NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS
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Commission Meeting of March 23, 2021
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Appearances: Camille Varlack, Chair

Commissioners:

Richard F. Braun
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, Director of Ethics
Carol Quinn, Deputy Director of Lobbying
Stephen J. Boland, Director of Administration
Michael Sande, Deputy Director of Ethics Guidance
Megan Mutolo, Associate Counsel
Lori A. Donadio, Principal Investigative Analyst
Kelly McCready, Confidential Clerk
Olivia Fleming, Intern

IT Staff – Tanya Smith
OGS Media Services – Amaury Corniel
Walter McClure: Chair, we’re live.

Chair Varlack: Okay. Great, Thank you. Good morning everyone. Welcome to the March 2021 meeting of the Joint Commission on Public Ethics. The meeting is now called to order. We apologize for our delay in starting because of technological challenges. This meeting is being held using video conferencing technology. The Public Session of this meeting is accessible on JCOPE’s website to watch via live stream. A couple of important reminders. It is important that only one person speak at a time. In addition, I ask that when you speak, please identify yourself so we have a clear record. We will take votes via a modified roll call to ensure that everyone is properly counted. And please also remember to mute your phone when you are not speaking.

Walter McClure: Madam Chair, if you could hang on one second. I do hear somebody has competing audio, so please make sure you mute that because it’s is coming through the speakers.

Martin Levine: Judge McCarthy, that might be your phone, I’m not sure.

Walter McClure: I think we’re okay now.

Chair Varlack: OK, great. Deputy General Counsel Levine, do we have a quorum?
Martin Levine: Yes, we do ma’am. We have all thirteen members.

Chair Varlack: Thank you, so let's get started. The second item on the agenda behind attachment A is the approval of the minutes from the Public Session of the last meeting of the Commission held on February 23, 2021. Are there any corrections to the minutes?

Martin Levine: Yes, ma’am, there are. There is one correction on page four, in the first full paragraph in the very first sentence, a word is missing. It should read several Commissioners weighed in on the issues. And then there is one issue to note, it won’t result in any change but, on page seven, the motion at the end of Roman six, Commissioner Fisher was not recorded. He had, we lost his audio and video feed, and the same thing occurred in the motion in Roman seven to go into Executive Session. Commissioner Fisher was not recorded. While we can’t change the minutes to record his vote, he did ask that today’s minutes reflect that he would have voted against the motion in Roman six and for the motion in Roman seven. So we will record that today for him.

Chair Varlack: Okay, thank you very much. Are there any other corrections to the minutes from any other Commissioner? Okay, great. Can I please have a motion to
approve the February 2021 minutes of the Commission, as corrected?

Commissioner Dering: So moved, Dering.

Martin Levine: I see Weissman.

Chair Varlack: Can we have a second?

Commissioner Braun: Second.

Chair Varlack: All in favor?

Martin Levine: Please keep your hands up until I’ve called your name. Braun, Fisher, Dering, McNamara, Weissman, Yates, Varlack. Sorry, Commissioner Cohen on the minutes?

Commissioner Cohen: Yes.

Martin Levine: Commissioner DiPirro?

Commissioner DiPirro: Yes.

Martin Levine: Commissioner Horwitz?

Commissioner Horwitz: Yes.

Martin Levine: Commissioner Jacob?

Commissioner Jacob: Yes.

Martin Levine: Commissioner Lavine?

Commissioner Lavine: Yes.

Martin Levine: And Judge McCarthy?

Commissioner McNamara: Yes.
Martin Levine: Motion Carries.

Chair Varlack: Thank you. Let's move on to item three on the agenda, report from staff. General Counsel Stamm?

Monica Stamm: Sure. The monthly operations report for the month of February attached at tab B. The only thing of note is again, the numbers of calls and emails coming in for lobbying assistance is still very high. We're expecting it to drop off soon as the bimonthly reports were due but we will see how that goes. We are happy to answer any questions about the monthly report.

Chair Varlack: Thank you. Anyone have any questions or comments? Okay, great. Moving on to item four, the delegation of authority to staff. General Counsel Stamm?

Monica Stamm: I think this is a matter of Commission discussion. Commissioners have asked that this matter be placed on the agenda and there is a proposal that has been circulated, so I leave it for the Commissioners to have discussion.

Commissioner Yates: If I may?

Chair Varlack: Yes, thanks Commissioner Yates.

Commissioner Yates: Okay, this is a topic that we've, that's been discussed before, although this motion is different from anything that has been proposed before or voted upon. The question comes down to this. The law requires, regulations
require, in at least four different places that the Commission approve certain activity before it be engaged upon by various officials. In particular, the statewide elected official, the Governor, the Attorney General, the Lieutenant Governor, the Comptroller, or a Commission head, or the head of a department wants to engage in certain activities, the law requires that they get the approval of the Commission. That includes things like outside income ventures, outside activity, fees or payments for services, travel reimbursements when it’s paid by either an interested party, a lobbyist, or not, and honoraria, and certain activities, and whether or not certain lobbyists may engage, may retain, someone to act on their behalf in a contingent manner that is based upon either equity or stock shares that might be provided which might depend upon the success of the venture. All of those activities according to regulations require approval of the Commission. We have had in place, for a number of years, a resolution which allows the Commission to delegate certain decisions and activities to the Executive Director and indirectly to the rest of the staff though that when the decision is between meetings, when a decision needs to be made between meetings and it’s based on precedent. I will acknowledge, although I take a strong position on it, I don’t feel like reigniting the debate, there has been a question which has arisen as to whether or not the delegation to the Executive Director to make, to issue,
informal letter opinions is the equivalent of the Commission approving outside activity or outside income or honoraria, etc. by a statewide official. It turns out, Commissioner Fisher and I had competing resolutions, and I thank Bill for this, Commissioner Fisher, he has engaged with me in a very, what I think has been and I hope will be a productive process of exchanging different forms of the two resolutions. We’re now up to what I call version eight, which is the one that’s been sent to all of you. And what it tries to do is the following, and that is, it turns out, upon research, that the staff, and through the Executive Director, through the informal letter opinion process, has quote, approved, unquote about thirty to forty decisions a year, are applications made by the Governor or Commissioners or statewide elected officials in those four areas. We have had a lot of debate over whether or not those letter opinions properly constituted approval and whether or not the approval that was required by the regulations was ever met. One issue of great concern to a number of our members has been that we are completely unaware, or have been completely unaware of almost all, if not all, of those opinions or decisions that have been made. It is in the normal course, I am not faulting staff for not making something necessarily available upon request, but in the normal course, the applicant, the Governor or the Comptroller, or whomever, the Attorney General, talks to staff through counsel or directly, gets an
opinion, considers it to be an approval and the Commissioners, myself and other Commissioners, not only weren’t aware of the decision, we didn’t even have the underlying materials. We didn’t even know what the application was based upon or what the question was. And those letter opinions have always been treated as confidential matters, which is why staff has not generally distributed them. So without faulting anybody, I am not trying resurrect history, and say whether anything was right or wrong in the past, but going forward, I get the strong sense, and I think, I hope a majority of the Commissioners agree, that in certain areas when the regulations require approval by the Commission for those limited number of cases, the thirty or so each year, thirty five or so each year, where the Governor or the Comptroller or the Attorney General or Commission Head asks for approval to engage in some outside income or activity or venture or travel, that the Commission be aware of it, and it not be made by dint of an informal letter opinion in a private conversation with staff, which has in the past. Now, Bill Fisher and I, and I commend him for this, was open to the prospect, even though he voted against my earlier motion which was broader, and he raised a couple of legitimate concerns which I hope are addressed in version eight. He said that minor travel expenses, as a routine matter, don’t necessarily require a vote of the Commission. And he asked that if there is going to be a fee for travel reimbursement or
a fee for speaking or performing a service where the money
goes to the state anyway, if the amount that’s paid is less
than $2000, then we delegate that to the staff. We don’t need
to approve it as a Commission matter. I am willing to accept
that even though it’s a variant of the general proposition
that no approvals can be done by staff, that we can’t delegate
that matter, but I think for things that are deminimus, like
a travel reimbursement less than $2000, I think Commissioner
Fisher raised a good point. I’d also commend him for carving
out an exception to that, and that is, if the travel
reimbursement or fee is offered on behalf of or by an
interested source, somebody who is a lobbyist or a client of
a lobbyist who has a matter of concern pending in front of
that statewide official, that in that case, you would still
require approval of the Commission regardless of the amount,
even if it’s one dollar, and I thank him for that amendment.
He also raised another good point and that is, since there was
a question in the past about the scope of delegated authority,
are we really going to go back and try and unwind past decisions.
He recommended that we go forward, but people had the right to
rely upon a good faith application and an approval in the past
and that it’s not worth us going back, and I agree with him on
that. We, there was ambiguity in the past, we are trying to
lend clarity with this resolution, and so I agree with him
that the resolution, which lends clarity, is one which should
be prospectively applied. There is a third matter and a fourth and then I’ll pass it on to the rest of the committee. The third matter is what do we do with the informal letter opinions, what force do they have? The statute says that when there is a formal application to the full Commission that we may publish a redacted form of it for the edification of the public and the covered parties. There is no mention in the statute of informal letter opinions at all. No reference to it. So, the question is, will they have force and what do we do with them? Commissioner Jacob has rightly pointed out that there is a parallel system in the SEC, which has worked for years when you have staff opinions. So the decision was made in version eight to do the following, and that is: if an applicant asks for approval or an opinion from staff and they present all the facts, they don’t omit anything, they don’t misstate anything, going forward, then as to that particular matter, that party will have safe harbor and will be able to rely upon that informal letter opinion. But, if in the view of the Commission that the staff decision, which was made one, which is not the Commission’s position and the Commission would rather reverse that as a matter of policy we are free to do so, we still have the authority to do that, but it would not affect the reliant party who had depended upon the informal letter opinion, but it would be a modification going forward, and as with formal opinions we would have the right, the Commission would have
the right, the discretion, to either publish, in a redacted form, an informal letter opinion, just as we do with formal opinions, for the edification of the public, or not. We could maintain confidentiality if we thought it was a matter that didn’t deserve or require publication. And then the last item is something that Commissioner Jacob’s raised, which I think a number of the Commissioners agree with as well. And that is that in the past, we didn’t really know, the Commission wasn’t really aware of the letter opinions, the facts underlying them, or even how many were issued or to whom and for what matter. So that the resolution now carries a provision that there would be a schedule attached at our monthly meeting so we can be advised as to, the Commission would be, advised as to who sought, which statewide official or Commission heads or Attorney General sought an opinion, an informal letter opinion or received one, and what was the subject matter. Now this, of course, will be confidential just as to the informal letter opinions themselves are confidential but at least the Commission within the Commission would be able to look at them, and Commissioners, every Commissioner individually and collectively, all the Commissioners, would have the right, if something caught their eye that they thought was worth further examining, they would have the right to see the submitted materials which is something new, because other than I think maybe one or two Commissioners I’m aware of that have actually
tried unearthing prior opinions and reviewing them, I think
the majority of the Commission, including myself, we have been
in the dark as to prior letter opinions and that would no
longer be true. So that is version eight and I don’t know if
at this point, I should try and move it or if you want to just
have discussion on it.

Chair Varlack: Thank you, Commissioner Yates. That
was actually an incredibly detailed walk through of sort of
where we are, and I very much appreciate your effort, as well
as that of Commissioner Fisher and others who have worked on
this document. I absolutely want to hear if any other
Commissioners have questions or comments. I will note that, I
think the most recent version, version eight, was circulated
yesterday, and so I am not opposed to, you know having,
continuing with the discussion and answering some questions
here and saving the vote until the April meeting, but I open
it up to the rest of the Commissioners to ask any questions.
I think I see a hand raised in Albany. Is that Commissioner
Fisher?

Commissioner Fisher: Commissioner Fisher. Thank you,
Chair Varlack. First, and I will keep my remarks brief, first
I want to thank my colleague, Commissioner Jim Yates, for all
the work that he’s put into this and there is a number of
people, including Marvin Jacob and others, that also provided
great feedback. I am very satisfied with the form and I saw
all versions up to and including version eight. One of the, and Jim did a great job explaining some of my concerns, one that I would like to bring forward is that I didn’t want this change to interfere with the regular process of our professional staff. And another one of our colleagues, George Weissman I believe, looked at two years’ worth of these opinions, and I believe George, that you found one that you would have disagreed with. So, the rate at which they do exactly what we would have done is extremely high and we wouldn’t want to create real inefficiency issues by bringing so many things back to us that it interferes with their work. The only other comment that I will make, and this is just based on a brief conversation I had with Commissioner Dering who is here with me, he received it yesterday, he hasn’t received any information about this from General Counsel or Deputy General Counsel, as I and others have benefited from, so I think it might be wise to let the other Commissioners who just received it yesterday, to have a little more time and to receive counsel from our attorneys if they feel that’s necessary and to hold off until the April meeting, but I would very much like to join in a motion in April to see the adoption of this, hopefully in its current form. And those are my remarks and I will go on mute.

Chair Varlack: Thank you, Commissioner Fisher.

General Counsel Stamm.
Monica Stamm: Yes, I just wanted to clarify one point, which I don’t think affects the substance of the delegation in any way, which is just that Commission approval is required under these regs in parts that are referenced in the draft delegation but really outside activities, official acts to be expensed and honoraria, Commission approval is required for all policy makers who engage in these activities under the conditions set forth in these regs. So it’s not just the statewides and agency heads for whom Commission approval is required. Staff gives guidance on the rest of the state officers and employees who are covered, and I don’t have numbers of letter opinions, but I just wanted the full Commission to understand that. But the way the delegation is written, I don’t think my point affects it in any way, but I wanted to just ask a point of clarification, with respect to paragraph three, and this references a schedule of informal letter opinions, but from the way Judge Yates presented it, I wasn’t clear if you just want a log of informal letter opinions to the agency heads and statewides or do you want them for all informal letter opinions that are issued. Either way, staff can accommodate it. I just wanted to make sure there was an agreement on what paragraph three was asking for.

Commissioner Yates: Thank you, Monica. I am going to pass that one to Commissioner Jacob and Weissman. They were the two who were most concerned about this, oh and Braun too,
I think Commissioner Braun on several occasions said that it’s important that Commissioners be more aware of what’s going on, so I put that last one in. That’s language that Commissioner Jacob proposed, and I know Commissioner Weissman and Braun endorsed so I am going to pass it to them.

Commissioner Jacob: Chair Varlack.

Chair Varlack: Yes.

Commissioner Jacob: This is Marvin Jacob and I had intended that all, we’re all, as Commissioners, I would like to understand the development of the law that we deal with and unless we see all of them, we really don’t have a good knowledge. Whether they go to statewides or others, so the answer is, from my standpoint, all, and that word should be inserted, and that is a good catch, Monica, very good catch.

Commissioner Varlack: General Counsel, any additional comments on that point?

Monica Stamm: No, I think, I think that was really it, and so like I said I think that the delegation is written is clear that for all, for anyone who is not an agency head or statewide, staff will continue to operate in the normal course, and then with respect to what is now being called approvals, that that will be handled differently but I think that the rest of it is clear and we will just, now we understand what paragraph three means. And just for all Commissioners to
understand, you know, staff issues informal letter opinions. We also take phone calls and emails, so you know we have you know, we looked at 2018 and 2019, and there is more than a thousand inquiries that come in, they don’t all result in informal letter opinions. And so a handful do, and we haven’t been tracking it in that way to date, but we will come up with a method to track when they result in informal letter opinions so that we can pull this from our log in an organized way to present it to the Commission in Executive Session.

Chair Varlack: Thank you, General Counsel Stamm.

Commissioner Braun: If I could add, being relatively new to this Commission, I did want to see informal opinions from the past and I did state that I thought we should have the opportunity, we the Commissioners, whoever wants to among us, to see informal letter opinions that have been issued by staff. I commend Commissioners Yates and Fisher for all the work they’ve done, Commissioner Jacob for what he added on this point, and I believe strongly that it should be all informal letter opinions that are issued. We should get a listing of them and each Commissioner have the opportunity, if he or she wants, to see any or all of those informal opinions so that we can be aware of what’s happening and what should be done, if we think something should flow from there.
Chair Varlack: Thank you, Commissioner Braun. Any other Commissioners would like to be heard on the delegation? Okay. So, as mentioned, I do think it’d be helpful to give some of the Commissioners that have not been as involved in this, the opportunity to just review it and again, to Commissioner, I think it’s Dering’s point, to be able to speak with our General Counsel and Deputy General Counsel should they have any questions on the impact of this resolution. Does anyone object to postponing a formal motion on this to the April meeting?

Commissioner Yates: If I may, I was going to make a motion to move it now, but I won’t. I will hold back, but with one caveat. I would ask that if there is, in the interim between now and April, any requests by any of the affected statewide elected officials for a letter opinion, that we as Commissioners be advised between now and then so that we have an opportunity to be heard before this takes effect.

Chair Varlack: General Counsel Stamm, do you see any issue with that?

Monica Stamm: Sure, we can certainly do that.

Chair Varlack: Thank you, and thank you, Commissioner Yates. Moving on to new and other business. The first thing is behind tab C is meeting schedule from July through December 2021. This was introduced at the last meeting,
so the Commissioners had an opportunity to take a look at it. Are there any questions or comments on the meeting schedule? Okay.

Commissioner Jacob: Madam Chair, Madam Chair?

Chair Varlack: Yes.

Commissioner Jacob: Commissioner Jacob here. I will, I don’t want to hold this point up, but I haven’t had a chance to look at this, and will communicate with counsel, and I should be able to do that in a day or two, but I will get back to them if I do have any issues.

Chair Varlack: Okay, thank you very much. Does anybody else, did anyone else just in the interim have any comments or questions on the meeting schedule? Okay, great. If you do, within the next couple of days, if you could just reach out to either General Counsel Stamm or Deputy General Counsel Levine, that would be great. Is there any other new or other business?

Commissioner Lavine: Yes, Madam Chair.

Chair Varlack: Yes, Commissioner.

Commissioner Lavine: Can you hear me, Madam Chair?

Chair Varlack: We can. You are little low for me, but we can hear you.

Commissioner Lavine: Is that better?
Chair Varlack: That is better, thank you.

Commissioner Lavine: Alright, thank you. I have several subjects I would like to address today. The first is Executive Order 202.7. On September 22, 2020.

Chair Varlack: One minute, Commissioner. Can you hear me?

Commissioner Lavine: Yes.

Chair Varlack: I just want to make sure that I heard you. You said Executive Order, what was the number?

Commissioner Lavine: 202.7.

Chair Varlack: Okay, and just to understand, is there going to be action requested on this?

Commissioner Lavine: Yes.

Chair Varlack: And what is the, what will the requested action be?

Commissioner Lavine: The requested action, I will move at the conclusion of my remarks that an informal subpoena be directed to the Governor’s counsel.

Chair Varlack: Okay, thank you.

Commissioner Lavine: Or an informational subpoena, better characterized.

Chair Varlack: Okay, thank you.
Commissioner Lavine: If I may continue, Madam Chair?

Chair Varlack: Yes, absolutely.

Commissioner Lavine: Yes. On September 22, 2020 the Albany Times Union made a FOIL request to the Executive Chamber for records indicating the identities of those within the ambit of Executive Order 202.6, which was ultimately superseded by 202.7, and also asked if there were any gifts exemptions or recusals. The response emanating from the records access officer of the Executive Chamber was made, dated March 5, 2021 and stated no records responsive to the request were found. In the most charitable characterization, this response from the Executive Chamber is disingenuous. In light of the governor’s counsel’s acknowledgement of the vaccination major domo’s status, the response can fairly be described as a sham. It also appears that some of the purported volunteers may not actually be volunteering, which is to say they’re being paid. They’re being paid by their employers, which invites many ethics questions, particularly if the employers had business before the state. Given our jurisdiction for Executive Law 94(9)(j), which states we shall advise and assist any state agency in establishing rules, regulations relating to possible conflicts between private interests and official duties, I move that an informational subpoena be directed to the governor’s counsel for all pertinent information relating to Executive Orders 202.6 and 202.7, including a list of all
individuals who have been or now are within the ambit of Executive Orders 202.7 or 202.6.

Chair Varlack: There is a motion on the floor. Do we have a second?

Monica Stamm: I saw Commissioner Weissman.

Commissioner Weissman: Yeah, I’ll second it.

Chair Varlack: Okay, thank you, Commissioner Weissman. We will open it up for discussion. The first thing I just want to ask for clarification on. I understand, I think I understand, that there was a vote related to this matter at the December meeting. I am not sure that that vote, I am not sure if it’s exactly the same issue. General Counsel Stamm, I don’t know if you or actually Commissioner Lavine, I don’t know if you can shed any light on whether or not this is a different request.

Commissioner Lavine: Same subject, different motion.

Monica Stamm: Yes, I would agree with Commissioner Lavine. There have been votes on whether to make a request for, there were votes on making a request for whether or not there is a process in place, there have been votes on whether or not to send a written letter to the chamber, making a written request. This is different in that it’s, it would be authorizing staff to issue a subpoena, which, if I understand, would be under the Commission’s authority under 94(17).
Chair Varlack: Okay, thank you. Any questions or comments from any Commissioner?

Commissioner Weissman: Madam Chair?

Chair Varlack: Yep, go ahead, Commissioner Weissman, and then Commissioner Fisher, I will call on you next.

Commissioner Weissman: Okay, thank you very much. The reason I am seconding this motion has to do with a recent article that appeared in the Washington Post relating to a particular person who apparently has, works for a company that has business interests down in the New York Metropolitan area, sits on a Board of an Authority, and had the opportunity to use governmental resources not only for, to do the volunteer work, but also in terms of lodging. So I am just trying to, you know, get to the bottom of where this really is, in terms of where the lines, where lines are being drawn, in terms of volunteering and then other ethical obligations, so thank you.

Chair Varlack: Thank you, Commissioner Weissman, Commissioner Fisher?

Commissioner Fisher: Thank you, Chair. I wanted to ask about the practical impact of this, so if I am understanding correctly, there are volunteers related to the COVID pandemic that we believe are not subject to our jurisdiction because they’re exempted, but we want a list of who those people are, even though we don’t have any
jurisdiction over them. So I am not sure what, if we had that
list we would do with it, and I believe there was reporting on
a different case where one of these volunteers had something
referred to the public integrity unit, is that right, of the
Attorney General’s office. So, if we don’t have any
jurisdiction, what would we do with this information if we had
it, and I guess I’ll leave it as that.

Commissioner Lavine: May I respond to Commissioner
Fisher, Madam Chair?

Chair Varlack: Of course.

Commissioner Lavine: The provision of the Executive
Law I cited says we shall advise agencies with respect to
conflict of interest matters. We can hardly make an informed
assessment and convey our assessment to the Executive Chamber
if they are withholding the information with respect to the
implementation of the Executive Order. I repeat, for emphasis,
given the fact that the Governor’s acting counsel publicly
acknowledged that the leader of the vaccination program is a
supposed volunteer and has been vetted, it belies the assertion
made by the Chamber’s record access officer that they don’t
have any information on the subject. Therefore, we ought to
elicit it, make an assessment, and convey our conclusions, if
any, to the Executive Chamber.
Chair Varlack: Thank you, Commissioner Lavine. Do any other Commissioners want to be heard on this motion?

Commissioner Dering: Madam Chair?

Chair Varlack: Yes.

Commissioner Dering: Jim Dering. Just adding to Commissioner Fisher’s comment, if, and Commissioner Lavine’s concerns, I think with regard to a FOIL request, if a requestor has a concern with regard to the response, the remedy would an article 78 proceeding, so I think the requestor would have the ability to pursue that. In terms of advise and assist, I just personally don’t see how issuing a subpoena falls within the category of advise and assist, so those are my comments.

Chair Varlack: Okay, Commissioner Dering. Commissioner Yates?

Commissioner Yates: I wanted to take issue with an assertion that was made and that is that we don’t have jurisdiction. Without speaking to the propriety of a subpoena at this point in time, one thing that I’ve raised in three consecutive meetings here, and I want to, I don’t want to ever put it aside is the following, and that is that the Executive Law allows the Governor to suspend, temporarily, laws that are necessary to be suspended to deal with a disaster or emergency. Fine. One of the, Executive Order 202.6 and 202.7, which Commissioner Lavine is referring to, says that anyone who is
either a volunteer or nominally paid is exempt from Public
Officer Law 74. Public Officer Law 74 is the law that says
that, if you’re acting as a public official with public
authority, that you have to follow certain ethical rules. You
can’t contract to your family, to yourself. You can’t award
bids to yourself. You can’t accept gifts. You can’t accept
bribes, etc, etc. So the question that arises is whether or
not the Governor has the authority to issue an Order that says
disregard all conflict laws and all conflicts concerns if a
person’s nominally paid, even if they’re acting on behalf of
the Governor and they wield extraordinary power. I don’t want
to concede the point that was made earlier by another
Commissioner, that somehow or other, that’s an authority that
the Governor has. I don’t want to concede that the Governor
can wipe away all conflicts that may exist and say that it’s
being done because it’s necessary to the dealing with the
disaster or with COVID. So therefore, I think we have a
legitimate concern about whether ethical laws are being
violated. I don’t have to remind you, I mean, if you all
remember two years ago or three years ago when there was a
disaster in Puerto Rico, and apparently, we were told,
according to newspaper stories, that a couple people that had
no experience with electrical work at all were given a hundred
million or two hundred million dollar contract to do the work
in the Puerto Rico, and they were contributors but that they
were not qualified. Now, you could call them volunteers if you want, but still, there was a lot of conflict that was done, and electric work in Puerto Rico was never done. We want to make sure that nothing like that ever happens in New York, and the only way to do that is that we keep vigilant in our responsibility to deal with ethical conflicts. I will not concede that a person who wields power on behalf of the Governor or the state is free of examination by us if there is a conflict that becomes apparent.

Chair Varlack: Okay, thank you, Jim. Commissioner Fisher?

Commissioner Fisher: It seems to me that the legislative branch of New York State government has a strong interest in these Executive Orders and recently has taken action and had discussion around whether they should be extended or modified. And it seems to me that that’s the appropriate branch of government to contest the Governor’s assertion of what he is able to do under these Executive Orders, and I still don’t see where we have any jurisdiction, but it seems like the state legislature has plenty. Likewise, if the state legislature wanted to change the statute that we operate under to give us jurisdiction over volunteers subject to this Executive Order, then they have every power to do that, and if they give that to us, I think we should take up that work, but
I don’t see why we should take up work that isn’t ours to do and therefore, I would be voting against this motion.

Commissioner Dering: Adding to that, if I could, Madam Chair.

Chair Varlack: Yeah.

Commissioner Dering: My recollection is that the statute also provides the legislature the ability to overturn an Executive Order issued by the Governor, so, to Commissioner Fisher’s point. Thank you.

Chair Varlack: Thank you. Commissioner Yates, did you have a comment?

Commissioner Yates: Yes. I am not talking about changing the statute. I am talking about following the statute. The statute says, in particular, that any suspension order shall provide for the minimum deviation from the requirements of the statute which is suspended, consistent with the disaster action deemed necessary. In other words, all I am saying is this, if the Governor wants to issue an order that says I don’t care about ethical conflicts and JCOPE can’t look into them for a volunteer, then let’s apply the statute. The statute says it’s got to be the minimum deviation necessary to deal with the crisis, and that’s all I’m saying, is let’s follow the law. I am not asking for a change in the law.

Chair Varlack: Commissioner, I see your hand raised.
Commissioner Dering: My concern with that, and it relates to the concerns that Commissioner Fisher brought up, is that then what we would be doing, I believe, is challenging the Governor’s Executive Order based on our reading of the Executive Law, and I just don’t think that’s our place. I think that’s the place of a court, if there was a challenge, or I think within the Executive Law, the legislature has the ability to overturn an Executive Order, so I just don’t, from a jurisdictional standpoint, I just don’t see our place with it.

Commissioner Yates: If I may again, just to respond. That’s actually where I maybe vary from Commissioner Lavine’s motion. His proposed remedy is to find out, first of all, who is exempted. I had previously made a motion or at least raised the issue, I forget, I don’t think it was a formal motion, on two or three occasions, and that is that we ought to get clarification as to whether or not we have jurisdiction when we become aware of a conflict. If someone submits a sworn affidavit to us telling us that a volunteer has self-dealt or taken a gift or honoraria or some kind of self-reward to himself, or her family or his family, then the question is do we have the authority to go forward or not. I asked counsel last two times to write to the Governor’s counsel to find out whether or not the intent of the Governor was to exclude us or preclude us from being able to act on a complaint when there is a clear conflict. That hasn’t happened. So, we could do an
informational subpoena the way Commissioner Lavine has offered, or on the other hand, maybe it is appropriate for us to go ahead and ask for a formal opinion from the Attorney General. We could ask Attorney General Letitia James does she think that total preclusion of any examination of conflict by this Commission is lawfully covered by that Executive Order, and I’d actually welcome, if I can’t get it from Governor’s counsel, then I’d like to get it from Attorney General James.

Chair Varlack: Okay. So before we move on, does anyone have any additional comments? Okay. Commissioner Yates, are you seeking to amend Commissioner Lavine’s motion at this time?

Commissioner Yates: No, I’d rather continue this discussion among the Commissioners.

Chair Varlack: Okay, so seeing no other hands, Deputy General Counsel Levine, can you please repeat the motion that’s on the floor?

Martin Levine: Yes ma’am, and I would actually ask that Commissioner Lavine clarify, because I was trying to keep up on notes, but the motion was to issue an informational subpoena to the Governor’s counsel for all individuals covered by Executive Order 202.6 and .7. Was there additional material that you were seeking, Commissioner Lavine?
Commissioner Lavine: Any other information related to recusals by volunteers.

Marine Levine: And any other information related to recusals by volunteers.

Chair Varlack: Okay.

Commissioner Lavine: Yes.

Commissioner Horwitz: Madam Chairman, this is Dan Horwitz.

Chair Varlack: Yes, Commissioner.

Commissioner Horwitz: I have a question, really I guess, for our General Counsel. First of all, what authority, what section of section 94 would this subpoena be issued pursuant to?

Monica Stamm: I believe it would be under 94(17), which gives us, the Commission, the ability to, 17(c), which gives the Commission the ability to issue subpoenas.

Commissioner Horwitz: Has the Commission ever voted to issue a subpoena under 17(c) in the Public Session?

Monica Stamm: No, not that I recall.

Commissioner Horwitz: And is the reason that, and the Commission has issued those subpoenas historically, is that correct?
Monica Stamm: Yes, the Commission, any subpoena the Commission issues is pursuant to 17(c).

Commissioner Horwitz: And historically, those subpoenas, those 17 subpoenas have been issued confidentially because they were pursuant to the confidentially requirements under the Public Officers Law, right?

Monica Stamm: The majority of subpoenas that have been issued under 17(c) have been done in connection with investigative matters and so they have been covered by the confidentiality that’s applied to investigative matters. I think, generally speaking, if we are dealing with a matter relating to an individual, whether it is the subject to an investigation, or a corporate entity, a lobbyist, or a client, in any context, if it relates to individual we’ve done it in Executive Session.

Commissioner Horwitz: So I’m curious then, if the Commission was to vote to issue the subpoena that the subject of the motion, would the return of the subpoena, the information provided in response to the subpoena, be covered under the confidentially rules of the Public Officers Law?

Monica Stamm: Of the Executive Law?

Commissioner Horwitz: Yeah. That’s an important question given, historically, the use of these subpoenas for investigative matters. This certainly sounds like it’s more
an investigative question that anything else. So I am curious about whether, notwithstanding this motion was made in the Public Session, whether the return would be confidential. And if the answer is unclear, I think that is also important for the Commission to understand.

Monica Stamm: So, I think it is unclear. I don’t know that, again, this not a situation we have ever contemplated before, but I certainly would recommend, that if the return included individual guidance that was given to any volunteers or anyone else who’s covered under 202.6 or .7 of the Executive Order, that that is not the kind of information that we would normally make publicly available and so that has to be given some thought, and I don’t have an answer.

Commissioner Horwitz: Yeah, thank you Madam Chair.

Chair Varlack: No problem at all. Are there any other questions or comments with respect to the motion on the floor? Okay, so why don’t we move ahead to the vote on the motion unless, General Counsel Stamm, considering the last question you think, your recommendation would be that we need to hold until we have an answer?

Monica Stamm: I think the Commission could consider, it is really for the Commission to decide. It’s an open issue and if that’s the reason why Commissioners don’t want to do
this, you know, approve a subpoena in the Public Session, that
is certainly a legitimate concern for Commissioners to have in
voting on this motion, and other Commissioners may not share
that concern. So I think it can go forward.

Commissioner Horwitz: Madam Chair, I do think that
I would like to have a more cogent analysis from the staff
about the implications of the subpoena. First, since we’ve
never, this is the first time we’ve done this, and the fact
that these kinds of subpoenas have historically been used,
sounds like almost exclusively, for the conduct of
investigations. And while I think the public policy questions
that Commissioners have raised today about adherence to
conflict of interest rules is, of course, critical, and, of
course, something that generally is within our, our purpose,
I do think that a more cogent analysis of the answer to this
question is important for Commissioners to understand before
we are asked to vote on something like this. Particularly
because, notwithstanding the fact that some Commissioners, who,
without naming these people who are the subject of newspaper
articles, there may be others who are not as high profile as
these people and whose rights may be implicated, and I think
we need to sensitive to that as well. Notwithstanding the
important public policy concerns that Commissioners have
raised about this issue.
Chair Varlack: Thank you, Commissioner Horwitz.

Commissioner Lavine, with the point that has been raised, are you amenable to tabling your motion until the next meeting so that Commissioners can receive additional views on the matter raised by Commissioner Horwitz, or would you like to proceed with a vote?

Commissioner Lavine: I am not amenable. I agree with the proposition that whatever information that we receive should be reviewed by the Commission, with respect to whether it should be divulged to the public or not. That’s our prerogative as a Commission. I will not withdraw the motion today.

Chair Varlack: Okay, thank you.

Commissioner Horwitz: Madam Chairman. I do have a point of order that since the author of the amendment has conceded that the subject matter of the subpoena is subject to the Executive Law confidentiality rules that we abide by, then I would submit that the issuance of the subpoena itself is not appropriately discussed in the Public Session. I think the motion is out of order.

Commissioner Lavine: I do not agree with learned counsel, Madam Chair. I am simply accommodating a concern. In the normal course, we as a Commission, would review the material. If it appears that there is some legal imperative to
withhold it in camera, then, of course, we should do that. But
it should not impede a vote on the resolution today, nor is
there any legal requirement whatsoever that the motion be
confined to the Executive Session.

Chair Varlack: Thank you, Commissioner Lavine.

Commissioner Jacob: Madam Chair, Madam Chair.

Commissioner Jacob here.

Chair Varlack: Hi, Commissioner Jacob.

Commissioner Jacob: I can’t agree with the reading
of section 17(c) that Commissioner Horwitz is putting to it.
Section 17 begins by saying, in addition to any other, any
other powers and duties specified by law, the Commission shall
have the power and duty to. Begins with promulgating rules. If
in connection, for example, with promulgation of a rule, this
Commission needed information and had to issue an informational
subpoena, I would not agree 17(c) to mean that that could not
be done. We need the ability as a Commission, since we regulate,
and we also enforce. The notion of reading section 17 as being
exclusively an enforcement provision is belied by the
introductory language ‘in addition to any other’. Promulgation
of rules follows immediately. So we should, and we do, have
the power to issue informational subpoenas in order to conduct
the business of the Commission. And to read 17(c) as meaning
only enforcement subpoenas because our recollection is that we
have not issued any in connection with our regulatory or other duties is, in my view, an incorrect reading of section 17, and I would urge that we do vote on this today. I would agree with Commissioner Lavine in that regard. Thank you.

Chair Varlack: Thank you. Commissioner Dering?

Commissioner Dering: Looking at 17(c), it says “conduct any investigation necessary to carry out the provisions of this section. Pursuant to this power and duty,” the Commission may issue subpoenas. So number one with regard to that, I don’t see the motion, as I understand it, is to issue an informational subpoena under the authority to advise and assist, I don’t see that. And then for 17(c), the way I read it is that clearly it relates to conducting an investigation. So in looking at this, I question whether we even have the ability to issue the informational subpoena as proposed, and if somehow we had that authority under 17(c), which I am not seeing it, I don’t see how we have this vote in public because I think it would be subject to the confidentiality provisions. Thank you.

Chair Varlack: Thank you, Commissioner Dering. Okay, at this point, I think I am going to call for a vote on the motion on the floor. All in favor?

Martin Levine: Please raise your hand until I call your name on the motion. I see McNamara in favor, Weissman,
Braun. Have I missed anyone? Okay, let me record that, and I will call the remaining roll? Commissioner Cohen?

Monica Stamm: Wait, Commissioner Yates has his hand up, but I am not sure if he’s voting. Commissioner Yates, are you voting in favor? You’re muted.

Commissioner Yates: Sorry I stepped away for a second and I’m back that’s all I was saying.

Martin Levine: Okay, would you like to vote in favor?

Monica Stamm: I think Martin you can keep going.

Chair Varlack: You’re muted, Commissioner Yates.

Martin Levine: Okay, I’ll come back at the end.

Commissioner Cohen on the motion?

Commissioner Cohen: No.

Martin Levine: Commissioner Dering?

Commissioner Dering: No.

Martin Levine: Commissioner DiPirro?

Commissioner DiPirro: No.

Martin Levine: Commissioner Fisher?

Commissioner Fisher: No.

Martin Levine: Commissioner Horwitz?

Commissioner Horwitz: No.
Commission Meeting 3/23/2021

1 Martin Levine: Commissioner Jacob?

2 Commissioner Jacob: Yes.

3 Martin Levine: Commissioner Lavine?

4 Commissioner Lavine: Yes.

5 Martin Levine: Judge McCarthy?

6 Commissioner McCarthy: Yes.

7 Martin Levine: Commissioner McNamara I recorded.

8 Judge Yates?

9 Commissioner Yates: Yes.

10 Martin Levine: Thank you, and Chair Varlack?

11 Chair Varlack: No.

12 Martin Levine: That’s 1, 2, 3, 4, 5, 6, 7 in favor.

13 Motion fails.

14 Chair Varlack: Thank you. Commissioner Lavine, your next item?

15 Commissioner Lavine: Yes, Madam Chair. If I may ask staff, what is the status of the records access policy proposal that was before us several meetings ago?

16 Monica Stamm: It’s just pending. We’ve obviously, other issues have been more pressing, and have needed to be addressed by the confidentially and records access committee,
so we can bring it back to the Commission at a future meeting.

It is just there is a lot on the agendas.

Commissioner Lavine: Yes. Has it been established to your satisfaction, madam General Counsel, that the prior discussion has it that disclosure would be made of an inquiry with respect to an FDS to the filer if the Commission were subject to FOIL? And that the practice mandated by New York City Charter of the New York City Conflicts of Interest Board is to divulge to the filer if an inquiry has been made?

Chair Varlack: Commissioner Lavine, is this an informational point or will you have a related motion?

Commissioner Lavine: Well, I may have a motion depending on what responses I get, Madam Chair, from staff.

Chair Varlack: Okay, thank you.

Monica Stamm: So, I think as a matter of law, the Conflicts of Interest Board, it’s in the City Charter I believe, and if anyone, Martin or someone else, can correct me if I am wrong, I think it’s a matter of the City Charter, the Conflict of Interest Board is required to disclose to filers if their FDS is requested. We’ve researched the question of whether FOIL requests are publicly available under FOIL and they are, but obviously FOIL exceptions would apply if those requests were made. So, as you mentioned, we are not subject to FOIL, but if you are making the analogy then, if we were subject to
FOIL, I think that requests for public records would be publicly available, but again, subject to the exceptions under the FOIL law.

Commissioner Lavine: Thank you. I now have a question and follow up to the staff. During the past three years, has any request been made by the Executive Chamber, someone reasonably supposed to be affiliated with the Executive Chamber, or the Office of Inspector General for the FDS of any member of the Commission?

Monica Stamm: So, I don’t have that information, but this is an open question pending before the Commission whether this information is going to be made publicly available, and so staff cannot answer that question absent a vote of the Commission to disclose such information. So, the current state of the records access regulations is that that information is not information staff makes available. The proposal in the records access, the amended records access regulation, was to allow filers to find out if their FDS has been requested but not who made the request. And so, your question goes to the heart of the issue, which is pending before the Commission and has not yet been decided, so staff can’t answer it in this setting.

Commissioner Lavine: I’m not sure I follow. I’m not sure I fully apprehend your answer, madam General Counsel. I
am asking the question. Has Executive Chamber, someone affiliated with the Executive Chamber, or the Inspector General made a request within the last three years for the FDS of any Commissioner? I am not asking you to identify a specific Commissioner; I am simply asking has such a request been made. Surely you must know the answer.

Monica Stamm: I understand your question, and I am saying that until the Commission rules on this issue, I can’t answer the question and I would direct staff on the (inaudible) that they should not answer the question until the Commission rules on this issue. But I would also ask, if this goes to your personal request as to whether or not your FDS has been requested by the Chamber or the Inspector General’s office, then I would question whether you should be raising this in this context.

Commissioner Lavine: Well, I believe under the conflicts of interests policy of the Commission, the ultimate determination of whether there is a conflict of interest on the part of a Commissioner participating is the prerogative of the Commissioner, and I believe that the question that I just put to you does not constitute a conflict of interest on my part. Now, on the follow on are you asserting now that the Commission institutionally is not entitled to answer to this question?
Monica Stamm: No. I am saying the Commission votes on the issue of whether staff can disclose who has made requests, then staff will follow that directive. But this is, as it stands, the Commission hasn’t ruled on this issue. So until, the Commission can address this right now. If you want to make a motion, the Commission can vote on that motion and then staff will do what the Commission directs us to do, but as it stands right now, this is not information that the staff makes publicly available and so until the Commission rules on that issue, whether it’s by motion or a change in the regulations, staff can’t answer the question in a Public Session.

Commissioner Lavine: This term publicly available includes within its ambit communication only with the Commissioners? Is it your position that staff is not authorized to answer the question that I just put to you, without identifying any specific inquiry?

Chair Varlack: I’m sorry. Go ahead Commissioner Lavine.

Commissioner Lavine: Is it the position of, is it the position of staff that the generic question, has any inquiry been made by the Executive Chamber or the Inspector General’s office for any Commissioners without identifying the
specific Commissioner, that that, the staff will withhold that
information from the Commission? Is that the position of staff?

Monica Stamm: Not withholding the information from
the Commission. The Commission hasn’t addressed this issue.
Once the Commission decides the question then staff will share
the information, but I can’t share it, and I would caution any
staff not to share the information in the Public Session,
absent a decision by the Commission.

Commissioner Lavine: Well on the follow up, madam
General Counsel? Suppose the same question were put to you in
the Executive Session, would you answer the question in
Executive Session?

Monica Stamm: So, if we were asked a question. Go
ahead, sorry Chair.

Chair Varlack: That’s okay. I just want to make sure
that I understand, General Counsel Stamm, what you’re saying.
What I understand is that the general policy of the staff at
this time is not to reveal who has requested a copy of the FDS.
Whether it is the Executive Chamber or any other individual.
And that absent a vote of the Commission to change that policy,
that is the way staff would proceed, is that correct?

Monica Stamm: It’s not that it’s a policy. The
Commission had approved records access regulations that
dictate what information staff makes publicly available, and
staff follows those rules, and those rules currently do not cover the information that Commissioner Lavine is requesting. And because this is a matter that is of debate among the Commissioners right now whether this information should be publicly available, I’m uncomfortable answering the question in a Public Session until the Commission has ruled on the question. So it’s not a matter of policy for staff right now. It is a matter of policy of the Commission, and the Commission can change its position by a motion or to change the regs and then staff will have direction. But this information falls into the category of information that is currently not publicly available, and it’s completely in the Commission’s discretion whether it should be or shouldn’t be. But it’s not in staff’s discretion.

Commissioner Lavine: Well that response, Madam Chair, prompts me to renew the question. Would you answer the question that I have put to you in the Executive Session?

Chair Varlack: So Commissioner Lavine, based on what General Counsel Stamm just indicated, I don’t know that, and of course she can answer, but it doesn’t seem that it would matter. It seems as though the current rules don’t allow for the sort of the provision of that information and General Counsel Stamm, correct me if I am wrong.
Monica Stamm: That’s where I am right now. I am happy to discuss it further in Executive Session.

Commissioner Lavine: Yes, well, thank you very much, Madam General Counsel and Madam Chair. I move, Madam Chair, that the staff be directed to answer the question, within the last three years, has any request been made by the Executive Chamber, an individual who reasonably could be construed as being affiliated with the Executive Chamber, or the Office of Inspector General asked to review the financial disclosure statement of any member of the Commission, past or present?

Chair Varlack: Thank you, so there’s a motion on the floor. Is there a second?

Commissioner Weissman: Second, Commissioner Weissman.

Chair Varlack: Thank you, Commissioner Weissman. The floor is open for any questions, comments, or debate on the motion. Commissioner Dering?

Commissioner Dering: This is a question for Commissioner Lavine regarding his motion. Is that to disclose publicly or in Executive Session?

Commissioner Lavine: Publicly.

Commissioner Dering: One comment on the discussion that happened before. If it’s not able to be released publicly pursuant to the regulations, I don’t even think that JCOPE
Commissioners could waive the regulations. I think we’d have to amend the regulations, that’s my only comment.

Chair Varlack: Thank you Commissioner Dering.

Commissioner Fisher?

Commissioner Fisher: I’m planning to vote against this motion. I don’t believe it’s right for us to give ourselves some sort of special access to information, if this applies only to requests of our Commissioners and not to other people that file disclosures. We are not setting any rules about somebody else that makes a request about whether someone from the Executive Chamber and elsewhere has asked for financial disclosure statement about them, so I don’t think it’s right to give ourselves access to information until we’ve settled the larger question of, are financial disclosure filed by anyone subject to disclosure when someone else asks for that record. So I think we should consider this in a much broader way, and I will vote against this.

Chair Varlack: Thank you, Commissioner.

Commissioner Lavine: Well, may I ask Commissioner, may I ask Madam Chair, Commissioner Fisher a question?

Chair Varlack: Of course, Commissioner Lavine.

Commissioner Lavine: Yes, Commissioner Fisher. If the motion were to amend the records access policy to provide that our policy be consistent with the protocol of FOIL or the
New York City Conflicts of Interest Board, would you vote in favor of that motion?

Commissioner Fisher: Not at this time. My concern would be whistleblowers. I would want to make sure that there were protection, if someone in a whistleblower scenario was obtaining this information from us, they would want to know, I think, that we weren’t simply going to turn their name over to their boss or someone else that they might be, I guess, about to or preparing information regarding to whistleblower scenario. So I think there is a lot of work that needs to be done about the different scenarios in which someone would ask to find out whether someone has requested information about their financial disclosure and whether it was retaliatory in nature, as it might be, in the case of a whistleblower so no, as it currently stands, I would continue to be opposed.

Commissioner Lavine: On the follow on, Madam Chair. Commissioner Fisher, surely you’re not positing that there is any issue with regard to retaliation regarding the Executive Chamber, so suppose the motion were made that any filer that asked to have divulged to that filer whether the Executive Chamber has asked for the FDS, would you vote for that motion?

Commissioner Fisher: I believe we should adopt the policy after considering the various ramifications and apply it not just to the Executive Chamber or this entity or that
entity, and not just Commissioners or Commissioners plus some
other. I think there should be a general rule applied to who
can request information about who has requested an FDS that
they file, and until we’ve gone through that with care, I am
not willing to vote for any new policy along the lines you’re
suggesting.

Commissioner Lavine: Thank you, Commissioner Fisher,
and thank you, Madam Chair.

Chair Varlack: No problem, Commissioner Lavine. Are
there any other questions or comments or debate on the motion
that is on the floor?

Commissioner Weissman: Madam Chair? Commissioner
Weissman. This is to General Counsel Stamm. the question raised,
or the issue raised by Commissioner Fisher regarding
whistleblowers, would that fall within the exceptions of 87(2)
of the Public Officers Law, Article 6?

Monica Stamm: I would have to look at the exceptions.
As you know we are not subject to FOIL, so I don’t regularly
apply them or interpret them, I just, I don’t know the answer.
I don’t know that we would always know if somebody is a
whistleblower, because we wouldn’t necessarily be aware of why
their asking for the FDS. They don’t have to state a reason.
So, you know, we wouldn’t necessarily have that information,
unless they filed a complaint with us.
Commissioner Weissman: But that same logic holds true whether Chair Varlack or I work for the Department of Transportation and somebody asks for our personnel file and they got it, and then you know, we could go ask for it. We could file our own FOIL request to figure out who FOILed for our personnel record, correct? This is the extent of the absurd that we’re talking about.

Monica Stamm: Correct, but for whatever reason we’re exempted from FOIL, so there was a decision when the law was passed not to have this type of information necessarily publicly available, and it was for the Commission’s discretion. We are specifically exempted from FOIL. The statute specifies what records are publicly available. These are not included. So there are different reasons for why that might be. I can’t begin to put my head in the mind of why that was done but this is, we are different, and for that reason alone, the law makes us different.

Commissioner Weissman: Well, Monica, at the end of the day, I think Commissioner Lavine’s motion is more or less just about getting us to a place, in this particular instance, where every other state agency is, okay, and that’s all about this.

Monica Stamm: Currently, his motion is just about Commissioners getting information about their filings. So I
understand if there is going to be a broader policy change recommended, whether it’s going to be by motion or as part of the records access regulations, but the current motion is about Commissioners getting information about their filings.

Commissioner Weissman: Well then, I am going to ask, I am going ask Commissioner Lavine to expand his motion, so we end, so this Commission ends up being treated as all other state agencies are.

Commissioner Lavine: Well, if I may, Madam Chair. First of all, I want to clarify the characterization made of the pending motion by our General Counsel. The pending motion does not require staff to divulge the names of the Commissioners whose filing has been requested, if at all. It certainly does not require divulging to the particular filing Commissioner. It simply directs the staff to answer a very narrow question. Has the Executive Chamber or the Office of Inspector General within the last three years asked to see, review, an FDS of any Commissioner, presently serving or has served during the period? Doesn’t ask for anything else to be divulged. Just the answer to that question. Has any inquiry been made? That’s the motion.

Chair Varlack: Okay, so Commissioner Lavine, did you have, I see you Commissioner Yates. I just want to ask,
Commissioner Lavine, do you have a response to Commissioner Weissman’s question to you?

Commissioner Lavine: Yes. When the gubernatorial cohort blocks this motion, then I will make that motion.

Chair Varlack: Commissioner Yates?

Commissioner Yates: I am going to follow up on something that Monica Stamm and Commissioner Lavine were just talking about and that is, narrow in on exactly what information is going to be available and to whom, because it’s important to me. I read section 19(a) of the Executive Law to say that, notwithstanding FOIL, the only records of the Commission which shall be available for public inspection and copying are, and then it itemizes them, so if this motion in anyway would lead to public inspection or copying of a record that is not listed there, then I would vote against it because I think it violates the Public, the Executive Officers Law, or the Executive Law rather. On the other hand, if what Commissioner Lavine’s motion is, is merely that a person whose records are being sought can be notified that his or her records are being sought, and it’s not available for public inspection or copying, and it will be information that’s solely available to the subject of the inspection, then I could support the motion. So I really need clarification on that because I don’t want us violating the Executive Law.
Commissioner Lavine: Madam Chair, a response to Judge Yates. You have articulated better than I would have the second omnibus motion that I will make once this motion is defeated, that’s pending.

Chair Varlack: Okay, so let’s move to vote on the motion that is currently on the floor. Deputy General Counsel Levine, can you repeat the motion please?

Martin Levine: Yes ma’am, to direct staff to disclose whether any requests for a Commissioner’s financial disclosure statement have been made in the last three years by the Executive Chamber, someone reasonably affiliated with the Executive Chamber, or the Office of Inspector General.

Chair Varlack: All in favor?

Martin Levine: Please hold your hand up until I call your name. I see Commissioner Weissman and McNamara, let me record that. I’ll call the remaining roll. Commissioner Braun? I didn’t hear you, but I will come back to you. Commissioner Cohen?

Commissioner Cohen: No.

Commissioner Braun: I said no.

Martin Levine: Thank you, Judge. I heard you now. Commissioner Dering?

Commissioner Dering: No.
Martin Levine: Commissioner DiPirro?

Commissioner DiPirro: I would like to abstain. I have heard two different legal positions on this, and with the lack of background, I would like more information from staff. I just don’t think it’s appropriate for me to vote with two distinct determinations from a legal standpoint.

Martin Levine: Thank you. Commissioner Fisher?

Commissioner Fisher: No.

Martin Levine: Commissioner Horwitz?

Commissioner Horwitz: No.

Martin Levine: Commissioner Jacob?

Commissioner Jacob: Yes.

Martin Levine: Commissioner Lavine?

Commissioner Lavine: Yes.

Martin Levine: Judge McCarthy?

Commissioner McCarthy: Yes.

Martin Levine: Judge Yates?

Commissioner Yates: No.

Martin Levine: Chair Varlack?

Chair Varlack: No.
Martin Levine: 1, 2, 3, 4, 5 in favor, one abstention.

Motion fails.

Chair Varlack: Thank you.

Commissioner Lavine: At this juncture, Madam Chair, if you will indulge me, I now make the motion as expressed, outlined by Judge Yates.

Chair Varlack: Yes, please proceed, Commissioner Lavine. Are you making the new motion?

Commissioner Lavine: I’m making that motion, yes.

Chair Varlack: Okay, so Commissioner Yates, could you repeat the motion just so that we’re clear on what the current motion is?

Commissioner Yates: Somehow this has become my motion? I will articulate Commissioner Lavine’s motion.

Commissioner Lavine’s.

Commissioner Lavine: Why don’t you move it and I will second, alright?

Commissioner Yates: I would move that any Commissioner can request from staff and be advised if a request to inspect their FDS was made by anybody in the Executive Chamber or connected with the Executive Chamber in the last three years.

Commissioner Lavine: Second the motion, Madam Chair.
Chair Varlack: Thank you.

Monica Stamm: I just, Commissioner Yates, what, maybe I missed something, isn’t this the same as Commissioner Lavine’s motion?

Commissioner Yates: No. The only difference is, this would not be publicly available or disclosed publicly in any way. It is merely advice between staff and that Commissioner, the requesting Commissioner.

Chair Varlack: Okay, so the motion has been made, properly seconded. Is there any discussion? Commissioner Dering?

Commissioner Dering: Just echoing some comments that Commissioner Fisher made before. I think that JCOPE Commissioners should be treated the same as the public. Thank you.

Chair Varlack: Thank you, Commissioner Dering. Any other comment before we move to a vote on the section option? Okay. I will add that I too believe that we should have a comprehensive approach to the these and there not be carveouts for Commissioners.

Commissioner Yates: I’d like to table my motion, in that case. I agree with you it should go to the confidentiality committee.
Chair Varlack: Thank you, Commissioner Yates. So at this point, we will, we will move on. Are there any other, yes, Commissioner Yates?

Commissioner Yates: I have a new motion if you don’t mind, and I’ll try and keep this brief. The Attorney General is authorized to issue opinions and advice to Commissions and Commissioners. They do so regularly. You can look up the opinions. You see their advice all the time. I would ask that, on behalf of the Commission, that we write a letter, within the week, to Attorney General Letitia James, and ask an opinion as to whether or not, if we receive a complaint of a violation of Public Officers Law 74 that is sworn and credible, if we have the authority to investigate it, notwithstanding Executive Order 202.6 and 202.7?

Chair Varlack: Okay. Is there a second?

Commissioner Lavine: Second.

Chair Varlack: Thank you. Opening the floor for comments and discussion. Okay. Seeing no hands, we can move to a vote. All in favor?

Martin Levine: Please raise your hand. I see Commissioner Yates, Commissioner McNamara, Commissioner Weissman, and Judge Braun. I will call the remaining roll.

Commissioner Cohen?

Commissioner Cohen: No.
Martin Levine: Commissioner Dering?

Commissioner Dering: No.

Martin Levine: Commissioner DiPirro?

Commissioner DiPirro: No.

Martin Levine: Commissioner Fisher?

Commissioner Fisher: No.

Martin Levine: Commissioner Horwitz?

Commissioner Horwitz: No.

Martin Levine: Commissioner Jacob?

Commissioner Jacob: Yes.

Martin Levine: Commissioner Lavine?

Commissioner Lavine: Yes.

Martin Levine: Judge McCarthy?

Commissioner McCarthy: Yes.

Martin Levine: Chair Varlack?

Chair Varlack: No.

Martin Levine: 1, 2, 3, 4, 5, 6, 7 in favor. Motion fails.

Chair Varlack: Are there any, is there anything else under new and other business?

Commissioner Yates: This is the last thing I’ll ask.
Commissioner Jacob: May I ask, may I just ask? I didn’t hear the last statement of counsel, of, that Martin. Did that motion pass, or fail?

Martin Levine: The motion failed. Seven in favor.

Commissioner Jacob: Thank you, Martin.

Chair Varlack: Commissioner Yates?

Commissioner Yates: I’ll be brief. This is maybe the sixth time in a row that I have raised this, but the fact that the senate democratic leadership refuses or fails or omits to follow the law which requires appointment of, filling of a vacancy within 30 days on this Commission means that we’ve gone without a representative by the Senate Democrats for almost two years. I just want to remind people that, by not following that law and appointing someone within 30 days, effectively the Senate Democrats are voting no on any investigation, so if someone comes forward with a sexual harassment complaint or with any other complaint that they may be reading about in the papers that’s of interest to anybody, about conflicts of interests or malfeasance, whenever we take a vote on that, there is an absolute no vote by the Senate Democratic representative because that’s what a vacancy is, is a no vote.
Chair Varlack: Is there any other new and other business? Okay. At this time can I please have a motion to move into Executive Session?

Commissioner Lavine: If I may, Madam Chair. I have some questions for staff. With respect, and I want to emphasize at the outset of this discussion, I am not addressing any particular opinion that they have previously rendered, but I want to understand, in generic terms, the application of opinions of the predecessor Commission, Commissions plural, the Commission on Public Integrity, and the Ethics Commission preceding the Commission on Public Integrity.

Chair Varlack: So, very quickly, Commissioner.

Commissioner Lavine: So, when the staff, I’m sorry Madam Chair?

Chair Varlack: I’m sorry, I didn’t mean to interrupt you. I wanted to ask is there going to be a related motion to these questions?

Commissioner Lavine: No.

Chair Varlack: Okay. I’m sorry, please proceed.

Commissioner Lavine: Thank you. The predecessor Commissions, at least the predecessor Commission, the Commission on Ethics, has rendered opinions on various subjects.
Those are taken as precedent by staff when rendering opinions. Do I understand that’s the protocol?

Chair Varlack: I think that question would be for.

Monica Stamm: I’m sorry, Commissioner Lavine. I’m sorry, I didn’t understand the question.

Commissioner Lavine: Well, maybe the question, maybe that’s because I didn’t put the question artfully. Opinions that are rendered by our predecessors, those, the statute says that they obtain unless we overrule those opinions, correct?

Monica Stamm: Correct.

Commissioner Lavine: Without getting into the arrangement for the Governor’s book, it has been the case in the past that state employees have requested opinions from our predecessors on the subject of publishing books, pamphlets, manuals, and the like. Is that not the case?

Monica Stamm: Yes, that’s the case.

Commissioner Lavine: When there have been, there have been various opinions on the subject of publishing rendered by the predecessor Ethics Commission, in ’95, and ’98, and ’89. If there is a perceived conflict with respect to those opinions juxtaposed with each other, would that, under the current policy, then be deferred to the Commission to
decide what the precedent is, or does the staff make its own
determination?

Monica Stamm: I’m not sure what you mean by a
perceived conflict. We, if there isn’t precedent that is in
effect and on point and it raises a novel question, we would
take it to the Commission. So either one, if it’s raising a
novel question, but I am not sure what you mean if there’s a
perceived conflict.

Commissioner Lavine: Well, let me take it out of the
realm of the ethereal. 95-25 of the State Ethics Commission,
Opinion 95-25 held that if a public officer were publishing on
a matter that the public officer was involved with, which was
within the ambit of their current duties and responsibilities,
the royalties could not be gleaned from the publication. There
was further opinions, 98-15 and 98-16, which could be construed
to reach different conclusions from 95-25, so my question is
when staff has to address that kind of a juxtaposition, would
it normally be deferred to the Commission or would the staff
resolve the differences?

Monica Stamm: So, my understanding, but Michael
Sande, the Deputy Director of Ethics Guidance is on the call
and he can confirm this, it might be better to put the questions
about the specifics of the Advisory Opinions, but my
understanding is it’s not a juxtaposition but that 98-15
clarifies the rules, the precedent, and then it very clearly says to the extent that the prior decision is inconsistent it’s overruled, but that’s what I think, but again Mike Sande can jump in here. I don’t know that it’s a juxtaposition or a conflict. More recent precedent that deals with the question and comes to a different conclusion, I think it overturns the precedent with respect to one point, but Michael, you might be muted. Hold on. I’m sorry. I’m looking at the Advisory Opinion right now.

Michael Sande: Monica, can you hear me?

Monica Stamm: Now we can, yeah. I’m just trying to find the language. I thought that there was language in the more recent Advisory Opinion, 98, which is very clear about its effects.

Commissioner Weissman: Monica?

Monica Stamm: Yeah.

Commissioner Weissman: This is George. Let me read you the language that modified 95-25. The prohibition arises only when the job relatedness of a published work is used to demonstrate that it is part of the employee’s job duties. That’s the only thing left of 95-25.

Monica Stamm: Right, so again, I don’t think there’s a juxtaposition or conflict. I think that 98-15 addressed this question more recently and resolved it. But I thought there
was more explicit language, I just don’t know. Michael, do you know?

Michael Sande: Monica, can you hear me?

Monica Stamm: Yes.

Michael Sande: Yes, that language is in the opinion and I’m looking for it now, I have the opinion printed out.

Chair Varlack: Okay, so Commissioner Lavine, I know you had some questions for staff and I don’t know if there is a motion related to it, but I will note that we do have quite a bit of business to continue on. Did you have any other questions related to this?

Commissioner Weissman: Madam Chair?

Chair Varlack: Yes, Commissioner Weissman.

Commissioner Weissman: Could we, there is a short paragraph in 98-16 that maybe Michael Sande can read which clears up the language from 98-15, but it’s short and it won’t take him more than a minute.

Commissioner Cohen: Madam Chair, this is Rob Cohen. Can I just be heard for a brief moment? I am just scratching my head kind of wondering what we’re doing here. We are reading opinions and people are making interpretations seemingly on this. Not staff, making their own interpretations, some of them would seem to be on the fly. I just don’t understand what
benefit anyone is deriving from this here, and if the discussion does merit some other, if this topic does merit further discussion, then it is precisely the type of issue that should be raised beforehand, circulated beforehand, people can muse over it, cogitate over it, and then have an informed discussion. But right now, there is vast moments of silence where people are reading opinions and excerpts thereof, and it just seems a complete and utter waste of time. That's my two cents.

Chair Varlack: Thank you, Commissioner Cohen. So, Commissioner Lavine, I know I asked you this at the beginning of this particular point. Is there, do you intend to make a motion at this time? If not, my inclination would be, it would seem as though there is something here that you want to discuss. The opinions that are being cited, while General Counsel Stamm is looking for some, I think Michael as well, certainly the rest of the Commissioners, I certainly don't have these opinions, and I would like to keep moving with the meeting because, again, we have a lot of business to discuss. So my question would be is there a motion that you intend to make? I’m not sure if we lost him.

Commissioner Lavine: Thank you very much, Madam Chair. I certainly want to accommodate you if I can. I will exit this subject today, with the nub of my inquiry. It appears to me, can you hear me, Madam Chair?
Chair Varlack: Yes, we can hear you.

Commissioner Lavine: It appears to me that there is a lack of clarity in how several of these opinions should be read together and what conclusions should be drawn. Now what I want to note is, given the fact that 98-15 changed the ‘95 opinion, and then 98-16 changed 98-15, I would like to hear from staff how they reconcile the differing opinions, and whether it is their prerogative to do that or the Commission’s. And I will certainly be happy to hear it at the next meeting.

Chair Varlack: Thank you very much, Commissioner Lavine. I appreciate it. At this time, can I please have motion to move into Executive Session pursuant to Executive Law 94(19)(b)?

Commissioner Dering: I’ll move. Dering.

Chair Varlack: Thank you, Commissioner Dering. can I have a second?


Chair Varlack: Thank you.

Commissioner Cohen: Chris, I’m going to go move the car. Yeah, I’m going to go move it, Dexter. Okay, Chris I’m going. (inaudible).

Commissioner Varlack: Walt, are we in Executive Session?
Monica Stamm: Walt, can you mute Commissioner Cohen for a moment?

Walter McClure: We haven’t taken, we didn’t take a vote. Hold on. Let me mute him. I’m sorry.

Chair Varlack: Oh, sorry.

Walter McClure: Yes, go ahead. I did mute Commissioner Cohen at the moment.

Chair Varlack: Thank you. All in favor of moving to Executive Session.

Martin Levine: Thank you. I see Commissioner Yates, Fisher, Dering, McNamara, Weissman, Braun and the Chair. Commissioner Cohen I know is indisposed. I’ll come back to him.

Commissioner DiPirro?

Commissioner DiPirro: Yes.

Martin Levine: Commissioner Fisher voted.

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: I’ll come back. Commissioner Cohen, are you there? No. Okay twelve in favor.

Monica Stamm: He’s muted, wait, Commissioner Cohen is muted. Walt, you have to take him off mute.

Walter McClure: I tried to. It’s not letting me unmute him. It sends a request to tell him to unmute so it’s not, he has to unmute himself.

Martin Levine: I don’t think he would object if we went forward but if he does, we can revisit the motion after the Public Session.

Monica Stamm: It carried.

Martin Levine: Twelve in favor. We’re out.

Walter McClure: Stand by please.

Chair Varlack: Thank you.

[The Commission went into Executive Session]

[The Commission returned to Public Session]

Walter McClure: Madam Chair, we're back in Public Session.

Chair Varlack: Thank you very much. General Counsel Stamm, can you please report on our Executive Session?
Monica Stamm: Sure. The Commission discussed personnel matters, approved two settlement agreements, commenced one substantial basis investigation, and authorized steps in several investigative matters, closed one matter, and discussed several other investigative matters.

Chair Varlack: Thank you. Is there any other business before the Commission? Okay, seeing no hands, hearing nothing, I will note the next Commission meeting is scheduled for April 27th. May I have a motion to adjourn the meeting?

Commissioner Dering: So moved. Dering.


Chair Varlack: Thank you, Martin. Do you have the motion and the second, Deputy General Counsel Levine?

Martin Levine: Yes, Chair.

Chair Varlack: Thank you, All in favor?

Martin Levine: Dering, Fisher, McNamara, Braun, Weissman, Cohen?

Commissioner Cohen: Yes.

Martin Levine: DiPirro?

Commissioner DePirro: Yes.

Martin Levine: Jacob?

Commissioner Jacob: Yes.
Martin Levine: Lavine?

Commissioner Lavine: Yes.

Martin Levine: McCarthy?

Commissioner McCarthy: Yes.

Martin Levine: Motion carries.

Chair Varlack: Thank you. Have a good day.