

**MINUTES OF THE PUBLIC SESSION OF THE  
OCTOBER 27, 2015  
COMMISSION MEETING  
OF THE JOINT COMMISSION ON PUBLIC ETHICS  
HELD AT THE COMMISSION'S OFFICE LOCATED AT  
540 BROADWAY  
ALBANY, NEW YORK**

**Chair:** Daniel J. Horwitz (ALB)

**Members:** Hon. Joseph Covello (ALB)  
Marvin Jacob (ALB)  
Seymour Knox, IV (ALB)  
Hon. Eileen Koretz (NYC)  
Gary J. Lavine (Webex)  
David A. Renzi (Webex)  
Michael A. Romeo, Sr. (ALB)  
Hon. Renee R. Roth (Webex-Present for Public Session only)  
Michael K. Rozen (Webex)  
Dawn L. Smalls (NYC)  
George H. Weissman (ALB)

**Members**

**Absent:** David Arroyo  
Hon. Mary Lou Rath

**Staff:**

Monica J. Stamm, General Counsel  
Kevin T. Gagan, Chief of Staff  
Martin L. Levine, Director of Lobbying and Financial Disclosure Compliance and Senior Counsel  
John P. Harford, Special Counsel and Director of Ethics and Lobbying Compliance  
Stephen Boland, Director for Administration  
Walter J. McClure, Director for External Affairs  
Emily A. Logue, Investigative Counsel  
Stacey Hamilton, Manager of Education Program and Special Counsel  
Carol Quinn, Associate Counsel  
Leah Ramos, Associate Counsel  
Michael Sande, Associate Counsel  
Patrick E. Coultry, Chief Investigator  
Terence Mulderrig, Senior Investigator  
Peter Smith, Confidential Investigator  
Lori Donadio, Confidential Legal Assistant  
Deborah Novak, Executive Assistant

**I. CALL TO ORDER**

Chair Horwitz opened the meeting and stated that the minutes from the October 7, 2015 Commission meeting will be presented at the next meeting.

**II. REPORT FROM STAFF**

**2016-17 Budget**

General Counsel Monica Stamm discussed the budget request for the 2016-17 fiscal year. As previously discussed at the last meeting, staff consulted with Commissioner Weissman. A request was submitted for the same budget as last year - \$5.582 million dollars, which includes the increase of \$1.2 million: \$4.682 in personal services and \$900,000 in non-personal services. Of the personal services budget, \$200,000 would continue to be reallocated to invest in software that will aid the Commission in data mining and analysis. Director of Lobbying and Financial Disclosure Compliance and Senior Counsel Martin Levine explained that the goal of the system is to pull together data from the various reports filed with JCOPE as well as data collected by the Board of Elections, and develop metrics and analytics to identify trends and “red flags” that staff might not identify manually. This can be used to provide areas to target efforts in enforcement, compliance or education.

Commissioner Weissman asked for an update on the redesign of the on-line lobbying application. Director Levine reported that the business rules for the developers to start the programming should be ready in the next couple weeks, and then the development will take place over the next 12 months. Commissioner Weissman asked for a more detailed schedule to be presented at the next meeting.

**Second Quarter Financial Report**

Director for Administration Stephen Boland gave the second quarter financial report, stating as of September 30, 2015 the Commission spent just under \$907,000 on personal service, approximately 37% of the cash target for the year. The non-personal service for the second quarter was just under \$237,000, which results in approximately 36% of the

cash target. Overall for the quarter, the Commission spent \$1,143,000, which is at 36.8% of annual cash.

### **Ethics Review Commission**

General Counsel Monica Stamm explained that staff met with the Ethics Review Commission and discussed general information about JCOPE. She indicated that the Review Commission asked for follow up information related to financial administration; allocations of staff to the different functions of the agency; information about the number of Commission meetings that are held in a year; information about how productive JCOPE is in providing legal advice and guidance; information about training and education programs, and statistical information about investigations and enforcement. A draft response will be circulated to the Commissioners.

### **SEARCH FOR EXECUTIVE DIRECTOR**

Chair Horwitz stated that, as explained at the August 4<sup>th</sup> meeting, the Commission is conducting a nationwide search to find an Executive Director. The Commission set up a committee to assist the Commission in conducting the search in a thoughtful, deliberate and careful manner. The Search Committee is made up of Commissioners Koretz, Jacob, Rath, Rozen and Chair Horwitz. The Committee has met to discuss the process by which the search should be conducted. After the October 7<sup>th</sup> Commission meeting, the position was posted on the JCOPE and State Jobs websites; multiple online publications, including the Albany Times Union, the New York Times and the New York Law Journal; advertised on websites, and distributed to a number of public associations connected to government and law, including the counsel on Government Ethics Law, the National Conference on State Legislatures and the National Association for Law Placement. The Committee has also engaged in outreach to bar associations and law schools across the State. To date the Committee has received approximately 70 resumes and will continue collecting resumes through mid-November. The Committee is in the process of reviewing all of the resumes.

Chair Horwitz indicated that the Search Committee discussed the engagement of an executive search firm, and as part of that discussion, the Committee directed staff to inquire of the Assembly about the process that it followed in hiring its new Executive Director for Ethics and Compliance. Staff was also directed to find out what process other States Ethics Panels and Commissions followed in filling similar vacancies. The Committee received information that State and municipal counter parts around the country generally did not utilize such firms. The Committee looked into the cost and determined to abstain from engaging an executive search firm at this time, proceed with the search as discussed, and see whether it is successful. The Committee will meet again shortly, once it has had a chance to review resumes, and begin to make determinations about candidates that are appropriate for interviews. The Committee will keep the full Commission apprised of the process.

### **III. REPORT FROM MANAGEMENT COMMITTEE**

Chair Horwitz stated that the Commission established a Management Committee to evaluate staffing and budgeting needs. Commissioners Arroyo, Lavine, Rath, Roth and Smalls all agreed to serve on the Committee. Chair Horwitz will participate in an ex-officio basis. Commissioner Arroyo prepared a report on behalf of the Committee that was provided to all the Commissioners and in his absence, Chair Horwitz read the report into the record:

Dear Commissioners: As you all know, during our last meeting JCOPE revoked the delegation of authority to the executive director to hire staff. On Monday, October 19, a subcommittee of commissioners met -- including David Arroyo, Gary Lavine, Senator Rath, Judge Roth, and Dawn Smalls -- to discuss a plan to deal with seven current staff vacancies, all of which are below the "director" level on the organizational chart. Those vacancies are: (1) one investigator; (2) two associate counsel; (3) one compliance auditor; and (4) three FDS filing specialists. While the subcommittee intends in the coming weeks to further discuss an overall staffing plan and to come back to the full commission with ideas for us all to consider, because the following vacant positions are non-leadership in nature, it is our recommendation that the commission adopt a limited delegation at its next meeting that would allow General Counsel Monica Stamm to

oversee a process to search for, interview, and hire candidates for the positions of compliance auditor, FDS filing specialist, and investigator, without the need for our further input or approval. If you have questions or concerns about this approach, please respond to this email or call any of us. To be clear, we are not at this point teeing up the issue of hiring at the senior level ("director" and above), nor are we ready to analyze whether our human resources are appropriately deployed. We expect to tackle these issues in the future, and thereafter put them to the full commission for decision.

Chair Horwitz asked General Counsel Stamm about the need to fill the positions. General Counsel Stamm explained that the primary vacancies, the compliance auditors and the three FDS filing specialists, are important because the statute requires that JCOPE conduct random reviews of the financial disclosure statements and lobbying filings. The Commission has also discussed conducting more specific Financial Disclosure Statement reviews on high profile people and filling these vacancies is required to accomplish those functions. Until the positions are filled, it will restrict how many filings are able to be reviewed. The compliance auditor position is in the lobbying section and would assist with the random audits of lobbying filings. General Counsel Stamm noted that JCOPE has posted openings for those positions, has received resumes, and needs to review the resumes received, select candidates and begin interviewing. The initial steps would be made by the direct supervisors of the unit, recommendations are then reviewed by Martin Levine, as the Director of the division, and then the Chief of Staff will meet with the lead candidates and determine who should be hired.

Commissioner Jacob stated that he sent a reply email to Commissioner Arroyo pointing out that the General Counsel has not been authorized to hire and the statute does not provide for the Commission to delegate that authority to her. Commissioner Jacob stated that the Commission is in the process of hiring an Executive Director and the vacancies should be left open for him/her to fill. Commissioner Jacob also suggested that the full Commission, with the assistance of the Management Committee, could fill these positions.

General Counsel Stamm stated that she does not believe that the statute intended that in the event of a vacancy of the Executive Director, the Commission would come to a standstill. JCOPE is currently operating on a day-to-day basis and executing the functions of the agency. The Commission inherently has the ability to delegate the hiring function to staff. Commissioner Jacob stated that the plain reading of the statute says otherwise. General Counsel Stamm stated that the statute plainly authorizes the Commission to delegate any of its powers that do not require a vote of the Commission. Commissioner Jacob believes that it is countered by the fact that there is an express provision for delegations to the Executive Director. Chair Horwitz acknowledged Commissioner Jacob's analysis of what the statute provides but pointed out that the Commission has before it a report from the Management Committee whose recommendation is that, for these ministerial positions, the authority can be delegated to General Counsel Stamm. Chair Horwitz recommends that the Management Committee address the issues that Commissioner Jacob has raised and come up with a recommendation so that the work of the Commission can function in the absence of an Executive Director.

Commissioner Covello suggested that the resumes of the selected candidates be distributed to the Commissioners and the Commission will vote on whom to hire. Commissioner Smalls stated that the Management Committee made its recommendation, and everyone on the Committee agreed on Commissioner Arroyo's statement. The General Counsel has given her opinion, and while there is a differing opinion offered by a Commissioner, unless the General Counsel needs additional time to reconsider, the recommendation of the Management Committee stands. Commissioner Smalls made a motion to vote on the limited delegation set forth in the Management Committee's recommendation. Commissioner Rozen seconded the motion.

Commissioner Lavine strongly urged his colleagues not to gratuitously circumscribe their prerogative to conduct the administration of the Commission, and stated that the statute, §94(9)(b) states, "...that the Commission may appoint such other staff as are necessary to carry out its duties under this section." Commissioner Lavine stated that it is the

Commission's prerogative to delegate duties to other staff in the absence of an Executive Director and the Commission should allow staff to proceed with these hirings. Commissioner Weismann stated that he agrees with Commissioner Jacob's legal interpretation, and adds that this is a statute of strict construction and has always been interpreted as such. Commissioner Weismann stated that, even taking a liberal interpretation of the statute, such a delegation would go too far. Commissioner Weissman expressed that it is one thing to allow staff to fill a filing specialist position, but policymakers should be left either to the delegation under the law or to the Commission in total. Commissioner Romeo confirmed with General Counsel Stamm that for the past four years, this is something she has been doing, reviewing resumes and then making a recommendation to the Executive Director. Commissioner Romeo stated that in the absence of an Executive Director, as in a corporation, the business of the corporation does not stop. They have trusted General Counsel Stamm in the past, and he agrees with the committee to let her continue to do her job and fill the positions recommended by the Management Committee. Commissioner Jacob stated that there is no mention anywhere in the statute that the Commission may delegate to anybody other than the Executive Director and the fact that Monica Stamm has assisted the Executive Director in the past, and even if she has done so efficiently, does not establish that it is correct as a matter of law.

Commissioner Covello stated that he thought that the committee was going to review the hiring chart and distinguish lower level positions from management positions for which the Commission would be involved in hiring decisions. It now seems that the Management Committee is approaching this in a piecemeal manner. Chair Horwitz stated that based on the written report of the Committee, they intend to do what Commissioner Covello has suggested but, for the time being, because there are certain positions that need to be filled promptly that are not at the director level, they are recommending a way to move forward immediately. Commissioner Smalls explained that the Committee does need to share the updated organizational chart which would illustrate that these are all non-leadership positions. Due to concerns of some members, leadership positions, such as Associate Counsel, were excluded from the unanimously

recommended delegation. Commissioner Smalls also expressed that in terms of the legal ability to do this, she defers to the Commission's General Counsel. There are a lot of lawyers on this Commission and if their job as Commissioners is to provide a statutory interpretation for every action that they make, then it needs to be discussed, because that is not what she had envisioned as her duties on this Commission.

Chair Horwitz asked Commissioner Weismann if his analysis changed if they deferred hiring an investigator and focused only on the lower level staff. Commissioner Weismann suggested that the cutoff should be whether the position is required to file an FDS. General Counsel Stamm stated that the FDS filings specialists and compliance auditors do not file FDSs.

Commissioner Weismann stated that he is not comfortable because there is too much contradictory information. There are a number of lawyers present, all of who took a constitutional oath of office, and how they carry out that oath of office is something that they have to look at, and if at times it means disagreeing with what the General Counsel believes, he is doing so within the context of that constitutional oath of office. Commissioner Jacob thought that the task of the Management Committee was to consider the organizational chart and report back to the full Commission for discussion.

Chair Horwitz stated that the Commission has received the Committee's report, the Commission has heard from Commissioners as to their thoughts, there is a motion that has been seconded, so now it is appropriate to take a vote on the motion. Commissioner Smalls explained that the motion was to adopt the recommendation of the Management Committee to delegate authority to the General Counsel to proceed with hiring for specific non-leadership positions. General Counsel Stamm stated that the positions in question were the investigator, the compliance auditor and the three FDS filing specialists, but asked whether the Commission would prefer to consider limiting the delegation to the non-policy making positions, the positions that do not file FDS statements, in order to address one of the concerns that some Commissioners raised.

Commissioner Smalls asked whether there was support for this change and agreed to amend the motion. The vote on the motion was 9/3. Chair Horwitz and Commissioners Koretz, Knox, Lavine, Renzi, Romeo, Roth, Rozen, and Smalls voted in favor of the motion. Commissioners Covello, Jacob, and Weisman opposed the motion. The motion carried.

#### IV. REGULATIONS

##### Proposed Regulations for an Exemption from Publicly Disclosing Client Information in Financial Disclosure Statements

General Counsel Monica Stamm provided two updates about the draft regulations. Based on discussions with counsel at the Office of Court Administration, it is in the process of developing a parallel set of procedures for exemptions from publicly disclosing client information in the FDS and expects to have a draft available for public comment within the next few weeks. The second update is that the Commission just received a letter from the Legislative Ethics Commission (“LEC”), which has not yet been circulated to the Commission. LEC raises a concern about the effect of an exemption if granted under the draft regulations.

Commissioner Weisman asked if the idea is to work with OCA and prepare regulations that are consistent. General Counsel Stamm explained that staff has been working cooperatively, sharing proposed language, standards, and procedures, incorporating ideas from each other. Chair Horwitz said that he also wanted to hear from LEC. General Counsel Stamm said she will circulate the LEC letter to the Commissioners. Commissioner Koretz stated that working with OCA and LEC is very important and requested that this matter be taken up at the next meeting. Chair Horwitz stated that this matter will be tabled pending further information from OCA and LEC.

##### NEW AND OTHER BUSINESS

Chair Horwitz asked the Commissioners to look at the proposed meeting schedule for the first half of 2016 and inform General Counsel Stamm if it poses any conflicts.

Chair Horwitz said he would entertain a motion to go into executive session.

Commissioner Jacob stated that he thought the Commission would take up a proposed Advisory Opinion in the public session. Commissioner Jacob said that he has always believed that the presumption should be that a matter belongs in Public Session, unless there is a legal reason, or some other good reason to go into Executive Session. Going forward, the Executive Session agenda should state the General Counsel's opinion as to why a matter belongs in Executive Session. Commissioner Jacob further stated that matters related to investigations should be in Executive Session, but proposed forward guidance for the regulated community, such as the proposed guidance for officials engaged in campaigns for reelection, should be held in Public Session. Commissioner Jacob stated that one of the main criticisms of JCOPE is that it operates in secrecy, and questioned the need for secrecy on the matter.

Commissioner Smalls agreed with Commissioner Jacob and stated that unless they are discussing a specific investigation or personnel matter, the discussion should be held in public. General Counsel Monica Stamm agreed that to the extent the Commission can discuss matters in the Public Session, they should, but stated that based on conversations she had with some Commissioners, there are confidential matters that they would like to discuss associated with the Advisory Opinion that they will not be able to discuss in the Public Session. The Commission could begin the discussion in Executive Session and then continue when the Commission returns to Public Session. Chair Horwitz asked if there are any Commissioners who feel that they should not proceed with the preliminary discussion of the Advisory Opinion in the Public Session. Commissioner Lavine stated that he did not have an objection to speaking about the Advisory Opinion in Public Session, but felt that the Opinion has a direct implication on the Commission's investigatory function, which is appropriate for discussion in the Executive Session, so he will hold his comment for Executive Session. Chair Horwitz stated that because there is at least one Commissioner who feels that he would be constrained, the discussion should begin in Executive Session with the expectation that the discussion would be completed in Public Session. Commissioner Jacob asked if they are taking a vote on this. Chair

Horwitz said there was no need for a vote and asked Commissioner Lavine if he wanted to proceed now or in Executive Session. Commissioner Lavine responded that other Commissioners should not be impeded from speaking in Public Session, which he encourages, but he will wait until Executive Session.

General Counsel Stamm stated that the proposed Advisory Opinion has arisen because Commissioners wanted to reconsider a footnote in Advisory Opinion 98-12, which was issued by a predecessor agency. The footnote provided that certain elected officials are not subject to the Public Officers Law with respect to campaign activities. Staff circulated a draft of a proposed Advisory Opinion that sets forth new rules with respect to how an elected official should conduct himself with respect to the Public Officers Law, when soliciting or accepting campaign contributions from individuals or entities that are the subject of their enforcement powers.

Associate Counsel Sande explained that the opinion lays out the reasons why the footnote needs to be revisited and the basic principal that official's running for reelection are subject to the Public Officers Law. The Opinion then provides guidance for some common scenarios encountered in the context of political campaigns. Elected officials cannot solicit campaign contributions from a subject of that official's investigatory powers or from a person or party against which the elected official has commenced litigation. Investigatory and litigation functions are included in the term "enforcement powers" which includes, but is not limited to, the power to issue subpoenas, audit the books and records of a person or entity, compel testimony, execute search warrants and initiate litigation or adjudicatory proceedings on behalf of the public. Anyone that is the subject of these enforcement powers could not be solicited by the elected official for campaign contributions. Untargeted mass mailings would be permissible under §74 unless the official knows that the prohibited source would be targeted in the mass solicitation. Once the elected official has notice or knowledge that a prohibited source has been solicited, that official then bears responsibility for the actions of his/her staff and the contribution must be returned. When a contributor subsequently becomes the

subject of enforcement powers, the official must recuse himself from any participation in the matter unless the contribution was unsolicited or untargeted.

Commissioner Jacob stated that according to the Advisory Opinion, the Commission is proceeding pursuant to the authority granted us in Executive Law §94(16). However, §94(16) only applies when JCOPE is asked to render an opinion, which is not the case here. Section 94(1) is more appropriate because the Commission is revisiting and reversing an opinion of the State Ethics Commission that was issued in 1998. There are protocols and procedures set forth in §94(1) which are to be followed and the Commission should follow them. Commissioner Jacob also noted that the Opinion calls for absolute recusal for 12 months following the receipt of a contribution made by an individual who is subsequently a subject of enforcement powers or adverse litigation. Commissioner Jacob suggested applying the language of Opinion 98-12 which states “the length of period may vary depending upon the circumstances.”

General Counsel Stamm stated that there is some precedent that under §94(16) the Commission can revisit a former opinion to clarify an issue or provide different guidance going forward. It is inherent to the Commission’s authority to administer and enforce the law that it can provide guidance on the law and issue Advisory Opinions. The Commission has already completed the undertaking in §94(1), having engaged in a comprehensive review of precedent in consultation with the LEC and issued a report in February, recommending issues that the Commission should address going forward. Whether the Commission proceeds under section 94(16) or 94 generally, it has the authority to reverse an Advisory Opinion issued by a predecessor agency. Commissioner Jacob stated that it is important because he does not want the Commission subject to challenge in the future based on failure to follow certain protocol.

Chair Horwitz explained that §94(1) references consultation with the LEC about precedent and some might feel that it will be useful to consult the LEC on this Advisory Opinion. General Counsel Stamm stated that this draft will be made public, in accordance with the Commission’s meeting guidelines, and staff will have discussions

with LEC, as well as the statewide elected officials, and other interested parties. There may be legal issues and practical considerations that need to be addressed related to the rule set forth in the proposed Opinion before the Commission finalizes it. Based on the discussion today, including the comments from Commissioners which will be incorporated into the draft, staff will solicit views from others, and re-introduce the Advisory Opinion at a future date for more discussion. Commissioner Jacob stated that he assumes that the views of the Board of Elections will be solicited. General Counsel Stamm agreed.

Commissioner Weissman stated that he is approaching this differently, in a broader context. In 2007, when the Commission on Public Integrity was created, section 94(1), which Commissioner Jacob was referencing, was amended to similarly state that the guidance issued by predecessor agencies would remain in effect but “such regulations and opinions shall apply only to matters over which such commissions had jurisdiction at the time such regulations and opinions were promulgated or issued.” Therefore, the opinions remained in effect, but could not be relied upon going forward. For JCOPE, as the Commission incorporates prior opinions, it may give them affect, but practitioners relying on other precedent may be misguided. Chair Horwitz stated that the Commission has discussed this in the past. Certain Commissioners feel that the precedential value of Advisory Opinions is limited to those seeking the Opinion. However, the prior discussions included consideration that other agencies that issue guidance similar to Advisory Opinions, such as private letter opinions issued by the IRS or no action letters by the SEC. The premise is that these documents are published and have been publicly disseminated, and their purpose is to provide guidance to the public as to what is acceptable and unacceptable conduct. To the extent that they have precedential value, and there are arguments that they do, there is also the issue of notice and due process. While an Advisory Opinion is limited on its face to the party that sought it, someone else may read that opinion for guidance on how to conduct oneself in the future. Chair Horwitz stated that these are issues that should be given thought and discussed further going forward. Chair Horwitz said the proposed Opinion will be posted, JCOPE will

solicit comments, and staff will bring the matter back to the full Commission for further discussion at a future meeting.

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

A motion was made by Commissioner Covello, which was seconded by Commissioner Romeo, to enter into Executive Session pursuant to Executive Law §94(19)(b). The motion was approved by unanimous vote.

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

Chair Horwitz announced that, during the Executive Session, the Commission approved an application for exemption from the revolving door provision of Public Officers Law §73(8-b). The Commission approved a Substantial Basis Investigation Report and Settlement Agreement. The Commission approved the referral of a Substantial Basis Investigation Report concerning a former member of the Legislature to the Legislative Ethics Commission. The Commission also considered a number of investigative matters, commenced a Substantial Basis Investigation and received and discussed an update on pending litigation involving the Commission from the agency's General Counsel.

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

A motion was made by Commissioner Covello, which was seconded by Commissioner Romeo, to adjourn the Public Meeting. The motion was approved by unanimous vote of those Commissioners present.