

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

Chair: Camille Varlack (WebEx)

Members: Richard F. Braun (WebEx)
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 (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 March 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.

II. APPROVAL OF MINUTES – PUBLIC SESSION

February 23, 2021

Deputy General Counsel Martin Levine noted a correction to page four, first paragraph, where it should read “[s]everal Commissioners weighed in on the issues.” Additionally, Deputy General Counsel Levine stated that Commissioner Fisher would like the minutes of this [March 23, 2021] meeting to reflect that he had technical difficulties at the February 23 meeting and was not able to register either his “no” vote on the motion on page seven at the end of roman numeral six, *i.e.*, regarding the Office of Inspector General, or his “yes” vote on the motion to enter into executive session. Although his votes cannot be considered part of the final tally, this record will memorialize his intended votes.

A motion was made by Commissioner Dering, seconded by Commissioner Weissman, to approve the minutes as amended from the Public Session of the March 23, 2021 Commission Meeting. The motion was approved by a unanimous vote.

III. REPORT FROM STAFF

Operations Update

General Counsel Stamm stated that behind Attachment B is the February 2021 monthly operations report. General Counsel Stamm noted that the number of lobbying calls and emails continues to be very high but should decrease after the bimonthly filing’s due date.

IV. DELEGATION OF AUTHORITY TO STAFF

Informal Guidance

General Counsel Stamm stated that Commissioners requested that the issue of staff’s provision of informal guidance be placed on the agenda, along with a proposal that has been circulated for the Commission’s discussion.

Commissioner Yates explained that the newest version of his and Commissioner Fisher’s proposed resolution provides that if a statewide elected official or agency head asks for approval to engage in outside income, activity, venture or travel, the matter be brought to the Commission for a vote. Commissioner Yates noted that Commissioner Fisher proposed

certain revisions, including that: (1) the approval of minor travel reimbursements or fees offered to a statewide elected official or agency head, *i.e.*, under \$2,000, can be delegated to staff unless the proposed payment is from an interested source (as defined under the Commission's gift regulations); and, (2) that the proposed delegation resolution would be applied only prospectively. Commissioner Yates stated that under the proposal, if the Commission disagrees with an opinion given by staff, it may reverse the opinion, but it will not affect the reliant party. The Commission could publish an opinion in a redacted form if deemed appropriate. Commissioner Fisher stated that it was important to him not to interfere with the regular and productive work of staff, and the proposed change would only affect a small number of matters. Commissioners Jacob and Braun requested that staff provide a monthly report to Commissioners with all informal letter opinions.

Chair Varlack thanked the Commissioners for their efforts to develop the joint proposal which she intends to consider. Chair Varlack suggested, however, that because this latest version of the resolution was only circulated the day before the meeting, the vote be postponed until the April meeting. Commissioner Yates agreed to defer the proposal until the April meeting, but asked that any interim requests from statewide elected officials or agency heads be brought to the Commission's attention.

V. **NEW AND OTHER BUSINESS**

Proposed Meeting Schedule

Chair Varlack stated that Attachment C is the Commission meeting schedule for July-December 2021. Commissioner Jacob stated that he hasn't had an opportunity to review the schedule but if he has any conflicts, he will notify Monica Stamm or Martin Levine.

Commissioner Lavine stated that he intends to move that a subpoena be directed to the Executive Chamber related to Executive Orders 202.6 and 202.7. Commissioner Lavine stated that the Chamber responded that it had no responsive records to a Freedom of Information Law (FOIL) request from the Times Union. Commissioner Lavine also stated that it appears that purported volunteers might be getting paid by their employers, possibly employers which had business before the state. The Commission has jurisdiction under

Executive Law 94(9)(j) to advise and assist an agency in establishing rules and regulations for possible conflicts between private interests and official duties.

A motion was made by Commissioner Lavine, seconded by Commissioner Weissman, to issue an informational subpoena to the Governor's counsel for all pertinent information relating to Executive Orders 202.6 and 202.7, including a list of all individuals who have been, or now are, within the ambit of the Orders and any information related to recusals by volunteers.

Commissioner Weissman referenced a newspaper article in the Washington Post about a volunteer who works for a company with business interests and wants to know where lines are being drawn between volunteering and other ethical obligations. Commissioner Fisher questioned the Commission's jurisdiction in light of the Executive Order which clearly exempts from ethics rules volunteers related to the COVID pandemic. Commissioner Dering stated that when a requestor has a concern with a response from a FOIL request, they have the right to file an Article 78 proceeding and he does not see where issuing a subpoena falls under the category of advise and assist in the law.

Commissioner Yates stated that the Governor has the right to temporarily suspend laws to deal with an emergency, but questioned if the Governor has the authority to issue an Order that disregards conflict laws for volunteers or those being nominally paid, consistent with the requirement that the suspension be limited to the minimum deviation necessary. Commissioner Dering stated that the Commission would be challenging the Governor's Orders based on its reading of the Executive Law; that type of challenge would be more appropriately addressed by a court or the legislature. Commissioner Fisher stated that the Legislative branch has already had discussions regarding Executive Orders 202.6 and 202.7, and it has the jurisdiction to change the law that gives the Governor power to issue Orders if it deems it appropriate, and it did not do so.

Commissioner Yates stated that Commissioner Lavine's motion was to find out who is exempted. Then, if the Commission receives a complaint, it could consider whether or not

the Commission has the authority to move forward. Commissioner Yates stated that he has asked counsel to find out if the effect of the Executive Order was to prevent JCOPE from investigating possible violations of law, but because that has not been done, the Commission could issue an informational subpoena or ask for an opinion from the Attorney General.

Commissioner Horwitz asked questions about the Commission's prior use of its subpoena power under Executive Law Section 94(17)(c), as well as the confidentiality requirements around such subpoenas. General Counsel Stamm stated that the majority of subpoenas issued were done in connection with investigative matters and the confidentiality provisions applied. Because this situation, discussing a subpoena in the public session, has never before been contemplated, General Counsel Stamm does not know whether the response would be deemed confidential under the Executive Law, but noted that if the return documents include individual guidance that was given to a particular volunteer, that information typically would not be made public. Commissioner Horwitz requested that a more cogent analysis take place before voting on the subpoena in public session. Chair Varlack asked Commissioner Lavine to consider tabling his motion until the next meeting; he did not agree. Commissioner Jacob stated that the subpoena power in Section 94(17)(c) is not limited to investigations; it can be used to conduct the business of the Commission. Commissioner Dering said that Section 94(17)(c) clearly contemplates investigations and that it is not appropriate to vote in Public Session due to confidentiality concerns.

Commissioners Braun, Jacob, Lavine, McCarthy, McNamara, Weissman, and Yates voted in the favor of the motion. Commissioners Cohen, Dering, DiPirro, Fisher, Horwitz, and Varlack opposed the motion. The motion did not carry, with a vote of 7-6.

Commissioner Lavine asked General Counsel Stamm for the status of the records access regulations. General Counsel Stamm stated that it is pending within the Confidentiality and Records Access committee. Commissioner Lavine asked whether the Commission would have to divulge to an FDS filer if the filer's FDS had been requested, were the Commission subject to FOIL or a provision similar to the New York City Charter with respect to the

City Conflicts of Interest Board. General Counsel Stamm stated that her understanding is that under FOIL, requests for access to records are publicly available on request subject to certain exceptions, but that the City Charter requires the Conflict of Interest Board to affirmatively disclose that information to a filer. Commissioner Lavine asked whether, within the last three years, any requests have been made by the Executive Chamber or someone affiliated with the Executive Chamber or the Inspector General for the FDS of any Commission member. General Counsel Stamm stated that the information Commissioner Lavine has requested is not publicly available under the current records access regulations, and therefore, that information cannot be disclosed by staff absent a vote of the Commission.

A motion was made by Commissioner Lavine, seconded by Commissioner Weissman, to direct staff to answer whether in the last three years any request been made by the Executive Chamber, an individual who reasonably could be construed as being affiliated with the Executive Chamber or the Office of Inspector General asked to review the financial disclosure statement of any member of the Commission, past or present.

Commissioner Fisher stated that he does not believe that the Commissioners should receive special access to information, and until the proposed amendment to the regulations has been formally adopted, he will vote against the motion. Commissioner Lavine stated that he is not requesting disclosure of information relating to any individual Commissioner. Commissioner Lavine asked whether Commissioner Fisher would support an amendment to the current records access regulations to be consistent with FOIL. Commissioner Fisher stated he was concerned about whistleblowers and that the regulations need more consideration before he will vote in support of such an amendment. Commissioners Lavine, Fisher, and Weissman discussed how the request might be treated if the Freedom of Information Law were applicable.

Commissioner Yates stated that in light of section 94(19)(a) of the Executive Law, which sets forth the Legislature's view on the records of the Commission that should be publicly

available, he would only consider making records request information available to a filer, not the public. Commissioner Lavine declined to change his motion.

Commissioners Jacob, Lavine, McCarthy, McNamara, and Weissman voted in favor of the motion, Commissioners Braun, Cohen, Dering, Fisher, Horwitz, Yates, and Varlack opposed the motion. Commissioner DiPirro abstained from the vote. The motion did not carry, with a vote of 5-7-1.

A motion was made by Commissioner Yates, seconded by Commissioner Lavine, that any Commissioner can request and be advised by staff if any request for their FDS has been made from anybody from the Executive Chamber in the last three years. Commissioner Dering stated that Commissioners should not have access to information about their FDSs that is unavailable to other public officers. Chair Varlack agreed that there should be a comprehensive approach for all requests and for all filers. After further discussion, Commissioner Yates agreed to table his motion for review from the records access and confidentiality committee.

A motion was made by Commissioner Yates, seconded by Commissioner Lavine, that the Commission write a letter within the week to the Attorney General, Letitia James, for an opinion as to whether, notwithstanding Executive Orders 202.6 and 202.7, the Commission had authority to investigate a sworn and credible complaint of a violation of Public Officer's Law. Commissioners Braun, Jacob, Lavine, McCarthy, McNamara, Weissman, and Yates voted in the favor of the motion. Commissioners Cohen, Dering, DiPirro, Fisher, Horwitz, and Varlack opposed the motion. The motion did not carry, with a vote of 7-6.

Commissioner Yates raised the fact that by the Senate Democratic leadership's failure to fill the vacancy on the Commission, the Commission has gone without a representative by the Senate Democrats for almost two years, which is effectively a no vote on any investigation.

Commissioner Lavine and General Counsel Stamm discussed the legal precedent surrounding a state official's ability to publish and receive royalties. Commissioner Lavine stated that State Ethics Commission Advisory Opinions 95-25 and 98-15 seemed to reach different conclusions regarding whether a public official could publish and receive royalties on a matter that was under the ambit of their current duties and responsibility. General Counsel Stamm stated that that 98-15 clarified the principle and overruled 95-25 to the extent it was inconsistent. Commissioner Cohen stated that this issue should have been raised beforehand so all Commissioners could inform themselves on the precedent. Chair Varlack stated that she would like to review the opinions before having any more discussion.

MOTION TO ENTER INTO EXECUTIVE SESSION PURSUANT TO EXECUTIVE LAW

§ 94(19)(B)

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

VI. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

General Counsel Stamm stated that in Executive Session, the Commission discussed personnel matters, approved two settlement agreements, commenced one substantial basis investigation, authorized steps in several investigative matters, closed one matter, and discussed several other investigative matters.

VII. MOTION TO ADJOURN THE PUBLIC MEETING

Upon motion made by Commissioner Dering, seconded by Commissioner DiPirro, the Public Session was adjourned by unanimous vote. Commissioners Horwitz and Yates were not present for the vote.