

**MINUTES OF THE PUBLIC SESSION OF THE
SEPTEMBER 19, 2017
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
HELD AT
540 BROADWAY
ALBANY, NEW YORK**

Acting Chair: Michael K. Rozen (NYC)

Members: Robert Cohen (NYC)
James E. Dering (ALB)
Marvin Jacob (ALB)
Seymour Knox, IV (ALB)
Gary J. Lavine (ALB)
J. Gerard McAuliffe, Jr. (ALB)
Barry C. Sample (ALB)
Dawn L. Smalls (NYC)
George H. Weissman (ALB)
James A. Yates (NYC)

Members

Absent: None

Staff: Seth H. Agata, Executive Director
Monica J. Stamm, General Counsel
Martin L. Levine, Deputy General Counsel
Stephen J. Boland, Director of Administration
Keith C. St. John, Director of Ethics
Andrew Bechard, Director of Lobbying
Pei Pei Cheng-deCastro, Director of Investigations and Enforcement
Emily A. Logue, Deputy Director of Investigations and Enforcement
Erin Lynch, Associate Counsel
Patrick E. Coultry, Chief Investigator
Peter J. Smith, Investigator
Carol Quinn, Deputy Director of Lobbying Guidance
Meghan Hennigan-Cohen, Deputy Director of Education
Lori Donadio, Principal Investigative Analyst
Katherine Santandrea, Secretary to the Commission

I. CALL TO ORDER

Acting Chair Michael Rozen called the September 19, 2017 Commission Meeting to order.

II. APPROVAL OF MINUTES – PUBLIC SESSION

August 8, 2017

A typo was identified on page 5, the 4th line. A motion was made by Commissioner Weissman, seconded by Commissioner Knox, to approve the minutes from the Public Session of the August 8, 2017 Commission Meeting, as amended. The vote on the motion was 10-0-1. Chair Rozen and Commissioners Cohen, Dering, Jacob, Knox, Lavine, McAuliffe, Sample, Weissman and Yates voted in favor of the motion. Commissioner Smalls was not present for the vote. The motion carried.

III. REPORT FROM STAFF

Update on Outreach Activities

Executive Director Agata stated that Deb Novak, Secretary to the Commission has retired and welcomed Katherine Santandrea in her position. The State Bar is having a CLE in Albany on October 12; Executive Director Agata is on a panel to discuss lobbying, and Commissioner Yates will be conducting a one-hour discussion about the Executive budgeting process. JCOPE's CLE is scheduled on October 26, 2017 at 2:00 p.m. at New York Law School, and will provide three ethics credits for lawyers. The new JCOPE book on the ethics and lobbying laws in New York will be distributed at the program. Education staff also sent out an "Ethics Reminder on Political Activities", and conducted outreach to ethics officers and general counsels on the "Ethics Hotline". An ethics officer forum will be held on September 26, 2017.

IV. REGULATIONS

Update on pending Rule-Making Proceedings

General Counsel Stamm explained that at its last meeting, the Commission voted on both the Comprehensive Lobbying Regulations and the corresponding changes to the Source of Funding Regulations. Both regulations are in a public comment period until October

16, 2017. A public hearing will be held in Albany on Monday, October 30, 2017 at 1:00 p.m. at the Legislative Office Building, in Hearing Room A. It is anticipated that after the hearing and a review of further comments, staff will bring those regulations back to the Commission at the November meeting for discussion. In addition, the Records Access Regulations, for which a rulemaking process was started at the August meeting, are out for public comment until October 9, 2017. Those regulations will be brought back to the Commission at the October meeting.

The subcommittee on hearing officers has met and is conducting outreach to increase the existing pool available for selection.

Proposed Amended Exemption Regulations and Adjudicatory Proceedings and Appeals Process Regulations

Deputy General Counsel Levine explained that the proposed amendments to the Financial Disclosure Exemption Regulations and Adjudicatory Proceedings and Appeals Process Regulations derived from a request from the Commission to provide a right of appeal to the full Commission from any determination of the Executive Director to deny an exemption application in connection with Financial Disclosure Statements. The proposed regulations are non-emergency, and amend Part 935 (exemption from filing an FDS) Part 942, (exemption from disclosing client information) Part 941 (adjudicatory proceedings and appeals) and Part 936 (extension of time to file an FDS). Deputy General Counsel Levine noted that the proposed amendments to Part 936 merely changed the reference in that Part from the Commission on Public Integrity to the Joint Commission on Public Ethics.

Commissioner Weissman asked if any consideration has been given to providing statistical information to the Commission relating to the number of exemptions that have been granted by the Executive Director. Executive Director Agata stated that the Regulations would be amended to provide for the Executive Director to report such information to the Commission.

A motion was made by Commissioner Weissman, seconded by Commissioner Dering to commence the rulemaking proceeding on the Regulations, with the suggested language added. The vote on the motion was 11-0-0. Chair Rozen and Commissioners Cohen, Dering, Jacob, Knox, Lavine, McAuliffe, Sample, Smalls, Weissman and Yates voted in favor of the motion. The motion carried.

V. **APPLICATION FOR EXEMPTION FROM SOURCE OF FUNDING DISCLOSURE REQUIREMENT**

Commissioner Yates recused himself on this matter and was not present for the discussion.

General Counsel Stamm reported that the application from New York Civil Liberties Union (NYCLU) for a blanket exemption from disclosing all its “Sources of Funding” pursuant to 19 NYCRR, 938.4(c) is included in the Commission meeting materials. This exemption is available to a 501(c)(4) exempt organization which shows that its primary activities involve areas of public concern that create a substantial likelihood that disclosure of its sources will cause harm, threats, harassment or reprisals to the sources or property affiliated with the sources. The Commission regulations set forth a non-exclusive list of five factors the Commission should consider in making the determination. General Counsel Stamm advised that regardless of whether or not the Commission grants the application, there needs to be a clear record of the reasons for the vote. If the Commission does not approve the application, a letter of denial must be sent, accompanied by a statement of findings and conclusions and the reasons or basis for the denial.

Director of Lobbying Andrew Bechard reported that the NYCLU application included evidence in the form of several new documents received since December 2016, containing what NYCLU described as threats and harassment. The evidence includes 10 holiday cards, 3 letters, 14 assorted photos or posters, with statements like “I sure hope no terrorists bomb your building”, “to the ACL Jew... may your love ones be the next victims and not mine”, “every one of your Mother [expletive] should have been aborted”, “God is waiting to send you to hell,” “Peace on Earth without you”, “take your group out

of the USA”, and “Terrorists Will Nuke New York City” (with picture of a prophetic warning). The NYCLU also argued that its members and supporters have historically been subject to periodic harm, threats, and harassment and in past requests, it has provided documentation regarding bomb threats to New York City and upstate New York offices, vandalism on the vehicles of members, and the need to take protective anonymity measures. NYCLU also argues that past denials of the Commission have incorrectly applied the Commission’s own regulatory scheme and disregarded the statutory mandates. NYCLU incorporated its prior applications as part of the current application to the Commission.

Commissioner Jacob asked about the sources of funding that NYCLU disclosed after prior exemption applications were denied. General Counsel Stamm advised that NYCLU has disclosed a small number of primarily institutional sources. Commissioner Weissman requested that his statements from April, 2017 be incorporated into the record of these proceedings.

Commissioner Lavine asked about NYCLU’s position regarding the standard for evaluating exemptions. General Counsel Stamm explained that NYCLU has been arguing in each of its applications that the proper constitutional standard is “reasonable probability,” while JCOPE’s regulation and the statute require a demonstration of a “substantial likelihood” of harm, threats, reprisal, or harassment. Commissioner Weissman noted that the Legislature was the proper venue to amend the standard. General Counsel Stamm explained that the Legislature directed the Commission to develop regulations, and stated the Commission is charged with interpreting the language of the statute in enacting such regulations. Commissioner Smalls asked about other contexts in which the term “substantial likelihood” had been interpreted. General Counsel Stamm explained that there are no direct parallels. The standard for analyzing exemptions, according to General Counsel Stamm, from similar types of disclosure mandates is “reasonable probability”. However, substantial likelihood has been interpreted by courts in other contexts to range from reasonable probability to almost a near certainty. General Counsel Stamm recommended that the Commission determine

whether the application satisfies even the lowest possible standard. Commissioner Weissman responded that in his opinion, the evidence provided does not meet any standard.

Commissioner Smalls suggested that the Commission define “substantial likelihood” to provide clear guidance to future applicants. Executive Director Agata noted that the Source of Funding Regulations, currently in a formal rulemaking process and slated for a public hearing on October 30th in Albany, were the proper forum in which the Commission could clarify its interpretation of “substantial likelihood.”

Acting Chair Rozen suggested that the Commission should first determine if NYCLU’s application satisfies any of the standards and then clarify the definition of substantial likelihood through the SAPA process. Commissioner Jacob asked if there is anything in the record that shows that past donors disclosed in 2015-2016 were threatened. Deputy Director Bechard stated that, with exception of American Civil Liberties Union, there does not appear to be any such evidence, but noted that the donors are primarily institutional. General Counsel Stamm advised that actual harm to donors is one factor the Commission can consider, but it is not required nor is it the only factor. Acting Chair Rozen requested a vote on NYCLU’S application, which did not appear to provide sufficient evidence above and beyond what was previously considered and rejected by the Commission.

A motion was made by Commissioner Cohen seconded by Commissioner Smalls, to approve NYCLU’s application for Exemption from the Source of Funding disclosure requirements. The vote on the motion was 4-6-1. Commissioners Cohen, Dering, Sample and Smalls voted in favor of the motion. Chair Rozen and Commissioners Jacob, Knox, Lavine, McAuliffe and Weissman opposed the motion. Commissioner Yates was not present for the vote. The motion did not carry.

VI. NEW AND OTHER BUSINESS

Executive Director Agata noted that a proposed meeting schedule for the first six months of 2018 was included in the meeting materials for the Commission's consideration.

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

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

VIII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

General Counsel Stamm announced that during the Executive Session, pursuant to Executive Law §94(19)(b), the Commission discussed personnel and litigation matters, approved an application for an POL 73(8-b) exemption, approved a Substantial Basis Report and Settlement Agreement, commenced two Substantial Basis investigations and authorized actions on investigations matters.

IX. MOTION TO ADJOURN THE PUBLIC MEETING

A motion was made by Commissioner Smalls, seconded by Commissioner Cohen, to adjourn the Public Meeting. The motion was approved by unanimous vote.