Commission Meeting of May 25, 2021

Appearances: Camille Varlack, Chair

Commissioners:

Richard F. Braun
Robert Cohen
James E. Dering
William P. Fisher
Daniel J. Horwitz
Marvin E. Jacob
Gary J. Lavine
James W. McCarthy
David J. McNamara
Juanita Bing Newton
George H. Weissman
James A. Yates

Staff:

Sanford N. Berland, Executive Director
Monica J. Stamm, General Counsel
Martin L. Levine, Deputy General Counsel
Walter J. McClure, Director of Communications and Public Information Officer
Keith C. St. John, Director of Ethics
Stephen J. Boland, Director of Administration
Michael Sande, Deputy Director of Ethics Guidance
Peter Smith, Chief Investigator
Anthony DeFino, Investigator
Lori A. Donadio, Principal Investigative Analyst
Kelly McCready, Confidential Clerk

IT Staff - Tanya Smith
OGS Media Services - Amaury Corniel
Walt McClure: Chair, we are in public session.

Chair Varlack: Thank you very much, Walt. Good morning everyone. Welcome to the meeting of the Joint Commission on Public Ethics. The meeting is now called to order. As with all JCOPE meetings that are being held during the pandemic, we are using video conferencing technology. Public session of the meeting is accessible on JCOPE's website to watch via live stream. A couple of important reminders. It is important that only person speak at a time. In addition I ask that when you speak you identify yourself so that we have a clear record. As has been our practice, we will take votes via a modified roll call to ensure that everyone is counted. Please also remember to mute your phone when you are not speaking. Mr. Levine, can you please confirm that we have a quorum.

Martin Levine: Yes, ma’am.

Chair Varlack: I'd like to take a moment to introduce our new Executive Director, Judge Sanford Berland. Welcome Judge Berland.

Sanford Berland: Thank you very much. I'm very happy to be here.

Chair Varlack: Good. We are, we're happy that you're here as well. Before we move to the first substantive item on the agenda, I would like to take a moment to address one item.
What has become clear is that we need rules and order to ensure that the Commission is efficiently and effectively able to handle its business. Several of you have reached out to me on this point over the past few months. To that end, I am establishing a protocol committee to consider and develop recommendations for the Commission. I ask that anyone who is interested in participating please contact me offline. Moving on to the second item on the agenda, it is the approval of the meeting minutes of the Commission, which you will find behind attachment A. These are the minutes of the public session for the April 27, 2021 meeting. Are there any corrections to the minutes?

Martin Levine: Yes, ma'am. On page three of the public session minutes, line eight, Judge Yates has requested that the sentence beginning “the revisions also make clear,” would read “the revisions also make clear that the Commission can publish and modify.” Those two words would be added after publish and modify informal letter opinions in redacted form. Judge, have I accurately stated your amendment?

Commissioner Yates: Yes, thank you.

Chair Varlack: Okay, thank you. Are there any other amendments to the minutes? Okay. Can I please have a motion to adopt the April 27, 2021 minutes, as amended, of the public session of the Commission?
Commissioner Weissman: So moved.

Chair Varlack: Thank you.


Chair Varlack: All in favor, please raise your hands

Martin Levine: I see Judge Yates, I see Commissioner Horwitz, McNamara, Dering, Judge Newton, Judge Braun, and Albany, leaving Commissioner Cohen?

Commissioner Cohen: Yes.

Martin Levine: Commissioner DiPirro is not here.

Commissioner Horwitz I got. Commissioner Jacob?

Commissioner Jacob: Yes.

Martin Levine: Commissioner Lavine?

Commissioner Lavine: Yes.

Martin Levine: Judge McCarthy?

Commissioner McCarthy: Yes.

Martin Levine: Judge Yates, motion carries. 13, ma’am.

Chair Varlack: Thank you. Moving on to item three on the agenda report from staff. Judge Berland?

Sanford Berland: Thank you, Madam Chair. Before we give the report from staff, I wanted to say a few words and introduce myself to the public. As you know, I’m Sanford Berland,
Sandy to my friends and family. I recently retired as a Court of Claims Judge and as an Acting Supreme Court Justice. I had a long career in private practice, and a two-year stint before that as a Federal law clerk before my judicial appointment. My wife Susan and I have four grown children, two older boys, and we live in Suffolk County. Although I'll be working primarily out of JCOPE’s Manhattan office, I plan to be in Albany on a regular basis. I do want to thank the Commissioners again for their confidence in me and to reiterate my commitment to carrying out the role of Executive Director vigorously, and even-handedly. The people of the state deserve no less than the assurance that JCOPE is doing everything within its power to ensure that those who serve us in government understand what their ethical responsibilities are and adhere to them. I'm impressed with the caliber and dedication of the JCOPE staff at every level and it is a primary goal of mine to ensure that they have the resources they need to carry out their work efficiently and thoroughly. Further, I want to let the public and the regulated community know that I look forward to meeting with you and working with you. Again, I have tremendous respect for the JCOPE mission and for the work it does. I firmly believe that to meet our mandate requires the direct and open dialogue, both with those we serve and with those we regulate. To that end, I will be setting up calls and meetings in the coming
weeks. I've already said to the staff, whether virtually or otherwise, my door is always open, and I welcome comments from all corners. In short, I'm excited to be here today and eager to meet whatever challenges lie ahead. With that, I’ll move into the agenda with the operations report, which can be found at tab B in the agenda book. Staff is happy to answer any questions, if there are any, with respect to the operations report. As has been previously reported, the majority of staff has been working from home during the pandemic. They come into the office as needed for operational purposes. And I'm confident the staff has continued to be productive. There have been no issues. I would add that ethics guidance calls and tips appear to be returning to pre-pandemic levels, while lobbying inquiries, which spiked with the January introduction of new regulations, are continuing to run at a significantly higher level than in the past. Staff will continue to work from home until after Labor Day to align with children returning to school and more or less the completion of long-planned work on the New York offices. And we'll be developing a plan for everyone to return to the office safely. If there any questions, staff will be happy to respond to them. All right. Let me move on to financial disclosure statements. The 2020 annual statements of financial disclosure were due Monday, May 17. We've received nearly 19,000 filings to date and the FDS unit
will be working on compliance shortly. FDS filings for the statewide elected officials have been posted on JCOPE's website. The FDS filings for the legislative branch are first filed with the Legislative Ethics Committee, Commission. They'll be submitted to JCOPE by June 30, and the FDS filings from members of the legislature will be posted on JCOPE's website soon thereafter. That's what I have on the FDS filings. Any questions?

All right. Thank you.

Chair Varlack: Thank you, Judge Berland. Moving on.

Monica Stamm: Commissioner Horwitz.

Chair Varlack: Sorry.

Monica Stamm: I'm sorry, Camille, Chair.

Commissioner Horwitz had his hand up.

Commissioner Horwitz: I had a question about the legislative FDS filings. I just want to make sure I understand. So the legislatures, the legislators, they file an FDS with the Legislative Ethics Commission, and then after some period of time, after all the other public officers in the state, get to file, have to file their FDSs, then the LEC gives us the FDSs of the legislature, do I understand that correctly?

Sanford Berland: Yes, by law, that's the procedure.

Commissioner Horwitz: Right. Do we ever get to see what exactly the legislators file with the LEC, as opposed to
the final product that LEC sends to us? In other words, if a legislature, legislator submits something to the LEC and then there are changes to what the legislator gives to the LEC and what we ultimately see, do we ever get to see what those changes are?

Sanford Berland: The question is, do we get to see the raw original submissions before any modifications or the modification, a red line version?

Commissioner Horwitz: Yes, that's right, Judge Berland.

Sanford Berland: I will defer to staff. I am not yet familiar with that portion of a procedure.

Martin Levine: Commissioner Horwitz, this is Martin. Whatever might occur prior to JCOPE, we post promptly on, shortly after we receive them on June 30th every year. But I wouldn't be privy to anything that happened before that.

Commissioner Horwitz: So if the LEC tells a legislator to make a change in what the legislator gives to the LEC, we don't get to see that, and the public doesn't get to see that either, do they?

Martin Levine: I just, I don't think we're in a position to speak to their process.
Commissioner Horwitz: Do we understand what the public policy is behind that requirement in the law, not a requirement, it's an exception to the law as I understand it. What's the public policy behind the legislators sending a raw FDS to an internal legislative body before the public gets to see what the financial disclosure for the legislator is, what's that public policy all about? I don't understand that.

Commissioner Weissman: Commissioner Horwitz, this is Commissioner Weissman. I would strongly suggest you go to the bill jacket and see if you can find it.

Commissioner Horwitz: Well, George, you're a great student of the bill jackets for legislation. Do you know what the public policy is?

Commissioner Weissman: I haven't looked for it, so I can't answer the question.

Commissioner Horwitz: I don't need to belabor this. I just was trying to get some information since we're talking about FDS's today. I would like to hear from the staff at some point what the public policy is behind this provision of the FDS law. I think it would be helpful for the Commissioners to know that. Thank you.

Sanford Berland: We would be happy to look into that and report back to you at the next meeting.
Commissioner Horwitz: Great, thank you so much.

Commissioner Yates: Can I chime in with one brief comment?

Chair Varlack: Yes, please. I'm sorry. I can't see who's.

Martin Levine: Judge Yates.

Commissioner Yates: I just remind Commissioner Horwitz that the LEC is equally divided between Democrats and Republicans so that anyone from an opposing party to the filer would have free and open access to it, and I'm sure would look at it carefully.

Commissioner Horwitz: Thanks, I mean, I appreciate that Jim, and I'm sure you may have on the staff in the legislature when this provision was written, so I'm anxious to hear what the public policy is. I just, I just don't understand why the public doesn't get to see, and I appreciate that, that legislators are well intentioned and there's a attention to party parity and the process. I just would like to understand what the public policy is behind any legislators sending something to an internal body before it is made public when the rest of the people who work in the state have to file it on an earlier date and don't have that provision, and again, I don't need to belabor it, and I very much appreciate you know, your
insight, but I would like to hear from the staff about the public policy. Thank you very much.

Sanford Berland: We'll look into it and we will report back at the next meeting.

Chair Varlack: Thank you. Moving on to item four on the agenda, which relates to a proposal relating to FDS filer access information. This item has been requested to be added to the agenda by Commissioner Lavine. Thank you. If you'll recall this is something that we've discussed in previous meetings and Commissioner Lavine graciously allowed us to table, I think, at the last meeting to allow Commissioners more time to review his proposal. So, Commissioner Lavine, I'll turn it over to, you.

Commissioner Jacob: Madam Chair.

Commissioner Lavine: Thank you very much.

Commissioner Jacob: Madam Chair, this is Commissioner Jacob. I was trying to comment on the dialog between Commissioners Weissman and Horwitz with a simple question. Can I do that now or shall I wait because I'm talking about something before with a proposed, the resolution of JCOPE, that you're about to get involved in and it's just a question of Martin or the people who are the persons at JCOPE who monitor the FDS filings and how it works at JCOPE.
Chair Varlack: Apologies that I didn't see your hand, I'm a little visually challenged.

Commissioner Jacob: Well, I'm on the telephone, I'm on the telephone, and it is often hard to get into the discussion.

Chair Varlack: Please ask your question, Commissioner.

Commissioner Jacob: Thank you very much. Martin, how does it work at JCOPE? I know that, that from time to time, Commissioners at JCOPE file their FDS’s, staff reviews it because even I have, from time to time, been called by staff about my filing. And perhaps, once in the past I've amended it, although I don't remember, but if a JCOPE commissioner files an FDS, staff reviews it and staff finds some deficiency, calls the Commissioner and the Commissioner amends it, is the original filing by the Commissioner available to the public, or is only the final available? How does it work here?

Martin Levine: The filings and their amended, and any amendments that might follow, are both aware, excuse me, available to the public. And should a legislator or their staff file an amendment, it would be the same issue. The amended filing as well as the original would be available.

Commissioner Jacob: Thank you for the information.
Martin Levine: Of course.

Commissioner Jacob: Thank you.

Chair Varlack: You're welcome, Commissioner Lavine.

Commissioner Lavine: Again, thank you very much, Madam Chair. Let me emphasize in moving the proposal. The current practice of the Commission renders the Commission an outlier and it ought to be changed to conform with practice that would obtain under FOIL. Moreover, one or more staff members have access to this information. I believe it's inappropriate that any information whatsoever be withheld from the Commission. However, I do agree with Judge Braun and others who have expressed the view that all filers should have the benefit of this proposal. In moving the proposal, I want to alert the Commissioners that the proposal as I am propounding it today is retroactive. I move the proposal, Madam Chair.

Chair Varlack: Thank you, Commissioner Lavine. Is there a second? Thank you, Commissioner Weissman.

Commissioner Yates: I’ll second. OK.

Chair Varlack: OK. So Commissioners, the proposal is behind your exhibit C. Is there any discussion? Yes.

Commissioner Fisher: Thank you, Chair. I’d to ask Commissioner Lavine to clarify something he just said. What I was going to say is that I’m prepared to support this resolution
if we can agree that it should apply only to requests for FDS reports made after today. And if there's some sort of notice given to FDS report requestors, that the fact of their request may be disclosed to the filer because of this resolution. And when we discussed this at an earlier meeting, I believe Commissioner Lavine was in agreement with me on this. But it sounds like when he says this would apply retroactively that he no longer is. I think it's important that we give notice to someone when they file, when they submit a request rather for an FDS filing, that the person that is the filer could receive information about their request. And I don't think we should make it retroactive. And if that is your intention, Commissioner Lavine, I would not support this, and I would vote against it.

Commissioner Lavine: Madam Chair, if I may. I'm in accord with Commissioner Fisher that our practice ought to be that any individual making an inquiry with regard to a filing ought to be notified, in very clear terms, that their inquiry is subject to being divulged to the filer. However, I do not agree with Commissioner Fisher with respect to restricting the ambit prospectively only.

Commissioner Fisher: Okay, so I guess I, I misunderstood. So the thing that's retroactive is the FDS, so you can request FDS’s, I don't understand. So, let's use an
example, let's say Jane Doe's filing that was made in April, and let's say John Doe makes the request tomorrow for that filing, for that filing, we're going to notify John Doe that Jane may request information about his request? Go ahead, Martin.

Martin Levine: So I think what Commissioner Lavine is saying, and please correct me if I'm wrong, Commissioner, is that requests for an FDS that were made in the past, the filer could now, moving forward, ask if anybody had previously requested their FDS even prior to the resolution, I think. Is that right, Gary?

Commissioner Lavine: Mostly correct.

Commissioner Fisher: Okay, yeah. I don't think that is what we should be doing because people that made requests before today had no idea that information about their request might be revealed for the filer. And I think they should be given that notice at the time of the request, and therefore, only requests after today should be subject to this new policy. So I plan to vote against this because I don't think it's reasonable to make it retroactive for requests prior to today.

Chair Varlack: Judge Newton.

Martin Levine: I think she's muted.

Chair Varlack: I think you're muted.
Monica Stamm: She’s muted.

Commissioner Newton: Sorry. Good morning all. If I may, I'd like to ask a couple of fundamental questions. One, could we, someone please explain me the import of a resolution, is that is it different from, it's not obviously a regulation, it's not statutory so how are resolutions, what's the import and impact of a resolution by JCOPE, is my first question. And my second issue is one of concern about section three about subpoenas and the limitations. I guess I would like to know how does anyone think that that would work, and do we want it to be something, whether this provision requires more work than should be necessary if there is a law enforcement investigation. So, those are two of my questions. And then my third question is that, this resolution says that a filer may request from the Commission regarding anyone who has requested the filer’s information. Yet some Commissioners suggested there will be another automatic feature where any time someone's file is requested, that filer would be notified. So, what is the thinking of how this resolution would operate? Thank you.

Chair Varlack: Thank you, Judge Newton.

Commissioner Lavine: Well, may I, Madam Chair?

Chair Varlack: Yes.
Commissioner Lavine: First of all, your honor, you recall that the New York City Charter provides that the city conflict of interest board must take the initiative to notify the filer if an inquiry is made. This proposal would not require the Commission to take the initiative. The initiative would be on the part of the filer to ask if the inquiry was made. With respect to law enforcement, it's not the intent of the proposal to interfere with these legitimate considerations that are attendant to a criminal investigation, so this carve out will provide that the right of filer to obtain the information will be suspended during some course of the investigation, maybe to the end of the investigation, unless the full Commission votes otherwise.

Commissioner Newton: So, just a point of clarification, Commissioner. You say that this resolution permits a filer to ask JCOPE, hey, has anybody inquired about my filing? I guess my feeling about that is how would any filer know to ask that question? And if that's a reasonable response, would we then open a floodgate of every filer just periodically contacting JCOPE for them to interrupt their day to find out if someone has filed for them. It seems awkward if we don't first say that the triggering event should be the asking about the filer’s file and then notifying the filer, hey, this has
happened, you may want to ask some more questions. I guess I'm just concerned about which comes first, the chicken or the egg.

Commissioner Lavine: It's certainly a very legitimate concern. The object here is, in not requiring the Commission to take the initiative to notify the filer, is to bring the whole process into a realm of practicality, given we have 30,000 filers. If a filer has some reason, or concern, however, this change will permit the filer to take the initiative to ascertain if the inquiry was made.

Commissioner Newton: Thank you.

Chair Varlack: General Counsel Stamm and Deputy Counsel Levine, could you please speak to Judge Newton's first question with respect to the import of it being a resolution?

Martin Levine: Yes, ma'am. I think the point of the resolution is that it makes the Commission's position memorialized, and I don't know that, legally, it has any more strength or value than a motion, per se, but it also documents the language clearly so that there's no confusion, and it's been used by the Commission for different purposes from time to time, but I think it has a clear distinction from a regulation, which is an administrative process. This is simply a memorialized motion.
Chair Varlack: I'd also ask and perhaps this has happened before. Yeah, well, it looks like at that point. Commissioner Horwitz, I see your hand raised.

Commissioner Newton: Thank you.

Commissioner Horwitz: Thank you, Madam Chair. I am opposed to this resolution and I want to explain what my concerns are with it, because I think that there are institutional concerns and I think that, in a nutshell, this resolution is completely contrary to JCOPE’s mission and public policy of ensuring integrity with public employees, and the integrity of investigations and inquiries that we conduct. Because it stands the process on its head. And what I mean by that is that with an FDS filing, to the extent that a member of the public, whether it’s somebody who works in state government who has concerns about a superior asking to see the FDS, because that state employee believes that their superior is engaged in outside activity, it isn't properly disclosed. What this resolution does is it hand to the boss the name of the person who's asked for his or her FDS, his address, it says contact information, telephone number, address, so that the boss knows exactly who it is that's asked for the FDS, can go to that person's house, or call them on the phone, or send them an email, and then who knows. It’s off to the races of what that boss does with the subordinate. And this turns that
process of protecting the public, whether it, again, it's somebody who has concerns about a public official, whether that's a member of the public generally, whether that's another public officer, whether it's a member of the press. We've had this discussion before, and this amendment does nothing to protect a reporter, or the news organization's identity, from disclosure to a possible target in an investigation. So, here's a scenario. The U.S Attorney's office for the Southern District is conducting a criminal investigation. Under this resolution, we can say, if they ask us for the FDS, you may not tell the filer that the U. S. Attorney’s Office has sent us a subpoena or asked for this information. However, as there often are, there may be news stories about the investigation. Well, if someone from the New York Post or the New York Daily News, the New York Times, or the Albany Times Union, calls us up and says, we understand that there's an investigation by the US Attorney for the Southern District, and we'd like Legislator Jones’ FDS filing. Of course, that would be the one that is filed with us and not to scratch that gets filed with LEC. But nevertheless, we would then disclose to the target of the investigation that the Albany Times Union is doing a story and asked for your FDS. This stands the entire process on its head, and to the extent that somehow the New York City Conflict of Interest Board follows that, the process that's in encapsulated
in this resolution, that, that actually gives me great concern because the COIB, while it does a lot of good things, the COIB is the agency that gave Mayor DeBlasio a pass on the pay-to-play investigations that everybody did and said it was okay for him to raise the money that he did with the Campaign for One New York. So I am not persuaded, Gary, that using the COIB as precedent is good, is good policy. And again, I understand this started because there were some, there was a thought that the Commissioners on this Commission should be told when someone requests their FDS, and now the resolution that we see before is to expand it to everybody. That doesn't change the fact that again, this tilts against our public policy and so that's why I am going to oppose this. Thank you, Madam Chair.

Chair Varlack: Thank you, Commissioner Horwitz.

Judge Newton, I see your hand raised, and Judge Braun.

Commissioner Newton: So, my question is a simple one. What is the current practice regarding financial disclosure? Can anyone pick up the phone and call JCOPE and say, I would like to see employee Jones' FDS, please let me see it? Or does it have to be a showing as to who you are and why you want to see it and the authority for you to see someone else's filing? I know Monica has her hand up.

Monica Stamm: Sure, yes. Judge by, law, by law, the financial disclosure statements are available on request. And
we have a process in our records access regulations, which the 
Commission just voted to amend at the last meeting for how the 
members of the public should do that. They can submit a written 
request via email over our website, and then those are processed 
and logged. But any....

Commissioner Newton: And the process.

Monica Stamm: …there is no showing. no showing.

Commissioner Newton: Okay. That was my question. If 
I'm curious, I can call and get your financial disclosure to 
see what you got going on in your life. Okay, thank you. And 
so so the question is, do we let that person know that 
somebody's snooping around in your business? Thank you.

Monica Stamm: That's the law, yes.

Commissioner Newton: Can’t argue with the law. Thank 
you. Thank you.

Chair Varlack: Judge Braun, did you have your hand 
raised? You’re muted. Okay, thank you, General Counsel Stamm.

Monica Stamm: I'm sorry. Judge Braun, I can't hear 
you. Is Judge Braun speaking?

Commissioner Braun: I just said I'm just listening.

Monica Stamm: Okay, so just two things, two things.

One I just wanted to clarify that and we will, we can certainly
report back on this at the next meeting, but I do believe that the Legislative Ethics Commission gives us both the original filing, and then any changes that are made afterwards are handled as an amendment. And again, we can confirm that, but I do believe, I just wanted to correct the record that that is my understanding of how this works if there was any confusion earlier.

Martin Levine: That’s correct.

Monica Stamm: And then also just, Commissioner Lavine, I just wanted to clarify, with respect to paragraph three of your resolution, so that everyone understands. The exception for subpoenas is only going to apply to what you characterize as law enforcement subpoenas. So, just grand jury subpoenas. It would not apply to civil subpoenas that are issued by other investigative agencies who are conducting investigations that may be a relating to a state officer employee, or a private business that is engaging in business with the state. So it would only apply to, is it your position, it would only apply to grand jury subpoenas when you say law enforcement?

Commissioner Lavine: So, Madam Chair, the intent is, and I will amplify on General Counsel’s observation. The object is, if there's a criminal inquiry whence the subpoena emanates, that would be subject to paragraph three.
Chair Varlack: Thank you. I see Commissioner Horwitz.

Commissioner Horwitz: So, Madam Chair, if I understand then, if there was a request by an Inspector General, let's say for the MTA or the Port Authority or the State Inspector General, or the New York City Department of investigation, this resolution, item three, the carve out for law enforcement wouldn't apply to an inspector general's investigation?

Commissioner Lavine: May I, Madam Chair? It’s contemplated, it’s contemplated that within the ambit of law enforcement, the Inspector General’s activities would be included.

Commissioner Horwitz: I mean, I think, I said that I'm opposed to this, but for the sake, you know, of good order, you know, law enforcement isn’t actually a defined term, for example, in Penal Law, and some of those agencies have law enforcement responsibilities and they have extra responsibilities that move beyond that. So, I, I think that, to the extent if this passes, and I hope it doesn't, but if it does there ought to be some clarification on what exactly law enforcement means, so there isn't any confusion, as I said, when, for example, who knows, the construction authority IG calls up and asks for an FDS, that it’s clear that’s an agency that's covered. Thank you.
Chair Varlack: Thanks, Commissioner Horwitz, is there any discussion before I call the question?

Commissioner Weissman: I have a question that I believe should be directed at staff. This is Commissioner Weissman. Would the request for contact information under number two fall within the ambit of an unwarranted invasion of privacy under the Freedom of Information Law?

Martin Levine: We'd have to, I personally would have to do the research. I haven't, I don't know the FOIA exemptions well enough to speak to that specific question, but we can...

Commissioner Weissman: Of all things that Commissioner Horwitz raised, that's the one thing that struck me as truly a concern, and maybe the language in paragraph three that may need to be sharpened up to a certain extent. I don't know if this is appropriate, but I'd request Commissioners Lavine and Yates to withdraw their motion so we can sort through some of the other legal issues that have been made here today.

Chair Varlack: Commissioner Lavine, are you willing to withdraw the motion at this time so that we can research these additional issues and we can bring it back at the next meeting?

Commissioner Lavine: Yes.
Chair Varlack: Thank you.

Commissioner Jacob: Madam Chair, this is Commissioner Jacob. May I ask a question?

Chair Varlack: Absolutely.

Commissioner Jacob: I'd ask this of staff who handle the requests that are raised from the public to access the FDS filings, and this is based upon your experience. Do persons who request FDS filings request that their names not be divulged, request anonymity? Do they demand it? What is the experience of the staff when these requests are made?

Sanford Berland: I think we'll have to survey staff on intake and whether specific requests are made. The current practice would not be to divulge the identity of the requestor. So those who are sophisticated enough to understand current practice would likely want the same thing on that protection that's (inaudible). It may be that some individuals request the need for it, but we'll have to survey staff to find that out. I would add too we'll also look at the volume of the requests as all as the point raised as to, if we're not going to be informing filers who request, what kind of volume back of standing requests, closure of requests, by the tens of thousands of individuals who file FDS reporting.

Commissioner Yates: Madam Chair?
Chair Varlack: Yes.

Commissioner Yates: To the Chair. I made this suggestion last time and I'll reiterate it. Instead of reinventing the wheel, the exception should track FOIL. It should cross-refer to Public Officers Law § 87, which has a broad range of exceptions that would cover most of the things that Commissioner Horwitz was concerned about and that Commissioner Weissman expressed some concern about, including invasions of privacy in ongoing law enforcement proceedings, et cetera, et cetera. I think the simplest way to do this is don't reinvent the wheel. Just look at whoever's doing the redrafting, whether it's Commissioner Lavine or staff on behalf of him, just look at 87 in the Public Officers Law and cross-refer to it.

Chair Varlack: Thank you.

Commissioner Jacob: Madam Chair. Commissioner Jacob here. I'm on the telephone and there's a lot of noise. I, maybe it's because people are not muted, but it's difficult to hear. I don't know whether others are having the same experience who are on the phone, but I find it very difficult to hear what is happening.

Chair Varlack: I was actually just, I was actually just going to address it. I believe that someone who is on the
phone is not muted, and so we would absolutely ask that if you're not, if you haven't been called upon, if you can just mute your phone. It actually has gotten quiet now, so hopefully (laughter)..

Commissioner Jacob: So just one, just one final question, just to get the facts out. I don't know whether this has been stated before, but what is the volume of requests to access FDS filings? How many of these come in a month, a year? What are we dealing with here in terms of volume? Perhaps staff can look at that as well and get back to us.

Sanford Berland: We'll look at the question of volume.

Chair Varlack: And I think, Judge Berland, a question of capacity to address these additional, these additional requests that potentially would come in. General Counsel Stamm?

Monica Stamm: I just wanted to point out that in the monthly operations report, the very last page, we've been reporting on this on a monthly basis and the year-to-date. But my understanding is that now that they've just been filed, so that this is obviously the last month’s report, but when they're filed, we get a huge uptick in requests. So, Walt and the staff that process FDS’s are dealing with those now. So these numbers will take a big leap for the month of May. And then they also
will take a big leap in the month of November when we get the academic filings. So, this is always included in the monthly operations report, so we will have it at the next meeting. You can see what the May numbers look like.

Chair Varlack: Moving on to our next item on the agenda. It relates to the Governor's Executive Orders 202.6 and 202.7. Before we begin conversation on this item, Commissioner Lavine, you asked that it be added to the agenda. I would ask that you consider moving this item to Executive Session. My understanding is that this proposal relates to the potential issuance of subpoenas, and my general understanding of how the Commission is operated, we don't generally have those conversations in Public Session.

Commissioner Lavine: So, thank you, Madam Chair. I have asserted before, and maintain the proposition at this meeting, that the request is for an informational subpoena and that the discussion should be in the open session.

Chair Varlack: Please proceed.

Commissioner Horwitz: May I have a point of order, please?

Chair Varlack: Yes, Commissioner Horwitz.

Commissioner Horwitz: Thank you. I'd like somebody on the staff to explain what the difference is between a quote,
unquote informational subpoena and an investigative subpoena. And what the support is in the Public Officers Law for the distinction, because I am very confused and highly skeptical that there is something called a quote, unquote, informational subpoena. I’m just not familiar with that concept with an investigatory body like ourselves. Thank you.

Chair Varlack: Thank you, Commissioner Horwitz. General Counsel Stamm or Deputy General Counsel Levine, if either of you could speak to that point.

Monica Stamm: To Commissioner Horwitz’s point, there is no distinction between one type of subpoena and another. We'd be issuing a subpoena pursuant to our authority under 94(17)(c) which, as I think most of the Commissioners are familiar, but it says that the Commission shall have the power and duty to, in relevant part, conduct any investigation necessary to carry out the provisions of this section. Pursuant to this power and duty, the Commission may administer oaths or affirmations, subpoena witnesses, compel their attendance and require the production of any books or records, which it may deem relevant or material. So that would be the power under which we would access or exercise the authority to issue a subpoena. And obviously, if we were challenged on the subpoena, we would have to establish that we had a good faith basis to issue the subpoena. But there is no distinction between an
informational subpoena and any other subpoena that we would issue.

Chair Varlack: Thanks, General Counsel Stamm.

Commissioner Horwitz: I guess, Madam Chair, I support your suggestion that this issue be taken up by the Commission but that it be done consistent with the law, which requires a discussion like this to be held in Executive Session, and I am fearful that any departure from that process will create a dangerous precedent for us to begin to have discussions in the public session for what is rightfully to be conducted and lawfully to be conducted in the Executive Session. So I am really unsure about the legal basis for our proceeding at this point in the Public Session with this, with this application.

Chair Varlack: Thank you, Commissioner Horwitz, and I certainly agree, especially based upon the clarification that General Counsel Stamm has just made, and I would move that we move this item to discussion in today's Executive Session of the meeting. Is there a second?

Commissioner Horwitz: I would second that.

Chair Varlack: Thank you. Is there any further discussion on this point, on this motion? All in favor.

Martin Levine: Okay. In Albany, Chair Varlack and Commissioner Fisher. I see Commissioner Horwitz, McNamara,
Judge Newton, Commissioner Dering. That looks like it. I will call the remainder. Commissioner, or Judge Braun?

Sanford Berland: You’re muted, Judge Braun.

Commissioner Braun: No. I had with the mute button, but no.

Martin Levine: Okay. Commissioner Cohen?

Commissioner Cohen: Yes.

Martin Levine: Commissioner Jacob?

Commissioner Jacob: Can you repeat the motion again? I had trouble hearing on the phone.

Martin Levine: Yes, Commissioner. The motion is to move the discussion of the item to Executive Session.

Commissioner Jacob: The answer is no.

Martin Levine: Thank you. Commissioner Lavine?

Commissioner Lavine: No.

Martin Levine: Judge McCarthy. I believe we lost the judge. Commissioner McNamara, I saw your hand. Judge Newton, I saw your hand. Commissioner Weissman?

Commissioner Weissman: No.

Martin Levine: Thank you. Judge Yates?

Commissioner Yates: No.
Martin Levine: Thank you, and Chair, it gives me 1,2,3,4,5,6,7 in favor. Motion fails, ma'am.

Chair Varlack: Okay. Commissioner Lavine, please proceed.

Commissioner Lavine: Thank you, Madam Chair. With the legislature now considering fundamental changes in ethics administration, out of the hub of Executive Order 202.7 spoke some very important implications for ethics administration. First of all is the question, what constitutes status as a public officer? I would note in the Percoco case, there was extensive attention paid by the court to the question of when Mr. Percoco was functioning as a public officer and when he was not for purposes of federal law. We have in 202.7, since rescinded by joint resolution of the legislature, a variation on the theme. Who constitutes, what circumstances and characteristics render an individual who is a supposed volunteer, as a public officer or as not a public officer? Two, there's an opinion of the Attorney General, which requires that volunteers be supervised by state employees. But when the Executive Chamber made its FOIL response, it stated it had no relevant records. So, the response by the records access officer in the Chamber is either fabrication, which itself is unethical, or it indicates nonfeasance on the part of the administration. Likely, one or more of the senior level
volunteers are not volunteers at all. They are being paid, or they were paid, before the recission of the order, by their employers, employers who may have substantial business with the state. Plausibly among the volunteers were those who were politically involved, including soliciting campaign contributions. Now, participating in politics is their prerogative, so long as they do not exploit the de facto public officer status. As I read the executive order, Madam Chair, the volunteers had and continued to have the benefit of substantial exemption from compliance with the Public Officers Law but appeared to have and continue to have the benefit of Public Officer’s Law section 17 and 19, which provides legal fees in civil and criminal proceedings, which, given current circumstances, may turn out to be a very important consideration. The one aspect of ethical compliance which is explicitly addressed by the former executive order is a conflict of interest protocol. However, so far as I'm aware, the Executive Chamber has refused and continues to refuse to disclose how this compliance has been enforced, if it has been enforced at all. Volunteers are not subject, as I understand it, to post-volunteering employment restrictions, which raises again significant ethical questions. Indeed, there are many questions posed by Executive Order 202.7 and so far, there’ve been very few answers. With the legislature undertaking its
review, I believe it's incumbent upon us to participate in that
deliberation of what reform should be made in ethics
administration, and we cannot offer an informed viewpoint in
the deliberation unless we have information about how this
order was administered. Under the Executive Law, I will
reiterate, it is our responsibility to advise with respect to
ethics administration in this state. I believe it's important
that we have this information so that we can meaningfully
contribute to that discussion and I move the proposal.

Chair Varlack: Commissioner Lavine, can you just be
very clear so that we all know what we're considering, exactly
what your proposal is?

Commissioner Lavine: Yes, Madam Chair. I am
proposing, and we can be polite about it, of course, that we
ask the Executive Chamber for: one, a list of individuals who
are within the ambit of the executive orders, two, who in the
Executive Chamber administered these Executive Orders and
compliance with the opinion of the Attorney General. And so
with respect to supervision of so-called volunteers, a list of
persons who are literally volunteers or were literally
volunteers within the ambit of the executive order and a list
of those were considered volunteers but who are actually being
paid by their employers. Any recusals with respect to the
individuals identified. Any instances in which gifts from
interested sources were given to individuals identified. And
lastly, any vendor which did business with the state under
emergency provisions which exempted them from regular
procurement process if the value of the contract is one million
dollars or more.

Chair Varlack: Thank you, Commissioner Lavine. Is
there a second?

Commissioner Horwitz: I'm not seconding. I have a
question about the language. We talked a few minutes ago about
what kind of subpoena this is, this amendment, this motion is
calling for, I think, that needs to be in the motion. I don't,
we need to know whether this is investigative subpoena, this
is an administrative subpoena. Is this subpoena being issued
pursuant to section 17(c) or some other part of the law? I
think this motion needs to have that degree of specificity in
it, Madam Chair.

Chair Varlack: Commissioner Lavine?

Commissioner Lavine: Yes. Thank you, Commissioner
Horwitz, for your observation. It is certainly not
unprecedented in administrative agencies to issue subpoenas to
glean information for the purposes of establishing policy or
advising on policy. The purpose of this subpoena is not
investigatory. It is to glean information so that the
Commission may make an informed contribution to the discussion about ethics reform in the state.


Commissioner Fisher: I plan to vote against this. As someone who believes in limited government, this is a great example of overreach. This Commission can express its opinion and ask the legislature to look into an executive order and rescind it. There's investigative journalists that can (inaudible), but this has nothing to do with any of our powers and duties, and therefore, I'm going to vote against it.

Chair Varlack: Is there any, Commissioner, Judge Yates?

Commissioner Yates: Thank you. This has been ongoing for several months and the genesis of this, for those who are not familiar with the history is the following: the Executive Law allows the Governor, during an emergency or a disaster, to go ahead and suspend certain laws. He can do that on certain conditions and that is, it has to be reasonably necessary to aid the disaster effort and it needs to, any suspension needs to provide for the minimum deviation from the requirements of existing statutes which have been suspended. If you look at
202, the executive orders, both 202.6 and 202.7, they say that ethics laws, disclosure and conflicts of interest laws, Public Officers Law 73 and 74 are suspended with regard to anyone who's a low paid, a volunteer or a low paid person. We've asked the question repeatedly, this might be the fourth month in row when I've asked the question, and that is, suppose somebody is invested with the authority of a state officer or a public officer to wield great power during this emergency situation and that person acts in conflict, for instance, awarding a contract to a family member or to a, as a political favor. Is there no way that we can look at it? So, the simple question that Gary and I and a couple of other Commissioners have asked over and over and over again, is if there's a conflict, can we, an ethical violation, are we empowered to investigate it or has the Governor's Executive Order divested us of any authority to look into the conflict to examine a misdeed or corruption? In order to keep it simple and informal, on a couple of occasions, Commissioner Lavine asked staff, would you please reach out to the second floor, to the Governor's office, and find out what the scope of the impact of this executive order is. How many people are affected and what powers do they have, just so we know who's out there and whether or not they're covered. Now, at one point or another, in one of the responses that we received, we were told that the ethics laws don't apply because
oh, they're not state officers, they're not public officers if
they're volunteers. Well, that's clearly wrong. Commissioner
Lavine was talking about an Attorney General's opinion. You can
actually just look at the Public Officers Law, the definitions
in section two and thereafter, and then anyone who is invested
with the authority of the state is, by the governor and
appointed and empowered to perform certain functions, is a
public officer. You don't become free of ethics laws just
because you say, oh, you know what, I'll give myself a contract,
but don't pay me a salary. It doesn't work that way. So, the
question that we've been trying to get to for the longest time
is, do we have the authority, as the JCOPE, to look into and
hear complaints about conflict of interest or misdeeds or
corruption just because somebody has popped in and said, oh,
I'm acting on behalf of the governor, but by the way, I'm not
being paid? And that's what this is all derived at. The response
that our staff reportedly, that our staff got when they reached
out to the Governor's Counsel or Governor’s, the second floor,
was, I'm being polite, was basically none of your business. So
the thrust and the point of this subpoena is to find out what
the scope of our authority is, period. And what the impact of
the suspension is, period. That's not an investigative matter.
We're not looking into anybody, any one particular case. We're
asking an administrative structural question and that is, are
the rules suspended for people who are empowered by COVID because of 202? Now, the last thing that I'll say, I've gone on and I appreciate you giving me the time to say this, is, the way the Executive Law works is that a suspension by the governor during an emergency is in effect, unless by resolution, the legislature withdraws that power. So, the question that Commissioner Lavine’s motion puts in the public forum is an essential and vital question, and that is, is this, has JCOPE been divested of power to look into complaints about corruption, and if so, shouldn't the legislature know that so that they can take the power that they have by resolution to limit or adjust that exemption? Thank you.

Chair Varlack: Okay. We've got a couple of hands.

Sanfrod Berland: Yeah, let me just say in response to that, that absolutely, we have the authority to look into complaints. I don't, I don't think that there's any question about that. The other side of it is whether we have the authority and the resources to go off in a different direction seeking information, essentially, if I understood correctly, at least partly for educational purposes, so that we could learn whether there's some sort of issue that we might be able to address through educational needs, through some of the processes we use there, to inform state actors of what their
ethical responsibilities are. But those are very different
courses of action.

Commissioner Yates: I'm sorry. I have to jump back
in. I couldn't disagree with you more. The plain language of
the executive order says that section 74 is suspended for people
who are covered by that order, period. If section 74 is
suspended, then with all deference to, I would like to see a
written opinion either from counsel, or from the second floor
explaining to me, why being, why a suspension of section 74 of
the Public Officer’s Law means we still have the power to
investigate. Thank you.

Chair Varlack: Thank you, Judge Yates. It's
Commissioner Horwitz, then Commissioner Fisher, and then Judge
Braun.

Commissioner Horwitz: Thank you, Madam Chair. For a
group of Commissioners that is committed to the rule of law, I
am highly disturbed by the deviance from what the law requires
of us. The issue is not whether the chamber gave us an obnoxious
response to an informational request. That is not what this
issue is. This issue right now is whether this Commission has
the legal authority under Executive Law 94 to issue this
subpoena. I am not passing judgment on whether or not it was
obnoxious for the chamber to blow us off, if that's what they
did. We are not, our authority is defined in Executive Law for
subpoenas. In section 13(a) under investigations and in section 17(c), we can issue subpoenas to conduct any investigation necessary to carry out the provisions of Executive Law 94, section 17. There's nothing in the law that gives us plenary authority to issue an administrative subpoena in the way that Gary said that we have the authority. And I appreciate what Jim Yates is trying to do, which he's trying to explain that, look, we have good reason for asking for this. Gosh, we asked for this information and the chamber blew us off and we really should get it. Well, that may be, but we should do that with the legal authority that we have under Executive Law 94 to conduct an investigation and issue a subpoena, which we are authorized to do under Executive Law 94, mind you, in an Executive Session. And so again, I come back to what I said at the beginning, which is, for a group of people who honestly are committed to the rule of law, this is an application that deviates from that. Notwithstanding, whatever we feel the chamber did in terms of responding to an information request. At the end of the day, the legislature and the executive branch created Executive Law 94, and we're stuck with it, whether we like it or not. And we should follow that rule. So, I'm going to vote against this for that reason, because I don't believe that the way that this amendment has been proposed, again, it's not going to the substance of the amendment, it's going to the
process. The process does not have legal basis. If this amendment was brought up in the executive session, we would not be, I would not be making these points, but because, because a majority of Commissioners decided to proceed in the Public Session, this amendment is without authority, and if it's agreed to, it's my strong view that this is contrary to the law, this amendment, if it passes, will be contrary to the law and will be without legal basis in the law. Thank you, Madam Chair.

Chair Varlack: Commissioner Fisher.

Commissioner Fisher: Madam Chair, with all due respect to my friend Commissioner Yates, I wanted to correct the record. At least as far as I know, the staff has not told us that volunteers are not subject to our jurisdiction, and in fact, they've told us the opposite, that if there's a person volunteering, let's say at the New York State Department of health, who's in a policy making position, it's the responsibility of that department when they submit their list of their people who are subject to FDS to include that person, regardless of the fact that they don't make any money. I requested a list of the Department of Health employees and there's right around 500 people on it. Many are above a limit, a salary limit. Others, though, are below the limit, but are named because their positions as policy makers, and my
understanding, and I'll ask General Counsel Stamm to confirm this, is that volunteers who are in policy making positions need to be on that list of people that are subject to our jurisdiction and must file financial disclosure.

Chair Varlack: Okay, so we do have a list of Commissioners that need to speak, so I'm going to ask Judge Braun and then Judge Newton to speak, and then General Counsel Stamm, I will ask if you can respond to Commissioner Fisher.

Judge Braun?

Commissioner Braun: Thank you. Directed to Commissioner Lavine, could you restate the portion of your resolution motion that relates to recusal and elaborate for all of us on the basis for your including that?

Commissioner Lavine: Yes, your honor. 202.7 has an allusion, it's somewhat cryptic, I’ll characterize it, to recusals involving volunteers. But the order, as I interpret it, does not delineate or enumerate a process by which these recusals will be made, who monitors compliance with a recusal. And the Executive Chamber won't divulge this information either.

Chair Varlack: Thank you, Commissioner Lavine. Judge Newton?

Commissioner Newton: Yes. I have several questions, and I appreciate the various positions and the backgrounds, but
right at this moment, I have one specific question, and may want to tag on to what Judge Yates said about in writing an opinion from staff to clarify. I think I've gleaned an understanding that the relevant statute says that we can issue a subpoena, and that it doesn't make any, it doesn't differentiate between the type of subpoena. Doesn't say there's an informal or formal, it just says subpoena, and my question is that it is attending to the notion that the subpoena should be issued when there is an investigation. And I guess as still the newbie on the Commission, a new member, whether or not the kind of subpoena with the focus offered by Judge Yates and Judge Lavine is sufficient to call it an investigation. So, my question is, do we have to have an investigation voted on in order to issue the subpoena? And that is strictly a legal question in my mind, and I think it's important to have the answer to that, notwithstanding the very strong feelings that people have about whether this matter in general should be looked into, whether we have the legal authority. Is this an investigation or are we opening an investigation? Is this a subpoena? Would our subpoena withstand, have the specificity that's necessary from a legal point of view and are we considered just sort of, we're interested, and we want to learn a lot so we can do our job better? So those are legal questions,
I think, that we need to at least consider having answered before we complete this vote. Thank you.

Chair Varlack: Thank you, Judge Newton. General Counsel Stamm, there’s been several issues raised, including the communications with the chamber. I'd ask you to comment. We can't hear you.

Monica Stamm: Sorry, so just to clarify, despite the fact that the Commission has discussed this multiple times in the Public Session, there haven't been multiple communications with the chamber about this issue because many of the discussions in the Public Session have resulted in a vote that didn't carry. So, I don't remember the specifics at this point in time, but early on when this issue was first raised by Commissioner Lavine he asked for information similar to what he wants to request now by subpoena, and the direction I received from former Chair Rozen at that time was, well, contact the chamber and find out whether or not they have a process but not going into all the specifics of the questions that have been raised by Commissioner Lavine now. I had a discussion with the chamber at that point in time and they responded that if there were specific allegations relating to any individual violating the Public Officers Law, that they would cooperate with that request, but with respect to other requests, what I'm going to characterize as informational, based on what, how
Commissioner Lavine has made this request, they asked what the Commission’s authority is to make that request, and again, I reported that back to Commission. There’s been multiple discussions, but we never got back to the chamber because votes to do so never carried, and so we never responded with our legal authority for making such a request, whether orally, in writing, or by subpoena. And, as Judge Yates has said, we have discussed multiple times, whether or not there's anything in the executive order that would prevent us from conducting an investigation, or whether or not the executive order would just give someone a potential defense if we were to conduct an investigation. So, that question has been discussed, and I understand Judge Yates’s position. I don't see anything in the executive order that precludes us from conducting an investigation, but I think as Judge Newton said, and also Judge Yates, this should be addressed by legal staff, could be addressed by legal staff. Again, that should be done in Executive Session if we're going to talk about our legal authority, legal challenges to our legal authority. We currently have two ongoing civil litigations relating to how we've exercised our subpoena authority, and so this should be discussed in Executive Session. As to the issue with respect to volunteers, and Commissioner Yates and I have discussed this also in the Public Session multiple times, we have precedent
that makes clear that in some circumstances, volunteers will be subject to the Public Officers Law, and there's criteria for that. Same for certain independent contractors, may be subject to the Public Officer’s Law if they meet certain criteria. Not all volunteers and not all independent contractors; it depends on the authorities and the powers and duties that they're exercising. So then, to Commissioner Fisher's question, which relates to whether or not an individual has to file a financial disclosure statement. It turns on whether or not the appointing authority has determined that that person is a policy maker and that, by law, is a determination of the approving authority. That’s set forth in Public Officers Law 73-a. So, if the appointing authority determines that the individual is a policy maker, they are required to identify that person to us, and we add them to our system, and they are required to file an FDS. In addition, obviously, individuals who make over a certain salary also have to file. I think I've answered many of the questions, but I'm not sure if I answered all of them, and I'm happy to answer more.

Commissioner Yates: Can I, can I proceed with a question then, or with, actually three or four points that have been raised? Thank you, Monica, for some of the clarification. I couldn't agree with you more when you say that in the past, the law and practice has been that, even if you're a volunteer,
the ethics law supplied to you. I agree with that and apparently
you agree with that. The concern here is that the executive
order put out by the governor says, oh, by the way, because of
the emergency, I'm suspending that rule. So, the issue is not
whether or not a volunteer is covered. The issue is whether or
not the governor has overbroadly, under Executive Law 29(a),
because it's not necessary to handle the emergency and it's not
a minimum deviation, whether or not he's suspended the law and
the practice, which is that the ethics rules do apply. That's
number one. Number two, in the answer that you were just
providing, which was very helpful, people have conflated and
confused section 73 with 74. 73 is the requirement to file a
financial disclosure form, and it's true that the employers
can, I think Commissioner Fisher pointed this out, and you did
as well, Monica, that under 73, that an employer can designate
someone as a policy maker, and we have a list for those people,
but that only applies to financial disclosures. My concern from
the beginning has never been about financial disclosures from
volunteers during the pandemic. My concern has always been
about conflicts. Whether or not there's corruption, self-
dealing, whether or not people are wielding power in an
unethical way merely because they're volunteers, and the
governor has said, I’m suspending that law. That's number two.
Number three, I've heard from staff, conflicting responses here
so far, on the core question, which Commissioner, I think it was Commissioner Fisher raised, and that is whether or not, today, we may investigate a conflict because I think I couldn't tell because it's a phone number and not an image or whatever, but I think I heard Executive Director Berland say, oh, clearly the laws, the ethics laws are not suspended with regard to the volunteers. Well, I don't see that and I agree with everybody, I think, Judge Newton and everyone else, who said, yes, we should get that in writing, either from the second floor, or from staff itself because if that's the rule, and we're not disempowered by the Governor's Executive Order, then I'm happy. And I would, and I would just put aside this whole concern. The problem is, I don't believe that's the rule and I don't read it that way and I hear conflicting answers from different people so I would like to have clarity on that issue. And then, finally, with regard to the last point that Monica, Monica, I hope you don't mind me calling you Monica throughout, it's, we're friends so I do that, okay, Counsel Stamm has raised, with regard to the last point, you raise an excellent point that gives me pause about the prior vote. And that is, I voted to have this discussion in public because I thought we were talking about the scope and power and administrative structure of the agency and not about any particular investigation. But you do raise a good point and that is, if you think that a memo and a
legal discussion is going to rely upon advice of counsel to the Commissioners, and we're going to have an internal legal decision based on that, then I do agree with you, Monica, that that particular discussion should be in Executive Session.

Sanford Berland: Let me just clarify, Judge Yates. What I was saying was we clearly have the authority to investigate in response to complaints. The broader question was whether we'd have the resources to engage in a broader pursuit, and that's something that we really need to look at. I was, I was not reflecting on the question of whether or not the Governor had the power, through executive order, to supersede our jurisdiction under section 74.

Commissioner Yates: Well, if some empowered public official has gone ahead and done something wrong, either politically or ethically, and you're telling me, and there's consensus here, that we can go and pursue that, then I'm happy.

Chair Varlack: So.

Commissioner Jacob: Madam Chair, Madam Chair.

Chair Varlack: Yes.

Commissioner Jacob: This is Commissioner Jacob. Just wanted to make one point when you're prepared to recognize.

Chair Varlack: Please go ahead, Commissioner Jacob.
Commissioner Jacob: I respectfully submit that there's been a serious misreading of section 17. Commissioner Horwitz has advanced, at several meetings, the notion, and staff has as well, that the only subpoenas we can issue are investigative subpoenas. This is not literally what section 17 says. Section 17, if I may, in addition to any other powers and duties specified by law, the Commission shall have the power and duty to promulgate rules. That is 17(a). And 17(c) says, to conduct any investigation necessary to carry out the provisions of this section, not of the entire chapter. In other words, what section 17 seems to be designed to do is empower the Commission to issue subpoenas so it is in a position to promulgate rules. That's what 17 says, and it's just being read very broadly, and I believe, I submit, incorrectly. So the notion, and I said this the first time this subject came up, having served at other agencies, albeit federal, we conducted studies, we promulgated rules and regs, and we issued subpoenas to collect the information so we could intelligently do that. And that's what 17 seems to be about. We promulgate rules in the lobbying area, and if we need information, we're empowered to subpoena that information. That's an informational subpoena. Has nothing to do with investigations. And the notion that we have no authority to issue informational subpoenas is clearly contradicted by section 17. Section 13, in our investigations,
and 13 speaks about a subpoena plan, those are investigations. 17 is redundant if it means that. We already have the power issues subpoenas to do investigations, but this gives us the power to do studies if we need them, to assist the legislature to legislate, to assist ourselves to regulate through rules and regulations. So it clearly says, conduct any investigation necessary to carry out the provisions of this section, meaning section 17. It doesn't mean section 13 or 14. So, I again submit, as I did the very first discussion, that every agency has the authority to issue informational subpoenas, because agencies regulate, they promulgate rules, they promulgate regulations for comment. They haven't got the power to get the information and it's all out there, they can't carry out their work, and that's what I believe 17 recommends. So, 17 says, so I, what Commissioner Lavine is talking about, an informational subpoena, is not something alien and unheard of, not done. It’s done everywhere all the time. I was at an agency of the federal government for years, we did it all the time. So, I again submit that 17 should be read as it is written, and informational subpoenas make a lot of sense, and the legislature thought so and put it into 17. Thank you.

Commissioner Horwitz: Madam Chair, I feel compelled to respond to what Commissioner Jacob just said. I mean, look, let's come to the bottom line. May I finish please, because
nobody interrupted you and I want to just have the courtesy of being able to respond, Marvin, as you would give the courtesy to everybody. So I'll just proceed then.

Chair Varlack: Hold on.

Commissioner Jacob: I'm asking you to identify yourself.

Chair Varlack: We have two Commissioners speaking, which is going to be difficult for purposes of making sure we maintain order. Commissioner Jacob, I thought.

Commissioner Jacob: You're asking people to identify themselves. I'm on the phone. People talk. I don't know who's talking. I was merely asking the person who was talking to please identify himself or for herself. Is that too much?

Chair Varlack: No problem. No, no, no. Not at all. I was actually going to acknowledge Commissioner Horwitz for that very purpose. So, Commissioner Horwitz, please proceed.

Commissioner Horwitz: Thank you, Madam Chair. So as much as Marvin would like to still be at the SEC from 40 years ago, JCOPE's not the SEC. It has a completely different set of enabling laws that give it a whole broad range of authority that has zero to do with what we do. Now, looking at section 17, the fact is, that in 17(c), there's a word, and its investigation. And as much as you want to substitute your
judgement for the judgment of the professional staff, our general counsel, you can't get away from the fact that the statute has the word investigation in it. Now, to the extent that you say that we have the authority under 17 to promulgate rules on outside activity and limitations on the receipt of gifts and honoraria by persons subject to our jurisdiction, the way that this motion has been framed by its author, and by a number of people who have talked about the conduct of the chamber, and trying to find out what the chamber did with volunteers, and whether volunteers were in compliance with what would otherwise be their requirements, that all smacks of something that has nothing to do with our issuing a new rule. I mean, as I understand it from the author, the purpose of this is to gather information. We're not about to issue a new rule because again, Marvin, going to the plain language of the statute, it says promulgate rules concerning restrictions on outside activities and limitations on the receipt of gifts and honoraria by persons subject to its jurisdiction. That's what, if you're going to limit this, 17, to that purpose, well, I haven't heard anything about rules. I've heard questions about conduct which go to the kind of investigative activity that we engage in to find out whether there have been violations of the law. So, again, that's my basis for believing in response to you, Marvin, respectfully, that this motion is contrary to the
law, is not authorized by our law, not the law that enables the
SEC to do what it does, but our law, and so I don't think the
motion is legally appropriate and I think that if the Commission
votes in favor of issuing this subpoena, it will be a subpoena
outside of the law. Thank you, and thank you, Marvin, for giving
me an opportunity to respond and I'm sorry that I didn't
identify myself. I forgot that you're on the phone and it's
hard to figure that out, although you and I have known each
other for such a long time, I guess I just assumed you'd
recognize my voice but anyway, thank you. And thank you for
giving me the courtesy, Marvin.

Commissioner Jacob: Thank you. I would just ask the
Chair to just briefly respond to you. That you are, I am saying.
there is nothing to suggest that Commissioner Lavine’s motion
does not direct itself as well to the promulgation of rules.
There is a legislative provision out there, 29-a, and there are
executive orders such as 202, et cetera, that happened during
disasters and emergencies, who’s to say the Commission should
not today, tomorrow, be promulgating rules as to how these
things are to be conducted, so that there aren't the kinds of
disputes we're talking about now. We're not ousted from
promulgating regulations, so if you just look at 17(c), and
it's all Gary is asking, maybe we want to do regs about this,
and I want a subpoena issued for that purpose. That's exactly what 17 says. That's my simple response to you.

Chair Varlack: Thank you, Commissioner Jacob.

Commissioner Fisher.

Commissioner Fisher: I have a couple of questions for staff, and since Martin's right here, I'm going to ask him rather than Monica, just because it's easier that way. So let me understand the language of the resolution that Commissioner Lavine read. Would this apply to health care professionals offering their medical services on a voluntary basis?

Martin Levine: I don't want to speak for Commissioner Lavine, but it would seem to include any volunteers under the executive order which talked about assisting with the COVID response.

Commissioner Fisher: Okay. And would it apply to volunteers working at the testing centers and the vaccine centers? I know in Onondaga County we have volunteers at all of those places that are contributing their time. Most of those people have jobs, so they have employers. Would those volunteers at the pop-up centers and the testing centers have to be on this list that we're looking for of volunteers that are exempt from certain provisions of 73 and all of 74?
Martin Levine: Until the executive order was rescinded, I would, I would think yes.

Commissioner Fisher: So that could be in well into the thousands, if not over 10,000 people that have volunteered as a medical professional or volunteered at a clinic or a vaccine center?

Martin Levine: I don't have any information on the volume.

Chair Varlack: So, Commissioners, I think. Just one brief moment. Thank you for the discussion, the robust discussion on this point. I just wanted to note that there clearly seems to be a state of unreadiness, at least for some Commissioners, with respect to a whole host of issues, several of them being legal. And there was mentioned that it would be helpful if there was, or that it perhaps would be clearer, if there was a legal memorandum that perhaps addressed some of the specific issues that have been raised by Commissioners on this call. Commissioner Lavine, I would ask whether or not you would consider tabling your motion for purposes of the legal staff putting together such a memo, which could perhaps be illustrative to the Commissioners on some of the points that they've raised.
Commissioner Lavine: I don't accept the premise, Madam Chair, that what we do with the information is germane to the vote today, number one. I've stated previously, and I will repeat for emphasis, it is certainly plausible that information would be turned over to us that would prompt an investigation. In that second phase, obviously, that would be confidential under our statute. It is certainly the case that information that should be otherwise redacted should be scrutinized by staff and the Commissioners and appropriate redaction taken. But nonetheless, there is no question in my view. No memorandum is required. It is the inherent institutional prerogative of the Commission to issue an informational subpoena. Therefore, I will not withdraw today's motion.

Chair Varlack: Okay. I call the question. All in favor of the motion, please raise your hand.

Martin Levine: In Albany, I see Commissioner Weissman. On the screen, I see Commissioner McNamara, Judge Yates, and Judge Braun. I'll call the remaining roll. Commissioner Cohen.

Commissioner Cohen: No.

Martin Levine: Commissioner Dering?

Commissioner Dering: 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: Judge Newton?

Commissioner Newton: No.

Martin Levine: Thank you. Commissioner Weissman, you voted in favor, Judge Yates, I apologize, I already forgot, can you?

Commissioner Yates: I said yes.

Martin Levine: Thank you, Judge. I apologize. And Chair Varlack?

Chair Varlack: No.

Martin Levine: That’s 1, 2, 3, 4, 5, 6, 7 in favor. Motion fails.
Chair Varlack: Thank you. We are now at the new and other business of the agenda. Commissioners, do we have any?

Commissioner Lavine: Yes, Madam Chair, and then I have a question for staff, and then I have a motion to make. Two different subjects. The question deals with the deliberations of the confidentiality committee. Would staff indicate to the Commission what is the timetable for resolving the myriad of other substantial issues with respect to confidentiality?

Monica Stamm: So.

Chair Varlack: General Counsel Stamm?

Monica Stamm: Chair, if I may?

Chair Valack: Sure.

Monica Stamm: I don't think that there is a clear timetable. There is an issue pending that has been on the Executive Session agenda that the Commission hasn't been able to get to, and then there are remaining issues that the Commission has to address that the committee has made recommendations on. But again, the Commission needs time in Executive Session to discuss these issues. So they are, they're ready for the Commission to consider, but the Commission needs time in Executive Session to address them.
Commissioner Lavine: Well, on the follow-on, Madam Chair, if I may address Madam General Counsel? Has the staff considered for example whether the confidentiality provision of the Executive Law obtains if one or more Commissioners are subpoenaed by one or both Houses of the legislature to testify, as the Senate has indicated they intend to do?

Monica Stamm: I would like, if you want me to address that question, I'm happy to address it. We could do it offline or we could do it in the Executive Session, but I'm not prepared to answer that question in the Public Session.

Commissioner Lavine: Okay, thank you very much and I will pursue that question, Madam Chair. Now to my resolution if I may, Madam Chair, I propose henceforth, the executive sessions be recorded and that the deliberations be transcribed.

Chair Valack: OK. Is there a second?

Commissioner Weissman: Yeah.

Chair Varlack: Okay, Commissioner Weissman has seconded the motion. Is there any discussion? I believe, I'll just start by saying, I am establishing a rules committee, and I think that, you know, that the conversation with respect to the recording of Executive Session certainly should be referred to that committee for discussion. At minimum, I think it should be discussed in Executive Session because there are potentially
legal issues with respect to our changing our current procedure. Is there any other Commissioner that has a point that they'd like to make on this matter? I don't see any hands raised. Anybody on the call. Okay, Commissioner Lavine, would you be willing to move the discussion on this point to today's Executive Session?

Commissioner Lavine: On the proviso, Madam Chair, that the result of the deliberation is in the public domain.

Chair Varlack: I'm not going to commit to that because I don't know what the decision is going to be.

Commissioner Lavine: I will not withdraw the proposal.

Chair Varlack: Okay. I call the question. All in favor?

Martin Levine: Okay. I see Commissioner Weissman in Albany. Judge Newton, that's it on the screen. I'll call the remaining roll. Judge Braun?

Commissioner Braun: No.

Martin Levine: Commissioner Cohen?

Commissioner Cohen: No.

Martin Levine: Commissioner Dering?

Commissioner Dering: No.

Martin Levine: Sorry, Jim, we missed that.
Commissioner Dering: No. Did you hear me?

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: Commissioner McNamara?

Commissioner McNamara: No.

Martin Levine: Saw Judge Newton. Commissioner Weissman, you voted in favor. Judge Yates?

Commissioner Yates: Madam Chair, point of clarification before I vote. You suggested that there be further discussion about this in Executive Session. I just want a clarification that this won't be, the vote here today won't be considered a final vote on that, and that you're offer to
discuss it further later, as part of the rules committee, is still on the table.

Chair Varlack: My understanding is that we are voting right now on Commissioner Lavine’s motion, which is to proceed to record our executive session, so.

Commissioner Yates: What I'm asking is, in your mind, is this a topic for the protocol or rules committee, subcommittee, later, or does today's vote take it off and out of that realm?

Chair Varlack: I certainly think that there would be additional conversations that would need to happen with respect to whether or not we can do that, under any rules that govern how the Commission acts, as well as operationally, how we would actually get that done, and so those were the conversations that I thought we needed to have before we voted on actually doing it. So it's, it's not clear to me, sort of where those, where those conversations can take place. Certainly can happen there, but I would prefer that the conversation happens before we vote on it.

Commissioner Yates: OK. Yeah, well, on the reliance that this does not preclude further consideration, I vote no.

Martin Levine: Thank you, Judge, and Chair Varlack?

Chair Varlack: No.
Martin Levine: 1, 2, 3, 4, 5 in favor. Motion fails.

Chair Varlack: Thank you. Is there any other?

Commissioner Braun: Madam Chair?

Chair Varlack: Yes.

Commissioner Braun: Okay. I voted no because I thought this should they have further consideration, and I'm going to move that this piece, this issue, be sent to the rules committee that you're establishing for further discussion.

Commissioner Yates: I'll second that.

Chair Varlack: Thank you, Judge Yates. Is there any discussion? Okay. All in favor of moving a discussion about this to the rules committee, please raise your hand.

Martin Levine: I see all in Albany. I see Commissioner McNamara, Judge Yates, Commissioner Dering, Judge Newton, and Judge Braun. Commissioner Cohen?

Commissioner Cohen: Yes.

Martin Levine: Commissioner Dering?

Commissioner Dering: Yes.

Martin Levine: Thank you. 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: Commissioner McNamara, I think I recorded you. Judge Newton, I recorded you. Commissioner Weissman, Judge Yates, I recorded you, and Chair Varlack, so that is 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13. Motion carries.

Chair Varlack: Thank you.

Martin Levine: 12, actually.

Chair Varlack: Are there any other items under new and other business? At this time, may I please have a motion to move into Executive Session, pursuant to Executive Law section 94(19)(b)?

Commissioner Fisher: So moved, Fisher.

Chair Varlack: Thank you. Can I have a second?

Commissioner Dering: Second. Dering.

Chair Varlack: Thank you. All in favor.

Martin Levine: One, two, three. Braun. Cohen?
Commissioner Cohen: Yes.

Martin Levine: Commissioner Jacob?

Commissioner Jacob: Yes. Lavine?

Commissioner Lavine: Yes.

Martin Levine: McCarthy?

Commissioner McCarthy: Yes.

Martin Levine: I think that's everyone. Motion carries. Motion carries, ma'am.

Chair Varlack: Thank you. Walt, can you please let us know when we're in Executive Session?

Walter McClure: Yes. Stand by.

[The Commission entered into Executive Session]

[The Commission returned to Public Session]

Walter McClure: We are back in public session.

Chair Varlack: Thank you very much, Walt. General Counsel Stamm, can you please report out on the actions taken in Executive Session?

Monica Stamm: Sure. The Commission discussed litigation matters. The Commission commenced one substantial basis investigation. The Commission authorized steps in several other investigative matters, and, I'm sorry, in
several investigative matters and discussed several other investigative matters.

Chair Varlack: Thank you.

Monica Stamm: That was it.

Chair Varlack: Can I please have a motion to adjourn the meeting?

Commissioner Weissman: Moved.


Chair Varlack: All in favor?

Martin Levine: I see three in Albany, and I see McNamara, Yates, Dering, Bill? Braun.

Martin Levine: Jacob?

Commissioner Jacob: Yes.

Martin Levine: Commissioner Lavine?

Commissioner Lavine: Yes.

Martin Levine: McCarthy?

Commissioner McCarthy: Yes.

Martin Levine: And if Judge Newton is still there, Judge, can you give me a thumbs up to adjourn? There we go. We’re out, ma’am.
Chair Varlack: Okay. Thank you.