Commission Meeting of September 22, 2020

Appearances: Michael K. Rozen, Chair

Commissioners:
Robert Cohen
James E. Dering
Colleen C. DiPirro
William P. Fisher
Daniel J. Horwitz
Marvin E. Jacob
Gary J. Lavine
James W. McCarthy
David J. McNamara
George H. Weissman
James A. Yates

Staff:
Monica J. Stamm, General Counsel
Martin L. Levine, Deputy General Counsel
Walter J. McClure, Director of Communications and Public Information Officer
Keith St. John, Deputy Counsel and Director of Ethics
Carol Quinn, Deputy Director of Lobbying
Stephen J. Boland, Director of Administration
Michael Sande, Deputy Director of Ethics
Megan Mutolo, Associate Counsel
Lori A. Donadio, Principal Investigative Analyst
Timothy Willox, Intern
Nuwer Alexandria, Intern

IT Staff – Tanya Smith
OGS Media Services – Amaury Corniel
Chair Rozen: We are holding this meeting using video conference technology. The public session is accessible on JCOPE’s website to watch via livestream. To conduct this meeting smoothly, I will do my best to recognize anyone who wishes to speak. It is important that only one person speak at a time and in addition I ask that when you do speak please identify yourself, so that we have a clear record. We still need to take votes by roll call to ensure that everyone is counted. As a reminder, please mute your phone when you are not planning on speaking. Let’s move to item two on the agenda, approval of the minutes from the August Public Session behind attachment A. Any questions or comments.

Commissioner Dering: I’ll move it.

Commissioner Weissman: Second.

Chair Rozen: Thank you, you guys in Albany you are going to be doing a lot of that today.

Commissioner Weissman: Mr. Chair, we aim to please.

Chair Rozen: Thank you sir, appreciate it as always.

Martin, can you take the roll please?

Martin Levine: On the minutes, Commissioner Cohen?

Commissioner Cohen: Yes.

Martin Levine: Commissioner Dering?

Commissioner Dering: Yes.

Martin Levine: Commissioner Fisher?

Commissioner Fisher: Yes.
Martin Levine: Commissioner Horwitz?

Commissioner Horwitz: Recuse, or abstain, I wasn’t here for that meeting.

Martin Levine: Commissioner DiPirro?

Commissioner DiPirro: Yes.

Martin Levine: Commissioner Jacob?

Commissioner Jacob: Yes.

Martin Levine: Commissioner Lavine?

Commissioner Lavine: Yes.

Martin Levine: Commissioner McCarthy?

Commissioner McCarthy: Yes.

Martin Levine: Commissioner McNamara?

Commissioner McNamara: Yes.

Martin Levine: Commissioner Weissman?

Commissioner Weissman: Yes.

Martin Levine: Judge Yates?

Commissioner Yates: Yes.

Martin Levine: Chair Rozen?

Chair Rozen: Yes.

Chair Rozen: Okay. Item three, report from staff please.

Monica Stamm: Sure, this is Monica Stamm. We will start with the outreach update. At the last meeting, the Commission issued Advisory Opinion 20-01, which has been posted on the website and distributed to all agency Ethic Officers.
It applied to principles in a prior Advisory Opinion, 18-01, concerning the lifetime bar to a long-term project and concluded based on the specific circumstances that the lifetime bar did not prohibit the former employee from working on a different aspect of a project. In addition, it has been announced that JCOPE is holding its annual CLE event with CityLaw and NY Law School. It’s on Tuesday, October 13th. The topic is “Ethics and Innovation in New York State, Navigating Conflicts When Government is A Partner”. This year, we are only doing one panel. It will be virtual but there still will be CLE credits. If you are interested, if any of the Commissioners are interested in participating, coordinate with Walt. We are hoping for a lot of attendance. CityLaw has said that they have had success with their virtual CLE programing, and we have had a lot of positive feedback in the past. Does anyone have any questions about the panel?

We issued our Spring/Summer newsletter a few weeks ago. Again that’s put on our website and it’s distributed to Ethics Officers and, finally, in response to timely questions concerning whether state employees can volunteer in connection, can volunteer as poll workers in connection with the election, we issued an Ethics Reminder within the last two days about the topic and how to analyze a conflict, and that is really the outreach update.
With respect to the 2021-2022 budget, typically around this year we get the call letter from DOB. We haven’t received it yet. Last year it came a little bit later than the September meeting. We expect it will probably come in the next few weeks. Often the turnaround is tight; it’s possible that we will respond with our budget request before the next meeting. So, if any Commissioners have questions, want to talk to us offline between meetings as we prepare our budget request, we can keep people informed when we do receive the call letter and any guidance that we get from DOB as to what to expect for year’s financial planning.

Commissioner Weissman: Monica?

Monica Stamm: Yes.

Commissioner Weissman: When we get the call letter, would you be so kind to share it with everybody?

Monica Stamm: Sure. No problem.

Commissioner Weissman: Thank you.

Monica Stamm: Any other questions? Okay, the next item on the agenda, if we want to proceed is a proposed advisory opinion. This is an advisory opinion that the Commission has seen before. It is attached at Tab B,. We presented, we have been working on this Advisory Opinion with the Commission for a long time now. It was last presented to the Commission in February, which feels like a lifetime ago. To avoid creating any delays or confusion about donations and support during the
health crisis, we delayed discussing this until now. You may recall that we previously made changes to address various concerns raised by Commissioners, and at the February meeting, additional concerns were raised. Commissioner Yates, you particularly had us address an issue and subsequent to the meeting, we added a footnote, and I think reached a consensus that the issue was resolved, but I don’t want to speak for Commissioner Yates. We added footnote six to the Advisory Opinion. So we are asking now that the Commission vote to approve this Advisory Opinion and if anyone has any questions about the substance, I will turn it over to Deputy Director for Ethics Guidance Michael Sande for any questions.

Chair Rozen: Any questions? Alright. Not hearing any or seeing any, can I have a motion to approve please?

Commissioner Dering: I’ll move.
Chair Rozen: Thank you, second?
Commissioner Weissman: Second.
Chair Rozen: Thank you, Martin, the roll please.
Martin Levine: On the Advisory Opinion, Commissioner Cohen?
Commissioner Cohen: Yes.
Martin Levine: Commissioner Dering?
Commissioner Dering: Yes.
Martin Levine: Commissioner DiPirro?
Commissioner DiPirro: Yes.
Martin Levine: Commissioner Fisher?

Commissioner Fisher: Yes.

Martin Levine: Commissioner Horwitz?

Commissioner Horwitz: Yes.

Martin Levine: Commissioner Jacob?

Commissioner Jacob: Yes.

Martin Levine: Commissioner Lavine?

Commissioner Lavine: Yes.

Martin Levine: Judge McCarthy?

Commissioner McCarthy: Yes.

Martin Levine: Commissioner McNamara?

Commissioner McNamara: Yes.

Martin Levine: Commissioner Weissman?

Commissioner Weissman: Yes.

Martin Levine: Judge Yates?

Commissioner Yates: Yes.

Martin Levine: Chair Rozen?

Chair Rozen: Yes. Okay, attachment C, the proposed meeting schedule.

Monica Stamm: Alright, again, attached at C is the proposed meeting schedule for January to June 2021. We usually try to prepare it a few months in advance so if between meetings you could all take a look at the proposed schedule. We tried to avoid holidays but if you have any conflicts, please let us
know and then we will try to finalize the schedule at the next meeting.

Chair Rozen: Okay, thanks. Unless anybody has anything further that is not on the agenda, that concludes the public session.

Commissioner Lavine: Pardon me, Mr. Chairman.

Chair Rozen: Commissioner Lavine, yes, go ahead.

Commissioner Lavine: I have several items, if I may have your indulgence.

Chair Rozen: Go ahead.

Commission Lavine: First, I would like to ask staff to address the operation and implication of Executive Order 202.6 which, as I understand it, exempts not only from the Public Officers Law, but all statutory or regulatory protocols, volunteers or others who may be retained for pay by the state who are assisting the governor in responding to the public health crisis. And I have specific questions regarding this Executive Order, but my first question is, have I properly characterized its broad ambit?

Martin Levine: I can address that, Commissioner Lavine. So, you have, with one slight correction, I think your characterization is accurate. There was a clarification in Executive Order 202.7 which limited the application of the previous EO to those volunteering or hired for nominal salaries. It would not, on the clarification, it was not
intended to cover those who were hired for these positions. What the executive order did was remove from the definition of a public officer or state employee from the public officer’s law to those who were in these temporary positions to aid in the response to the COVID-19 pandemic. It also suspended certain aspects of the gift laws for lobbyists and public officials to allow the state to solicit from lobbyists, gifts to aid in the COVID response, and allow lobbyists to provide those gifts when they wouldn’t otherwise have been able to. Because of the exclusion from the definition of a state employee, these individuals, by extension, were also excluded from the requirement to file a financial disclosure statement. Finally, application of post-employment restrictions would not apply to these individuals when they resume their private sector duties after volunteering for the state, so they wouldn’t be penalized for coming to volunteer in the COVID response and then turning around then being restricted from carrying out these duties before the COVID response in their private sector capacity. So, I think that generally covers it but if you have specific questions, I am happy to address those as well.

Commissioner Lavine: Yes, I do. the Executive Order addresses those who are volunteering. The Executive Order also has at least one provision that addresses those who are not considered state employees but are being paid by the state.
And it specifically exempts them from subparagraph one of the subdivision one, of section 73, what is the implication of that exemption?

Martin Levine: Well.

Commissioner Lavine: Volunteers who are being paid.

Martin Levine: As I mentioned earlier, and I just want to check it again, that I think your statement about those being paid is incorrect because as I mentioned earlier, 202.7 appears to modify that to limit it to only those who are hired for a nominal or no salary in a volunteer capacity. So I don’t believe, and again this is not our order, this is something that was issued by the executive chamber, by the Governor, but my reading of that is that it is not applicable to those who were hired but rather those who volunteer. But I don’t want to speak to the intent of the governor, so that is all I would say to that extent.

Gary Lavine: The order, as extant, provides that there is some protocol for identifying and recording recusals, is that correct?

Martin Levine: The order provides that the agency or entity bringing that person on board may decide to implement recusals on an individual basis with the person volunteering. As for protocol, I would have to check again but I don’t believe the order established any sort of protocol as to how to go
about that. Again, this is outside of our purview. I am just giving you my interpretation of how I read it.

Gary Lavine: But so far as staff knows, if I may continue Mr. Chairman, so far as staff knows, is there actually a list of all the individuals that executive order 202.6 currently is applicable to who are involved with the state?

Martin Levine: I am not able to answer that. I can find out, but I don’t have that information right now.

Gary Lavine: Well so far as the staff, if I may continue Mr. Chairman, so far as staff knows is anyone or any entity within the administration maintaining a catalog of who these people are, what their affiliations are, whether they would by their circumstance be deemed a so called “interested source” under our regulations, whether they are doing business with the state, whether they are lobbyists, and the list of these so-called recusals that have been provided for in the order? Is any of this information available so far as staff is aware?

Martin Levine: I don’t have any of that information. As you know, the executive order removes these people from our jurisdiction so by necessity, not by necessity, but we would not know.

Gary Lavine: But again, on the follow-up, Mr. Chairman, can the executive order be interpreted as exempting all of those who are lobbying the state, doing business with
the state, or engaging in political fundraising from having to
file anything with anybody that is open to public disclosure,
is that a fair interpretation of the order?

Monica Stamm: Commissioner, I mean, as Martin has
implied, this is not our executive order. If you want us to
direct your questions to the chamber about how they are
interpreting and applying their executive order and what
records they are keeping with respect to people who are covered
by their executive order, we can do so, but we are not in a
position to continue to interpret the chamber’s executive order
and what its effectiveness is. If a question or a specific
situation arose, then we would consult with them, but if you
want us to get answers to questions on how they’re interpreting
their executive order, we can do that. You can give us a list
of questions but you know, offline, however you want to
communicate them to us, and we will pursue them.

Gary Lavine: Mr. Chairman, if I may express myself?

Chair Rozen: Go ahead.

Gary Lavine: And indulge in allowing these questions.

Now, first and foremost, I feel very strongly that the Governor
should have anyone involved that he wants involved in
addressing the crisis. There is a model that I believe is
pertinent to deal with conflicts and that is the one presented
by the business corporation law, where the conflicts are fully
disclosed the conflicts may be waived if it is in the interest
in the corporation. Similarly, I repeat for emphasis, the Governor ought to have whomever he wishes to have involved in responding and the conflicts legitimately can be waived, however, I believe there is a matter of accountability in disclosure. So far as I can ascertain, a list of people who are the beneficiaries of this executive order has not been listed for public disclosure. If they are listed for public disclosure, I will stand corrected. But I believe that the staff should be directed to immediately consult with the executive chamber to ascertain the lists of people to whom this order currently applies, whether their circumstances are such that they would otherwise be interested persons or lobbyists or doing business with the state, and also that the recusals that have been identified ought to be publicly disclosed. Does it require a vote so we could have the Commission direct the staff to have that consultation with the executive chamber? Can you hear me Mr. Chairman?

Chair Rozen: I heard you, Gary. What it is that you are asking?

Commissioner Lavine: I am asking that the staff be directed to have an immediate consultation with the executive chamber and report back to us with respect to one, is there a list of individuals to whom this executive order applies, what are their particular circumstances with respect to being an interested party, which is to say are they lobbying
professionally or otherwise doing business with the state? And 
thirdly, what recusals have already been identified 
administratively?

Chair Rozen: Okay, Monica. Do you have any issue with 
that, Martin?

Monica Stamm: Well, we don’t need a motion if that 
is what the Commission wants us to do. Much of this information 
is not, you know, I don’t know whether or not this information 
is made publicly available. It’s not required to be publicly 
available, and it would be up to the chamber if, you know. We 
can talk with them if that is what the Commission wants us to 
do.

Commissioner Lavine: Well, in fairness to everyone 
involved, including the executive chamber, we ought to make the 
inquiry if it is available that resolves the matter. If it is 
not available, then there ought to be further discussion 
amongst the Commission in public session at the October 
meeting.

Monica Stamm: It looks like Commissioner Fisher would 
like to speak.

Commissioner Fisher: I would like to suggest a 
variation on what Commissioner Lavine has asked. I think as a 
practical matter, it would useful to know who staff should not 
be seeking disclosures from, like by default we get a list of 
who is subject to our jurisdiction and who has filed and who
hasn’t, and unless someone tells us not to go after someone for a disclosure, staff’s going to go after them, right. Go after them, maybe that is the wrong term, but again as a practical matter, it would be useful to know, don’t expect any of the normal disclosure from this person because due to this executive order they are not required to file with JCOPE, therefore our staff shouldn’t waste any time chasing down disclosures that aren’t coming, so why wouldn’t be just say, get a list so that we don’t waste our time.

Commissioner Dering: I just have a comment on that, and I have a question for Monica. Monica, you had mentioned that should an issue arise, part of the conversation would be whether the order applies to the person or not. That strikes me as making sense. I just wanted to ask you, from an implementation standpoint, I mean, if the point of the executive order is to taken outside of our jurisdiction so I’m just really questioning, you know, to what extent it is appropriate for us to, you know, the appearance of attempting to damage that executive order when it is outside of our authority.

Commissioner Lavine: Mr. Chair, may I address Commissioner Dering’s comment?

Chair Rozen: Sure.

Commissioner Lavine: At this juncture, Commissioner Dering, what I am suggesting is that staff identify whether a
list of whom this order applies to and what their circumstances are and what recusals have already been noted. I don’t understand how that request could be construed as managing the executive order. We are simply asking for the information.

Commissioner Horwitz: Well, Mr. Chairman?

Chair Rozen: Yep.

Commissioner Horwitz: I guess the fundamental question really that is underlying all of this is, and I don’t think anyone is challenging this, because I haven’t heard anything that any Commissioner has said that in anyway suggests that the executive order was somehow unauthorized. So if we are going to approach this in a logically and cogent manner, then I think the first question is, if nobody has issues about whether the executive order was legally inappropriate, and it doesn’t sound like that is the case, then the question becomes the one that Monica has posed which is, you know, what is, what, if we don’t have the jurisdiction, then I understand that some Commissioners may think it is good public policy to try to understand what the chamber is doing to ensure that there aren’t, you know, what would otherwise be impermissible conflicts created. There is no question, I don’t think anybody on the Commission is suggesting that is sort of a wordy question. I guess the question is, I am concerned that, you know, we are setting out on yet another fool’s errand where, you know, we think that we have the ability to tell something
and, you know, look, this happens to be the executive chamber, but why would this be any different than if we decide we want, demand from, I don’t know, Legislative Ethics certain information that they keep that we are not entitled to, to me it is not any different. And again, nobody, I don’t think any of the Commission’s efforts are questioning the public policy of wanting to make sure that in inviting members of the public to assist in an unprecedented public health crisis, attention should be paid to whether there are or are not conflicts that might be created, nobody is suggesting that. But what I am concerned about Mr. Chairman, yet again, this turns into some sort of fool’s errand, and then there is going to be, I don’t know, commentary and newspaper articles and we go down yet another rabbit hole. And I would also add, we are at a time where your know our staff is stretched thin, and I know we are going to go into executive session and we are going to talk about ongoing investigations where we have staffing issues, where because of where we are generally, and because of the crisis. And so yet again, Mr. Chairman, I am concerned about employing staff resources on a fool’s errand that at the end of the day, we don’t have the ability to do anything about it. If a Commissioner wants to find out what the chamber is doing, we’ll contact the chamber. If the Commission consensus is that we ask the chamber what they are doing to ensure that there aren’t conflicts with respect to the executive order, if that
is what people want, that’s fine. But if the chamber or, and there are plenty of good public policy reasons why they wouldn’t want that information publicly disseminated, perhaps they can disseminate to us, you know, in a more confidential way, but if they determine that is not in public interest to make this disclosure at this time, then boy, I really don’t think we are going to, you know, it’s not going to be useful. It is not going to useful for anybody if we then set ourselves up into something we can’t deal with, and we can’t control. So that is my view on it, Mr. Chairman.

Chair Rozen: Thank you.

Commissioner Lavine: May I respond, Mr. Chairman?

Chair Rozen: Yes, go ahead.

Commissioner Lavine: What I am suggesting is informational only, but I start with a immutable fact. The executive order has completely supplanted our function, and I believe institutionally, it is our responsibility to ask the question what are they doing, how is this order being applied, and to whom, in its information. Now they make the decision that they don’t want to disclose the information, then that’s a next stage discussion, not for today. What I am proposing is that staff make a phone call and ask, is this information available and if so, turn it over to us.

Commissioner Horwitz: Again, Mr. Chairman, nobody is questioning the public policy interest in this, but I always
find these discussions curious because they always inevitably focus on the executive branch, which is fine, and is certainly in our purview. I think I could count on one hand, maybe, the times that we’ve ever asked the legislature for similar statistical information; how many complaints have there been filed against members, what kind of discipline has been against members. And I am not suggesting, Mr. Chairman, that we go ahead and do that because, again to me, the legal analysis and public policy analysis are to the question I framed before. If the executive order is legally appropriate then we can, you know, ask for whatever we want but, you know again, I don’t want to go down the rabbit hole of gee, if the chamber has a legitimate public policy reasons for not providing every answer to what a Commissioner has asked for, then I really think, you know, where are we going with this. In any event, I don’t mean to belabor it, but I do think that it is worth noting that these kinds of requests always seem to go down the same street, which I find curious. Thank you, Mr. Chairman.

Chair Rozen: Okay, anybody else on this? So, Monica, if you would, I am sorry, was somebody about to say something?

Commissioner Dering: Yeah, Jim Dering. I just want to say that I agree with the comments from Commissioner Horwitz. I think they are consistent with what I said but in a more articulate way.
Chair Rozen: So, Monica, why don’t you just start by asking the chamber if they’ve got a process and then report back to us and we can decide if there is anything else that we want to request. Let’s just take it step by step, I think.

Monica Stamm: Okay, will do.

Chair Rozen: Okay.

Commissioner Lavine: Thank you, Mr. Chairman.

Chair Rozen: You are quite welcome. At this point, we are now concluded with the public session, so I need a motion to go into Executive Session please.

Commissioner Dering: I’ll move.

Chair Rozen: Commissioner Dering, thank you. Second, thank you, Commissioner Fisher. Martin, can you take the roll please?

Martin Levine: On the motion to Executive Session, Commissioner Cohen?

Commissioner Cohen: Yes.

Martin Levine: Commissioner Dering?

Commissioner Dering: Yes.

Martin Levine: DiPirro please?

Commissioner DiPirro: Yes.

Martin Levine: Fisher please?

Commissioner Fisher: Yes.

Martin Levine: Horwitz?

Commissioner Horwitz: Yes.
Martin Levine: Jacob? Commissioner Jacob?

Commissioner Lavine?

Commissioner Lavine: Yes.

Martin Levine: McNamara?

Commissioner McNamara: Yes

Martin Levine: Judge McCarthy?

Judge McCarthy: Yes.

Martin Levine: Weissman?

Commissioner Weissman: Yes.

Martin Levine: Yates?

Martin Levine: Chair Rozen?

Chair Rozen: Yes.

Martin Levine: I’ll come back, Commissioner Jacob?

Commissioner Jacob: Yes.

Martin Levine: Judge Yates.

Monica Stamm: Judge Yates is muted.

Walter McClure: He’s unmuted now. Go ahead, Commissioner Yates.

Commissioner Yates: Yes.

Martin Lavine: Thank you. Alright, motion is unanimous.

Walter McClure: Okay, stand by. Oh I’m sorry I forgot to unmute you, Chair.

Chair Rozen: It’s okay.

Walter McClure: So are we ready, stand by, okay.
[Chair Rozen was not present for the remainder of Public Session. Commissioner Dering served as Chair for the remainder of the meeting.]

[Commissioner Horwitz was not present for the remainder of Public Session.]

Walter McClure: We’re back on.

Commissioner Dering: We are back in Public Session. Monica, can you please summarize what we did in Executive Session?

Monica Stamm: Sure. We discussed litigation and personnel matters, we commenced one substantial basis investigation, and we authorized steps in several investigative matters, closed four matters, and discussed several other investigative matters.

Commissioner Dering: Unless someone has something else, is there a motion to conclude the meeting?

Commissioner Fisher: I’ll make that motion.

Commissioner Weissman: Second.

Martin Levine: To adjourn, Cohen?

Commissioner Cohen: Yes.

Martin Levine: Dering?

Commissioner Dering: Yes.
Martin Levine: DiPirro?
Commissioner DiPirro: Yes.
Martin Levine: Fisher?
Commissioner Fisher: Yes.
Martin Levine: Horwitz is off, Jacob?
Commissioner Jacob: Yes.
Martin Levine: Lavine?
Commissioner Lavine: Yes.
Martin Levine: McCarthy?
Commissioner McCarthy: Yes.
Martin Levine: McNamara?
Commissioner McNamara: Yes.
Martin Levine: Weissman?
Commissioner Weissman: Yes.
Martin Levine: Commissioner Yates?
Commissioner Yates: Yes.
Martin Levine: Chair.
Commissioner Dering: That’s it, take care.
Monica Stamm: Thanks everyone.