

**MINUTES OF THE PUBLIC SESSION OF THE
OCTOBER 19, 2021
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
540 BROADWAY
ALBANY, NEW YORK**

Chair: Jose L. Nieves (WebEx)

Members: Richard F. Braun (WebEx)
Terry L. Brown (WebEx)
Colleen C. DiPirro (WebEx)
William P. Fisher (Albany)
Sharon Stern Gerstman (WebEx)
Randall Hinrichs (WebEx)
Marvin E. Jacob (WebEx)
Gary J. Lavine (WebEx)
David J. McNamara (WebEx)
George H. Weissman (Albany)
James A. Yates (WebEx)

Absent: James W. McCarthy
Juanita Bing Newton

Staff: Sanford N. Berland, Executive Director
Monica J. Stamm, General Counsel
Martin L. Levine, Deputy General Counsel
Emily Logue, Director of Investigations and Enforcement
Walter J. McClure, Director of Communications and Public Information Officer
Keith C. St. John, Director of Ethics
Carol Quinn, Deputy Director of Lobbying Guidance
Michael Sande, Deputy Director of Ethics Guidance
Jeffrey Linehan, Investigative Counsel
Peter Smith, Chief Investigator
Anthony DeFino, Confidential Investigator
Lori Donadio, Principal Investigative Analyst
Kelly A. McCready, Confidential Clerk

I. CALL TO ORDER

Chair Nieves called the October 19, 2021 meeting to order pursuant to Executive Law § 94(4).

II. APPROVAL OF MINUTES – PUBLIC SESSION

A motion was made by Commissioner Weissman, seconded by Commissioner Fisher, to approve the minutes of the August 26, 2021 and September 14, 2021 Commission meetings. The minutes were approved by a unanimous vote. Commissioners Gerstman and Brown abstained from the vote.

Chair Nieves welcomed Commissioner Terryl Brown, who was newly appointed by Governor Hochul.

III. REPORT FROM STAFF

Operations update

Executive Director Berland stated that behind attachment C is the September 2021 monthly operations report. Executive Director Berland stated that the chart reflects the extensive amount of work by Commission staff, notwithstanding that staff is working a hybrid schedule. The New York City Office is operational but there are some normal construction issues to work out.

Meeting Schedule

Executive Director Berland stated that behind attachment D is the Commission meeting schedule for January through June 2022. If any Commissioners have conflicts, please let him know.

Second Quarter Financial Report

Director of Administration Stephen Boland stated that during the second quarter, the Commission spent approximately \$1,500,000 in personal services, for a year-to-date total of \$2,495,000, or 54 percent of the budget. That figure is higher due to retroactive payments for cost-of-living increases and performance advances for FY 2020-2021, as well as the performance advances for 2021-2022. For non-personal services, the Commission spent approximately \$151,000, for a year-to-date total of \$297,000, or 28 percent of the budget.

The agency's total year-to-date spending is \$2,792,000, or 49.7 percent of the Commission's total budget.

FY 2022-2023 Budget Request

Executive Director Berland stated that the Commission has not received the call letter from the Division of the Budget but will keep the Commission informed about when it comes in, and the proposed response. Executive Director Berland has reviewed the Commission staffing plan, and has thoughts about requesting additional resources, but is waiting to hear back from division directors as to their views about future needs. Commissioner Fisher and General Counsel Stamm discussed that budgeted amounts for contractual services were expected to be sufficient to cover the cost of outside counsel.

IV. REGULATIONS

Proposed Amended Regulations for Access to Publicly Available Records

General Counsel Stamm explained that behind Tab E are the proposed amendments to the existing regulations for access to publicly available records. This proposal is the subject of an ongoing State Administrative Procedure Act rulemaking initiated by the Commission earlier this year. There have been two public comment periods. After the last round of changes, no public comments were received; the regulations are being presented for the Commission to adopt. If adopted, staff will submit the regulations for publication in the state register; they would become effective on the date published, with the exception of the one provision relating to requests to see the log of public records requests, which would become effective in January 2022. The only change from prior versions approved by the Commission is to Part 937.6(a), the appeals process. The current practice is that any appeal from a denial of a record request would go to the General Counsel or the Deputy General Counsel; the recommended change is to have appeals go to the Director of Ethics or his/her designee, which would segregate the process since the Records Access Officer, Walter McClure, occasionally consults with counsel on requests. This change does not require an additional notice-and-comment period.

Commissioner Lavine asked if General Counsel Stamm would provide a summary of the previous discussion regarding the right, if any, of a filer to be notified if an inquiry has been made to review the filer's Financial Disclosure Statement (FDS). General Counsel Stamm stated that under the proposed regulations, going forward, anyone – not just a filer – can request to see a log of requests made for records under these regulations. General Counsel Stamm clarified that the filer would not be proactively notified but could make a request for the log. Commissioner Lavine asked about law enforcement requests to review an FDS; General Counsel Stamm stated that while law enforcement requests under these regulations would be recorded in the log, a subpoena would not be covered. Commissioner Lavine noted that the proposal was to be implemented prospectively and asked whether a Commissioner would be entitled to know if the Office of Inspector General (OIG) previously requested to see a Commissioner's FDS. General Counsel Stamm stated that based on prior discussions, the Commission concluded that individual Commissioners should not have special access to information that other FDS filers do not have access to. There had been multiple motions on this, but the Commission did not authorize staff to share that information with Commissioners, opting instead to proceed with these regulatory changes. Commissioner Lavine stated that he will support the proposed regulations but at a future time, he will bring up the tactics of the prior administration.

Commissioner Yates asked whether all requests for FDS are logged, whether through this regulation or by Grand Jury subpoena. General Counsel Stamm confirmed that all records access requests for FDS have always been logged and subpoenas also are logged, separately. All requests pursuant to these regulations would be on the records access log, which will be publicly-available after January. All subpoenas, including agency civil subpoenas – not just court ordered subpoenas or Grand Jury subpoenas, are contained on the subpoena log, which Commissioners currently receive. If the OIG issues a subpoena for an FDS, it will be included the subpoena log.

Commissioner Jacob questioned why in Part 937.3(a) the word "approved" is stricken and is substituted with the word "provided." General Counsel Stamm stated that the language pertains to the request form, which is on the Commission's website, and that the

amendment will allow staff to make changes to the form expediently on an as-needed basis. General Counsel Stamm also stated that while she doesn't specifically recall what precipitated this change, she does not believe it was intended to be a substantive change. General Counsel Stamm asked that if the Commission opted to keep the word "approved", then the current form be deemed approved.

Chair Nieves stated that his understanding of the proposed amendments is that it is an effort of the Commission to broaden its ability to provide more information to the public upon request to become more transparent, and the pending regulations should be voted upon.

A motion was made by Commissioner Weissman, seconded by Commissioner Fisher, to approve the Proposed Amended Regulations for Access to Publicly Available Records as provided in the meeting materials. Commissioners Braun, Brown, DiPirro, Fisher, Gerstman, Hinrichs, Lavine, McNamara, Weissman, and Chair Nieves voted in favor of the motion. Commissioners Yates and Jacob opposed the motion. The motion carried with a vote of 10-2-0.

V. CONFIDENTIALITY

Interpretation of Executive Law § 94(9-a)

Commissioner Jacob stated that he has circulated a memo that he will present to the Commission, but due to the substance and complexities discussed in his memo, he suggested that the matter should be deferred to Executive Session; there were no objections.

VI. NEW AND OTHER BUSINESS

Commissioner Lavine read a motion that would void the opinion of the Deputy General Counsel, acting in the capacity as Acting Co-Executive Director, approving Governor Cuomo's publishing activity on the ground that there was a failure of required concurrence by the other Acting Co-Executive Director. Commissioner Lavine then asked discussion of the matter be moved to the Executive Session and returned to Public Session for a vote.

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

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

VIII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

[Commissioners Brown, DiPirro, and Newton were not present for this portion of the meeting]

Chair Nieves stated that during Executive Session, the Commission decided that it will move forward with the revision of JCOPE’s policies regarding the public disclosure of information, including developing new regulations to make the Commission more transparent and accountable. The Commission welcomes public comment of proposed and suggested revisions to JCOPE’s public disclosure policies.

A motion was made by Commissioner Lavine, seconded by Commissioner Weissman, to revoke the informal opinion of the Deputy General Counsel, acting in the capacity as Acting Co-Executive Director, approving Governor Cuomo’s request for an outside activity to publish a book on the ground that there was a failure of required concurrence by the other Acting Co-Executive Director, and because material facts were omitted, misstated, or misrepresented in seeking the opinion, and considering the circumstances under which the application was presented, and Governor Cuomo will have 20 days to reapply to the full Commission. Commissioners Braun, Gerstman, Hinrichs, Jacob, Lavine, Weissman, and Yates voted in favor of the motion. Commissioner Fisher and Chair Nieves opposed the motion. The motion did not carry with a vote of 7-2.

General Counsel Stamm stated that during the Executive Session, the Commission discussed litigation and other legal matters, the Commission granted an application for

exemption from the post-employment restrictions pursuant to Public Officers Law § 73 (8-b), and the Commission approved an informal letter opinion pursuant to Executive Law §94(16) and the Commission regulations 19 NYCRR Part 931. The Commission also approved an Advisory Opinion pursuant to Executive Law § 94 (16). The Commission approved one settlement agreement and authorized steps in several investigative matters.

IX. 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.