPE, consistent with that of the Commission on Public Integrity and the State Ethics Commission, that staff processes outside activity requests as part of the delegation of the informal guidance function. No vote of the Commission is required in practice or by law, so long as staff is relying on precedent. General Counsel Stamm further discussed that informal opinions are generally issued without consultation with Commissioners, but staff has brought high-profile matters to the attention of the full Commission. Staff has had communications with many Commissioners about such matters, including Commissioner Lavine. Commissioner Lavine requested that if staff consults with one or more Commissioners, the full Commission be notified.

Chair Rozen stated that any discussion of the delegation should be done in executive session; further, Chair Rozen stated that he believes the Commission has already voted on this matter and it failed to pass. Commissioner Yates clarified the difference between his proposed resolution and the vote held at the October meeting. Chair Rozen indicated that he would oppose the new motion because he does not accept Commissioner Yates'

interpretation of the law and because he does not believe it is in the Commission's best interest. Commissioner Horwitz also stated that he has a different view of the law than Commissioner Yates. Commissioner Horwitz further stated that the delegation to the professional and expert staff for more than thirty years has operated effectively and has not prevented the Commission from bringing enforcement actions when warranted, generally when a subject either misrepresented facts or did not follow advice as given. Commissioner Horwitz also stated that Commissioner Yates's broad reading of the law would result in Commissioners fulfilling other statutory duties currently delegated to staff, such as providing ethics training and issuing notices of fail to file financial disclosures. For those reasons, Commissioner Horwitz stated, he will not support the motion. Commissioner Dering noted that changing the delegation would interfere with staff's ability to quickly respond to requests for guidance and provide excellent advice.

Commissioner Yates stated that he believes that the previously delegated authority to make informal advisory opinions is a good thing, and he wants to keep it, even though the language in the statute does not explicitly authorize it. His motion is to keep the current practice but to notify people that staff's advice is informal advice and does not constitute the formal advice that would be voted on by the Commission. A discussion took place between General Counsel Stamm and Commissioner Yates about whether or not the staff's informal guidance is binding on the Commission or if the Commission is divested of its authority to either correct an opinion that is wrong and/or publish guidance. General Counsel Stamm stated that the Commission could reconsider issues raised in the guidance that was provided informally and could revisit its precedent. They discussed whether prior advice could be now published (with redactions), with General Counsel Stamm noting that the informal guidance could not be published, but the Commission can issue and publish a new Advisory Opinion, that would be prospective only.

Commissioner Cohen stated that there is no distinction between outside activity requests and other requests for guidance – they are all informal guidance. Commissioner Cohen further stated that if individuals cannot rely on staff guidance, or Commissioners take it upon themselves to approve all guidance, the process will come to a halt. Commissioner

Weissman said that he reviewed the guidance log and stated that staff has done an excellent job. There is only one instance that is questionable and four or five that would require additional information. Commissioner Weissman stated that he would take Commissioner Yates's resolution further and ask that staff provide the Commission its determinations every month and the Commission could effectively approve them as a consent calendar.

Commissioner Lavine seconded Commissioner Yates' motion.

Commissioner Fisher stated that he is planning to vote against the resolution because he does not believe that the resolution is an accurate assessment of Executive Law § 94(6) and that the proposed language goes too far. Commissioner Lavine stated the law requires that the Commissioners approve outside activity by the four constitutional officers and agency heads, and that he is strongly in favor of the resolution. Commissioner Jacob argued that the delegation did not cover outside activity approvals, as they are issued under Executive Law § 94(17), not § 94(16). General Counsel Stamm stated that § 94(17) authorizes the Commission to issue regulations, but all approvals and interpretations (including outside activities, honoraria, travel, and public service announcements, which are governed by other sections of law and regulations) are provided under the advice and guidance powers of § 94(16). Commissioner Jacob disagreed.

Commissioner Yates's motion to amend the delegation as described in the materials, seconded by Commissioner Lavine, was restated. Commissioners Lavine, McCarthy, McNamara, Jacob, Weissman, and Yates voted in favor of the motion. Commissioners Cohen, Dering, DiPirro, Fisher, Horwitz, and Chair Rozen opposed the motion. The motion did not carry, with a vote of 6-6-0.

Commissioner Lavine made a motion that all informal opinions rendered by staff with respect to outside activity within the last 36 months for the constitutional officers or agency heads be put into the public domain immediately.

Commissioner Weissman questioned the legality of such a proposal. General Counsel Stamm confirmed that under the law, the Commission cannot make something that is confidential available to the public. Chair Rozen requested that Commissioner Lavine withdraw his motion in order for the matter to be reviewed by the Confidentiality Committee. Commissioner Lavine agreed and withdrew his motion.

Commissioner Yates stated that the JCOPE website states that the attorney of the day renders both formal and informal opinions. General Counsel Stamm stated that will this will be corrected.

Commissioner Lavine asked if the Executive Chamber has responded to the Commission's request regarding Executive Orders 202.6 and .7. General Counsel Stamm stated that the Executive Chamber has indicated that it is considering the Commission's request but wants to know under what legal authority the Commission is requesting this information. Commissioner Yates asked if an obvious conflict of interest by a volunteer was reported to the Commission, would the executive order preclude the Commission from investigating. General Counsel Stamm explained that the Commission could investigate, review the specific facts and circumstances, and inquire about what, if any, guidance was given about the application of the executive order, but if the individual was covered under that order, the exemption would likely preclude the Commission's ability to pursue the matter.

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

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

VII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

[Chair Rozen left the meeting during Executive Session. Commissioner Dering served as Chair for the remainder of the meeting. Commissioner McNamara was not present for the remainder of the meeting.]

General Counsel Stamm stated that in Executive Session, the Commission discussed litigation matters and legal issues pertaining to financial disclosure statements, granted an application for exemption from the post-employment restrictions pursuant to Public Officer's Law 73(8-b), 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 Weissman, seconded by Commissioner DiPirro, the Public Session was adjourned by unanimous vote.