

**MINUTES OF THE PUBLIC SESSION OF THE
APRIL 27, 2021
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
VIA WEBEX**

Chair: Camille Varlack (WebEx)

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

Staff: Monica J. Stamm, General Counsel
Martin L. Levine, Deputy General Counsel
Walter J. McClure, Director of Communications and Public Information Officer
Keith St. John, Director of Ethics
Michael Sande, Deputy Director of Ethics Guidance
Stephen Boland, Director of Administration
Carol Quinn, Deputy Director of Lobbying Guidance
Megan Mutolo, Associate Counsel
Lori A. Donadio, Principal Investigative Analyst
Kelly McCready, Confidential Clerk
Olivia Fleming, Intern

I. CALL TO ORDER

Chair Varlack called the April 27, 2021 meeting to order and noted that the meeting was being held using video conference technology and that the public session is accessible on JCOPE's website to watch via livestream. She also noted that all votes would be taken via a modified roll call.

II. APPROVAL OF MINUTES – PUBLIC SESSION

March 23, 2021 & April 9, 2021

A motion was made by Commissioner Weissman, seconded by Commissioner Braun, to approve the minutes from the Public Sessions of the March 23, 2021 and April 9, 2021 Commission Meetings. The motions were approved by a unanimous vote.

III. REPORT FROM STAFF

Operations Update

General Counsel Monica Stamm stated that behind Attachment B is the February 2021 monthly operations report.

End of Year Financial Report

Director of Administration Stephen Boland gave the 2020-2021 fourth quarter and end of year financial report. For personal services, the Commission spent almost \$4,328,000. For non-personal service, the Commission spent \$587,000, for a year-to-date total of \$4,915,000. The Commission achieved its 5% reduction of cash goal from the Division of Budget by spending 88.9% of the budget.

2021-22 Budget Appropriation

General Counsel Stamm stated that the Commission received its budget appropriation of \$5,594,000, an increase of \$12,000 over FY 2021 levels to accommodate the new private building lease in Buffalo.

Update – FDS Filings

General Counsel Stamm stated that the 2020 financial disclosure statements are due on Monday, May 17th. If filers have not received notification, they should contact their Ethics Officer or JCOPE staff.

IV. DELEGATION OF AUTHORITY TO STAFF

Informal Guidance

General Counsel Stamm stated that included in the meeting book materials is a Proposed Amendment to the existing Delegation of Authority to staff. The amendment provides that outside activities, expense or service payments, and honorarium for statewide elected officials and agency department heads are required to be approved by the Commission. In addition, informal guidance issued by staff can be reconsidered by the Commission, but any changes by the Commission will be prospectively only. Any change by the Commission will not affect the individual who made the request. The revisions also make clear that the Commission can publish and modify informal letter opinions in a redacted form. Also, at each Commission meeting, staff will provide the Commission a list of all letter opinions that have been requested and issued.

Commissioner Jacob stated that he would like to make an amendment to the delegation that gives comfort to a recipient of an opinion. Commissioner Jacob proposed to add that if an opinion was given and all of the facts were included with no material facts omitted, and the recipient acts in accordance with the opinion, staff would not recommend enforcement action against the recipient. This would not bar the Commission from acting against the recipient.

A motion was made by Commissioner Yates, seconded by Commissioner Fisher, to adopt the resolution to change the delegation as proposed in the meeting materials.

Commissioner Jacob asked Commissioner Yates to amend the motion to include Commissioner Jacob's amendments. Commissioner Yates stated that he would like to vote on the main motion first and wait on the proposed amendment so that Commissioners can review the language Commissioner Jacob proposes. Commissioner Horwitz stated that he would support Commissioner Yates' motion but would not support Commissioner Jacob's amendment because he believes it will undo the safe harbor and have a chilling effect on state officers and employees seeking guidance from the Commission. Judge Braun made a motion to amend the delegation to remove Chair Rozen's name but withdrew his motion after clarification that the proposed delegation included certain historical references.

Commissioners Braun, Cohen, Dering, DiPirro, Fisher, Horwitz, Lavine, McCarthy, McNamara, Newton, Weissman, Yates and Chair Varlack voted in favor of the motion. Commissioner Jacob opposed the motion. The motion carried, with a vote of 13-1.

A motion was made by Commissioner Jacob, seconded by Commissioner Lavine, to amend the Delegation of Authority consistent with Commissioner Jacob's requested change. Commissioner Horwitz explained that Commissioner Jacob's amendment gives no safe harbor because it only addresses the recommendations of staff, and as the Commission well knows, it is entirely the Commission's decision, not staff's, whether to pursue an enforcement action. If a person calls staff and asks for an opinion and discloses all facts honestly, forthrightly, and comprehensively, they do not get any comfort under this amendment because the Commission can still decide that an enforcement action should proceed.

Commissioner Fisher suggested waiting to vote on the amendment until hearing from General Counsel and other Commissioners. Commissioner Weissman requested that Commissioners Jacob and Lavine withdraw the motion to permit some language to be developed in consultation with Counsel and other Commissioners. Commissioner Jacob agreed to withdraw his motion.

Commissioner Lavine stated that at the May meeting he is going to propose an amendment to divulge the previously rendered opinions to statewide elected and department heads and will ask staff to develop language and send it to Commissioners before the next meeting.

V. **CONFIDENTIALITY & RECORDS ACCESS COMMITTEE**

Proposed Amended Regulations for Access to Publicly Available Records

General Counsel Stamm explained that the Proposed Revised Regulations for Access to Publicly Available Records (Part 937) are the result of the work of the Confidentiality and Records Access Committee. Although these proposed amendments to the existing regulations were already presented to the Commission, they were not voted upon. If the Commission moves forward, staff will submit them to be published in the state register

under the State Administrative Procedure Act. There will then be a 60-day notice and public comment period. The Commission will then determine whether or not to incorporate any of those comments. The Commission could either continue a rulemaking or adopt the regulations at that point. Presently, only the Financial Disclosure Statement itself is made available, consistent with the Executive Law, but the new section 937.1(b) makes additional information relating to financial disclosure statements available. Also, subsection C makes information relating to staff titles and salaries available. Commissioner Yates stated that he requested that it be made clear that the term “information” is only expanding what can be disclosed with respect to the Financial Disclosure Statements but does not suggest that other information cannot be disclosed. Commissioner Yates is concerned with the possible negative implication that under Executive Law § 94(9-a), it could be construed that the only information that is not confidential is that set forth in 937, which could expand secrecy. General Counsel Stamm stated that regulations make clear what documents staff can make publicly available, the process for how the requests are made, the process for getting access, and how to challenge a determination of staff. The regulation itself doesn’t expand what is or is not confidential. Commissioner Jacob stated that the regulations create a new undefined area of “information”, without any statutory predicate, and he will not vote in favor until he sees a memorandum of law explaining the definition of “information” and the statutory predicate for it. Commissioner Newton asked about the reason or intention for the change to the regulation. General Counsel Stamm stated that the Committee undertook to examine how the Commission could be more transparent and make more records available, including more information about financial disclosure statements. Commissioner Braun stated that the new section in Part 937 clearly defines information. Specifically, 937.3(a)(1) provides for a request for information “pursuant to this part,” and 937.1(b) expressly sets forth the information that is available.

Commissioner Horwitz stated that the Commission has struggled with the tension between preserving confidentiality and the public’s need to know what the Commission is doing. This proposal was a way to incrementally improve transparency. Commissioner Yates stated that for years, the public has received misstatements and misapprehensions about the work of the Commission, including the status of investigative matters and advice and

guidance that has been issued, so the subcommittee undertook ways to disclose more information that is not legally required to be confidential, and is proceeding in incremental steps. Commissioner Yates reiterated that by designating certain information as publicly available, the regulation does not restrict disclosing information that is not included.

A motion was made by Commissioner Horwitz, seconded by Commissioner Fisher, to approve the proposed Amended Record Access Regulations. Commissioners Braun, Cohen, Dering, DiPirro, Fisher, Horwitz, Lavine, McCarthy, McNamara, Newton, Weismann and Chair Varlack voted in favor. Commissioners Jacob and Yates opposed the motion. The motion carried, with a vote of 12-2.

A motion was made by Commissioner Lavine, seconded by Commissioner Weissman, to amend the Records Access Regulations to include that a filer could inquire as to who has requested to review his/her FDS and, once that information is disclosed to the filer, it is in the public domain and the filer could disclose that information.

Commissioner Fisher stated that because of insufficient time to review Commissioner Lavine's proposal and because he has some suggestions to add to the amendment regarding notice to filers and whistleblower implications, he suggests waiting to vote on this motion. Commissioner Horwitz stated that he believes the change is antithetical to the Commission's mandate and could also tip off subjects to potential investigations and would protect public officials' interest over that of the public. Commissioner Horwitz requested that the amendment be withdrawn for review by the Confidentiality and Records Access committee. Commissioner Braun agreed with Commissioner Horwitz because the Commission is increasing transparency in government, not transparency to public officials. Commissioner Newton also requested that Commissioner Lavine withdraw his motion until further consideration can be given to consider the consequences of the amendment. Commissioner Lavine agreed to withdraw his motion.

A motion was made by Commissioner Lavine, seconded by Commissioner Jacob, to direct staff to divulge, without specific Commissioner's names, if the Executive Chamber or the

Inspector General has requested to review a Financial Disclosure Statement of any Commissioner. Commissioner Jacob stated that Commissioner Lavine's amendment would disclose to a filer whether or who requested a filer's FDS, and doesn't see anything in the statute that prohibits the release of that information. Commissioner Jacob stated that the Commission has proceeded with the assumption that releasing that information is prohibited, and the Commission adopted a practice that is less transparent and more secretive. Commissioner Horwitz stated that he will not support Commissioner Lavine's motion, but questions why the motion is just for the Inspector General and the Executive Chamber -- why not include the legislature, press, law enforcement, etc.

Commissioners Jacob, Lavine, McCarthy, McNamara, Weissman, and Yates voted in favor of the motion. Commissioners Braun, Cohen, Dering, DiPirro, Fisher, Horwitz, Newton and Chair Varlack opposed the motion. The motion did not carry, with a vote of 6-8.

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

§ 94(19)(B)

A motion was made by Commissioner Horwitz, seconded by Commissioner Newton, to enter into Executive Session.

Commissioner Lavine stated that he believes that other business is on the agenda and he has other business. Chair Varlack stated that the next item on the agenda is moving into Executive Session. Commissioner Lavine stated on a point of order, the agenda provides for discussion of other business in the open session. Chair Varlack stated that it is on the Public Session agenda after the Commission returns from Executive Session. Commissioner Lavine and Chair Varlack discussed the order of the agenda at length, with Commissioners Lavine, Jacob, and Yates arguing that the placement of new and other business should be before Executive Session, and that a change should not be made without notice to the full Commission. Chair Varlack and Commissioner Fisher noted that the agenda was distributed several days prior to the meeting, and no objections were raised. Commissioner Horwitz added that it is the Chair's prerogative to move an item to after Executive Session. Commissioner Horwitz stated that he requested regular order several

months ago to ensure they get to the work in Executive Session, which has not been done in the last three months. Chair Varlack stated she is not trying to shut down a discussion. The opportunity for Commissioners to bring up new business remains on the agenda.

Commissioners Braun, Cohen, Dering, DiPirro, Fisher, Horwitz, Newton and Chair Varlack voted in favor of the motion. Commissioners Jacob, Lavine, McCarthy, McNamara, Weissman, and Yates opposed the motion. The motion carried, with a vote of 8-6.

VII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

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

General Counsel Stamm stated that in Executive Session, the Commission approved two requests to engage in outside activities, authorized steps in several investigative matters, closed two matters, and discussed several other investigative matters.

VIII. NEW AND OTHER BUSINESS

Commissioner Lavine and Chair Varlack continued to discuss the order of the agenda, including whether future meetings will have the same order of items. Chair Varlack stated that future meetings will be conducted in accordance with the agenda that is presented to Commissioners in advance of the meeting, and that materials are put together and sent out to Commissioners well in advance of the meeting so if anyone has a concern, they can raise it. Judge Braun stated that the Chair traditionally sets the agenda and runs the meeting and the Commissioners can always move to amend the agenda. Commissioners Lavine and Jacob disagreed and expressed their objection to the change in practice, *i.e.*, moving New and Other Business until after the Executive Session, arguing that it put *de facto* time limits on the Public Session and was done to stifle debate. Chair Varlack stated that part of the reason that the Commission has a lengthy Executive agenda is because Commissioner Lavine has gone on at length in previous meetings about topics that he wished to discuss. Chair Varlack stated that it is her responsibility to make sure that the Commission

addresses the items that need to be voted on before the Commission and that the Commission does the work that needs to be done. Commissioner Jacob stated that Executive Law does not set forth who sets the agenda but requests that the meetings be conducted as they always have been. Commissioner Newton stated that the business of the Commission needs to be conducted in an efficient way, as it was today, so questioned why the Commission needs to do what it has always done -- that suggests that new Commissioners are lesser Commissioners, and she resents that notion. Commissioner Newton stated that if people are concerned about the opinions of JCOPE, the meeting should be done efficiently to get old business done. Commissioner Jacob stated that he has been on the Commission ten years and he has the right to request that the Commission continue with a practice that has always been done. Commissioner Dering stated that the issue is getting blown out of proportion. The Commission had a significant agenda and the Chair put together an agenda. Items were not removed. The Commission was aware of the time constraints and could have used the time accordingly, but instead chose to argue about the order of the agenda.

A motion was made by Commissioner Lavine, seconded by Commissioner Jacob, to discuss Executive Order 202.7 at the May Commission meeting in the Public Session prior to Executive Session. Commissioners Braun, Jacob, Lavine, McCarthy, Weissman, and Yates voted in favor. Commissioner Dering, Fisher, Newton, and Chair Varlack opposed the motion. The motion did not carry, with a vote of 6-4.

IX. MOTION TO ADJOURN THE PUBLIC MEETING

A motion was made by Commissioner Dering, seconded by Commissioner Fisher, to adjourn the Public Session. Commissioners Braun, Dering, Fisher, Jacob, Lavine, McCarthy, Newton, and Chair Varlack voted in favor of the motion. Commissioner Yates opposed the motion. The motion carried, with a vote of 8-1. Commissioner Weissman was not present for the vote.