

NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS

Commission Meeting of April 27, 2021

Appearances: Camille Varlack, Chair

Commissioners:

Richard F. Braun
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
Juanita Bing Newton
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, Director of Ethics
Carol Quinn, Deputy Director of Lobbying
Stephen J. Boland, Director of Administration
Michael Sande, Deputy Director of Ethics Guidance
Megan Mutolo, Associate Counsel
Melinda Funk, Deputy Director of Financial Disclosure
Lori A. Donadio, Principal Investigative Analyst
Kelly McCready, Confidential Clerk
Olivia Fleming, Intern

IT Staff - Tanya Smith
OGS Media Services - Amaury Corniel

1 Chair Varlack: Good morning everyone. Welcome to the
2 meeting of the Joint Commission on Public Ethics. The meeting
3 is now called to order. As with all JCOPE meetings being held
4 during the pandemic, we are using video conferencing technology.
5 The Public Session of this meeting is accessible on JCOPE's
6 website to watch via live stream. A couple of important
7 reminders. It is important that only one person speak at a time.
8 In addition, I ask that when you speak, you identify yourself
9 so that we have a clear record. As has been our practice, we
10 will take votes via a modified roll call to ensure that everyone
11 is counted. Please also remember to mute your phone when you
12 are not speaking. Deputy General Counsel Levine, can you please
13 confirm that we have a quorum? I think all Commissioners are
14 present on the call, is that correct?

15 Martin Levine: Yes ma'am, all fourteen are here.

16 Chair Varlack: Thank you. The second item on the
17 agenda is the approval of the meeting minutes of the
18 Commission. Behind attachment A are the minutes of the Public
19 Session of the March 23, 2021 meeting. Are there any
20 corrections to the minutes? Okay, I don't see any hands.
21 Behind attachment B are the minutes of the Public Session of
22 the April 9, 2021 meeting of the Commission. Are there any
23 corrections? Okay, I don't see any hands; can I please have
24 a motion to adopt both the March 23rd and April 9th minutes of
25 the Public Session of the Commission?

1 Martin Levine: I see Commissioner Weissman.

2 Chair Varlack: I saw Judge Braun. Judge Braun, are
3 you, is that a second? Thank you. All in favor please raise
4 your hands.

5 Martin Levine: Okay I see, Chair Varlack,
6 Commissioners Fisher, Weissman, and Dering, Horwitz, McNamara,
7 Yates, Newton, Braun. Commissioner Cohen?

8 Commissioner Cohen: Yes.

9 Martin Levine: Commissioner Jacob?

10 Commissioner Jacob: Yes.

11 Martin Levine: Commissioner Lavine?

12 Commissioner Lavine: Yes.

13 Martin Levine: Judge McCarthy?

14 Commissioner McCarthy: Yes.

15 Martin Levine: Motion carries, ma'am.

16 Chair Varlack: Thank you. Let's move on to item
17 three on the agenda, report from staff. General Counsel Stamm?

18 Monica Stamm: Hi, we'll start with the operations
19 update. The monthly operations report is behind Tab C. If
20 anyone has any questions, I'm happy to address them. Otherwise,
21 I will turn it over to Director of Administration Steve Boland
22 to do the end of year financial report.

1 Stephen Boland: Good morning everybody, this is
2 Steve Boland. I want to go over the annual report for 2020-
3 2021. The year to date cash disbursements for personal
4 services ended up being almost \$4.32, I'm sorry almost \$4.38
5 million dollars, and for non-personal service was almost
6 \$587,000, for a year to date total of \$4,915,000, and we
7 achieved our cash goals from the Division of the Budget. We
8 spent 88.9% of our budget. Does anyone have any questions?
9 Thank you.

10 Monica Stamm: Okay, with that (inaudible) okay with
11 that being said, just to inform the Commission that we
12 received our budget appropriation which was \$5.594 million
13 dollars. It's basically the same as in past years, but we got
14 a small increase of \$12,000 in our non-personal spending which,
15 services spending, is to accommodate the prospective lease
16 in Buffalo when we have to move out of the state office
17 building into a private building, and I think that is expected
18 for this fall. Otherwise, the numbers are very similar to
19 prior years. Does anyone have any questions? Okay, then with
20 respect to...

21 Commissioner Jacob: Monica, Commissioner Jacob here,
22 Monica?

23 Monica Stamm: Yes.

1 Commissioner Jacob: What is the, what is the status
2 of our downtown New York office?

3 Monica Stamm: So the New York City office was
4 temporarily relocated within 25 Beaver Street to a temporary
5 space, and it is functional. We are all continuing to work
6 from home for the most part, for now, but when we are all
7 ready to return to the office, the office is functional, and
8 then we will be moving into our permanent space sometime
9 hopefully this fall. That's when the construction on our
10 permanent space is supposed to be done, also 25 Beaver Street.
11 We haven't had an update on where they are with the
12 construction, but I can get one for the next meeting, but the
13 temporary space will accommodate all staff and Commission
14 meetings and trainings, if needed.

15 Commissioner Jacob: Thank you.

16 Monica Stamm: The other issue, I just wanted to
17 remind everyone who is subject to the financial disclosure
18 statement requirements that filings are due. People should
19 have received their notices by email. You can file
20 electronically, or you can file a paper version. The filings
21 are due on May 17th, Monday, May 17th this year because May
22 15th falls on a Saturday. If you haven't received your notice,
23 you should reach out to your Ethics Officer or JCOPE to let
24 you know. Commissioners, you should have all received a copy

1 of a filing in with your packages. If you file electronically,
2 you have the option of pre-filing your filing with last
3 year's information to make it easier, and there is staff
4 available to answer any questions. Okay, with that being said,
5 I am done with the staff report.

6 Chair Varlack: Thank you very much. Does anyone have
7 any questions on any of the items that were reported by staff?
8 Okay, so moving on to item four. Item four relates to the
9 delegation of authority to staff. It is behind your exhibit D.
10 The current proposed draft resolution is found behind exhibit
11 D. While we've discussed this previously, General Counsel
12 Stamm, can you provide just a high-level summary of what the
13 resolution proposals do?

14 Monica Stamm: Sure, and so this is just, this is an
15 amendment to one portion of the existing delegation. And what
16 it purports to do, and please Commissioners who, who worked on
17 this correct me if I, if I say this inaccurately, but with
18 respect to certain types of guidance, which we're calling for
19 purposes of ease, approvals, that are required under the
20 agency's regulations; such as outside activities, expense or
21 service payments, honoraria. Those approvals for statewide
22 elected officials and agency and department heads will be
23 approved by the Commission going forward. In addition, it just
24 formalizes some of the other practices of the agency with
25 respect to informal guidance issued by staff. And that those,

1 the effect of those opinions that will be in place, but the
2 Commission can reconsider any staff opinion, but any changes
3 that the Commission makes to a staff opinion will be
4 prospective only, and will not affect the requestor. And it
5 makes clear that the Commission can publish even informal
6 letter opinions in a redacted form. I think that covers it, in
7 addition, that staff will provide to the Commission at each
8 meeting a list of all letter opinions that have been requested
9 and have been issued.

10 Chair Varlack: Thank you, General Counsel Stamm. To
11 all the Commissioners that worked on this particular resolution,
12 is there any, is there any additional comment or any
13 clarification that anyone wants to make with respect to what
14 General Counsel Stamm has indicated?

15 Commissioner Jacob: I have one, Chair.

16 Chair Varlack: Please.

17 Commissioner Jacob: Chair Varlack, this is
18 Commissioner Jacob. I actually have no problem with what is in
19 paragraph two. The notion that a recipient of such an opinion
20 can present it in defense and that is permissive, I suppose we
21 can bar such a presentation, but what we are saying, it may be
22 presented. I would offer an amendment that gives more comfort
23 to the recipient of an opinion; one that says that if you have
24 omitted, you have not omitted, you have fairly stated the facts

1 and you've not omitted any material facts, the recipient should
2 enjoy the knowledge that the staff, that if the recipient acts
3 in accordance with the opinion, that staff would not in the
4 future seek, or recommend, enforcement action against the
5 recipient to the Commission. This is similar to what is done
6 on the federal level with SEC no action letters, where if staff
7 advises a requestor for advice and that person acts in
8 accordance with the advice, that staff assures the recipient
9 that it will not recommend action against the recipient if all
10 of the facts were fairly stated in the letter. So I would urge
11 that my colleagues consider adding to paragraph two, that the
12 recipient have, that the recipient understand that if the
13 letter opinion has all of the facts, all of the material facts,
14 and the recipient acts in accordance with the advice, that
15 staff will not recommend enforcement action to the Commission.
16 That doesn't mean that we, as a Commission, are barred if you,
17 on our own, we decide that we should take enforcement action.
18 That would hardly ever happen, I'm not aware of it ever
19 happening on any, on the federal level. I'm seeking an
20 amendment to paragraph two that leaves paragraph two as is but
21 adds the provision I'm talking about.

22 Chair Varlack: Okay, so before we can, we can seek
23 to have an amendment, and please correct me if I'm wrong with
24 respect to my parliamentary procedure, do we need to have a
25 motion and a second on the resolution, that's my understanding.

1 And then at that time, there can be, I see, I see my Judge
2 Braun is agreeing with me. Okay.

3 Commissioner Jacob: Yes, that is true, that's true.

4 Commissioner Yates: Okay, to the Chair, I would move
5 this, I don't want to reiterate everything. We've talked about
6 this for four meetings in a row, so I think everyone
7 understands it and enough is enough. It's a compromise that,
8 and I thank Commissioner Fisher for all the work he did in
9 taking the original motion that I had back in November or so,
10 which failed on a 6-6 vote, and I think with his improvements
11 on it, maybe today we can do better than 6-6. So, I thank him,
12 and I will move it.

13 Chair Varlack: Thank you, is there a second?

14 Commissioner Jacob: Excuse me. On the motion?

15 Chair Varlack: We don't have a second as yet. Hold
16 on, I want to make sure we got a second.

17 Martin Levine: Commissioner Fisher.

18 Chair Varlack: Is there any discussion?

19 Commissioner Jacob: Clarification please.

20 Chair Varlack: Yeah, I'm sorry.

21 Commissioner Jacob: I'd like to ask whether Judge
22 Yates is moving the, the, is moving the resolution with or

1 without the amendment I have proposed. I will move the
2 amendment.

3 Chair Varlack: Sure, so let me just clarify, I asked
4 for a motion to move the resolution that is in the book. So,
5 now that that has been moved, you can move to amend.

6 Commissioner Jacob: Oh, okay. Well I move, I can do
7 that now?

8 Chair Varlack: You can, yes.

9 Monica Stamm: I think what you would need is that
10 Commissioner Jacob would suggest an amendment, and then
11 Commissioner Yates could consider accepting that.

12 Is that correct?

13 Monica Stamm: Yes, Judge Braun, our parliamentarian,
14 is shaking his head. (laughs). So it's not a separate motion,
15 it would, Commissioner, would Judge Yates accept an amendment
16 to his motion and then we'll proceed from there.

17 Commissioner Weissman: Friendly amendment.

18 Monica Stamm: And then we'll proceed from there.

19 Commissioner Yates: Okay.

20 Commissioner Jacob: My question.

21 Commissioner Yates: Here's my feeling about it. I
22 do think in, in nature, it's consonant with the original motion,
23 and

1 merely adding in some words that say that a person who
2 honestly relies upon a letter opinion, an informal letter
3 opinion, will not face in the future a staff recommendation
4 for discipline. I think that's, that's okay. We don't have the
5 exact language and my position is this, I would like to have
6 a vote today on the main motion. So, I wouldn't like the
7 amendment to either delay this for people to see language, and
8 I think we should have the separate vote on the amendment
9 because if there's not a sufficient number for Commissioner
10 Jacob's language, I don't want that to be a reason for the
11 main motion to fail.

12 Chair Varlack: Thank you, Judge Yates. Commissioner
13 Horwitz?

14 Commissioner Horwitz: Thank you, Madam Chairman, I
15 appreciate the work, particularly that done by Commissioner
16 Fisher, on Commissioner Yates's original proposal. I don't
17 love it, but I'm prepared to support it. However, to
18 Commissioner Yates's point, I will not support Commissioner
19 Jacob's friendly amendment. I believe it undoes, it will undo
20 safe harbor, it will have a chilling effect, and it will render
21 the staff's advisory work to people soliciting the staff's
22 view meaningless. So to Commissioner Yates's point, if this
23 amendment is agreed to, I won't support the motion. If we put
24 it off, I'd be happy to support it. Thank you, Madam Chairman.

1 Chair Varlack: Thank you, Commissioner Braun, Judge
2 Braun?

3 Commissioner Braun: To Commissioner Yates, I'm
4 offering what I would hope and presume would be a friendly
5 amendment, it's merely housekeeping. In the last whereas
6 clause, it refers to Chair Michael Rozen. As we all know, we
7 have a new esteemed, capable Chair, Commissioner Varlack, and
8 either it should say, I think the better way to say would just
9 say along with the Chair and remove Michael Rozen. I just
10 want to also say for the record, the same whereas clause says
11 in the absence of an Executive Director, the implication is,
12 and I think it can remain as is, that once we have an Executive
13 Director, then that paragraph, that whereas paragraph, goes
14 out of effect as long as we have an Executive Director. And
15 just on that point, but not to speak to it now much, I would
16 hope that either at this meeting, preferably in our Executive
17 Session so as not to invade the privacy or embarrass anybody
18 in discussion who has applied for Executive Director, but I
19 would hope that after over two years, we would today, or if
20 not today, very, very soon, take another vote and approve an
21 Executive Director and hire such person. But in any event back
22 to you, Jim, the only change I want is, I propose is take out
23 Michael Rozen and change it to read along with "the chair."

24 Chair Varlack: So, Judge Braun, thanks, yes, General
25 Counsel Stamm.

1 Monica Stamm: Judge Braun, I just wanted to clarify
2 that, and there's another way you can do this, but this
3 particular whereas clause is a past tense, so it's talking
4 about what happened in June of 2019. So to effectuate what
5 you want, we would have to rewrite it further. It's not a
6 forward-looking paragraph. There, there was a forward-looking
7 paragraph that was edited out, I think, between the
8 negotiations between Commissioners Fisher and Yates, but this
9 paragraph is a historical paragraph.

10 Commissioner Braun: Yeah, yeah, I, let me speak to
11 it Jim, I do see that now, in terms of the grammar so it can
12 remain as is. I will withdraw my proposal, my proposed
13 amendment.

14 Chair Varlack: Thank you, Commissioner Braun. So
15 we've got one Commissioner who has thus far indicated that
16 they are prepared to move forward but are not accepting the
17 friendly amendment offered by Commissioner Jacob. Judge Yates,
18 what is your pleasure?

19 Commissioner Yates: As I said, I'd like to have a
20 separate vote on both. Now maybe sequentially the way to do it
21 is move the bill, or move the resolution as printed and agreed
22 to by Commissioner Fisher and I, get a vote on that, and then
23 take a vote on Commissioner Jacob's amendment, which I'd be

1 fine doing it that way. But I don't want to amend the main
2 motion right now, as a friendly motion, as a friendly amendment.

3 Chair Varlack: Okay, thank you. Commissioner Yates,
4 Judge Yates. Are there any...

5 Martin Levine: Ma'am.

6 Chair Varlack: I'm sorry.

7 Martin Levine: You have a motion on the table from
8 Commissioner Jacob. It was a friendly amendment, and it appears
9 it was rejected by the author of the original motion, so the
10 discussion is still open. If commissioner Jacob would like to
11 move his amendment, now is the appropriate time to do so, and
12 if that advances, then we would consider the main motion, but
13 the discussion on the motion is still open. so this would be
14 the appropriate time. Or he could withdraw it, obviously.

15 Commissioner Jacob: Chair, may I.

16 Chair Varlack: Commissioner Jacob?

17 Commissioner Jacob: I am trying to understand
18 Commissioner Horwitz's comments on the friendly amendment, and
19 in particular, the chilling affect aspect. May I ask
20 Commissioner Horwitz to explain how giving a recipient of an
21 opinion the comfort of knowing that staff will not recommend
22 against what it had previously advised is a negative to this
23 process. I just want to understand it.

1 Chair Varlack: So, I, I hear your inquiry,
2 Commissioner, however, at this point, the individual,
3 Commissioner Yates, has moved to the motion and has rejected
4 the friendly amendment. So, to the extent that you want to
5 have discourse with Commissioner Horwitz about his opinion on
6 the proposed friendly amendment, we can certainly take that up
7 at a another time, but right now, where we are is the resolution
8 that is currently in your board book.

9 Commissioner Jacob: That's fair.

10 Chair Varlack: Is there any additional discussion?
11 Okay, so, for, just to make sure that we're all on the same
12 page, right now, we have the resolution as currently in your
13 board books, there is a motion and a second, there seems to be
14 no additional discussion. So all in favor, please raise your
15 hands.

16 Commissioner Yates: This is on the amendment?

17 Chair Varlack: No, this is, this is not on the
18 amendment, we're back to the original resolution.

19 Commissioner Yates: Oh, I thought Martin said you had
20 to vote on the amendment first.

21 Martin Levine: No, it was since you rejected it,
22 it's been considered, it's, it's dead in the water at this
23 point.

1 Commissioner Yates: Call the main motion then, fine.

2 Martin Levine: Okay, please raise your hands if your
3 voting yes. I see Chair Varlack, Judge Yates, Commissioners,
4 Fisher, Weissman, and Dering, Judge Braun, Commissioner
5 Horwitz, McNamara, and Judge Newton. I'll call the remainder
6 of the role. Commissioner Cohen?

7 Commissioner Cohen: Yes.

8 Martin Levine: Commissioner DiPirro?

9 Commissioner DiPirro: Yes.

10 Martin Levine: Horwitz, Fisher, Commissioner Jacob?

11 Commissioner Jacob: No.

12 Martin Levine: Commissioner Lavine?

13 Commissioner Lavine: Yes.

14 Martin Levine: Judge McCarthy.

15 Commissioner McCarthy: Yes.

16 Martin Levine: Motion carries, ma'am. 13-1.

17 Chair Varlack: Thank you. Moving on to item five
18 on the agenda. It is a proposal from the Confidentiality and
19 Records Access Committee. Behind exhibit E, you will find..

20 Commissioner Lavine: May I interrupt, Madam Chair?

21 Chair Varlack: I would ask that you..

1 Commissioner Lavine: We didn't have, may I interrupt?
2 We didn't have a vote on Commissioner Jacob's amendment. Can
3 you hear me.

4 Chair Varlack: I can hear you.

5 Commissioner Lavine: Does Commissioner Jacob wish to
6 propose the amendment? If he does, I'll second it.

7 Chair Varlack: Commissioner Jacob?

8 Commissioner Jacob: I do, I wish to propose the
9 amendment.

10 Chair Varlack: Please continue.

11 Commissioner Lavine: Seconded.

12 Commissioner Jacob: I thought that's what we were
13 going to do after the vote on the resolution.

14 Chair Varlack: You are, you are exactly right. That
15 is my mistake.

16 Commissioner Lavine: The amendment's seconded, Madam
17 Chair.

18 Chair Varlack: Thank you. So we need to understand
19 exactly what the language would be, so if you can please walk
20 us through your proposed amended language?

21 Commissioner Jacob: Well, I'll try to put it as
22 felicitously as possible. And I apologize for not putting it
23 in writing before, but, the amendment, it's a motion to, I'm

1 just trying to collect my thoughts. It's a motion to give
2 comfort to persons receipt and received advisory, an advisory
3 opinion of staff, to not be proceeded against by staff, if
4 facts, all facts are presented in the request and are followed,
5 the opinion is followed, provided, however, it is not a bar to
6 the Commission itself.

7 Chair Varlack: Okay, thank you.

8 Commissioner Jacob: I just, just to state why I
9 proposed this. It's that the regulated community should have
10 such comfort. It should know that when it seeks advice and it
11 receives it, that that advice, if followed, will not end up in
12 an enforcement proceeding. I think it's a fair way to proceed.
13 And just to allow the presentation of the opinion in a
14 proceeding, I suppose a recipient can always seek to introduce
15 an opinion in a criminal or civil litigation. It's not much,
16 it's not anything we're providing, except to say that, you
17 know, we could stop you, which would be silly. So just
18 permitting someone to present such in defense at any criminal
19 or civil action is an offer of hardly, of nothing I would say.
20 Now, the statute, section 16, in the formal opinions on this
21 is a mandate by the legislature that the opinion of the
22 Commission itself, a formal opinion, that is, is a valid
23 defense in any criminal civil litigation. The Legislature can
24 mandate that on the court. We cannot, nor can staff mandate

1 that the opinion is a defense, a valid defense. So all we're
2 doing is saying to the recipient well, since we can't mandate
3 it, we'll allow you to present it. Whatever right the
4 recipient would have in any event, so it seems to be quite
5 empty. But when you tell a recipient you have the comfort now
6 of knowing, since you were following everything in the opinion,
7 you've given the staff all of the facts, the staff will not
8 turn on you and recommend enforcement against you. Now that's
9 comfort and that's what a recipient deserves. And that's how
10 the process in my view should work. So I'm trying to put some
11 teeth into this. It is not in derogation of anything in this
12 resolution. And that's why I said earlier, I'd like to hear
13 a little more from Commissioner Horwitz.

14 Chair Varlack: Thank you.

15 Commissioner Horwitz: Happy to do that Commissioner
16 Jacob. You know, for many years I've heard from you, and a
17 number of other Commissioners, that it's not the staff that
18 makes decisions about enforcement actions. It's we who make
19 enforcement actions. And when I say that your amendment gives
20 cold comfort to those who are going to call the staff and ask
21 for opinions, it's in that little last phrase that you
22 mentioned that I heard you say, that the safe harbor would
23 apply to recommendations that the staff made, but in no way
24 did I hear you say that there's safe harbor for the employee
25 who seeks advice from us, the Commissioners. And since we are

1 the ones that make decisions about enforcement actions, and as
2 you have said eloquently, so many times over the years, that
3 the staff does not have the authority to do that, that is what
4 I mean, when your amendment provides no comfort at all. Um,
5 and in fact, I think it will have a chilling effect, because
6 anybody who actually understands that they can call up the
7 staff and ask for an opinion and disclose all facts honestly,
8 Forthrightly, and comprehensively, but they don't get the
9 comfort of knowing that a group of us can decide, for whatever
10 reason, that we think an enforcement action should proceed,
11 that is no safe harbor at all, Commissioner Jacob. And that is
12 why I'm going to oppose your amendment.

13 Commissioner Jacob: Thank you, thank you very much.
14 Chair, may I respond to that?

15 Chair Varlack: Yes, Commissioner Jacob.

16 Commissioner Jacob: As you well know, such comfort
17 is never preclusive for those who know nothing or little about
18 staff action. We are not following, we do not follow all of
19 this, all of these letter opinions, or know exactly what staff
20 is doing. Staff is relying on precedent in giving them, and it
21 is still comfort for those who receive it, and as you well
22 know if staff ever, or we on our own motion, wanted to sue,
23 one of the major factors we would have to consider is the fact
24 that our staff had given an advisory, and that if that were

1 the fact we, wouldn't do very well in litigation and you know
2 that.

3 You're a litigant so, you know if our staff gave such advice
4 and we unilaterally instituted, instructed staff, to institute
5 enforcement, and the recipient of a letter introduced that
6 advisory opinion, we'd probably lose the case on the equities
7 for sure. But historically, no organization that uses no action
8 letters have ever done what you, has ever done what you're
9 suggesting. So I think the comfort is not cold. It is very
10 warm and it's something the regulated community out there
11 deserves to get, and we ought to provide it.

12 Chair Varlack: Thank you, Commissioner Jacob. Is
13 there any further discussion? Yes, Commissioner Fisher. I
14 think you're still muted. Walt, I'm showing that.

15 Walter McClure: No, they're on.

16 Chair Varlack: There we go.

17 Commissioner Fisher: Chair, I can well imagine
18 supporting an amendment along the lines of what Commissioner
19 Jacob suggests, but I don't know exactly what the language is
20 that is being proposed. And I haven't had the benefit of
21 hearing from our General Counsel or other staff members. I
22 haven't had the benefit of hearing from other Commissioners.

23 And in the past, there's been disagreement between
24 Commissioners that gets clarified by other Commissioners,

1 especially those of you who are attorneys, taking the time to
2 review the language, talk to staff about how it would impact
3 their daily work, and before I could support an amendment along
4 these lines, I would want to receive the benefit of that
5 information from staff and from other Commissioners so I
6 clearly understand how this might impact the resolution that
7 we just passed. So, today, I would say that I'm going to oppose
8 this amendment, but I am open to supporting something along
9 these lines in the future.

10 Chair Varlack: Thank you, Commissioner Fisher.
11 Commissioner Weissman.

12 Commissioner Weissman: Thank you very much, Madam
13 Chair. While Commissioner Fisher is a layman, as a lawyer, I'm
14 hearing things, and I'm not putting them totally together and
15 I think maybe other lawyers are thinking the same thing. I
16 would request both Commissioner Jacob and Commissioner Lavine
17 to withdraw the motion and permit some language to be developed
18 in consultation with our General Counsel, and shared with the
19 Commissioners, so we can all at least get on the same page as
20 to what we're talking about.

21 Chair Varlack: Commissioner Jacob, are you amenable
22 to that request?

23 Commissioner Jacob: I, yeah, I can provide some
24 language, but if the Commission feels, the other Commissioners

1 feel that they'd like to proceed with this at another point,
2 where the staff can weigh in, and others as well, I don't want
3 to weigh this particular meeting down on language, staff
4 comments, and I would agree to proceed and allow this to be
5 developed at another time.

6 Chair Varlack: Thank you very much, Commissioner
7 Jacob. Moving on.

8 Commissioner Lavine: May I interrupt with a question,
9 Madam Chair?

10 Chair Varlack: Is your question, Commissioner Lavine,
11 with respect to the withdrawal of Commissioner Jacob of his
12 friendly amendment, of his of his motion?

13 Commissioner Lavine: The question is with respect
14 to informal opinions already granted. Can I have staff, or you,
15 apprise us, where did we leave off consideration of divulging,
16 redacted if necessary, previous opinions rendered to statewide
17 elected officials and department heads?

18 Chair Varlack: General Counsel Stamm.

19 Monica Stamm: So, Commissioner, the, the resolution,
20 21-01, which was just approved by the Commission, answers that
21 question prospectively only. That going forward, the
22 Commission can publish informal letter opinions in redacted
23 form. So the question that you're asking about prior letter

1 opinions issued by staff has not been addressed by the
2 Commission. This, it's just prospective.

3 Chair Varlack: Okay. I'm going to keep us moving.

4 Commissioner Lavine: Madam Chair, madam Chair, if I
5 may. At the May meeting, I am going to propose an amendment to
6 divulge the previously rendered opinions to the statewide
7 electeds and department heads. In accord with how we've handled
8 Commissioner Jacob's amendment today, I would also ask that
9 the proposed resolution, in consultation with staff, be
10 developed and sent to the Commissioners before the next meeting.

11 Chair Varlack: Understood, Commissioner Lavine.
12 Thank you. Item five on the agenda is a proposal from the
13 confidentiality and records access committee. Behind exhibit
14 E, you will find proposed amended regulations for access to
15 publicly available records. Relatedly, General Counsel Stamm
16 circulated last night, on behalf of Commissioner Lavine, a
17 promote, a proposed amendment to the revised records access
18 regulations, and I believe if you have that document, the
19 amended language is highlighted in yellow. So, General Counsel
20 Stamm, I would ask again, if you could just give a high-level
21 summary of the version of the regs that are in the book, just
22 so that we're all on the same page. I think that what we would
23 do as, as we previously did is we would need a motion to adopt

1 the regulations, and then we can move into discussion with
2 respect to the amendment, the proposed amendment.

3 Monica Stamm: Exactly. So, the Committee, and this
4 is coming out of the work of the committee, these regulations
5 in this revised form has been presented to the Commission
6 previously but has not been acted upon by the Commission. At
7 this point, the Commission could initiate a rulemaking
8 proceeding on these regulations. So just so everyone's clear,
9 937 exists. We follow this right now. The committee is
10 proposing the amendments, you can see them in the red line
11 version behind tab E. Correct, tab E?

12 Chair Varlack: Yes.

13 Monica Stamm: Tab E, and if the Commission moves
14 forward, it will start, we will then submit it to be published
15 in the state register under the State Administrative Procedure
16 Act, and there will be a 60 day notice, public comment period,
17 and we will determine whether or not to incorporate any of
18 those comments and the Commission could then either continue
19 a rulemaking or adopt the regulations at that point. As we
20 talked about in the past, with one exception, the disclosures
21 and changes to part 937 relate to information about financial
22 disclosure statements. At present, only the financial
23 disclosure statement itself is available, but the new section
24 937.1(b) makes additional information relating to financial

1 disclosure statements available. And then in addition, you'll
2 see that subsection C, which was a change which was suggested
3 by Commissioner Weisman previously, which is to also make
4 information relating to staff titles and salaries available
5 under the record access regs. And these regs, so everyone
6 understands, this is the process where members of the public
7 seek documents by submitting a request to our Records Access
8 Officer, who's Walt McClure, and these are routinely documents
9 that are just turned over as part of that process. As you know,
10 we are not subject to the Freedom of Information Law. If
11 anyone has any questions, I'm happy to answer them.

12 Chair Varlack: Thank you, General Counsel Stamm, so,
13 at this time, is there a motion to adopt the amended
14 regulations?

15 Martin Levine: I see Commissioner Horwitz.

16 Chair Varlack: Is there a second?

17 Commissioner Horwitz: Just to be clear, Madam
18 Chairman, this is to move, the regs that came out of the
19 proposal that came out of the work that we did on the committee,
20 but it is not a motion with respect to the amendment that
21 Commissioner Lavine has proposed. Is that correct? I mean,
22 that's what my intention is.

1 Chair Varlack: Yes, that is correct. Thank you,
2 Commissioner Horwitz. I see a second from Commissioner Fisher.
3 Is there any discussion?

4 Commissioner Yates: Yes.

5 Chair Varlack: Yes, Commissioner Yates.

6 Commissioner Yates: I'm generally in favor of this,
7 I'm on the subcommittee, but when we broke last at the end of
8 the subcommittee meeting, I said that I asked Martin and Walter
9 McClure, could you make clear that the information you're
10 talking about here when you use the term information, that
11 you're only talking about expanding what can be divulged
12 regarding FDSs, and that you're not in any way, by negative
13 implication, saying that other information other than that
14 can't be disclosed, and this goes to a general proposition and
15 that is that Executive Law 94.9(a) says that testimony received
16 or any other information obtained by a Commissioner shall not
17 be disclosed during the pendency of a matter. There is a core
18 question that we've had, continuing for over a couple of years,
19 And that is if a Commissioner obtains information.

20 Chair Varlack: Walt, do you know what that sound is?

21 Walter McClure: I do not. Hold on. It looks like it
22 is Commissioner Cohen. OK. Commissioner Cohen, you'll have to
23 unmute again when you are ready come back on.

1 Commissioner Yates: This is, this goes to a core
2 question, and that is, we receive some material during the
3 course of an enforcement action, either giving advice or
4 investigating that clearly, by statute, is confidential, no
5 question. There's other information that we receive during
6 our deliberations, some of which go towards the structure and
7 practices of the committee, some of which are either before or
8 after the pendency of an action, et cetera. Other information,
9 just general discussion sometimes when there's no
10 investigation going on, that's information that we receive and
11 there's a split, I think, within our community here about
12 whether that is confidential or not, especially if it's
13 something that was discussed in an Executive Session, but even
14 if there was something that was not discussed in an Executive
15 Session, some people, out of an abundance of caution, and I
16 include myself in that group, never talk about anything, any
17 information that we receive in the Commission because I don't
18 want to trespass. But some people, and I think maybe rightly
19 so, have pointed out that, hey, you know, you have discussions
20 and you get information that's not related to an investigation,
21 and you should be free to either talk to your principals or
22 the public or other people about those items. There's nothing
23 in the statute that clearly makes that kind of information
24 confidential, but there is ambiguity in the language of 9-a
25 which says that other information received by a member of the

1 Commission is confidential during the pendency of an action.
2 So now I'm going back to the original motion here, and I'm
3 sorry for belaboring this but it's important. When we, when
4 the, in the proposed amendment here in 937, it outlines certain
5 information that may be disclosed that go beyond just public
6 record access. It allows, for instance, Walter McClure, or the
7 Chair, or one of us, to actually talk about an FDS, even though
8 it's not part of a public record access request. I'm okay
9 with that, and I support that amendment, that proposal, but
10 I'm very concerned, I say, I use the term negative implication,
11 I'm very concerned that someone's going to turn around at some
12 point and say the only information that's not confidential
13 under 9-a is the information that's authorized by 937(a) and
14 if you have any other discussions about things that have
15 occurred within the Commission, even if it's related to,
16 unrelated to an investigation that all of a sudden we're
17 expanding secrecy, which is the last thing we want to do.

18 Commissioner Jacob: Chair, may I speak? Commissioner
19 Jacob here?

20 Chair Varlack: I'm sorry, I was actually
21 acknowledging General Counsel Stamm, and I was muted. I
22 apologize. And then I will call on you, Commissioner Jacob.
23 General Counsel Stamm, do you have a response to Judge Yates?

1 Monica Stamm: Sure. I just, I understand what
2 Commissioner Yates's concern is, but as I've explained before,
3 these regs are the direction of the Commission as to what
4 documents staff is going to make publicly available through
5 the process that's laid out here. It's merely, you know, it
6 used to just follow the statute, which was 94.19, and only
7 made those documents available through this process. And the
8 process, while we are not subject to FOIL, the process provides
9 how you request information from staff and how you make, you
10 get access to it and a process for, for challenging a
11 determination by staff not to turn over a document. It doesn't
12 in and of itself expand what it is or is not confidential.
13 It's just a declaration that what is in here can be made public
14 by staff. So, while I understand Commissioner Yates's concern,
15 I don't think it goes any broader than that, but that, then
16 said, that's certainly not the intention. This is just to
17 clarify what our Public Information Officer can turn over at
18 this point in time, once these regs become effective.

19 Chair Varlack: Thank you, General Counsel Stamm,
20 Commissioner Jacob?

21 Commissioner Jacob: Yeah. I agree with the statements
22 made by Commissioner Yates but would add the following. This
23 is a significant expansion of an existing reg that is being
24 proposed. And the expansion goes into the area of information
25 that leaves the records area and creates a whole new area

1 called information without any statutory predicate expressed
2 in the proposal for regulating information. But even more
3 problematic, what is information? There is no defined term in
4 the statute that I'm aware of, and this reg doesn't define
5 information. This is, we as a Commission, we're proposing to
6 regulate information. We know what's confidential because we
7 have at least, we have a half dozen statutes that deal with
8 confidential information. But they are specific, like 9, like
9 13, 16. But to propose a reg that expands on a records
10 provision, this is not an information reg. This is a records
11 reg. It tracks 19(a), which deals with the records, and
12 creates a whole new area, an undefined area called information.
13 Only promotes additional secrecy, and as you all know, we're
14 already under severe criticism of being much too secretive, so
15 I'm not for even proposing a reg until I see a memorandum of
16 law from Counsel that tells, that advises me about the
17 statutory predicates going forward with this kind of an
18 undefined expansion of this reg.

19 Chair Varlack: Thank you, Commissioner Jacob. Judge
20 Newton?

21 Commissioner Newton: Yes. Good Morning all. My
22 question may sound very fundamental because it is. And I've
23 been listening to, to this discussion and read the proposed
24 change of regulation but it's a use of an extraordinary power
25 to create another regulation. So I'd like to ask Ms. Stamm and

1 anyone else who can answer my question, coming as an outsider.
2 You talk, Ms. Stamm, you used the word about what the intention
3 of this change these changes were. And so I ask the question
4 for someone who is coming at this for the first time, not only
5 what is the intention, what is the need? What is the reason
6 for this significant change in the regulation? And if you could,
7 if you could, you could say I am a lawyer 45 years a Judge,
8 but I'm new to all of this, and I'd like to know the reason,
9 if you could, in plain English, what is the evil or the
10 problem that we seek to address by these significant changes.

11 Chair Varlack: I will ask the General Counsel Stamm
12 to respond.

13 Commissioner Newton: Thank you.

14 Monica Stamm: Sure. So, Judge Newton, the Committee
15 undertook to see if there are ways in which the Commission
16 could be more transparent, make more records and information
17 available. And this is just one of the various subjects that
18 the committee undertook, and certainly the members of the
19 committee could speak for themselves about what their goals
20 and intentions were, but with respect to part 937 specifically,
21 so these regs, these regulations currently exist and they
22 adhere strictly to the statute, and only those documents were
23 available through our records access regs, such as the
24 financial disclosure statement itself, certain documents

1 relating to investigations, like settlement agreements, or
2 what are called substantial basis investigation reports, the
3 final decision of the Commission, lobbying records. And this
4 is all spelled out in the statute and in the first part, A, of
5 these regs. What the amendments propose to do is to make
6 additional information about financial disclosure statements
7 available, and they are very specific as to what information
8 would be made available. So, this is in response to requests
9 for information that over the last 10 years, the Commission
10 staff have received, but we've had to respond we do not have
11 anything responsive, because these things haven't been made
12 publicly available. So, if you wanted to find out the date on
13 which someone submitted their FDS, that has never before been
14 made publicly available. If you wanted to find out if someone
15 was required to file an FDS, so, in other words, you asked for
16 an FDS, and you were denied that document, you were never
17 before able to find out whether or not that person was required
18 to file, whether or not they were late in filing, whether or
19 not they have an extension, whether or not they have an
20 exemption from filing. So these are the types of information
21 that would now be available. So if we receive a records access
22 request for an FDS, or someone wanted to find out who is
23 required to file at a particular agency, that information would
24 now be available. We have these kinds of documents and records
25 reflecting this information. But it's a computerized system,

1 which is very hard to make publicly available, so the best way
2 to make it available would be just to supply the information
3 itself. But I understand Commissioner Jacob's concern. That's
4 the reason why the word information was used. And then the
5 specific information is identified in part B, in addition to
6 the change that Commissioner Weissman previously had suggested,
7 which is the information relating to staff salary and titles,
8 which, since we're not subject to FOIL, has never before been
9 publicly available through a request to JCOPE, but all other
10 agencies who are subject to FOIL do have to make that
11 information available. So Commissioner Weissman had suggested
12 we add it to our regs as well.

13 Commissioner Newton: And we want to do this solely
14 on the issue of transparency that people want to know so we
15 should let them know? Or is there some deeper concept that is
16 applicable here?

17 Monica Stamm: I think it's really about transparency.
18 I think you hit it right on the head. It's about people have
19 a right to request, the members of the public have a right to
20 request financial disclosure statement and when they aren't
21 able to be made available, they can now find out more
22 information about why it's not available at this moment in
23 time. And so this is the type of information that's included.

1 Commissioner Newton: And this will apply that
2 everyone who applies to, who has to file a non-disclosure
3 statement, not just say elected officials or government heads.
4 This is like the person at a certain grade who just happens to
5 have a good salary, that person would be subject to these this
6 information request as well, this broader information request
7 as well.

8 Monica Stamm: Yeah, so there's approximately 30,000
9 state employees and officers who file financial disclosure
10 statements, and so at present, by law, their financial
11 disclosure statements are publicly available, but this
12 additional information is not. And so you are correct, that
13 this would be additional information for all 30,000 of those
14 people.

15 Chair Varlack: Okay, so I've got three additional
16 hands. In order, it will be Judge Braun, Commissioner Horwitz
17 and Judge Yates. Judge Braun?

18 Commissioner Braun: Yes. As to what Commissioner
19 Jacob brought it up, it is defined in the regulation with the
20 proposed amendments. Section 937.3(a) says a request for
21 information pursuant to this part, I emphasize pursuant to
22 this part, and then one goes back to 937.1, in which the first
23 part sets forth, what certain information, would what the
24 information would include. Any additional proposed amendments

1 to B and C set forth additional information, which, if approved
2 as an amendment to the regulation, would further expand the
3 definition of information, so it is defined.

4 Chair Varlack: Thank you, Judge Braun. Commissioner
5 Horwitz.

6 Commissioner Horwitz: Thank you, Madam Chair. As the
7 proponent of the motion I wanted to supplement what Monica
8 explained to Judge Bing Newton. We have had a struggle from
9 the inception of the Commission with the tension between the
10 need to, in our regulatory and enforcement function, preserve
11 the confidentiality of investigations, which is consistent
12 with public policy behind all regulatory and investigatory
13 agencies' need to use confidentiality, both to preserve the
14 rights and reputations of those who are investigated, in the
15 event that there are no charges that result. That was meant to
16 preserve the integrity of the investigation, on the one hand,
17 with a need for the public to understand what we do, and so
18 we, as the subcommittee, I think worked pretty hard to come up
19 with a way that we can incrementally improve what we say to
20 the public about a variety of the things that we do. And we've
21 struggled, even as Jim has mentioned, with, you know, how to
22 sort of thread that needle. In respect to what Monica has
23 said, you know, this particular issue that that Judge, that
24 Commissioner Jacob has raised ,we, I think we worked pretty
25 hard to keep it confined and to come up with a proposal, which

1 maybe isn't perfect because frankly, I am concerned about
2 making any sort of changes with respect to what we've
3 historically kept as confidential and I think for good legal
4 and policy reasons. But I think that, you know, understanding
5 the desire of the Commissioners that we, that I serve with,
6 and the need of the public that, that we should try to put a
7 proposal forward. So, I think, while not perfect, this is
8 something that tries to strike that balance and put us in a
9 better position, and put the public in a better position to
10 know some things that historically, that we have not been able
11 to share. So, I wanted to at least explain myself, why I moved
12 for this, and why I wanted to participate in the subcommittee's
13 work, and again to thank the other members of the subcommittee
14 for working on, I think, a pretty good compromise proposal.
15 Thank you, Madam Chair.

16 Chair Varlack: Thank you. So, Judge Newton, I'm just
17 going to give you two minutes to respond to Judge, to
18 Commissioner Horwitz and Judge Yates (inaudible).

19 Commissioner Newton: I don't have a response. I have
20 a question. You use, Commissioner Horwitz, thank you for that
21 explanation, you use the phrase investigations in your process
22 of your explaining this to me, but I want it to be clear that
23 we would give this information regarding these 30,000 employees
24 even if, only if there's an investigation, or regardless? And
25 I see Monica is shaking her head, it would just be open, period.

1 Commissioner Horwitz: It would be regardless, and
2 to the extent that I mentioned investigations, confidentiality
3 provisions, reach beyond simply investigations, but some of
4 the same public policy reasons that underscore confidentiality
5 versus disclosure for investigations are invested with
6 decisions about other things that we do and other information,
7 like the FDS. But again I think the overriding policy, if
8 you're going to balance, can we tilt a little bit more in favor
9 of disclosure, while still preserving people's rights to
10 privacy and the
11 like. I think this is a compromise that we thought could move
12 the ball forward on each of those needs.

13 Commissioner Newton: Thank you. And thank you for
14 your excellent work to the entire subcommittee. Thank you.

15 Commissioner Horwitz: Thank you.

16 Chair Varlack: Judge Yates.

17 Commissioner Yates: I think Dan basically articulated
18 much of what I was going to say in response to Judge Newton's
19 question, but I just wanted overall, Judge Newton, we've
20 suffered over the years with a lot of misstatements and
21 misapprehensions made publicly about our work. People say we're
22 dragging our feet when it's because of refusal of people to
23 participate or because of a request by a prosecutor to, that
24 we defer. We've had people misstate what our opinions were,

1 our decisions, or our advice. There's been a constant, it's
2 been a constant problem for us that we can't respond, even
3 when they're inaccuracies, gross inaccuracies in describing
4 what we're doing. So, the overall purpose of the subcommittee,
5 which was formed before you joined, but I can't speak for the
6 Chair, I would welcome you to, if you wanted to join it, the
7 work of the subcommittee has been figuring out ways that we
8 can open up things that are not actually required to be
9 confidential by the literal language of the statute. And we've
10 been picking apart different segments. Dan used the word
11 incremental and he's 100% right. This is one little small
12 step. It's an area where the Commission can respond when
13 there's, when someone asks for an explanation about what's
14 going on with an FDS. That's a good thing. It's not the biggest
15 problem we have, but it's an incremental change that's good.
16 My, when I opened up when I, my only concern, and I don't, I'm
17 not asking for an amendment to 937, but I do think there should
18 be an accompanying statement by us that we all agree that, by
19 designating here in 937 that there is more information that's
20 available, we are not saying by negative implication that
21 that means that 94(9-a)'s restriction on disclosing
22 information is now expanded to anything that's not in 937.
23 That's my only one fear, and I don't need to, we don't need to
24 amend 937. Judge Braun pointed out that there is a definition
25 in 937. I just want an accompanying statement. I want us all

1 to agree and be clear if we're going to vote on this, that it
2 is not restricting any other kind of information unless it's
3 prohibited by law.

4 Chair Varlack: Thank you, Judge Yates.

5 Commissioner Jacob: May I, Chair?

6 Chair Varlack: Yes, Commissioner Jacob.

7 Commissioner Jacob: I think Judge Yates and others
8 have described the task well. There are enforcement matters we
9 deal with. There are regulatory matters we deal with. There
10 are governance matters we deal with. By and large, the
11 confidentiality attaches to enforcement matters, of course.
12 Opinions have the benefit of anonymity and there's certain
13 confidentiality there as well. But by and large, our
14 enforcement proceedings, from beginning to end, the very
15 beginning to the very end, these are all confidential. But
16 what we have managed to do over the last 10 or 11 years is
17 create confidentiality, as Judge Yates suggests, where there's
18 no specific statute that says that the information is
19 confidential. And I agree with those who have spoken before.
20 Not everything, almost everything I should say in 937 as
21 proposed on information. There's no statute that proscribes
22 the release of this information. We are saying that we have
23 conducted ourselves that way, and we haven't released. Well,
24 that may be, that may be a problem with what we have done for

1 years. We haven't been as transparent as we should have been
2 and where the law says no, we should not do it. But where the
3 law does not prohibit it, we should have been releasing this
4 information. And, like Judge Yates, I'm afraid that more is
5 less, by agreeing that everything in this proposed 937 on
6 information was correctly withheld in the past and we need a
7 proposed reg to now release it. Well, how much more do we need
8 to release by proposed regs? Which if it is, there is no
9 proposed reg, will be criticized or reprimanded, because
10 somebody will say that's confidential. So, I asked in my
11 initial statements for a memo. I'd like to know the statutory
12 predicate for saying that this information that we're proposing
13 to release is prohibited to release without a proposed reg. Or
14 else this proposed reg is unnecessary and we can just proceed
15 and do what is correct and be more transparent. So, I will
16 vote against this because I see no statutory predicate for it.
17 I've received no memo on it. Thank you.

18 Chair Varlack: Thank you. So at this time, I'm not
19 seeing any additional, just checking, hands raised on this
20 issue. I move the question. All in favor of the proposed
21 amended regulations as they are currently in the book, please
22 indicate so by raising your hands.

23 Martin Levine: Thank you. I see Commissioners Fisher,
24 Weissman, and Dering, Chair Varlack, Commissioner Horwitz,

1 Judge Newton, Judge Braun. Thank you. I'll call the remaining
2 role. Commissioner Cohen? I'll come back. Commissioner DiPirro?

3 Commissioner DiPirro: Yes.

4 Martin Levine: Commissioner Jacob?

5 Commissioner Jacob: No.

6 Martin Levine: Commissioner Lavine?

7 Commissioner Lavine: Yes.

8 Martin Levine: Judge McCarthy?

9 Commissioner McCarthy: Yes.

10 Martin Levine: Commissioner McNamara?

11 Commissioner McNamara: Yes.

12 Martin Levine: Thank you. Judge Newton, you
13 responded, Commissioner Weissman. Judge Yates, I apologize if
14 I missed your hand earlier.

15 Commissioner Yates: No.

16 Martin Levine: Thank you very much. The chair
17 responded.

18 Commissioner Cohen, I'll come back one more time. Okay,
19 1,2,3,4,5,6,7,8,9.

20 Monica Stamm: Walt, did you mute Rob? Did you mute
21 Commissioner Cohen?

1 Walter McClure: He's back. I think he had to sign
2 back on.

3 Commissioner Cohen: I got, I got disconnected. I
4 apologize. I vote in favor.

5 Martin Levine: Okay, that's 5,6,7,8,9,10,11,12.
6 Twelve for, two against. Motion carries.

7 Chair Varlack: Okay, thank you. Commissioner Lavine,
8 do you want to speak to your amendment?

9 Commissioner Lavine: Yes, thank you, Madam Chair. The
10 motion in chief, as it were, which just passed, is a
11 significant improvement. Deficient in some ways, but
12 nonetheless an enhancement, with respect to public disclosure.
13 However, as adopted, the records access policy still leaves
14 the Joint Commission on Public Ethics as an outlier, an
15 anomalous situation. Under FOIL, which applies to most, if
16 not all, other state agencies, the so-called FOIL log may be
17 divulged. In other words, it will be divulged upon request,
18 the information relating to who has actually made a FOIL
19 request. Similarly, as we have discussed in previous meetings,
20 the New York City Charter provides that the Conflict of
21 Interest Board of the City of New York divulges this
22 information. In fact, the City Charter, as I understand it,
23 requires that the filer actually be informed, whether the filer
24 requests the information or not. The amendment now before the

1 Commission does not go that far, but it would permit the filer
2 to inquire as to who has actually made the inquiry to review
3 the filer's financial disclosure statement. I want to point
4 out also to the Commissioners that I've had a discussion with
5 our Deputy General Counsel, and I believe that I can state,
6 and it's certainly my intent in propounding the amendment,
7 that once the information is divulged to the filer, it's in
8 the public domain, And the filer can share the information
9 with anyone that he or she deems appropriate. I move the
10 amendment.

11 Chair Varlack: Is there a second? I see Commissioner
12 Weissman. Is there any discussion on the amendment? Yes,
13 Commissioner Fisher. I think you are still muted.

14 Walter McClure: You need to hit the mute button on
15 the phone by you. You're on.

16 Commissioner Fisher: So I'm generally supportive of
17 this, but there's two reasons that I think we should consider
18 whether to vote on it today. First of all, I believe that this
19 was sent on Friday afternoon to the committee that I'm part
20 of, which is the Confidentiality and Records Access Committee,
21 but as far as I know it wasn't distributed further to all the
22 Commissioners, and I don't believe all the Commissioners have
23 had an opportunity to review this. The second reason is, I had
24 spoken with Commissioner Lavine yesterday about his proposed

1 amendment and put forward a couple of ideas for perhaps
2 amending his amended regulation. One had to do with making
3 this apply only to future requests for information. I think
4 it's fair when you make a request for information to know that
5 this may be disclosed to others. And I also think that there
6 should be some sort of notice given when we disclose this
7 information about whistle blowers. A scenario would be, I'm in
8 a state agency, I believe that maybe my boss is doing something
9 untoward with respect to awarding contracts or something. I
10 would like to look at his or her financial disclosure. I do
11 that, the person in question asks about who's made a request
12 and they find out that I've made that request and they
13 retaliate against me. So, I would like the person requesting
14 the information about who requested my record to be told there
15 are laws in place, and I don't know the specifics, that prevent
16 retaliation against folks that have made a whistleblower
17 complaint, and please keep that in mind when you request
18 information about who is asking for your financial disclosure.
19 So I would like to see this amendment developed further and
20 distributed to all Commissioners in advance of our next meeting
21 so that we can hopefully move forward with it, but until that
22 happens, I'm not prepared to support the amendment.

23 Chair Varlack: Okay, thank you. Is there any
24 additional discussion with respect to the proposed, yes,
25 Commissioner Horwitz?

1 Commissioner Horwitz: I am hopeful that perhaps the
2 proponent of the motion will withdraw it for further discussion,
3 but I, I do want to point out though, that at its core, this
4 amendment, in my view, is truly antithetical to the change
5 that was agreed to in our, in our last series of changes we
6 just made. And the reason I say that is because at it's a
7 core, and I'm not persuaded at all that just because something
8 that the city, politicians in the city decided makes good sense
9 for them is something that we should necessarily follow, but
10 at its core, the way I understand Commissioner Lavine's
11 amendment is that when somebody makes a request for an FDS,
12 whether that's a reporter, a law enforcement agency, a member
13 of the public who has concerns, a whistleblower as Bill is
14 saying, that the public officials whose FDS is required is
15 going to be tipped off that somebody is looking, and I just
16 don't understand how the, what we would be doing is effectively
17 protecting public officials over the public's right to access
18 this information and I think it's, as I said, it's antithetical
19 to having a functioning agency that receives, where the public
20 is entitled to get information, in order to protect the people
21 whose information is being sought. And so I am hopeful,
22 perhaps, that if the proponent of the amendment withdraws it,
23 perhaps there's a way that the committee could look at this,
24 as we've done historically, and come up with something that on

1 a consensus basis will work. But as it's currently articulated,
2 I am very concerned about it and would vote against it.

3 Chair Varlack: Thank you, Commissioner Horwitz. Is
4 there, so, Commissioners, again, if you are not currently
5 speaking or have not been called upon, if you could just mute
6 your lines because I'm hearing a little bit of feedback. Judge
7 Braun and then General Counsel Stamm.

8 Commissioner Braun: I agree with Commissioner Horwitz.
9 There is that concern, there's an essential difference here.
10 We just approved an amendment to the regulation which increases
11 transparency in government, something I strongly believe in,
12 but this is not transparency in government. This is the person
13 asking for this transparency, or following the expansion of
14 transparency, the person who's asking for the information, and
15 I do share the concerns that Commissioner Horwitz just
16 expressed. I haven't finally made up my mind, my decision,
17 though I'm certainly, for that reason, or those reasons,
18 leaning against yes voting for this amendment. I haven't seen
19 what was apparently distributed to some, so I also agree that
20 I would hope that the amendment would be withdrawn to be
21 resubmitted before us in the future, once we all have the
22 opportunity to see that specific amendment that's been
23 apparently given to some Commissioners, but not all, and then
24 revisit it at that point.

1 Chair Varlack: So, Commissioner, Braun just for your
2 clarification, it did go out last night to all Commissioners.
3 You may have missed the email, but it was sent to everyone. Is
4 that correct, General Counsel Stamm?

5 Monica Stamm: Yes, I sent an email out, sorry,
6 there's definitely feedback, I'm sorry about that, but I sent
7 an email out to all Commissioners yesterday at 5:25 PM, and I
8 didn't get any bounce back. So I apologize if Commissioners
9 didn't receive it. I also just want to be..

10 Chair Varlack: Judge Braun?

11 Judge Braun: I'm going to look now. We all get many,
12 many emails every day, which I keep up with, but I'm going to
13 see if I received this one, and if it didn't bounce back then
14 I'm presuming I did, but I haven't read it.

15 Chair Varlack: Okay, Judge Newton.

16 -----

17 Commissioner Newton: Yes. Commissioner Lavine, I, I
18 also join the group of people who ask you to withdraw and let
19 us look at this a little bit more. I also read this first thing
20 this morning. This is why I created a separate account just
21 for JCOPE so I could keep up with the many email. I, first,
22 applaud you, Commissioner, on taking the initiative to write
23 it and highlight it. It made it easy to recognize for me that
24 there is an issue. And I look at it a little bit differently.

1 I look at the 30,000 people who file these reports, I'll be
2 very candid. My view is, if somebody's asking to see my
3 disclosure form, I want to know who that is, just as a who and
4 why. And I, and that may be an immature way of looking at this
5 important issue, but it is a visceral response that says to
6 me, this concern is a real concern, and it should not just be
7 about public officials, but everyone, and things like this can
8 be abused. So, I would like to hear more, Commissioner Lavine,
9 and, and maybe counsel can, and others in the committee can
10 advise us more on what would be the consequences of
11 consideration of your amendment. And I would, I'm on the fence
12 right now, because I just don't know enough. Thank you.

13 Chair Varlack: Thank you. Commissioner Lavine, are
14 you willing to withdraw the motion and postpone so that we can
15 proceed as many Commissioners have requested to have an
16 opportunity? At least one Commissioner hasn't seen it yet, but
17 it would give everyone an opportunity to review it again, and
18 to ask additional questions, so they're prepared to vote.

19 Commissioner Lavine: Well, first, Madam Chair. I
20 want to thank the Judge for the compliment. However, it is
21 undeserved. The drafting was done by our staff. With respect
22 to the substantive consideration of further deliberation, I
23 certainly want to accommodate the other Commissioners,
24 particularly if there's been insufficient time to digest the
25 material. In putting it aside for further consideration,

1 however, Madam Chair, I do have another resolution on this
2 subject that I would like to move at this juncture.

3 Chair Varlack: Is this resolution, is this a
4 resolution, Commissioner Lavine, that relates to the just
5 approved amended regulations?

6 Commissioner Lavine: Yes.

7 Chair Varlack: Please continue.

8 Commissioner Lavine: We have addressed the subject
9 before of whether the Executive Chamber or the Office of
10 Inspector General have requested to review the financial
11 disclosure statements of any member of the Commission. I
12 believe it is the staff's position that they will not the
13 divulge this information without a vote of the Commission. I
14 therefore move that the staff be directed to divulge to the
15 Commission, without specific names, whether the Executive
16 Chamber, or the office of Inspector General, have asked to
17 review the financial disclosure statement of any Commissioner.
18 And I would note, Madam Chair, there is obviously no question
19 with respect to whistle blower consideration or retaliation
20 associated with this motion.

21 Chair Varlack: There is a motion on the floor. Is
22 there a second?

23 Commissioner Jacob: I second.

1 Chair Varlack: Thank you, Commissioner Weissman. Is
2 there any additional discussion?

3 Commissioner Jacob: May I be heard?

4 Chair Varlack: Yes.

5 Monica Stamm: I think that's Commissioner Jacob. Go
6 ahead.

7 Commissioner Jacob: I thought I seconded that motion,
8 and if Commissioner Weissman did as well, that's fine. But
9 this is what I was talking about with regard to 937. I think
10 you focus upon the information that the amendment deals with.
11 The amendment talks about disclosing to the filer whether or
12 who has requested the filer's FDS. Now, I've searched the law.
13 I see nothing in the statute that prohibits release of that
14 information to a filer. And we have proceeded for a long time
15 on the assumption that that is prohibited, despite the fact
16 that other agencies around this state release that information
17 routinely. But we have adopted a practice that is less
18 transparent, more secretive, and now, we need an amendment to
19 a proposed reg to open up the information. And that is what I
20 meant earlier when I said more is less. As we keep acquiescing
21 in the notion that what has been withheld in the past or
22 restricted in the past was validly done. And that we need
23 regulations to open up the information. That is not helpful
24 because we may miss some of it. Whenever we miss something,

1 you can't be all encompassing. The information we miss is being
2 withheld. Again, all this discussion about information and
3 what is confidential and what isn't, I've yet to see a
4 memorandum from counsel that explains why certain information
5 has been restricted, withheld for so long. Unless that memo
6 shows me a statutory predicate, and points merely to what we've
7 done for a number of years, I will continue to vote against
8 these regulations.

9 Chair Varlack: Thank you. Is there any additional
10 discussion? Commissioner Horwitz.

11 Commissioner Horwitz: I don't intend to support this,
12 but I don't understand why this is limited just to the
13 Executive Chamber or the Inspector General. What about the
14 Legislature? What about people that are hired by the
15 Legislature? What about the press? What about law enforcement?
16 I mean, to Marvin's point, you know, drawing this out like,
17 you know, there's, there's a never-ending list of entities and
18 individuals who could be interested for a variety of reasons
19 in getting this. So, I'm, I'm not supporting this, but I, you
20 know, what about the Legislature? What about the, the press?
21 What about law enforcement? Why not? Why not just say hey,
22 we're the Commissioners, we'd like to know who's looking at
23 us?

1 Anybody who's ever asked for an FDS, ever, for any Commissioner,
2 either currently serving, or has ever served. Why don't we
3 just ask for that? I mean, really, this truly stands things on
4 its head. I mean, and to me, it smacks of paranoia and cynicism.
5 Thank you.

6 Chair Varlack: Thank you, Commissioner Horwitz. Is
7 there any further discussion? Okay. Martin, remind me. Where
8 are we?

9 Martin Levine: There's a motion and a second to
10 require staff to disclose certain information.

11 Chair Varlack: Okay, all in favor.

12 Martin Levine: I see Commissioner Weissman and
13 Commissioner McNamara. Commissioner Braun?

14 Commissioner Braun: For the reason stated by
15 Commissioner Horwitz, I am against, it's too limited.

16 Martin Levine: Okay. Commissioner Cohen?

17 Commissioner Cohen: No.

18 Martin Levine: Thank you. Commissioner Dering?
19 We'll come back; I think you all are muted.

20 Walter McClure: Commissioner Dering is muted; you
21 guys will have to unmute please.

1 Commissioner Dering: No, and Walt, there seems to
2 be an issue with regard to our muting and unmuting. We're
3 unmuted at times but can't be heard.

4 Staff member in conference room: I think it's the
5 second speaker.

6 Walter McClure: Yeah, it may be the other speaker,
7 I don't know, but if you mute the speaker phone in front of
8 you, that should suffice.

9 Commissioner Dering: Okay. It's open. I vote no.

10 Martin Levine: Thank you. Commissioner DiPirro?

11 Commissioner DiPirro: No.

12 Martin Levine: Commissioner Fisher?

13 Commissioner Fisher: No.

14 Martin Levine: Commissioner Horwitz?

15 Commissioner Horwitz: No.

16 Martin Levine: Commissioner Jacob?

17 Commissioner Jacob: Yes.

18 Martin Levine: Commissioner Lavine?

19 Commissioner Lavine: Yes.

20 Martin Levine: Judge McCarthy?

21 Commissioner McCarthy: Yes.

1 Martin Levine: I have McNamara. Judge Newton?

2 Commissioner Newton: No.

3 Martin Levine: Thank you. Commissioner Weissman? Oh,
4 yeah, thank you, apologies. Judge Yates?

5 Commissioner Yates: Yes.

6 Martin Levine: Thank you, and Chair Varlack.

7 Chair Varlack: No.

8 Martin Levine: 1,2,3,4,5,6 in favor, 8 against.
9 Motion fails.

10 Chair Varlack: Thank you. At this time, may I please
11 have a motion to move into Executive Session, pursuant to
12 Executive...

13 Commissioner Lavine: If I may Madam Chair, under
14 other business.

15 Chair Varlack: I, I,

16 Commissioner Horwitz: So moved.

17 Commissioner Lavine: Madam Chair?

18 Commissioner Horwitz: Motion.

19 Commissioner Lavine: Madam Chair? Madam Chair?

20 Chair Varlack: Yes, Commissioner.

21 Commissioner Lavine: I believe there is on the agenda
22 other business in the open session. I have other business.

1 Chair Varlack: I am looking here, the next item on
2 the agenda is moving into Executive Session. So, at this time,
3 I am asking for a motion to move into Executive Session
4 pursuant to Executive Law..

5 Commissioner Lavine: Madam Chair if I,

6 Chair Varlack: Please, please don't speak over me.

7 Commissioner Lavine: Madam Chair, if I may, on a
8 point of order. Doesn't the agenda provide for discussion of
9 other business in the open session?

10 Chair Varlack: It does. After Executive Session,
11 Commissioner Lavine. I would invite you to take a look at the
12 agenda. Thank you, Commissioner Horwitz.

13 Commissioner Lavine: Well, I have other business. Are
14 you saying that I cannot proceed with other business in the
15 public session?

16 Chair Varlack: I am saying that we will proceed to
17 that when we get to that item on the agenda. We have a motion
18 and we have a second to move into Executive Session. All in
19 favor?

20 Commissioner Lavine: Well, do I understand correctly,
21 madam Chair, that you will not permit me to address any other
22 subject in the open session?

1 Chair Varlack: Commissioner Lavine, I don't know what
2 it is that you want to address. However, I am saying that I'm
3 following the agenda that we all have, which indicates that at
4 this time, we are moving into Executive Session. When we come
5 out of Executive Session...

6 Commissioner Lavine: But it's been the practice,
7 Madam Chair, in the past...

8 Chair Varlack: Please do not, please do not interrupt
9 me.

10 Commissioner Lavine: You interrupted me.

11 Chair Varlack: I actually was speaking, and you
12 interrupted me several times. So, we are moving into Executive
13 Session because that is, in fact, the next item on the agenda.
14 As you are aware, we have a great deal of work to do. When we
15 come out of Executive Session, there is an opportunity to
16 discuss new and other business. We have a motion that has been
17 seconded and I am now calling for the vote. All in favor?

18 Commissioner Lavine: But on the point of order, do
19 I understand it's the ruling of the Chair that henceforth, no
20 other comments or business will be permitted by a Commissioner
21 in the open session without the approval of the Chair? Is that
22 your ruling?

1 Chair Varlack: I never, I did not say that. I was
2 very clear with what I did say.

3 Commissioner Lavine: But isn't that the practical
4 implication of what you just stated, Madam Chair?

5 Chair Varlack: Commissioner Lavine, you're out of
6 order. We are in the middle of taking a vote. All in favor of
7 moving into the Executive Session, please raise your hand.

8 Commissioner Yates: May I speak on the motion? Is
9 there any discussion on the motion?

10 Chair Varlack: Go ahead, Judge Yates.

11 Commissioner Yates: Thank you. I think just in
12 fairness to Commissioner Lavine, if there's going to be a
13 change in the way we've always practiced, so that it's out of
14 the expected sequence, that should have been a Commission
15 decision.

16 Not something that was done in an agenda that was sent to us
17 without fair warning. I really don't, I think Commissioner
18 Lavine expected to go with we have the regular practice in
19 order here and I, and that's why I'm going to vote no on this
20 motion.

21 Chair Varlack: Understood. Is there any other
22 discussion? Yes, Commissioner Fisher.

1 Commissioner Jacob: Commissioner Jacob please. I
2 think what you are..

3 Chair Varlack: Commissioner Fisher, Commissioner
4 Fisher has been acknowledged. Commissioner Fisher, you're
5 muted. We can hear you now.

6 Commissioner Fisher: Okay, thank you. I plan to
7 support this motion. I feel it's perfectly reasonable to get
8 into Executive Session. We have a number of things to discuss.
9 We had a special meeting just because there were so many things
10 to discuss. I think that the agenda clearly set forth, and
11 the agenda was distributed to us. I received it by overnight
12 courier on Thursday or Friday. I had every opportunity to ask
13 for a change in the agenda. I didn't, nor did any other
14 Commissioner. We've already heard from the Chair that when we
15 come out of Executive Session, we will resume the public
16 session, and there will be an opportunity to introduce new and
17 another business, and I will strongly support going into
18 Executive Session now, given that we plan to have an open
19 session with agenda item 7 being new and other business. Thank
20 you.

21 Chair Varlack: Is there any additional discussion?

22 Commissioner Jacob: Yes, yes, madam Chair. On the
23 motion. We have repeatedly relied on how this Commission has
24 operated for 10 or 11 years. And as a person who's been here

1 since this Commission's inception, I have never seen a meeting
2 conducted in the way you are doing it. And I'm offended. There
3 is a motion to shut us down. We are trying to make, to have a
4 conversation in public session, and not in back end, what
5 Commissioner Lavine has to say to a discussion after an
6 Executive Session. Now I've been here, as I say, a long time.
7 Some others have been too, although very few. But you may not
8 be aware of this precedent, Chair Varlack, but we have never
9 done this before, and this should not be the start of it, no
10 matter what is on this agenda that was unilaterally prepared
11 by staff in conjunction with the Chair, et cetera. So, I'm
12 going to oppose any motion to go into Executive Session.

13 Chair Varlack: Commissioner Horwitz?

14 Commissioner Horwitz: I've been here as long as
15 Commissioner Jacob, and if I understand what he's saying, just
16 because they don't like...

17 Commissioner Jacob: You were gone for a while.

18 Commissioner Horwitz: Right? Well, in any event, I've
19 been here for a while, and if I understand what you're saying...

20 Commissioner Jacob: It's different.

21 Commissioner Horwitz: ...you're saying, gee, I don't,
22 I don't like peas. So now they want us to eat peas, so I don't
23 like it. The fact is Bill's right. This agenda was sent out
24 last week. Anybody could comment on it, number one. Number two

1 we're not shutting anybody down. You guys want to talk about
2 something, it's just the Chair's prerogative that we're going
3 to do it afterwards. And frankly, the last several months, we
4 have not been able to do the work that needs to be done. In
5 fact, we had to have a special meeting, which you've only had
6 one other time in our 10 years of history. And frankly, the
7 need to have regular order, which is something I asked for
8 several months ago, can we please proceed with regular order.
9 We're all committed, and I appreciate everybody's commitment
10 to working on JCOPE but frankly, some of us have other things
11 we need to do. We have professional lives. And that's why
12 regular order, in addition to all the other reasons to have
13 good order in our meetings, we should follow that good regular
14 order. But I, you know, I'm obviously going to vote for this
15 and I, we've got a big book. We've had a big book. The book
16 keeps getting bigger. We've got things to do. Gary, you'll
17 have your chance, if I hear what the Chairman, Chairwoman is
18 saying, you'll have your chance to raise what you're going to
19 raise. It'll just be, let's get to the work that we haven't
20 been able to do for the last three months. Thank you.

21 Chair Varlack: So, I would just like to make
22 something very clear. I am not at all, trying to shut down
23 discussion. The opportunity for Commissioners to bring up new
24 and other business remains on the agenda. That being said, as
25 has been noted, this is an exceptionally, I understand perhaps

1 it's the biggest book we've ever had. We have business to
2 conduct and that is absolutely our responsibility. I am calling
3 for the question. All in favor of moving into Executive Session,
4 please raise your hand.

5 Martin Levine: I see Chair Varlack, Commissioner
6 Fisher, Commissioner Dering, Commissioner Horwitz, Judge
7 Newton, and Judge Braun. Thank you. Commissioner Cohen?

8 Commissioner Cohen: Yes.

9 Martin Levine: Commissioner DiPirro?

10 Commissioner DiPirro: Yes.

11 Martin Levine: Commissioner Horwitz. Commissioner
12 Jacob?

13 Commissioner Jacob: No.

14 Martin Levine: Commissioner Lavine?

15 Commissioner Lavine: No.

16 Martin Levine: Judge McCarthy?

17 Commissioner McCarthy: No.

18 Martin Levine: Commissioner McNamara?

19 Commissioner McNamara: No.

20 Martin Levine: Thank you, Judge Newton, you voted I
21 believe, Judge Newton, did I see your hand? Thank you very

1 much. Commissioner Weissman? Thank you. I see the thumb. Judge
2 Yates?

3 Commissioner Yates: No.

4 Martin Levine: Thank you, and Chair Varlack I saw.
5 1,2,3,4,5,6,7,8. Motion carries. We're in exec. We can go to
6 exec.

7 Chair Varlack: Thank you. Walt, please let us know
8 when we're in Executive Session.

9 Walter McClure: Stand by.

10 [The Commission went into Executive Session]

11 [The Commission returned to Public Session]

12 [Commissioners Cohen, DiPirro, Horwitz and McNamara were not
13 present for the remainder of the meeting.]

14 Walter McClure: Madam Chair, we're back in Public
15 Session.

16 Chair Varlack: Okay, thank you. Thank you. We are
17 now back in Public Session. General Counsel Stamm, I would ask
18 you to report on the activity taken during Executive Session.

19 General Counsel Stamm: The Commission approved two
20 requests to engage in outside activities under the regs,
21 regulations 19 NYCRR Part 932. The Commission authorized steps
22 in several investigative matters, closed two matters, and
23 discussed several other investigative matters. That's the end
24 of the report.

1 Chair Varlack: Thank you. We are now onto the new
2 and other business portion of the agenda. Is there any new or
3 other business?

4 Commissioner Lavine: Madam Chair, do I understand
5 correctly that the meeting must end at 3:30?

6 Chair Varlack: We will no longer have the
7 technological support that we need to continue the meeting
8 past 3:30 today.

9 Commissioner Lavine: Do I understand from the
10 discussion in the opening public session that in meetings to
11 ensue, no statement or resolution will be permitted in the
12 opening public session, except as approved by the Chair?

13 Chair Varlack: Did somebody make that representation?

14 Commissioner Lavine: I am asking if that is your
15 position.

16 Chair Varlack: I never said that.

17 Commissioner Lavine: I'm asking, is that your
18 position?

19 Chair Varlack: I have never said that that was my
20 position. It is not my position.

21 Commissioner Lavine: Well, what is your position with
22 respect to the opening of the Public Session?

1 Chair Varlack: With respect to the opening, with
2 every, is there a motion? What is the point of this
3 conversation?

4 Commissioner Lavine: Well, I want to understand for
5 ensuing meetings whether a Commissioner will be permitted to
6 make a statement or offer a motion in the opening session
7 before the Executive Session is conducted.

8 Chair Varlack: So, I'm sorry. I need you to repeat
9 that. I lost a moment of what you said.

10 Commissioner Lavine: Yes, I will repeat.

11 Chair Varlack: Thank you.

12 Commissioner Lavine: The question is, with respect
13 to meetings to ensue of the Commission, will statements by
14 Commissioners or motions made by Commissioners be precluded
15 from the opening session unless prior approval is granted by
16 the Chair to conduct those discussions in the opening session?

17 Chair Varlack: Future meetings of the Commission will
18 be conducted in accordance with the agenda that is presented
19 to Commissioners in advance of the meeting.

20 Commissioner Lavine: Right, and it's the, it's the
21 position of the Chair that the Chair has the sole prerogative
22 to determine the agenda of the opening public session?

1 Chair Varlack: The Chair puts together the agenda and
2 makes sure that the materials are put together and it is sent
3 out to Commissioners, as you know, Commissioner Lavine, well
4 in advance of the meeting. If anyone at any time has a concern,
5 they can certainly raise it.

6 Commissioner Lavine: I understand that proposition,
7 Madam Chair, but my very specific question is, is it the ruling
8 of the Chair that it is the sole prerogative the Chair to
9 determine the agenda for the open or public session, I will
10 characterize it, conducted prior to the Executive Session?

11 Chair Varlack: And what I've indicated, and I will
12 restate, Commissioner Lavine, and I'm not going to continue to
13 go back and forth on this because I think my position is clear,
14 is that there is an agenda that is sent out to the Commissioners
15 in advance of the meeting. If there are any questions or
16 concerns, then we can address them. When we open the meeting,
17 we have an opportunity to move things around on the agenda, as
18 we have done multiple times in the past, whether public session
19 or in Executive Session. Judge Braun?

20 Judge Braun: As per meetings I've gone to in the
21 past, and my understanding of Robert's Rules, which I
22 understand we don't necessarily follow, but do it to some
23 degree, the Chair runs the meeting. The agenda is put before
24 the body. We can always, as the Chair just said, we, the

1 Commissioners, the body in a sense, can move to amend the
2 agenda and change things. Old business, otherwise, in our
3 agenda called other business, is usually, is generally under
4 Robert's Rules, the next to last item on the agenda, new
5 business being the last item. I understand being new to the
6 Commission, just having joined the end of January, that there's
7 some tradition of taking old or other business and new business
8 before going into Executive Session. But it doesn't
9 necessarily have to be done that way. So, if the agenda was
10 set in a certain way, was modified today, the body, we could
11 have moved and voted to change the agenda before we went into
12 Executive Session, but we had a very busy agenda today, and my
13 understanding for what the Chair said was that was the reason
14 we went into Executive Session before taking up new and other
15 business. Today or next, we could have, or next time, or
16 anytime if we want to, somebody can make a motion and we can
17 vote on that to change the order the agenda. So, I don't think
18 anybody's precluded from speaking or raising items no matter
19 how the agenda is set up.

20 Chair Varlack: Thank you, Judge Braun.

21 Commissioner Lavine: Thank you, your Honor. May I,
22 on the follow-on, Madam Chair, point out that if today is an
23 exemplar, a very serious question is raised about this
24 unprecedented procedure, which you have instituted. The post-

1 Executive Session Open Session has been limited to
2 approximately 10 minutes.

3 Chair Varlack: So, I'm not sure if there's a question
4 there, but what I will say is that...

5 Commissioner Lavine: It's a statement. You have
6 unilaterally departed from the precedent that has, was
7 established early on in this Commission that has been our
8 practice until today. And I find it objectionable.

9 Chair Varlack: And what is that, what is that
10 departure? I'm sorry.

11 Commissioner Lavine: The departure is, that by the
12 machination of moving other business to the post-Executive
13 Session portion of the meeting, it necessarily time limits, in
14 an unreasonable manner, any discussion that the Chair does not
15 choose to have in the Open Session. That's objectionable.

16 Chair Varlack: Yeah, I would object to your
17 characterization here. The fact of the matter is, Commissioner
18 Lavine, is that a part of the reason that we have as heavy a
19 book as we have in this particular meeting is because you have
20 gone on, at length, in previous meetings about topics that you
21 wish to discuss. It is my responsibility to make sure that we
22 address the items that need to be voted on before the
23 Commission. My work here was to make sure that we addressed
24 the work that needed to be done and I think, in fact, that we

1 did a very good job. If you want this meeting to continue until
2 5:00 PM today, so that you can have the opportunity to say
3 anything it is that you would like to say, I would not have
4 objected to that. This limitation of time is not mine.
5 (inaudible).

6 Commissioner Jacob: May I?

7 Chair Varlack: I did not ask for the meeting to end
8 at 3:30.

9 Commissioner Jacob: Before we get cut off,
10 Commissioner Jacob here. May I just say, and I haven't got the
11 law in front of me, but I look at the Executive Law, which
12 doesn't speak about who sets the agenda, who writes it, who
13 controls it. In the past, our Chairs have been rather passive
14 and have allowed discussion to proceed, and we've done it quite
15 successfully, but the Chair is one vote, the same as we all
16 have, but there's one privilege above all of us. The Chair may
17 call a meeting, but the statute does not say that the Chair
18 not only calls the meeting but sets the agenda so that we
19 cannot continue to do what we've done here for 10 years. So,
20 I, I've got to disagree with you, Madam Chair. But I, I'm
21 looking at the law, and I'm looking at our process, our
22 procedure, and our tradition, how we've operated here. And
23 you've been, you've come on rather recently and I understand
24 what Commissioner Lavine is saying, and I think we've got to

1 cope with this and we've got to have a good answer because
2 he's asking a very good question.

3 Chair Varlack: I haven't heard...

4 Commissioner Jacob: And questions deserve good
5 answers.

6 Chair Varlack: What is the question?

7 Commissioner Jacob: I don't want to, I don't want
8 to...

9 Chair Varlack: I have not made any unilateral
10 decisions. As I said, the agenda was circulated in advance of
11 the meeting.

12 Commissioner Jacob: No, the question, Madam Chair,
13 Madam Chair, the question is, had we seen the agenda and
14 focused on the intent of the agenda, because I was taken by
15 surprise.

16 The agenda didn't have an item in it. I never looked for the
17 presence of the item, because I never assumed that this
18 meeting would be conducted in any way other than all the rest
19 of them.

20 Chair Varlack: I'm sorry, what's the missing item,
21 Commissioner? What is the missing items?

1 Commissioner Jacob: You took, the position, you took
2 the position that there was no New and Other business on the
3 Public Session agenda.

4 Chair Varlack: No, that line was on the agenda. It
5 is on the agenda.

6 Commissioner Jacob: It was on the agenda, but you
7 took the position that you could move that item, whether it's
8 on, off, whatever. I didn't make any such assumption when I
9 read that again. I had no knowledge of whether I should call
10 anybody, including yourself, and ask, but now I know. And now
11 Commissioner Lavine knows. But let's, why can't we agree to
12 conduct our meetings as we have always conducted them? Why do
13 we have to get into these disputes at this late stage?

14 Commissioner Newton: I have a question, Madam Chair.
15 If we can, if we can conduct the business of the Commission
16 in an efficient way, as he has, as we have today, why do we
17 have to succumb to what we've always done? That suggests new
18 people like me on the Commission are lesser Commissioners,
19 and I resent that notion. This is a discussion I've heard on
20 this Commission and looking at some of the past concerns,
21 super Commissioners, older Commissioners. I think that we need
22 to focus on doing the work of the Commission in an efficient
23 manner. So, we now know that Madam Chair is going to send us
24 the Commission agenda. Somebody has to do it. We now know that

1 every Commissioner has an opportunity to make suggestions to
2 her. We now know after today, we as a Commission can vote,
3 which we did, and we voted majority to go into Executive
4 Session. So before, so there's a lot of, for all of us to
5 consider, and I agree this should not be any acrimony or anger,
6 but I think that we should focus on this, and that is how can
7 we, we're very concerned about what other people think of
8 JCOPE, why can't we in that effort, it's my opinion, have a
9 meeting that's done efficiently and carefully and get some of
10 the old business done? Thank you, Madam Chair.

11 Chair Varlack: Thank you, Judge. As was discussed a
12 few months ago...

13 Commissioner Jacob: With all respect, may I? I
14 thought that was directed at my comment. May I just respond,
15 with all respect?

16 Commissioner Newton: Let me assure you, I was not
17 directing it at any single person, Commissioner. I was talking,
18 as the junior Commissioner, about my observance, having been
19 on the Commission for the last month and I am not, everybody
20 else gets to say what they want to say, and that's to the
21 whole Commission. Thank you very much, sir.

22 Commissioner Jacob: That's fine, but I have 10 years
23 of hard work invested in this Commission, and so have a few
24 others. Ten years. You just got here, and that's not a

1 statement to say that you are in any way inferior to me. But
2 when I raise the issue of, may we continue as we have continued
3 before, I'm not denying you the right to raise new issues. Of
4 course, not. But don't deny me to take the position that I
5 have some expectation, which is justified, that we continue as
6 before. And, all this business about precedent, when you talk
7 about internal, the informal letter opinions, we're constantly
8 told about, oh it was done that way at COPI. It was done that
9 way at the state, at the Commission prior to COPI. it was done
10 that way for 10 years, but when it comes to process, and that's
11 law when it comes to process, all of a sudden, all precedent
12 has no meaning. We could just recreate, do all these new things.
13 I'm trying to explain my position. I'm certainly not declaring
14 that certain Commissioners stand at a higher level than others.
15 But I shouldn't be faulted, because I've been here a while,
16 and have become accustomed and expect certain, a certain way
17 of how this Commission is conducted in Public Session. Public
18 expects to hear from us, and all of a sudden, it doesn't hear
19 from us. That's why we have this great reputation as, you
20 know.

21 Commissioner Dering: Chair, if I could make a couple
22 of comments?

23 Chair Varlack: I'm sorry. Who's speaking?

24 Commissioner Dering: Commissioner Dering.

1 Chair Varlack: Yes, Commissioner Dering.

2 Commissioner Dering: I'm just wondering if this is
3 getting blown out of proportion. We had a significant agenda
4 today. It is up to the, you know, in any entity, the Chair
5 works to put together the agenda. We had a lot of work to do
6 today. This item wasn't taken off the agenda. It was just, it
7 was just reordered. And today, we had we had the circumstance
8 where we had to end by a certain time. I think that was known
9 to everybody. People could have used their time accordingly.
10 And at the end of this session, instead, we use this time to
11 start arguing about this, which, quite frankly, to me is a lot
12 about nothing, so thank you.

13 Chair Varlack: Thank you, Commissioner Dering. Does
14 anybody else have any comment or any other, new or other
15 business?

16 Commissioner Lavine: May I ask? It's now 3:36. I
17 thought the meeting technically had to end at 3:30.

18 Chair Varlack: That is the case, but I understand
19 that the medical appointment that needed to be attended has
20 now been canceled to accommodate our continued discussion. Is
21 there any other new or other business?

22 Commissioner Lavine: Yes, I have a motion with
23 respect to the agenda for the May meeting. I move that a
24 further discussion about Executive Order 202.7 be discussed in

1 the Public Session prior to the Executive Session in May, as
2 I would have done today.

3 Chair Varlack: There is a motion on table. Is there
4 a second?

5 Commissioner Jacob: I second that.

6 Chair Varlack: Was that Commissioner, Jacob or?

7 Commissioner Jacob: It was.

8 Chair Varlack: Thank you. Is there any discussion?

9 Commissioner Braun: Do we have a quorum to vote on
10 any motions now?

11 Monica Stamm: Yes, we have a quorum. We have a quorum.

12 Commissioner Braun: I for one, I need to leave, but
13 I'm still here.

14 Chair Varlack: Thank you, Judge Braun. Is there any
15 discussion on the motion? Okay, all in favor?

16 Martin Levine: I see Commissioner Weissman, Judge
17 Yates, and Judge Braun. I will call the remaining role.
18 Commissioner Dering? Sorry Commissioner.

19 Commissioner Dering: Sorry, no.

20 Martin Levine: Thank you. Commissioner DiPirro.
21 Commissioner Fisher?

22 Commissioner Fisher: No.

1 Martin Levine: Thank you. Commissioner Jacob?

2 Commissioner Jacob: Yes.

3 Martin Levine: Commissioner Lavine?

4 Commissioner Lavine: Yes.

5 Martin Levine: Judge McCarthy?

6 Commissioner McCarthy: Yes.

7 Martin Levine: Judge Newton?

8 Judge Newton: No.

9 Martin Levine: Commissioner Weissman doesn't seem
10 to be there. Commissioner Yates?

11 Commissioner Yates: Yes.

12 Martin Levine: Thank you. And Chair Varlack?

13 Chair Varlack: No.

14 Martin Levine: I'll go back. Is Commissioner
15 Weissman still present?

16 Monica Stamm: He voted yes. Commissioner Fisher, can
17 you confirm?

18 Commissioner Fisher: Yes, we can confirm.
19 Commissioner Weissman voted yes before he departed.

20 Martin Levine: 1,2,3,4,5,6 in favor. Motion fails.

1 Chair Varlack: Is there any other new or other
2 business? Can I have a motion to adjourn the meeting?

3 Commissioner Dering: I'll move. Dering.

4 Chair Varlack: Thank you.

5 Commissioner Fisher: Seconded. Fisher.

6 Chair Varlack: All in favor?

7 Martin Levine: Varlack, Dering, Fisher, Newton,
8 Braun. Judge Yates, I assume, is that up?

9 Commissioner Yates: No.

10 Martin Levine: Okay. Thank you for clarifying.
11 Dering. Fisher. Jacob?

12 Commissioner Jacob: Yes.

13 Martin Levine: Lavine?

14 Commissioner Lavine: Yes.

15 Martin Levine: McCarthy.

16 Commissioner McCarthy: Yes.

17 Martin Levine: Newton?

18 Monica Stamm: She voted, I think, yes.

19 Judge Newton: I voted before. Yes, this is to adjourn
20 the meeting, yes.

1 Martin Levine: Yes, ma'am. (inaudible) Yates, you
2 said is a no. And Chair Varlack?

3 Chair Varlack: Yes.

4 Martin Levine: 1,2,3,4,5,6,7,8. Motion carries.

5 Chair Varlack: Thank you. Take care.

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