

**MINUTES OF THE PUBLIC SESSION OF THE  
DECEMBER 14, 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)  
Terryl 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)  
James W. McCarthy (WebEx)  
David J. McNamara (WebEx)  
George H. Weissman (WebEx)  
James A. Yates (WebEx)

**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  
Lori Donadio, Principal Investigative Analyst  
Kelly A. McCready, Confidential Clerk

**I. CALL TO ORDER**

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

## **II. APPROVAL OF MINUTES – PUBLIC SESSION**

A motion was made by Commissioner Braun, seconded by Commissioner Gerstman, to approve the minutes of the November 16, 2021 Commission meeting. The minutes were approved by a unanimous vote. Commissioner Brown was not present for the vote.

## **III. REPORT FROM STAFF**

### **Operations Update**

Executive Director Sanford Berland stated that behind attachment B is the November 2021 monthly operations report. Commissioner Braun inquired about the number of individuals that are overdue for Ethics Training. Executive Director Berland stated that the total is a rolling figure. Commissioner Fisher asked about the total requests for guidance, and out of 915, how many were handled by staff and how many were brought to the Commission. Director of Ethics, Keith St. John stated that most of the requests are handled by staff and disposed of by either telephone or email guidance; only a handful of requests require Commission approval, *i.e.*, Statewide Elected Officials, staff in the Executive Chamber, or heads of State Agencies. Commissioner Fisher asked if the requests are documented, published, or considered confidential. Director of Ethics St. John stated that they are documented in the master log, a portion of which is reported to Commissioners monthly. Commissioner Fisher asked if the details about who requested the guidance and the guidance provided is public. Executive Director Berland stated that information is confidential information under Executive Law § 94 (16) but the Commission reserves the right to publish redacted opinions. Commissioner Gerstman asked what the penalty is for failure to file the Financial Disclosure Statement (FDS) or failure to take an Ethics training. Deputy General Counsel Martin Levine stated that there is no penalty for failing to take ethics training but for failure to file an FDS, the statute provides for a penalty not to exceed \$40,000. Commissioner Gerstman asked if the agencies were notified that their employees are delinquent in taking Ethics training. Director St. John stated that personnel and ethics officers are copied on the training notices sent to the filers. Commissioner Braun inquired into the status of the six outstanding Notice of Delinquencies that were issued. Director St. John stated that staff is continuing its efforts to achieve compliance.

Director Berland reported that the staff hosted its annual continuing legal education program with the New York Law School. This year, it was on the intersection of land use approval procedures and lobbying, and it was attended by approximately 200 individuals. There was a robust discussion, and staff hopes to issue further guidance on this topic in the near future.

**IV. NEW AND OTHER BUSINESS**

Commissioner McNamara read his proposed resolution into the record for the Commission’s consideration:

By virtue of the authority vested in the Joint Commission on Public Ethics (the “Commission”) under New York Executive Law §94 (16 and 17), the Commission resolves as follows:

**WHEREAS**, by JCOPE Resolution 21-03 (“Resolution 21-03”), the Commission revoked the Conditional Approval Letter;<sup>1</sup> and

**WHEREAS**, as a consequence of the revocation of the Conditional Approval Letter, Governor Cuomo lacked legal authority to engage in outside activity and receive compensation with regard to the Book while employed by the State of New York; and

**WHEREAS**, Governor Cuomo received and retained compensation from the publisher of the Book; and

**WHEREAS**, in the absence of JCOPE’s approval of his outside activity in connection with the Book, Governor Cuomo is not legally entitled to retain compensation paid to him, in any form, for his outside activities related to the Book; and

**WHEREAS**, as counsel for the State of New York, the Attorney General of the State of New York (the “Attorney General”) is vested with the legal authority to take the actions specified herein;

**NOW THEREFORE**, it is

**RESOLVED**, that it is hereby ordered that, by no later than 30 days from the date of this Resolution, Governor Cuomo pay over to the Attorney General of the State of New York (the “Attorney General”) an amount equal to the compensation paid to him for his outside activities related to the Book (the “Book Proceeds”); and it is

---

<sup>1</sup> Defined terms herein have the meaning ascribed to them in Resolution 21-03.

**FURTHER RESOLVED**, that, in the event that Governor Cuomo fails to make timely payment as ordered above, enforcement of such order is hereby referred to the Attorney General; and it is

**FURTHER RESOLVED**, that the manner of the distribution of the funds to be paid to the Attorney General as ordered above is hereby referred to the Attorney General with the intent that the Attorney General determine the identity of the appropriate recipient(s) of the Book Proceeds under the law and distribute such funds accordingly.

Chair Nieves moved to go into Executive Session to discuss Commissioner McNamara's resolution. Commissioner Gerstman requested that Commissioner McNamara accept an amendment to his resolution to add a clause to the recitals stating that Governor Cuomo did not reapply for outside activity approval. Commissioner Weissman seconded the motion to approve the resolution. Commissioner Lavine asked if the resolution would be returned to the Public Session for a vote. Chair Nieves stated that would be addressed in Executive Session. Commissioner Lavine stated he would not vote in favor of going into Executive Session unless the Commission was assured that the matter would be returned to the Public Session for vote. Commissioner Braun stated a concern that if the Commission postpones the vote until after discussion in Executive Session, Commissioners may have to leave, which has caused prior motions to fail, and Commissioner Gerstman agreed with this concern. Chair Nieves withdrew his motion and stated that the Commission could discuss the proposed resolution in Executive Session and immediately return to the Public Session to vote on it.

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

A motion was made by Commissioner Braun, seconded by Commissioner Gerstman, to enter into Executive Session pursuant to Executive Law §94(19)(b) to discuss the proposed resolution, and the amendment made by Commissioner Gerstman, and immediately return to Public Session to vote. Commissioners Braun, DiPirro, Gerstman, Hinrichs, Jacob, Lavine, McCarthy, McNamara, Weissman, and Yates voted in favor of the motion. Chair

Nieves and Commissioner Fisher opposed the motion. The motion carried with a vote of 10-2. Commissioner Brown was not present for the vote.

[The Commission returned from Executive Session. Commissioner Brown was present for the remainder of the meeting]

Commissioner McNamara read his amended proposed resolution into the record for the Commission's consideration:

By virtue of the authority vested in the Joint Commission on Public Ethics (the "Commission") under New York Executive Law §94 (16 and 17), the Commission resolves as follows:

**WHEREAS**, by JCOPE Resolution 21-03 dated November 16, 2021 ("Resolution 21-03"), the Commission revoked the Conditional Approval Letter;<sup>2</sup> and

**WHEREAS**, no request has been made to the Commission to change or retract Resolution 21-03;

**WHEREAS**, since the Approval Request Letter, Governor Cuomo has made no further request for approval of outside activity with regard to the Book;

**WHEREAS**, as a consequence of the revocation of the Conditional Approval Letter, Governor Cuomo lacked legal authority to engage in outside activity and receive compensation with regard to the Book while employed by the State of New York; and

**WHEREAS**, Governor Cuomo received and retained compensation from the publisher of the Book; and

**WHEREAS**, in the absence of JCOPE's approval of his outside activity in connection with the Book, Governor Cuomo is not legally entitled to retain compensation paid to him, in any form, for his outside activities related to the Book; and

**WHEREAS**, as counsel for the State of New York, the Attorney General of the State of New York (the "Attorney General") is vested with the legal authority to take the actions specified herein;

---

<sup>2</sup> Defined terms herein have the meaning ascribed to them in Resolution 21-03.

**NOW THEREFORE**, it is

**RESOLVED**, that it is hereby ordered that, by no later than 30 days from the date of this Resolution, Governor Cuomo pay over to the Attorney General of the State of New York (the “Attorney General”) an amount equal to the compensation paid to him for his outside activities related to the Book (the “Book Proceeds”); and it is

**FURTHER RESOLVED**, that, in the event that Governor Cuomo fails to make timely payment as ordered above, enforcement of such order is hereby referred to the Attorney General; and it is

**FURTHER RESOLVED**, that the manner of the distribution of the funds to be paid to the Attorney General as ordered above is hereby referred to the Attorney General with the intent that the Attorney General determine the identity of the appropriate recipient(s) of the Book Proceeds under the law, and distribute such funds accordingly.

A motion was made by Commissioner McNamara, seconded by Commissioner Weissman, to approve Commissioner McNamara’s amended resolution.

Commissioner Fisher stated that he believes it is a matter of public record that the Commission has an ongoing related investigation and asked whether the Commission’s action today would affect such investigation. Chair Nieves stated that the resolution was circulated the night before and Commissioners have not had an opportunity to fully consider and consult with staff regarding the effect of the resolution but assumes that any investigation will continue. Commissioner Fisher questioned whether the Commission had authority to order repayment and whether there was any precedent for such an action and stated that for these reasons he will vote against the motion.

Commissioner Yates stated that the issue of disgorgement has been on the table and discussed for months, and he is shocked that staff has not looked into it. There has been a history of Commissioners complaining about investigations lingering for one, two, or three years, and has an interest in preventing that from happening in this case. Commissioner Braun stated that the Commission has already revoked the opinion and there is no need for an investigation and a determination by a hearing officer because there is nothing left to

determine; what is left is the appropriate remedy, and it would be highly inequitable for Governor Cuomo to keep the money, so he will support the motion.

Commissioners Braun, Brown, DiPirro, Gerstman, Hinrichs, Jacob, Lavine, McCarthy, McNamara, Weissman, Yates, and Chair Nieves voted in favor of the motion. Commissioner Fisher opposed the motion. The motion carried with a vote of 12-1.

**VI. NEW AND OTHER BUSINESS**

Commissioner Jacob stated that on December 9, he circulated to all Commissioners and the Chair a proposed motion that he would present in Public Session at the December meeting. Commissioner Jacob stated that in response to criticism that the Commission is too secretive, this motion will address the confidentiality issues which have been pending with the Confidentiality Committee for two years. Commissioner Jacob's motion is to establish procedures necessary to prevent unauthorized disclosure of information that the Commission receives under Executive Law § 94 (9-a), which should be done by promulgation of rules after posting and receiving of public comment.

Commissioner Jacob made a motion, seconded by Commissioner Braun, to direct staff to prepare regulations for publication and promulgation as follows:

Pursuant to Executive Law § 94 (9-a), the Commission (by majority vote of the full Commission) may disclose to any person or entity outside the Commission any testimony or information obtained by a Commissioner or staff, authorizing disclosure by full public release or to designated persons or entities as directed by the Commission. The Commission may further direct that disclosures to designated persons or entities be conditioned upon promises of confidentiality or agreement to limit further discussion.

Commissioner Braun stated that he believes strongly in transparency in government, but the Commission is greatly limited in what it can say without permission by virtue of the statute established by the Legislature, and the Legislature should re-examine the statute

that created JCOPE. That said, Commissioner Braun stated that Executive Law § 94 (9-a) says that “any confidential communication to any person or entity outside the Commission related to the matters before the Commission may occur only as authorized by the Commission.” Commissioner Braun interprets the statute to mean that the Commission can vote at any time to authorize a Commissioner to speak or reveal matters before the Commission; therefore, he is in favor of the motion. Commissioner Lavine stated that over the decade-long existence of the Commission, certain members have taken the position that confidentiality is paramount, and that the agency risks litigation exposure if it does not protect confidentiality. This position has led to criticism which may result in the replacement of JCOPE by the new Governor and the Legislature. The least the Commission can do on its exit is to uphold the presumption of openness. Therefore, Commissioner Lavine supports the motion. Commissioner Fisher commends Commissioner Jacob for his work and for circulating the motion in advance of the meeting, which allowed him to get answers to his questions from General Counsel in advance of the meeting. Commissioner Fisher asks if it is appropriate to comment on the regulations before they are adopted. General Counsel Monica Stamm stated that Commissioners will have opportunity to comment now, and again, when the regulations are presented to the Commission after the public comment period.

Commissioner Weissman asked Commissioner Jacob if he would consider a friendly amendment that the rulemaking be done on an emergency basis as well as the regular rulemaking process. Commissioner Jacob accepted Commissioner Weissman’s amendment because he believes the Commission already has the discretion to disclose information that is in the public’s interest by majority vote. Commissioner Weissman stated that under State Administrative Procedures Act (SAPA), there is a general welfare provision, and transparency in government is of general welfare to the citizens of the State of New York. Commissioner Fisher asked if there would be a comment period on the emergency regulations. General Counsel Stamm stated that the emergency regulations would be effective without a comment period, but the rulemaking would be on a parallel track which would allow for public comment before the regulations become permanent.



Commissioner Hinrichs asked about the status of draft regulations given the decision at the October meeting to propound regulations developing more transparency. Chair Nieves stated that the Confidentiality and Records Access Committee met twice, scheduled a meeting in January where staff were going to present draft regulations and standards, and had planned to present it to the full Commission for a vote at the January meeting. The Committee is considering automatic disclosures to the complainant, witnesses, and the subject of the investigation. These rules would automatically allow individuals to gain information, but, in contrast, the proposed motion requires that eight Commissioners must approve the release and dissemination of the information. Chair Nieves stated that allowing release of information to be controlled by a vote of Commissioners risks less transparency, and selective disclosure, and is not an open process. Chair Nieves said that the Committee was to receive regulations in January and asks the Commission not to vote prematurely. Commissioner Yates stated that the intent of the resolution is expanding transparency and not limiting the available information that is already public. Commissioner Yates stated that this motion also would clarify the ambiguity in the statute regarding confidentiality.

Commissioner Fisher stated that there have been occasions where Commissioners have expressed a need to consult with their appointing authority concerning matters pending before the Commission. For example, prior to voting on the Executive Director, there was a discussion about whether it was appropriate to consult with the appointing authority on the appointment. While he felt it was not appropriate, at least one other Commissioner felt that it was. Commissioner Fisher stated that he would support the motion but asks that staff draft an Amendment to the Commission's Code of Ethics requiring disclosure of any conversations between Commissioners and their appointing authority with respect to an upcoming vote, including a vote to disclose confidential information. This change would further transparency, and if Commissioners felt the need to consult with their appointing authority regarding an upcoming vote, the other Commissioners would know about it as well as the public. Commissioner Fisher requested that staff add his amendment to the Code of Ethics to the January agenda.

Chair Nieves asked General Counsel Stamm to explain whether this pending motion would create issues with law enforcement partners that share information with JCOPE. Chair Nieves is concerned that any Commissioners that arbitrarily decide that its necessary to release information could make law enforcement agencies reluctant to share information. General Counsel Stamm stated that it could impact relationships with prosecutors, law enforcement, and other entities who have been willing to share information with the Commission, if the information can be disclosed without standards or controls. The Commission gets cooperation with assurances that shared information will be kept confidential. Other concerns include cooperation from complainants and witnesses who regularly ask if their identities will be kept confidential, and staff would not be able to offer any assurances. General Counsel Stamm stated that the draft regulations would set standards and procedures for what, how, and when information would be disclosed. Chair Nieves is concerned about deciding the outcome without first determining the process. Commissioner Weissman stated the Commission has been in existence for ten years and that confidential information supplied by a law enforcement agency has never been released. The Commission has acted responsibly for over ten years and that will not change by adopting the motion.

Commissioners Braun, Brown, DiPirro, Fisher, Gerstman, Jacob, Lavine, McCarthy, McNamara, Weissman, and Yates voted in favor. Commissioner Hinrichs and Nieves opposed the motion. The motion carried with a vote of 11-2.

Commissioner Lavine stated that he will state two motions and asked that the discussion be deferred to the January meeting.

Commissioner Lavine stated that his first motion is to direct staff to divulge to the full Commission all inquiries made to review Commissioners' Financial Disclosure Statements (FDS) during the Cuomo administration by the Office of the Inspector General or the Executive Chamber.

Commissioner Lavine stated that his second motion is to direct staff to request from the Hochul administration the names of all purported volunteers granted exemptions from the Public Officer's Law pursuant to Executive Order 202.7, what those individuals employment status was at the time they received the exemption, whether any conflicts were discerned, and what provision was made to address those conflicts.

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

A motion was made by Commissioner Gerstman, seconded by Commissioner DiPirro, to re-enter into Executive Session pursuant to Executive Law §94(19)(b). The motion was approved by a unanimous vote.

**VIII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION**

General Counsel Stamm stated that during the Executive Session, the Commission discussed matters related to litigation and legal advice. The Commission granted an application for exemption from the post-employment restrictions pursuant to Public Officers Law § 73(8-b), approved outside activity requests pursuant to Executive Law § 94(16), and approved a Formal Opinion pursuant to Executive Law § 94(16). The Commission also commenced substantial basis investigations, authorized steps in several investigative matters, closed two matters, and discussed several other investigative matters.

**IX. MOTION TO ADJOURN THE PUBLIC MEETING**

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