

**MINUTES OF THE PUBLIC SESSION OF THE
MAY 25, 2021
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
VIA WEBEX**

Chair: Camille Varlack (Albany)

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

Absent: Colleen C. DiPirro

Staff: Sanford N. Berland, Executive Director
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
Peter Smith, Chief Investigator
Anthony DeFino, Investigator
Lori A. Donadio, Principal Investigative Analyst
Kelly McCready, Confidential Clerk

I. CALL TO ORDER

Chair Varlack called the May 25, 2021 meeting to order and noted that the meeting was being held using video conferencing technology and that the public session is accessible on JCOPE's website to watch via livestream. She also noted that all votes would be taken via a modified roll call.

Chair Varlack introduced and welcomed the new Executive Director, Judge Sanford Berland.

Chair Varlack stated that several Commissioners reached out to her about rules of order to ensure that the Commission is conducting its business efficiently and effectively. Chair Varlack will be creating a Rules and Protocol Committee that will consider and develop recommendations for the Commission. Any Commissioners interested in participating should contact her.

II. APPROVAL OF MINUTES – PUBLIC SESSION

April 27, 2021

Deputy General Counsel Martin Levine noted a request made by Commissioner Yates to include on page 3, line 8, the words “and modify” after the word “publish”.

A motion was made by Commissioner Weissman, seconded by Commissioner Fisher, to approve the minutes as amended for the Public Session of the April 27, 2021 Commission Meeting. The motion was approved by a unanimous vote.

III. REPORT FROM STAFF

Operations Update

[Commissioner McCarthy was not present for this portion of the meeting]

Executive Director Berland stated that behind attachment B is the April 2021 monthly operations report and explained that lobbying inquiries continue to be significantly higher due to the introduction of the new lobbying regulations. Executive Director Berland stated that staff are continuing to work from home until after Labor Day to align with children returning to school and the completion of renovations to the New York City office.

Update – FDS Filings

Executive Director Berland stated that the 2020 financial disclosure statements were due on Monday, May 17. The Commission has received nearly 19,000 filings to date and will soon be working on compliance. The FDS filings for the Statewide Elected Officials have been posted on JCOPE's website. The legislative FDS, which are filed with the Legislative Ethics Commission (LEC), will be received by JCOPE by June 30 and will be posted shortly thereafter.

Commissioner Horwitz asked if JCOPE sees the original legislative FDS filings and any amendments that were made prior to being sent to JCOPE. Commissioner Horwitz also asked what the public policy is for the legislative branch to review the filings before sending them to JCOPE. Several Commissioners weighed in on the discussion. Judge Berland stated that staff will look into it and report back at the next meeting.

Commissioner Jacob asked about JCOPE's practice with respect to FDS filings and asked whether the original submission and any amendments made are available to the public. Deputy General Counsel Levine stated that the filings and amendments are both available to the public. General Counsel Stamm advised that this is consistent with her understanding of the practice with legislative filings; the LEC sends JCOPE the original filings and any changes made to those filings as a result of the LEC's review are included as amendments, but staff will confirm.

IV. PROPOSAL RELATING TO FDS FILER ACCESS TO INFORMATION
JCOPE 21-XX

Chair Varlack stated that included in the meeting book materials is a proposal submitted by Commissioner Lavine relating to FDS filer access to information.

Commissioner Lavine made a motion to approve his proposed resolution to allow FDS filers access to information about requests made for their FDS reports. Commissioner Lavine clarified that his proposal would apply retroactively. Commissioner Yates seconded the motion.

Commissioner Fisher stated that he would consider supporting the motion if it applied prospectively only and asked Commissioner Lavine if notice will be given to requestors that their information will be disclosed to the filer. Commissioner Lavine stated that notice should be given to individuals who request a filing that the request is subject to be divulged to the filer, but that his motion is to be applied retroactively. Commissioner Fisher stated that he does not think that past requests for FDS should be divulged to the filer because the requestor did not have notice.

Commissioner Newton asked how section three, subpoenas and limitations, would work with law enforcement, and also asked if notice would be given automatically to a filer when someone requests their filing. Commissioner Lavine explained that the filer would have to ask JCOPE if an inquiry has been made for their filing and that law enforcement would have to ask that their FDS request be kept confidential. Commissioner Newton questioned if it would be better practice to affirmatively notify filers since they would not know to ask whether there has been a request. Commissioner Lavine stated that he had presumed it would be less burdensome this way, due to the fact that there are 30,000 filers; if a filer has a concern, this resolution will permit the filer to ascertain if an inquiry was made.

Commissioner Horwitz stated that he is opposed to the resolution because it is completely contrary to JCOPE's mission and the public policy ensuring the integrity of public employees and any investigations conducted to that end. In addition, the information proposed to be disclosed to the filer includes the requestor's contact information, phone number, and address. It turns the process of protecting the public on its head. If a news organization learns of a possible criminal investigation and asks for a FDS, that information would be divulged to the target. General Counsel Stamm asked Commissioner Lavine if it was his intent, with the carve out for law enforcement subpoenas, to only include grand jury subpoenas and not civil subpoenas. Commissioner Lavine stated that it would include civil or agency subpoenas. Commissioner Horwitz stated that it should be more clear as to what entities are covered under law enforcement, because civil subpoenas issued by inspector generals or other agencies would not typically be considered law enforcement. Commissioner Weissman asked whether the request for contact information in number two

would fall under an unwarranted invasion of privacy under the Freedom of Information Law.

Commissioner Weissman asked Commissioners Lavine and Yates to withdraw their motion in order to sort through some legal issues. Commissioner Lavine agreed to withdraw the motion. Commissioner Jacob asked if requestors regularly ask for anonymity. Judge Berland stated that the current practice is that the requestor's name will not be divulged so there is no need to request anonymity. Commissioner Yates suggested that the language in the resolution should track the exceptions from disclosure under FOIL in the Public Officers Law. Commissioner Jacob asked how many requests for FDS are received. General Counsel Stamm stated that the information is included in the monthly operations report and that requests increase in the months of May and November when the filings are due.

V. **GOVERNOR'S EXECUTIVE ORDERS 202.6 & 202.7**

Chair Varlack stated that as requested by Commissioner Lavine, the Governor's Executive Orders were placed on the agenda, but asked Commissioner Lavine to consider moving the item to the Executive Session because the proposal relates to potential issuance of subpoenas. Chair Varlack stated that those conversations generally are not held in the Public Session. Commissioner Lavine stated that his request is for an informational subpoena and insisted that the discussion be held in the open session. Commissioner Horwitz stated as a point of order he would like to know the difference between an informational subpoena and an investigative subpoena and where it is referenced in the Executive Law. General Counsel Stamm stated that there is no distinction in types of subpoenas. Under Section 94(17)(c), the Commission has the power and duty to issue subpoenas to conduct any investigation necessary to carry out the provisions of the law. Commissioner Horwitz stated that the matter should be moved to Executive Session to be consistent with the law, and any departure from that process could create dangerous precedent.

Chair Varlack made a motion, seconded by Commissioner Horwitz, to move the discussion to the Executive Session. Commissioners Cohen, Dering, Fisher, Horwitz, McNamara, Newton, and Chair Varlack voted in favor of the motion. Commissioners Braun, Jacob, Lavine, Weissman, and Yates opposed the motion. The motion did not carry, with a vote of 7-5.

[Commissioner McCarthy returned to the meeting.]

Commissioner Lavine stated that with the legislature considering fundamental changes in ethics administration, the Commission should consider what constitutes status as a public officer. This has been the subject of much discussion by the courts and other entities. Executive Order 202.7 is another variation on this theme, exempting certain individuals who are “volunteers” from the ethics requirements of the Public Officers Law. Since the Executive Chamber has not responded to requests for information relating to who is covered by the Executive Order, it is possible that the administration could deem a person a volunteer who is being paid by their employer, who could have business with the state or other ethical issues. Commissioner Lavine stated that with the legislature undertaking a review, it is incumbent upon JCOPE to participate in the deliberation, and under the Executive Law, it is the Commission’s responsibility to advise on ethics administration in the state. In order to have meaningful discussions on this subject, the Commission needs the information sought.

Commissioner Lavine made a motion to request from the Executive Chamber a list of individuals covered by the Executive Orders; who administered the Orders; a list of volunteers, and a list of those deemed volunteers who were paid by their employers; any recusals required for those individuals identified; any instances of gifts from interested sources to those individuals identified; and any vendor that did business with the state under emergency provisions which were exempted from the regular procurement process if the value of the contract is one million dollars or more.

Commissioner Horwitz stated that the motion should be clear about the kind of subpoena that is included in the motion, and under what section of the law the subpoena is being issued. Commissioner Lavine stated that administrative agencies issue subpoenas to establish or advise on policy and that the purpose of the subpoena is not investigatory, but rather to glean information so that the Commission may make an informed contribution to the discussion about ethics reform.

Commissioner Weissman seconded the motion.

Commissioner Fisher stated he will oppose the motion because he believes in limited government and the motion is an example of governmental overreach. The Commission can express its position and ask the legislature to review or rescind an Executive Order, but the motion does not fall within the Commission's powers and duties. Commissioner Yates stated that his concern continues to be that if there is an ethical violation by someone who is invested with the authority of a Public Officer or is a Public Officer, whether the Commission can investigate, or if the Executive Order has divested the Commission of the authority to investigate. The point of the subpoena is to find out the scope of the Commission's authority in light of the Executive Order. Commissioner Yates stated that it is not an investigative matter. Judge Berland stated that there is no question that the Commission has the authority to investigate complaints, but the proposal is for the Commission to issue a subpoena for informational or educational purposes, and Commissioners should consider whether this is a proper and efficient use of JCOPE's limited resources. Commissioner Yates stated that section 74 is suspended for people covered by that order and he would like to see a written opinion from counsel or the Executive Chamber that explains if JCOPE still has authority to investigate potential violations of section 74. Commissioner Horwitz stated that he is highly disturbed by the deviance from the law: the issue is whether the Commission has the legal authority under Executive Law 94 to issue this subpoena. Under sections 13(a) and 17(c), the Commission can issue subpoenas to conduct any investigation necessary to carry out its duties, but there is nothing in the law that gives the Commission authority to issue general administrative subpoenas. Commissioner Newton stated that it may be necessary to get an opinion from

staff on Commissioner Yates's question, on the authority of the Commission to issue this type of subpoena: will it have the specificity to withstand a legal challenge. Several Commissioners discussed the scope of the agency's authority and the nature of the proposal.

General Counsel Stamm clarified that when she spoke to the Executive Chamber, which was several months ago, she only asked if they had a process in place, as that was the direction from the Chair at the time. The Chamber stated that if there were specific allegations that an individual violated the Public Officer's Law, they would cooperate with any request, but as to general informational requests relating to the Executive Order, they asked for the legal basis for the request. To date, the Commission has not responded. General Counsel Stamm stated that questions relating to the agency's legal authority to pursue matters arguably covered by the Executive Order should be addressed in Executive Session.

Chair Varlack stated that there clearly seems to be unreadiness by some Commissioners and asked if Commissioner Lavine was willing to table his motion for legal staff to prepare a memo. Commissioner Lavine stated that no memorandum is required because it is the inherent institutional prerogative of the Commission, and he will not withdraw the motion.

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

VI. NEW AND OTHER BUSINESS

Commissioner Lavine asked if staff has considered if the confidentiality provision in the Executive Law applies to a Commissioner who receives a subpoena by the legislature to testify. General Counsel Stamm stated that she can answer that question offline or in Executive Session.

Commissioner Lavine made a motion, seconded by Commissioner Weissman, that the Commission's Executive Session be recorded and transcribed.

Chair Varlack stated that a Rules Committee is being established and the matter should be referred to that committee before the vote is taken; she also stated that the matter should be discussed in Executive Session due to potential legal issues. Chair Varlack asked Commissioner Lavine if he was willing to move the discussion to the Executive Session. Commissioner Lavine stated that he would if the result of the deliberation was reported publicly. Chair Varlack stated that she cannot commit to that request because she doesn't know what the decision will be. Commissioner Lavine stated that he will not withdraw his motion.

Commissioners Jacob, Lavine, McCarthy, Newton, and Weissman voted in favor of the motion. Commissioners Braun, Cohen, Dering, Fisher, Horwitz, McNamara, Yates, and Chair Varlack opposed the motion. The motion did not carry, with a vote of 5-8.

Commissioner Braun made a motion, seconded by Judge Yates, that discussions about recording and transcribing the Executive Sessions be addressed by the Rules Committee. Commissioners Braun, Cohen, Dering, Fisher, Jacob, Lavine, McCarthy, McNamara, Newton, Weissman, Yates, and Chair Varlack voted in favor of the motion. Commissioner Horwitz opposed the motion. The motion carried by a vote of 12-1.

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

§ 94(19)(B)

A motion was made by Commissioner Fisher, seconded by Commissioner Dering, to enter into Executive Session. The motion carried with a unanimous vote.

VIII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

General Counsel Stamm stated that in Executive Session, the Commission discussed litigation matters, commenced one substantial basis investigation, authorized steps in several investigative matters, and discussed several other investigative matters.

IX. MOTION TO ADJOURN THE PUBLIC MEETING

A motion was made by Commissioner Jacob, seconded by Commissioner Fisher, to adjourn the Public Session. The motion carried with a unanimous vote.