

**MINUTES OF THE PUBLIC SESSION OF THE
FEBRUARY 23, 2021
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
VIA WEBEX**

Chair: Camille Joseph Varlack (WebEx)

Members: Richard F. Braun (WebEx)
Robert Cohen (WebEx audio only)
James E. Dering (WebEx audio only)
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 audio only)
George H. Weissman (WebEx)
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 Guidance
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
Olivia Fleming, Intern

I. CALL TO ORDER

Chair Varlack called the February 23, 2021 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. She also noted that all votes would be taken via a modified roll call.

Chair Varlack thanked past Chair Michael Rozen for his service and introduced herself and Commissioner Braun to the Commission.

II. APPROVAL OF MINUTES – PUBLIC SESSION

January 26, 2021

General Counsel Monica Stamm noted a correction needed on page 4, second paragraph, to the spelling of Commissioner Lavine’s name.

A motion was made by Commissioner Dering, seconded by Commissioner Weissman, to approve the minutes from the Public Session of the January 26, 2021 Commission Meeting, as amended. The motion was approved by a vote of 9-0-3. Commissioners Braun and Horwitz and Chair Varlack abstained from voting as they were not present for the January 26 meeting. Commissioner McCarthy was not present for the vote.

III. REPORT FROM STAFF

Outreach Update

General Counsel Stamm stated that an Ethics Officer Forum on Advisory Opinion 20-02, which relates to third party gifts, has been scheduled for March 18. In early February, an ethics reminder was issued regarding running for and holding a public office while serving as a state employee. This will remind people to seek ethics guidance about potential conflicts. General Counsel Stamm also noted that she participated in a panel hosted by the New York City Bar on February 16 looking at JCOPE after nearly 10 years. Senator Krueger, Assembly Member Simon, Professor Richard Briffault, and John Albert from Bolton St. Johns also participated.

Operations Update

General Counsel Stamm stated that behind Attachment B is the January 2021 monthly operations report. General Counsel Stamm noted that the number of lobbying calls and emails have increased to more than 5,000 due to the new regulations and resulting changes to the lobbying filing application.

Lobbying Filing Deadline

General Counsel Stamm stated that due to some delays in implementing the changes in the lobbying application, JCOPE has announced that it will accept lobbying reports as timely if they are submitted by March 22.

IV. NEW AND OTHER BUSINESS

Proposed Meeting Schedule

Chair Varlack stated that Attachment C is the proposed Commission meeting schedule for July-December 2021. If Commissioners have conflicts, they should contact Kelly McCready.

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

§ 94(19)(B)

A motion was made by Commissioner Dering, seconded by Commissioner Horwitz, to enter into Executive Session. Commissioners Jacob, Lavine, and McCarthy were not present for the vote. The motion was approved with a vote of 10-0-3.

[The Commission went into Executive Session]

[The Commission returned to Public Session]

VI. NEW AND OTHER BUSINESS

Chair Varlack explained that the motion to enter into Executive Session was flawed because there were technical difficulties that prevented Commissioners from being heard, resulting in that motion being ruled invalid.

Commissioner Lavine stated that he had several motions to make in the public session. The first relates to the delegation of authority by the Commission to staff to render informal opinions that bind the Commission. Chair Varlack requested that since the matter is pending before the confidentiality and records access committee, Commission Lavine allow herself and Commissioner Braun the opportunity to meet and speak with the committee to get a fulsome understanding of the issues. Commissioner Horwitz questioned

whether, under Roberts Rules of Order, it was permissible to renew motions that were previously voted upon. General Counsel Stamm and Deputy General Counsel Levine both stated that the Commission would have to hear the specific motion before determining if it had been previously voted upon. A motion was made by Commissioner Lavine, seconded by Commissioner Yates, that the resolution of delegation of authority adopted in 2012 be amended to include language that all requests for informal opinions or requests for outside activity for the four statewide elected officers or department heads be subject to a deliberation by the Commission and a vote by the Commissioners. General Counsel Stamm stated that, without reviewing prior minutes, she could not definitively state that the Commission had voted on this particular motion previously, but the Commission has had several prior discussions on this issue and a decision was reached to have the confidentiality committee review and consider issues relating to the confidentiality of informal opinions before voting on the question about delegation.

Several Commissioners weighed in on the issues. Commissioner Fisher stated that he had proposed a resolution in December to change the delegation and had only agreed to defer his proposal until the confidentiality committee considered the confidentiality of informal opinions so his proposal should be considered first. Commissioner Weissman stated that a motion to reconsider should generally be available, and an important public policy discussion should not be curtailed, but he recognized that the new Commissioners should have an opportunity to be fully briefed. Commissioner Yates stated that there are two distinct issues: (1) whether the Commission can delegate the authority to the Executive Director to bind the Commission and (2) whether informal opinions issued by the Executive Director can be made public. Commissioner Horwitz agreed these are important policy issues, but stated that a course of action had already been decided, and the Commission should continue on that course which would allow the new Commissioners time to be briefed. Commissioner Dering agreed. Commissioner Jacob asked if the changes to the composition of the Commission make a difference in determining whether or not a motion can be reconsidered. Deputy General Counsel Levine stated that he would need to research the question.

Commissioner Lavine agreed to defer his motion but questioned staff about its interpretation and practice under the current delegation of authority, including the number of informal opinions issued to statewide elected officials and agency heads in the last three years. General Counsel Stamm stated that she did not have those particular statistics available at this time, but that it has been the understanding of staff and the Commissioners since 2012 that the delegation of authority included approvals such as outside activities and that this is consistent with the interpretation of the delegation and the practice of the Commission for 30 years. Commissioner Yates stated, as counsel to the Speaker at the time the statute was amended and because he was personally involved in the drafting of the legislation, that the law added new language that restricted the power of delegation, which included the approval of outside activities for certain officials under the regulations. General Counsel Stamm disagreed with that interpretation as applied to outside activity approvals, as there is no language requiring a vote of the Commissioners, in contrast to the sections of law amended at the time of the legislation, which expressly added special voting requirements.

After further discussion, at the request of the Chair, Commissioner Lavine agreed to defer the motion to a further discussion of the confidentiality committee.

Commissioner Lavine asked staff if there have been any further communications with the Executive Chamber regarding Executive Orders 202.6 and 202.7 pertaining to COVID volunteers who are exempt from the Public Officer's Law. General Counsel Stamm responded that there have not been any further communications. Commissioner Lavine stated that he believes it is the Commission's function to advise and assist state agencies in an effort to avoid conflicts of interest under the Executive Law. Commissioner Lavine made a motion that the Commission send a letter to the Governor asking for the list of individuals who are exempted under the executive order, including whether they are doing any business with the state. In response to a question from Chair Varlack, General Counsel Stamm stated that she believes the motion had previously been voted upon by the Commission and it did not carry. Commissioner Lavine explained that in light of recent events he is renewing his motion. Commissioner Yates seconded the motion.

Commissioner Horwitz stated that the Commission cannot continue to have motions made on matters that have already been resolved by a vote and discuss the same issues over and over. Commissioner Dering stated that the Commission does not have jurisdiction over Executive Orders issued by the Executive Chamber. Further, the Executive Law does not mandate that agencies seek assistance from JCOPE. Commissioner Yates disagreed with Commissioner Dering and stated that the Commission does have jurisdiction under the Public Officer's Law on anyone who is a public officer. Commissioner Horwitz stated that this is no different than the Legislature; when it believes a matter is outside of the Commission's jurisdiction, it refuses to answer. Commissioner Jacob stated that the exemption does not divest JCOPE of its jurisdiction.

A motion was made by Commissioner Lavine, seconded by Commissioner Yates, that by resolution, the Commission direct staff to communicate in writing to the Executive Chamber to request a list of the people who were exempted pursuant to Executive Order 202.7. Commissioners Braun, Jacob, Lavine, McCarthy, McNamara, Weissman, and Yates voted in favor of the motion. Commissioners Cohen, Dering, DiPirro, Fisher, Horwitz, and Chair Varlack opposed the motion. The motion did not carry, with a vote of 7-6-0.

Commissioner Lavine asked if the Commission is precluded from discussing in public session matters that have been referred to the confidentiality and records access committee. General Counsel Stamm stated that if the subjects are not confidential, they can be discussed in the public session, but the communications that take place in committee are confidential. In response to a question from Commissioner Lavine, General Counsel Stamm confirmed that the Commission is precluded from discussing in public session specific outside activities approved by staff, as guidance is confidential. Commissioner Lavine asked if Advisory Opinions 95-25, 89-10, and outside activities that involve writing books are precluded from public session. General Counsel Stamm stated that precedent of the Commission could be discussed in public session, but staff would be wary about giving legal opinions on applying precedent to a specific set of facts. Commissioner Horwitz stated that as a point of order, it would be helpful if Commissioner Lavine circulated the

materials he plans to reference in advance of a meeting so others can familiarize themselves with the subject.

A motion was made by Commissioner Lavine, seconded by Commissioner Weissman, to request that Executive Deputy Inspector General Spencer Freedman meet with the Commission in the Executive Session at the March meeting. Commissioners Jacob, Levine, McCarthy, McNamara, and Weissman voted in favor of the motion. Commissioners Braun, Cohen, Dering, DiPirro, Horwitz, Yates, and Chair Varlack opposed the motion. Commissioner Fisher was not present for the vote. The motion did not carry, with a vote of 5-7-0.

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

A motion was made by Commissioner Dering, seconded by Commissioner Horwitz, to enter into Executive Session. The motion was approved by unanimous vote. Commissioner Fisher was not present for the vote.

VIII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

General Counsel Stamm stated that in Executive Session, the Commission discussed several litigation and personnel matters, approved one settlement agreement, authorized steps in several investigative matters, closed two matters, and discussed several other investigative matters.

IX. MOTION TO ADJOURN THE PUBLIC MEETING

Upon motion made by Commissioner Weissman, seconded by Commissioner Dering, the Public Session was adjourned by unanimous vote. Commissioner DiPirro was not present for the vote.