

**MINUTES OF THE PUBLIC SESSION OF THE
JUNE 29, 2021
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
540 BROADWAY
ALBANY, NEW YORK**

Chair: Camille Joseph Varlack (Albany)

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

Absent: Robert Cohen

Staff: Sanford 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
Carol Quinn, Director of Lobbying Guidance
Michael Sande, Deputy Director of Ethics Guidance
Marlena Diaz, Assistant Director of Communications
Peter Smith, Chief Investigator
Anthony DeFino, Confidential Investigator
Lori A. Donadio, Principal Investigative Analyst
Kelly A. McCready, Confidential Clerk
Harris Bresowsky, Intern

I. CALL TO ORDER

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

Chair Varlack called the June 29, 2021 meeting to order.

II. APPROVAL OF MINUTES – PUBLIC SESSION

May 25, 2021

A motion was made by Commissioner Fisher, seconded by Commissioner Dering, to approve the minutes, with the amendment made by Commissioner Newton on page 9, second paragraph, clarifying that she voted in favor of the motion to transcribe the Executive Session. The minutes should reflect a vote of 5-8 instead of 5-9. The motion was approved, as amended, by a unanimous vote.

III. REPORT FROM STAFF

Operations Update

Executive Director Sanford Berland stated that behind attachment B is the May 2021 monthly operations report.

Executive Director Berland stated that the Commission expects to receive the legislative FDS reports on June 30 and post them online shortly thereafter. Staff has confirmed that the Legislative Ethics Commission date-stamps the original filings and gives those filings, along with any amendments, to JCOPE.

Executive Director Berland stated that the Buffalo office is scheduled to move to the new location in July and staff will inform the Commission when that move is complete. The New York City office is expected to be completed in September with the move date scheduled after the September meeting.

Executive Director Berland also stated that the Rules Committee has met and has begun discussions on several proposals to improve order, efficiency, and productivity of the Commission. The members of the Committee are Commissioners Braun, Fisher, Newton, and Chair Varlack.

Annual Report Update

Executive Director Berland stated that staff expects to release the annual report by the end of the week.

Demonstration of Lobbying Application

Executive Director Berland stated that the new online lobbying application is nearly completed and introduced Deputy Director of Lobbying Guidance, Carol Quinn. Deputy Director Quinn stated that the Public Search Query (PSQ) represents the culmination of three years of work by staff. One of the main goals is to increase transparency so the public can easily see who is lobbying on what topic. This process began with the adoption of the Lobbying Regulations and the launch of the new Lobbying Application, which were both effective starting in January 2019. Although the PSQ has been available since the launch, huge improvements have been made following the 2021 amendments to the Regulations and incorporating feedback from users. Marlina Diaz, Assistant Director of Communications, gave a presentation demonstrating how the public search query function can be used to conduct many different searches, including searching by disclosure type, lobbying focus, and government official lobbied.

IV. PROPOSAL RELATING TO FDS FILER ACCESS TO INFORMATION

JCOPE 21-XX

[Commissioner McNamara was present for the remainder of the meeting.]

Commissioner Lavine presented his proposal, clarifying that it does not follow the New York City Charter wherein the Conflicts of Interest Board must affirmatively notify the filer if an inquiry has been made on their filing. A motion was made by Commissioner Lavine, seconded by Commissioner Weissman, to approve the Proposed Resolution relating to FDS filer access to information as included in the meeting book materials. Commissioner Yates offered the following amendments to the motion: the proposal should follow FOIL, make available the Commission's FOIL log subject to applicable exceptions, and FDS reports for people directly appointed by elected officials be posted on the Commission website. Commissioner Lavine accepted Commissioner Yates' amendments.

Commissioner Horwitz asked if staff has had an opportunity to fully digest the information provided in letters from civic groups and asked staff if they have sought additional

information from third parties. Executive Director Berland stated that staff has begun a legal analysis on several issues but is in the midst of a rulemaking and will not receive comments until the day before the July meeting, so the staff would not likely present its views until the September meeting. Therefore, staff recommends that any change to Commission records access procedures be done through the ongoing formal rulemaking process. Commissioners Horwitz and Fisher agreed with Executive Director Berland.

Commissioner Braun stated that there might be conflicts between the privacy rights of the requestor, that of the person who filed the FDS, and the public interest in governmental transparency. Commissioner Braun mainly agreed with Commissioner Yates's amendment but noted that the letter from the outside entities raised important issues. He also agreed with Commissioner Horwitz's concerns and believes this matter should be studied further, and asked that the matter be tabled for staff analysis. Commissioner Horwitz seconded Commissioner Braun's motion to table the matter. Commissioner Yates stated that he did not object to tabling this particular motion for further study by staff, but objected to any referral to the Rules Committee for this or other substantive matters. Chair Varlack stated that neither the Confidentiality nor the Rules Committee makes decisions, but rather discusses proposals and brings them back to the full Commission for any action. Commissioner Braun amended his motion to table so it could be further studied by staff and if necessary be reviewed by the Confidentiality Committee since there may be potential confidentiality issues. Commissioner Newton stated that she could not vote on this resolution until she is further briefed on the FOIL rules. Commissioner Yates seconded Commissioner Braun's amended motion to send the matter to the Confidentiality Committee. Commissioner Yates stated that the amendments to the records access regulations came out of the Confidentiality Committee. Until the public comments are received, the Confidentiality Committee should review the matter and determine whether any amendments should be made in light of such comments.

Commissioners Braun, Dering, DiPirro, Fisher, Horwitz, McNamara, Newton, Yates, and Chair Varlack voted in favor of the motion. Commissioners Jacob, Lavine, McCarthy, and Weissman opposed the motion. The motion carried, with a vote of 9-4.

V. **NEW AND OTHER BUSINESS**

Proposal relating to Disclosing Informal Letter Opinions JCOPE 21-XX

A motion was made by Commissioner Lavine, seconded by Commissioner Weissman, to approve the Proposal relating to Disclosing Informal Letter Opinions as included in the meeting book materials. Commissioner Horwitz asked what staff's position is on making the informal opinions public. Executive Director Berland stated that staff has taken sample letters and has done redactions and has also considered the value of those redacted opinions weighed against the staff's time required to do so. General Counsel Stamm noted that the redacted versions of the informal letter opinions, which are much shorter than published formal opinions, had little public benefit. General Counsel Stamm further stated that the delegation that was previously agreed on by the Commission was prospective only and to now apply it retroactively might have a chilling effect on the public employees who seek informal guidance from the Commission. Commissioner Newton agreed with concern about a chilling effect and that this disclosure should be applied prospectively to give notice to requestors. Commissioner Horwitz stated that the proposal is making changes to the Commission's practices without a rulemaking process or a clear policy behind it, and it is also inconsistent with the Legislative Ethics Commission's (LEC) practice. Commissioner Yates stated that the resolution did not limit the ability to disclose and redact a letter opinion. Commissioner Braun stated that the Commission should not change the rules to disclose prior advice. General Counsel Stamm stated that the Commission reserved its rights to disclose some advice prospectively and notice will be given going forward. Commissioner Lavine stated that his proposal is for statewide elected officials and agency heads only and therefore should not have a chilling effect.

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

Commissioner Weissman raised an issue regarding certain requests received for Commission information that are not shared with the Commission. General Counsel

Stamm stated that she wanted to discuss this topic, relating to confidential requests for information, with the whole Commission in Executive Session as it is necessary to refer to specific requests. Chair Varlack asked Commissioner Weissman if he would be willing to have the discussion in the Executive Session. Commissioner Weissman agreed but reserved the right to maintain the issue as public.

A motion was made by Commissioner Lavine, seconded by Commissioner McNamara, that pursuant to Executive Law 63, Executive Director Berland be instructed to refer the potential criminal matters regarding the breach of confidentiality from a vote at the January 2019 Commission meeting to the Attorney General's office.

Commissioner Lavine stated there was a breach of confidentiality that occurred after the meeting of January 2019 regarding a vote of the Commission regarding an investigation that was divulged to the Governor. The matter was reported to the Office of the Inspector General (IG), which did not substantiate the allegation. Commissioner Lavine and other Commissioners contacted the New York County and Albany County District Attorney's offices to pursue the matter, but they declined to make an inquiry into the breach of confidentiality. The Albany County District Attorney's Chief of the Public Integrity Bureau specifically suggested going to the Attorney General pursuant to Executive Law § 63. Commissioner Yates stated that he would abstain from the vote because shortly after the January 2019 meeting, it was brought to his attention that the Governor complained about his vote, which he reported to the Commission's Executive Director and then to the IG. Commissioner Yates stated that he does not know how the Governor would know about his vote without someone leaking it to him and he doesn't know if the Governor was ever interviewed. Commissioner Yates thinks it is preposterous that under the law, the IG investigates a leak to the Governor and then sends the report to the Governor. Commissioner McNamara stated that the matter involves the integrity of the Commission and led to a Commissioner's resignation, which impeded the work of the Commission, and he is not confident that standard investigative tactics were deployed to reach the conclusion of the investigation. Commissioner DiPirro abstained from voting on the matter because the January 2019 meeting was her first Commission meeting and as a non-lawyer, she does

not feel qualified to participate in a vote evaluating whether certain conduct was criminal. Chair Varlack asked if the motion is appropriate under the law. General Counsel Stamm stated that the law provides that investigations are to be conducted by the IG pursuant to Executive Law § 94 (9)(a), which was added by the legislature and the governor during the creation of JCOPE (incidentally, as the result of a leak concerning its predecessor agency). Commissioner Newton stated that as Commissioner DiPirro observed, the analysis of whether criminal conduct is implicated is complex, but § 94 (9)(a) allows room to refer potential criminal activity and she believes the matter should be pursued by another body.

Commissioners Jacob, Lavine, McCarthy, McNamara, Newton, and Weissman voted in favor of the motion. Commissioners Dering, Fisher, Horwitz, and Chair Varlack voted against the motion. Commissioners Braun, DiPirro, and Yates abstained from voting on the matter. The motion did not carry, with a vote of 6-4-3.

A motion was made by Commissioner Lavine, seconded by Commissioner Weissman, that if any former or present Commissioner or staff is subpoenaed for Executive Session testimony by the Senate Ethics Committee, the Commission waives all confidentiality to the extent permitted by § 94 (9-a). Chair Varlack asked if the Commission has been contacted regarding testimony. Executive Director Berland stated that the Commission has not received any communications regarding testimony so it is difficult to know exactly what it would be waiving. Commissioner Fisher stated that he opposes the motion because the Commission should testify as a body, not individual members. Commissioner Yates stated that general information or statistics can be provided, but the proposal is to waive confidentiality to the extent permitted under § 9-a. The scope of § 9-a is under consideration by the Confidentiality Committee, and the issue has not been resolved with respect to any confidential investigative materials.

Commissioners Jacob, Lavine, McCarthy, McNamara, Weissman, and Yates voted in favor of the motion. Commissioners Braun, DiPirro, Newton, Horwitz, and Chair Varlack voted against the motion. Commissioner Dering was not present for the vote. The motion did not carry, with a vote of 6-6.

A motion was made by Commissioner Lavine, seconded by Commissioner McCarthy, to direct staff to determine if any state procurement contracts for supplies during the pandemic were exempt from the normal procurement process and to obtain any contracts awarded for over \$1,000,000. Also, if any exemptions were awarded, that staff be directed to issue a subpoena to the Health Commissioner for more information. Chair Varlack requested that Commissioner Lavine agree to move the matter to Executive Session since it involves a subpoena. Commissioner Lavine did not agree to move the matter. Commissioner Horwitz stated the matter should not be held in public because the subpoena recipients will have a built-in defense to quash the subpoena. Executive Director Berland stated that we do not have a lot of information relating to this request, such as whether such contracts are publicly available and how many there may be; moreover, it is unclear what Commissioner Lavine expects to be done with the contracts when and if we obtain them, and as such, the resources required may be substantial. Commissioner Newton stated she will vote against the motion because staff has not had time to consider the legal issues – does the Commission have the authority to issue a subpoena under these circumstances, without tying it to a specific investigation, and whether any discussion and action relating to such a subpoena must be conducted in Executive Session. Commissioner Dering stated that he will abstain because he believes the motion is inappropriate for similar reasons. Commissioner Weissman stated that the first question should be to request from OSC any such contract that has been audited. Commissioner Lavine declined to move the discussion into the Executive Session.

Commissioners Jacob, Lavine, McCarthy, McNamara, and Weissman voted in favor of the motion. Commissioners Braun, DiPirro, Fisher, Horwitz, Newton, and Yates voted against the motion. Commissioner Dering and Chair Varlack abstained from voting. The motion did not carry, with a vote of 5-6-2.

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

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

VII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

[Commissioner Horwitz was not present for the remainder of the meeting.]

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.

VIII. MOTION TO ADJOURN THE PUBLIC MEETING

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