

**MINUTES OF THE PUBLIC SESSION OF THE
AUGUST 26, 2021
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
540 BROADWAY
ALBANY, NEW YORK**

Members: Richard F. Braun (WebEx)
Robert Cohen (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 (Albany)
James A. Yates (WebEx)

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
Michael Sande, Deputy Director of Ethics Guidance
Megan Mutolo, Associate Counsel
Peter Smith, Chief Investigator
Anthony DeFino, Confidential Investigator
Lori A. Donadio, Principal Investigative Analyst
Kelly A. McCready, Confidential Clerk

I. CALL TO ORDER

Executive Director Sanford Berland called the August 26, 2021 meeting to order, pursuant to Executive Law §94(4), scheduled at the request of Commissioners. In the absence of a Chair, Executive Director Berland stated that the first order of business was to select someone to preside over the meeting.

A motion was made by Commissioner Lavine, seconded by Commissioner Weissman, to designate Commissioner Braun to chair the meeting. Commissioners Braun, Jacob, Lavine, McCarthy, McNamara, Newton, Weissman, and Yates voted in favor of the motion. Commissioners Cohen, Dering, DiPirro, Fisher, and Horwitz abstained from voting on the motion. The motion carried, with a vote of 8-0-5.

[Commissioner Braun acted as Chair for the remainder of meeting]

II. REPORT FROM STAFF

Proposed Amended Regulations for Access to Publicly Available Records

Commissioner Lavine made a motion, seconded by Commissioner Yates, to move the Records Access Regulations to the next regularly scheduled meeting. Commissioner Weissman asked if the matter is time sensitive. General Counsel Monica Stamm stated that the regulations have been posted in the State Register and the public comments are due on October 4, 2021. Commissioner Lavine withdrew his motion.

Commissioner Lavine stated that he has two motions that he would like to propose in the Public Session. Commissioner Lavine moved to rescind the informal staff opinion approving Governor Cuomo's book deal on the ground that a material misrepresentation was made in the request regarding the use of state personnel.

Commissioner Braun stated that New and Other Business is on the agenda after the Executive Session and asked if Commissioner Lavine is making a motion to amend the agenda. Commissioner Lavine made a motion to amend the agenda. A discussion was held about where New and Other business is listed on the agenda. Commissioner Newton stated that she has a hard stop at 11:30 a.m. so if there are time sensitive matters, it would be useful to proceed to executive session first. The motion was seconded by Commissioner Weissman.

Commissioner Fisher stated that he believes Commissioner Lavine's substantive motion relates to a pending case and he would like to seek legal advice on the motion before the discussion and vote. General Counsel Stamm stated that any legal advice would need to be discussed in the Executive Session; additionally, matters pertaining to guidance issued by the Commission are confidential and must be discussed in Executive Session, pursuant to Executive Law §94(16). General Counsel Stamm stated that it would be unprecedented to discuss the matter in the Public Session. Commissioner Horwitz asked if the Commission loses its legal privileges (including deliberative process privilege or attorney-client privilege) if counsel provides legal advice in the Public Session. General Counsel Stamm stated that by discussing the matter in Public Session, the Commission would arguably be waiving privileges, but there also are statutory confidentiality concerns.

In response to a request from Commissioner Braun, Commissioner Lavine stated his second motion: to direct the Executive Director, pursuant to Executive Law §63, to refer the breach of confidentiality that occurred at the January 2019 Commission meeting, and the subsequent cover-up of the leak by the Office of the Inspector General (OIG) to the Attorney General (AG). Commissioner Lavine stated that Governor Cuomo waived confidentiality when he announced that the book deal had been approved by the Commission. Commissioner Lavine stated that both the Mogul request for approval and the informal opinion is already in the public domain, and therefore is not confidential under the law. Commissioner Lavine further stated that the approval of the Governor's book deal was improper because it should have been subject to deliberation and vote by the Commission. Commissioner Braun stated that the motion regarding the leak was previously addressed and voted in Public Session and did not carry. Commissioner Fisher stated that there appears to be an additional allegation regarding the conduct of the OIG, and he would like the opportunity to consult with counsel about the possible violation alleged by Commissioner Lavine. General Counsel Stamm stated that the subject of a referral is confidential under §§ 94(13) & (14), and discussing any substance or providing legal advice should be in the Executive Session. She further stated while she supports the general interest in being more transparent, she is bound by the Executive Law and also must protect the agency's privileges.

Commissioner Yates stated that he is both a Commissioner and a witness in the “leak” matter and asked counsel if the events that occurred and his testimony thereof is confidential, because he would like to address some misrepresentations that were made at the Senate hearing. General Counsel Stamm stated her view that he could discuss the events that occurred and his testimony before the OIG, but could not disclose discussions that took place in an Executive Session of the Commission. Commissioner Yates stated that he has abstained from voting in the past but will not abstain if his vote is needed to move forward on the matter.

Commissioner Lavine made a motion to refer the breach of confidentiality that occurred at the January 2019 Commission meeting and the official misconduct and cover up by the OIG to the AG for investigation. Commissioner Newton stated that she believes that the motion has already been voted upon in the past and asked how many times the same motion can be made. Commissioner Braun stated that the motion is somewhat different, and it is appropriate to vote. Commissioners Braun and Yates indicated that they would not abstain from the vote and would vote in favor of the motion this time, and therefore Commissioner Lavine has the right to recall the motion. Commissioner Newton asked for a point of clarification whether the motion can be renewed because of a change of vote by Commission members or only if the motion is different from the prior motion. Commissioner Braun clarified that it is not the same motion. Commissioner Lavine restated his motion to refer the breach of confidentiality that occurred at the January 2019 Commission meeting along with any other previous leaks, and the cover-up that occurred by the OIG, to the AG for investigation pursuant to Executive Law §63.

Commissioner Fisher asked if the agenda needed to be modified before entertaining any motions. Commissioner Braun clarified that the intended motion is just being described at this point.

The motion to change the agenda to move New and Other business before the motion into Executive Session was called for a vote. Commissioners Braun, Jacob, Lavine, McCarthy,

McNamara, Weissman, and Yates voted in favor of the motion. Commissioners Cohen, Dering, DiPirro, Fisher, Horwitz, and Newton voted against the motion. The motion failed, with a vote of 7-6.

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

Commissioner McNamara stated that the special meeting was called by eight Commissioners for specific purposes, and he does not think it is proper that staff created the agenda that is imposed on the eight Commissioners who called the meeting. Commissioner Fisher stated that there were more than eight Commissioners, himself included, that supported the meeting and in the absence of a Chair, the Executive Director properly created the agenda, but the Commission has the ability to change it. Commissioner Dering stated that he also provided availability for the meeting, so he does not believe it was just eight Commissioners who called the meeting. Commissioner Horwitz stated that staff solicited Commissioners' views on the need for a meeting, and there was a consensus to call a meeting to address pressing legal matters that required immediate attention relating to ongoing or anticipated investigations that needed to be discussed in the Executive Session.

Commissioner Braun asked Commissioner Lavine if he would be willing to defer the breach of confidentiality matter to the Executive Session. Commissioner Lavine stated he will vote against a motion to go into Executive Session. Commissioner DiPirro stated that she wanted to wait until Executive Session to discuss the matter because of the wording that was used in the motion concerning the OIG's office. Commissioner DiPirro stated that the motion included language that the OIG covered-up an investigation and the cover-up has not been established. Commissioner DiPirro requested that the motion be reworded to say, "to investigate whether there was a cover up." Commissioner DiPirro stated that she will vote against the motion if it includes a presumption of guilt by the IG's office.

Commissioner Yates stated that when items are held for the Executive Session, some Commissioners have to leave, which results in the Commission not having a quorum, but

if it was guaranteed there would be a full vote in the Public Session, he would be willing to defer the motion. As to the OIG investigation, Commissioner Yates stated that he was surprised to hear former Commissioner Julie Garcia's testimony to the Senate Ethics Committee that when she reported the leak to the OIG, she didn't bring any corroborative materials with her. Commissioner Yates stated that when he reported the leak to the OIG and was subsequently interviewed, he voluntarily produced text messages, emails, and phone logs that demonstrated a leak. Commissioner Yates also stated that the day after he told Julie Garcia "to sleep on it," he told her to report it to the IG. Commissioner Yates stated that he believes that the OIG had corroborative material and could not understand how the OIG arrived at its conclusion.

Commissioner Jacob stated that the Commission is criticized when it cannot discuss information that is already in the public domain because of confidentiality concerns in Section 94. Commissioner Jacob further stated that the proposed matter regarding Governor Cuomo's book has already been made public and JCOPE should advise the public if the advisory opinion is valid. Commissioner Braun stated that he needed more information, and the matter could be addressed at the Commission's next regularly scheduled meeting. Commissioner Braun further stated that although the meeting was called for certain purposes, it does not prohibit Commissioners from bringing up other matters. Commissioner Braun asked Commissioner Lavine if he would amend his motion to add the word "alleged" before cover-up with respect to the OIG. Commissioner Dering stated that the Commission already voted not to change the agenda and that with respect to Commissioner Yates's point about not having a quorum to vote, one of the Commissioners has a hard stop at 11:30 a.m., so the Commission should proceed to the matters that must be voted on today. Commissioner Braun stated that this matter relates to the vote to go into Executive Session and called the vote.

Commissioners Cohen, Dering, DiPirro, Fisher, Horwitz, and Newton voted in favor of moving into executive session. Commissioners Braun, Jacob, Lavine, McCarthy, McNamara, and Yates voted against the motion. Commissioner Weissman abstained from the vote. The motion failed, with a vote of 6-6-1.

IV. NEW AND OTHER BUSINESS

Commissioner Braun stated that the Commission is back to the agenda of the Public Session – New and Other Business, which would include Commissioner Lavine’s second motion regarding the referral to the AG of the alleged leak. Commissioner Newton asked if Commissioner Lavine would consider amending his motion to make two separate motions concerning referrals to the AG: one to refer the alleged OIG cover-up, and the other to refer the alleged leak that occurred at the January 2019 Commission meeting.

Commissioner Lavine made a motion, seconded by Commissioner Weissman, to instruct the Executive Director to refer to the Attorney General, pursuant to Executive Law §63(3), the breach of confidentiality that occurred at the January 2019 or any preceding leaks that allegedly occurred. Commissioner Dering questioned if the motion was out of order because the vote to change the agenda did not pass. Commissioner Braun stated that because the motion to move to the Executive Session failed, the Commission is moving onto the next Public Session agenda item, New and Other Business, and that is his ruling as the Chair. Commissioner Dering disagreed that it is New or Other Business and does not believe the Chair can rule, as previously discussed by the Commission, because the Chair just leads the meeting. Commissioner Fisher stated that it is clear that two items from the Executive agenda are being moved to another part of the agenda after the motion to change the agenda failed. Commissioner Jacob stated that the Chair can rule because the meeting was called by eight Commissioners, and those Commissioners designated a Chair, so the objection to Commissioner Braun’s ruling is incorrect. Commissioner Dering stated that the law does not say that the Commissioners appoint the Chair, and historically the Chair cannot rule. Commissioner Braun stated that having been appointed as Chair to run an orderly meeting, he can move it along. Commissioner Yates called the question on Commissioner Lavine’s motion.

Commissioner Lavine restated his motion to instruct the Executive Director to refer to the Attorney General, pursuant to Executive Law §63, the alleged breach of confidentiality alleged to have occurred at the January 2019 meeting. Commissioner Braun called the

vote. Commissioner Fisher stated he would abstain from the vote because he is seeking counsel in the Executive Session. Commissioners Horwitz, Cohen, and DiPirro also abstained for the same reasons and to support Commissioner Fisher.

Commissioner Yates stated that he has abstained in the past but would vote if he was the determining vote and requested to be called last for his vote. Commissioner Newton stated she would vote in favor, but raised the question for the record if Commissioner Yates can wait to vote or if he should decide whether he was going to recuse. Commissioner Yates stated that he never recused himself but rather abstained from the vote because he didn't feel it was proper as a principal accuser to also vote on that matter. Commissioner Yates stated that because there has been other public information, he doesn't want to stop the matter from moving forward just because he is a witness. Commissioner Newton stated that the legal question is now on the record that Commissioner Yates was a witness, and it has been acknowledged should it ever be raised.

Commissioners Braun, Jacob, Lavine, McCarthy, McNamara, Newton, Weissman, and Yates voted in favor of the motion. Commissioners Cohen, Dering, DiPirro, Fisher, and Horwitz abstained from voting on the motion. The motion carried, with a vote of 8-0-5.

Commissioner Lavine made a motion, seconded by Commissioner Weissman, that the Executive Director be instructed, pursuant to Executive Law §63, to refer to the Attorney General for investigation the circumstances involved in the Office of the Inspector General's inquiry regarding the breach of confidentiality allegedly occurring at the January 2019 meeting and the alleged official misconduct by the Office of the Inspector General. Commissioner Fisher asked to have the opportunity to get advice from counsel in Executive Session and has been denied that counsel so he will abstain on the vote.

Commissioners Braun, Jacob, Lavine, McCarthy, McNamara, Newton, Weissman, and Yates voted in favor of the motion. Commissioners Cohen, Dering, DiPirro, Fisher, and Horwitz abstained from voting on the motion. The motion carried, with a vote of 8-0-5.

Commissioner Lavine asked if his motion to rescind the informal opinion purporting to grant outside activity approval for the Governor's book is appropriate at this time. Commissioner Braun stated that Commissioner Lavine agreed to defer the matter to the Executive Session. Commissioner Lavine expressed that since the vote to go into Executive Session failed, he believes it is appropriate to make his motion in New and Other Business and that he never agreed to withdraw his motion until Executive Session.

V. **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 pursuant to Executive Law §94(19)(b).

Commissioner Braun stated that he will vote for the motion because he believes that there are legal issues to be addressed concerning the approval of the book. Commissioner Weissman asked if there could be a discussion on Commissioner Lavine's motion in the public session after returning. Commissioner Braun stated that it would be permitted as long as it did not discuss confidential matters. Commissioner Weissman stated that if Commissioner Lavine's motion could be discussed in Public, he will vote in favor of going into Executive Session. Commissioner Newton stated that Commissioner Lavine's motion should be in the Public Session after important issues are addressed in Executive Session. Commissioner Yates stated he will vote in favor of going into Executive Session because he agrees with Commissioner Newton and because he has been saying for months that staff's approval of gubernatorial requests for outside approval is not authorized, but his motion to clarify that in a resolution failed by a tie vote. Commissioner Yates further stated that it wasn't until he and Commissioner Fisher compromised that a resolution ultimately passed that stated that going forward, staff's approval of gubernatorial requests is not allowed. That resolution also contained a clause that if there was any deception or material omission included in the request for approval (including retrospective staff approvals), the approval could be reopened for discussion. With that understanding, he will vote in favor

of going into Executive Session. Commissioner Lavine stated that he will vote in favor of going into Executive Session if the results of the vote on his motion are not confidential.

Commissioners Braun, Cohen, Dering, DiPirro, Fisher, Horwitz, Lavine, McCarthy, Newton, Weissman, and Yates voted in favor of the motion. Commissioners McNamara and Jacob opposed the motion. The motion passed, by a vote of 11-2.

VI. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

[Commissioners McNamara and Newton were not present for this portion of the meeting]

General Counsel Stamm stated that during Executive Session, the Commission discussed several investigative matters and deferred to the September Commission meeting discussion about Commissioner Lavine's motion regarding Governor Cuomo's outside activity approval for his book.

Commissioner Fisher stated that during Executive Session, the Commission received a report from Executive Director Berland about his testimony at the Senate Hearing and the Commission was pleased. Commissioner Fisher stated that the Commission staff is dedicated and works diligently to carry out the agency's mission to regulate lobbyists, public officers, financial disclosures, investigations, outside activities, etc. Commissioner Fisher stated that some Senators may not have been as familiar with the great work of staff, so Commissioners asked Executive Director Berland to supplement his testimony to make clear what the 50-member staff does so that the public can have confidence in their work. Executive Director Berland agreed to supplement his testimony and the Commissioners expressed a desire to sign the supplemental submission so that the public understands how vital the work the Commission is, and the Commissioners' support of the terrific job staff is doing in carrying out the agency's mission. Commissioner Braun thanked Commissioner Fisher for conveying the Commission's sentiment about the staff and its work. Commissioner Lavine stated that he does not join in Commissioner Fisher's statement.

VII. MOTION TO ADJOURN THE PUBLIC MEETING

A motion was made by Commissioner Weissman, seconded by Commissioner Dering, to adjourn the meeting. The motion was approved by unanimous vote.