

**MINUTES OF THE PUBLIC SESSION OF THE
SEPTEMBER 14, 2021
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
540 BROADWAY
ALBANY, NEW YORK**

Chair: James E. Dering (Albany)

Members: Richard F. Braun (WebEx)
Robert Cohen (WebEx)
Colleen C. DiPirro (WebEx)
William P. Fisher (Albany)
C. Randall Hinrichs (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
Peter Smith, Chief Investigator
Anthony DeFino, Confidential Investigator
Lori A. Donadio, Principal Investigative Analyst
Kelly A. McCready, Confidential Clerk

I. CALL TO ORDER

Chair Dering called the September 14, 2021 meeting to order pursuant to Executive Law §94(4).

Chair Dering welcomed Judge C. Randall Hinrichs, a new Commissioner appointed by Governor Hochul.

Executive Director Sanford Berland stated that Commissioner Newton must leave the meeting at 12:30.

II. APPROVAL OF MINUTES – PUBLIC SESSION

A motion was made by Commissioner Weissman, seconded by Commissioner Fisher, to approve the minutes of the public session of the July 27, 2021 meeting. The minutes were approved, by a vote of 12-0-1. Commissioner Hinrichs abstained from the vote.

III. REPORT FROM STAFF

Operations update

Executive Director Berland stated that behind attachment B is the monthly operations report for July and August 2021.

Meeting Schedule

Executive Director Berland stated that behind attachment C is the proposed meeting schedule for January through June 2022, and requested that if anyone has conflicts, to please bring them to his attention.

Inadvertent Broadcast during August 26, 2021 Commission Meeting

Executive Director Berland stated that at the beginning of the Commission's August 26, 2021 Executive Session, approximately ten minutes of the audio was inadvertently broadcast over the livestream. Staff examined the issue internally and with Office of General Services Media Services (Media Services) and concluded that there had been an error disconnecting the audio cable when the Commission went into Executive Session. During the pandemic, Media Services was handling livestream broadcasts remotely, but since the return to the Commission's office in July, it has been physically connecting and disconnecting the microphone system, as was the practice before the pandemic. Additional measures have been implemented to ensure that the audio is physically disconnected going forward, including additional checks by staff and monitoring the livestream during the

meeting. It has been determined that it was an inadvertent/unintentional failure to follow the technical protocols, which does not require a referral to the Office of the Inspector General pursuant to Executive Law §94(9-c).

IV. NEW AND OTHER BUSINESS

Commissioner Lavine made a motion to revoke the staff advisory opinion approving former Governor Cuomo's book publishing arrangement for "American Crisis" on the grounds that a material, fundamental misrepresentation was made in obtaining the opinion, and that the former Governor be given 20 days to present a response and apply for a reinstatement of the opinion. Chair Dering stated that the motion is out of order because the matter is on the Executive Agenda for discussion and a motion to amend the agenda would be required before the Commission could entertain the motion. Commissioner Lavine appealed the ruling of the Chair.

A motion was made by Commissioner Weissman, seconded by Commissioner Jacob, to amend the agenda. Commissioner Fisher stated that there is public record that a matter relating to the outside activity request is pending before the Commission and therefore it should not be discussed publicly. For this reason, he will oppose the motion. Commissioner Braun stated that he generally agrees with Commissioner Fisher that matters before the Commission should not be discussed publicly unless they are not confidential or have already been made public, and if the matter is already public, certain discussions can take place. Commissioner Braun is concerned about the process for revoking the opinion. Commissioner Lavine stated that the matter is already in the public domain and that former Governor Cuomo waived all confidentiality when he announced that the Commission approved the book publishing arrangement. Commissioner Lavine further stated that Judith Mogul sent a letter on behalf of the Governor containing material misrepresentations, and because the advisory opinion is already in the public domain, there is no legal reason why a motion to revoke the opinion cannot be conducted in the public session. Commissioner Lavine argued that matters within Executive Law § 94(17) are investigatory and the burden of proof is on the Commission, but when an applicant attempts to elicit an opinion under § 94(16), the burden of proof is on the applicant; the burden was

not met by former Governor Cuomo or his counsel, Judith Mogul. Commissioner Lavine stated that material misrepresentations were made, and state resources were used in writing, editing, and advancing the book. The fact that staff was going to be used to assist with the book should have been communicated to the Commission. Since it was not, the opinion should be revoked in the public session. Chair Dering stated that the motion pending is to amend the agenda. Commissioner Cohen stated that the outside activity request and subsequent approval is squarely within the purview of the Commission to investigate to determine whether the particulars of a request that was granted have been adhered to by the former Governor, and the Commission can and should investigate those matters. However, an individual does not and cannot waive confidentiality if they disclose that permission was granted by the Commission on an outside activity. That would mean that anyone who receives permission to conduct an activity, and then pursues it, would have to waive confidentiality to explain they obtained approval; such an argument collapses on itself. Commissioner Cohen stated that the matter can and should be properly discussed and vigorously pursued in the Executive Session as mandated by the legislature, which enacted the confidentiality provisions of the Executive Law. Therefore, Commissioner Cohen stated that he will vote against amending the agenda.

General Counsel Stamm stated that Executive Law § 94(16) is the governing provision that states that advice and guidance is confidential, but the Commission can make public the guidance that was given in redacted form. General Counsel Stamm stated that traditionally, it has been the position of the Commission that confidentiality cannot be waived. General Counsel Stamm stated that any further discussion relating to confidential information, including whether material misrepresentations were made, should be held in Executive session. Commissioner Yates stated that in § 94(16) it states that the *request* is confidential, and since the Commission can publish opinions, it is his position that counsel has read the statute too broadly. Commissioner Yates stated that the request is confidential, but the opinion is not, and since the matter is not an investigation under § 94(13), he disagreed with counsel's reading of the statute. General Counsel Stamm repeated that the Commission can only make the opinion public after redacting any identifying details and further stated that the request would include any representations made. General Counsel

Stamm further stated that there is nothing in the statute that clarifies the process for the revocation of an opinion and that the Commission should discuss what that process should be; it is unlikely that the law contemplated that a revocation of a specific opinion would be done publicly when everything else related to guidance is confidential. Commissioner Yates asked Commissioner Lavine if he is requesting to make the information contained in the request public or if his motion is directed at the opinion itself. Commissioner Newton stated that the Commission has diverted the discussion away from the pending motion and suggested to call the motion to amend the agenda.

Commissioners Braun, DiPirro, Jacob, Lavine, McCarthy, McNamara, Weissman, and Yates voted in favor of the motion. Commissioners Cohen, Dering, Fisher, Hinrichs, and Newton voted against the motion. The motion carried, with a vote of 8-5.

Commissioner Lavine made a motion, seconded by Commissioner Weissman, to revoke the informal staff opinion approving former Governor Cuomo's book deal on the ground that material misrepresentations were made in eliciting the opinion from the Commission, and to give the former Governor 20 days to respond.

Commissioner Fisher asked if an investigation is needed to determine whether material misrepresentations were made or if the Commission can vote on a motion without investigating the alleged material misrepresentations. General Counsel Stamm stated that it's unclear what process the Commission is following in determining the facts for the finding that misrepresentations were made. General Counsel Stamm stated that there are pending matters related to those findings, and the Commission is possibly jeopardizing those matters, but she cannot discuss it any further in Public session. Commissioner Lavine stated that Executive Law § 94(13) deals with investigations, § 94 (16) deals with opinions, and § 94(17) deals with rules regarding outside activities. Rules were promulgated regarding § 94(17) which required a deliberation and vote by the Commission. Commissioner Lavine stated that the rule was obviated by a staff determination that an informal opinion is tantamount to the approval of outside activity. He stated that § 94(16) discusses rendering of opinions, and since his motion is within the ambit of § 94(16), it

does not require an investigation. Commissioner Lavine stated that the former Governor knew that state personnel were involved in writing, editing, and advancing the publishing. Commissioner Newton asked about due process and what law gives the Commission authority to revoke an opinion and what are the factors used to make such a determination. Commissioner Newton stated that the motion is riddled with an assault on due process, and it is troubling that an ethics commission would not carefully and thoughtfully review its determination and follow its guidelines accordingly. Commissioner Newton's understanding is that there are currently no guidelines for revocation, nor has the Commission voted to seek guidelines similar to those that have been adopted by other agencies. Commissioner Newton stated that with respect to the statement of facts (where due process comes into play), just because there is information in the public domain, that doesn't make them facts, and the Commission should make its own determination of the facts. Commissioner Newton questioned if the motion was appropriate or if other steps are needed to ensure that the Commission is working within its jurisdictional guidelines.

Commissioner Braun stated that he was not on the Commission when this informal opinion was issued but he wants to understand the process. In his view, § 94(16) gives the Commission the power to revoke an opinion, and his understanding is that the Commission did not vote to approve the opinion; it was issued by staff. Commissioner Braun further stated that this is not meant to be critical of staff. General Counsel Stamm stated that her view is that the approval of any specific advisory opinion and any representations that were made in eliciting the opinion are confidential under § 94(16) so she can only address the general process. General Counsel Stamm then explained that until the Commission changed the delegation of authority earlier in 2021, it had been the operation of the agency (and its predecessor agencies) for the last decade that staff approved outside activities for state officers and employees under the outside activity regulations and § 94(16). General Counsel Stamm further stated that the delegation was changed in 2021 to make it clear that going forward, a vote of the Commission will be required to approve informal letter opinions of statewide elected officials and agency heads under the various regulations that require approval. But there is nothing in the regulations itself that said that a vote of the Commission is required; rather the regulations state that "Commission" approval is

required for outside activities for all state officers and employees subject to the regulation, not just statewide elected and agency heads. “Commission” is expressly defined in the regulations as the agency JCOPE, not Commissioners. While there is much confusion and dispute over what the process should have been, there was nothing unusual about the process that was followed by staff. Commissioner Yates stated that he disagreed with the “legal advice” from counsel, and stated that the law and the delegation resolution never delegated outside activity approval for a state official to staff. Commissioner Yates stated that he tried to clarify that previously in a version of a resolution that failed by a tie vote. Commissioner Yates stated that by not having the Commission vote on the approval, it is breaking the law. Commissioner Yates further stated that a compromise was made by himself and Commissioner Fisher and the new resolution makes it clear that going forward, the Commission is going to follow the law without opening up past approvals, unless there was a misrepresentation made in the request or the approval was improperly received. When PIRA was passed, the law was amended to include that any action of the Commission that requires a majority vote of the Commission cannot be delegated to staff. After that, the Commission amended its regulations to delegate in specificity what was authorized by staff. An outside activity request by the Governor or any other statewide elected official was not included in the delegation to staff. General Counsel Stamm stated that there may disagreement now about what authority was delegated to staff in the past, but there can be no disagreement that staff followed the exact same process it had been following for the duration of the Commission, and that the Commission was fully aware of staff’s approval of outside activities.

Commissioner McNamara stated that having the discussion in public session gives the public great insight into the quality of the dialog among the Commissioners and some of the issues they deal with on a regular basis, despite counsel’s ability to advise the Commission on some of the more nuanced legal issues. Commissioner McNamara stated that this is an issue of reconsideration of a topic that was addressed by staff under circumstances where, as events have unfolded, it appears that staff did not receive an accurate portrayal of the grounds upon which approval was being solicited. It is appropriate for the Commission to take a fresh look at the approval of the outside activity

based on what is now known as a certainty, which appears to contradict statements made in the application for approval, and therefore it does not require further due process or investigation. Commissioner McNamara's view is that it doesn't matter if the approval is revoked or left in place pending reconsideration upon a submission of clarity from the former Governor (or others who aided in preparing the request for approval). He believes that the matter should be discussed in the public session and that there is no reason to defer it to a secretive investigation before reaching the conclusion that the approval should be revisited. Commissioner Hinrichs stated that by listening to everyone, it seems clear that the matter should be reviewed again. The motion included the fact that material misrepresentations were made and there should be a fact-finding deliberation to reach that conclusion. Commissioner Hinrichs further stated that the Commission inherently has the power and obligation to revoke an opinion that was based on material misrepresentations but believes it is premature at this point. Commissioner Weissman stated that one of the material misrepresentations that Commissioner Lavine raised is the fact that the request did not make clear that state employees were going to volunteer to work on the book. That fact has been acknowledged by the former Governor's press secretary, Richard Azzopardi. Commissioner Weissman stated that in addition to Commissioner Lavine's reason for revocation, Advisory Opinion 98-16 held that "employees paid by the state for carrying out his or her public duties, where authoring materials within those duties, the employee should not receive additional compensation. In addition, if an employee were to receive payment from a private source for engaging in his or her state job, the public could reasonably question whether the employee is acting in the public interest or in the interest of the individual or entity offering the additional compensation." Commissioner Weissman stated that the book is about what the former Governor did at his job from day one of the pandemic, and it falls squarely within 98-16.

Executive Director Berland stated that according to § 94 (17), the ability of the Commission to prosecute a claim and to impose sanctions hinges upon ultimately being able to determine if there has been a departure from the requirements of the Public Officer's Law. In this discussion, and the proposed underlying conclusion, the Commission risks getting ahead of itself in purporting to make a factual determination on an element needed in the

ultimate enforcement action, which may prejudice the agency's ability to accomplish its goal. The Commission should give careful thought to the implications; there are factual contentions that need to be investigated fully and addressed in accordance with due process and follow the Commission's regulations and the requirements of the statute. Chair Dering stated that he agreed with Executive Director Berland and Commissioners Newton and Hinrichs that the Commission has a statute and a process that needs to be followed; while he is in favor of transparency, he is concerned about discussing the matter further in Executive Session, so he will vote against the motion.

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

Commission Dering reminded that Commissioner Newton has to stop at 12:30pm and Commissioner Cohen has to leave at 2:00pm and asked if there is any other New and Other business.

Commissioner Lavine asked Executive Director Berland why the two criminal referrals were sent to the Attorney General without being circulated to the Commissioners in advance. Executive Director Berland stated that procedurally, staff would not typically circulate referrals to the Commission and his goal was to get the referral sent out as soon as possible. Commissioner Lavine asked if it is the position of the Office of the Attorney General (OAG) that the special voting rules are applicable in the two referrals. Executive Director Berland stated that the OAG letter speaks for itself and has been shared with Commissioners. Commissioner Lavine asked about communications between the Commission staff and the OAG. Executive Director Berland stated that there were discussions about where to direct the referral, confirming receipt of the referral, and that the OAG would follow up with the Commission after it had an opportunity for review. Commissioner Lavine asked Executive Director Berland whether he believed that the special voting rules were applicable. Executive Director Berland stated that since the answer would involve an interpretation of the statute under Executive Law §63(3), he

would be happy to address it in Executive session. Commissioner Lavine asked if staff has rendered a previous opinion on the applicability of the special voting protocol on criminal referrals to the OAG. Executive Director Berland stated that it is set forth in Executive Law §94 (14) that criminal referrals (other than Public Officers Law §73, 73-a, and 94) are subject to and shall be conducted in the same manner in which votes are taken under Executive Law §94(13) and that the matter should be discussed in the Executive session.

A motion was made by Commissioner Lavine, seconded by Commissioner Weissman, that the Executive Director be instructed to refer for criminal investigation the alleged breach of confidentiality that occurred prior to or at the January 2019 Commission meeting to the OAG. Commissioner Newton stated that leaks occurring prior to the January 2019 meeting is overly broad and requested a friendly amendment to only include the allegations related to January 2019. Commissioner Lavine amended his motion to include only the alleged breach of confidentiality that occurred at the January 2019 Commission meeting. Chair Dering stated that he will again abstain on the vote because he believes that the matter should be voted in the Executive session.

Commissioners Braun, Cohen, Fisher, Hinrichs, Jacob, Lavine, McCarthy, McNamara, Newton, Weissman, and Yates voted in favor of the motion. Commissioner DiPirro voted against the motion. Chair Dering abstained from the vote. The motion carried, with a vote of 11-1-1.

A motion was made by Commissioner Lavine, seconded by Commissioner Jacob, that the Executive Director be instructed to refer to the OAG a criminal investigation of the alleged impropriety in the OIG's investigation of the alleged breach of confidentiality that occurred at the January 2019 Commission meeting. Commissioner Fisher stated that the Commission should not be voting on the matter in the Public session because it sets a bad precedent, and he will oppose the motion. Commissioner Cohen stated that it is inappropriate and unprecedented to vote on the matter in the Public session. Commissioner Braun stated that the matter (given that there are new Commissioners) should be discussed

in Executive session in order to establish the basis for the referral of the criminal investigation.

A motion was made by Commissioner Braun, seconded by Commissioner Cohen, to move Commissioner Lavine's motion to Executive session for further discussion. Chair Dering asked if Commissioner Lavine would be willing to withdraw his motion and entertain Commissioner Braun's motion. Commissioner Lavine stated that he would withdraw his motion if the vote on the motion will be reported in the Public session. General Counsel Stamm stated that if the Commission has the discussion in Executive session pursuant to Executive Law §§ 94(13) & (14), it is a confidential matter by law, and the Commission does not have discretion to release the vote in the Public session as with any other investigatory matter. Commissioner Braun suggested that the Commission take a vote to give the Commission the ability to release the vote (that is held in Executive session) in the Public session. Commissioner Braun further stated that it is not an investigatory matter, but a referral to the OAG to investigate the facts surrounding the leak. Commissioner Lavine withdrew his motion.

A motion was made by Commissioner Lavine, seconded by Commissioner Braun, in response to the letter received from the OAG, for the referral into the OIG's investigation be conducted in the Executive session and reported to the public. Commissioner Fisher stated that the Commission is now authorizing disclosure of a confidential vote of the Commission on a referral to the OAG regarding the OIG investigation of an alleged disclosure of a confidential vote by someone in the Commission. Commissioner Fisher questioned how it is not a crime when the Commission decides to release the information. Commissioner Fisher stated that the premise does not make sense, and he will vote against the motion. Commissioner Braun stated that in Executive Law §94(9-a)(b), it states that any confidential communication to a person or entity outside the Commission related to the matters before the Commission may occur only as authorized by the Commission, which gives the Commission the authority by vote. The alleged leak was done without any approval of the Commission. Commissioner Cohen asked if Commissioner Braun's interpretation of the provision of the Public Officer's Law is consistent with past practices

of the Commission. General Counsel Stamm stated that it is a subject that is currently under debate among Commissioners, but it is not consistent with the interpretation that the Commission has been operating under for the last several years. Until now, the Commission has operated with the understanding that the Commission can authorize “confidential communications”, which does not mean publicly disclosing information or actions of the Commission; rather the Commission can authorize confidential communications which allows staff to make disclosures necessary to effectuate investigations and have discussions with prosecutors. Commissioner Cohen stated that he would vote against the motion because it provides an end run around the issues of the Commission’s interpretation of the confidentiality provision of the Public Officer’s Law. Commissioner Cohen further stated that Commissioner Lavine’s motion decides the interpretation question, and the Commission would be de facto adopting a new interpretation. Commissioner Cohen believes that a robust discussion should be held regarding how the Commission wants to interpret the applicable provision of the Public Officer’s Law. Commissioner Jacob stated that he sent an email to Commissioners and counsel with the answers to the questions that are being raised. Commissioner Jacob stated that he received a response from General Counsel Stamm and wanted to raise the discussion in the Public session because it involves the statutory interpretation of Executive Law §94(9). Commissioner Jacob stated that he will vote for the motion because he strongly believes that the Commission has been misinterpreting the provision.

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

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

A motion was made by Commissioner Braun, seconded by Commissioner Fisher, to enter into Executive session pursuant to Executive Law §94(19)(b). The motion carried with a unanimous vote.

VI. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

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

General Counsel Stamm stated that during the Executive session, the Commission discussed matters related to litigation, commenced two Substantial Basis Investigations, authorized steps in several investigative matters, closed one matter, and discussed several other investigative matters.

Executive Director Berland stated that the Albany office is reopened with a hybrid schedule, and the New York City office will be reopening later in the month when the construction is completed.

VII. MOTION TO ADJOURN THE PUBLIC MEETING

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