



Commissioners
Joint Commission on Public Ethics (JCOPE)

June 24, 2021

VIA EMAIL

Re: All of JCOPE's public records should be subject to disclosure under the Freedom of Information Law and financial disclosure forms should be published online.

Dear Commissioners,

We write to express our concerns regarding two separate Joint Commission on Public Ethics (JCOPE) proposals related to the release of information about state financial disclosure form requests: the recent draft regulations posted in the NYS Register on May 26, 2021 (ID No. JPE-21-21-00002-P), and the resolution presented by Commissioners Lavine and Yates, as discussed at JCOPE's May 25, 2021 meeting.¹

As an overarching principle, we believe that JCOPE's records should be subject to the Freedom of Information Law (FOIL), meaning that all public records should be made available as is required for other state agencies. Furthermore, financial disclosure forms for members of state boards and commissions, agency commissioners, and other senior officials or directors should be available by default on the JCOPE website, as is currently provided for state elected officials.

Proposed Regulations Would Limit Public Access to Certain Records

We support the common-sense proposal in the proposed regulations to give the public access to some new information about financial disclosure forms, including:

- the date they are submitted to JCOPE;
- whether deletions have been made;
- the status of the filing, such as whether it is pending, overdue or extensions were granted, and if there are pending requests for deletions or exemptions (note the specific

¹ See the draft regulations here: <https://dos.ny.gov/system/files/documents/2021/05/052621.pdf>, and the proposed resolution here: https://jcope.ny.gov/system/files/documents/2021/05/jcope-21-xx-fds-requests_draft-for-review.pdf

requests for exemptions and/or extensions and materials around them would not be available);

- lists of job titles and employment classifications that have been exempted from filing statements for particular agencies; and
- the names, titles and salaries of JCOPE staff.

However, we strongly oppose the sections of the proposed regulations that would limit public access to certain types of records. JCOPE should not be in the business of limiting the information that is available to the public, but rather should be striving toward a regime of “open by default.” The regulations would allow only the *filers* of the disclosure forms to have access to information about whether requests have been made for their own individual filings. The general public would not have access to information about these requests under the regulations. As described further in this letter, this is inconsistent with how the state’s Freedom of Information Law treats requests for public records for other state agencies. The regulations also propose that the names of the individuals and entities making requests would not be available to the filers.

Proposed Resolution – COIB Disclosure is NOT a Model

Commissioners Lavine and Yates later proposed a resolution for adoption by JCOPE, as discussed at its May 25, 2021 meeting, which would also allow public officials who file disclosure forms to have access to the requests for their disclosure forms. Unlike the proposed regulations, the resolution would give filers access to information about requesters’ identities, contact information, organizational affiliations, and any other information or materials disclosed as part of the requests for the financial disclosure forms. The proposal also provides that requester information would not be available to filers for a period of 6 months if related to law enforcement subpoenas or court orders.

As part of the discussion at the JCOPE meeting regarding the resolution, members discussed the NYC Conflict of Interest Board (COIB) process for disclosure, citing it as a model for JCOPE to follow.

Watchdog groups believe that the COIB’s process, as provided in the NYC Administrative Code², is not a model that should be used by the state for consideration of this issue. NYC law provides that disclosure forms are available for public inspection, and COIB is required to notify the person who filed the forms of the identity of the person(s) who requested to view their disclosure form. This notification process is potentially chilling for members of the public who are merely seeking access to public records, as it is something that is affirmatively provided to filers of forms, rather than available upon request.

It should be noted that forms filed by most city elected officials are available proactively on the COIB website, such as for citywide offices and city council, thus not triggering a notification process.

² See § 12-110 of the NYC Administrative Code re: Annual disclosure.

JCOPE Should Follow FOIL, Not Models That Limit Access

Our groups have long supported making JCOPE's public records subject to the state's Freedom of Information Law rather than be subject to a separate disclosure regime that limits public access.³

We believe that lists of those persons who request disclosure forms should not be viewed differently than the logs of FOIL requests maintained by state agencies and authorities. State agencies log FOIL requests as part of their tracking systems, and these logs are available through FOIL. For example, the State Office of Temporary and Disability Assistance lists on its FOIL subject matter list "public information records" including Freedom of Information requests and responses.⁴ Our groups have frequently requested FOIL logs from agencies as part of our analyses of how FOIL is working and can be improved, and agencies have fulfilled these requests.⁵

We do not believe that the information regarding who is requesting financial disclosure forms should be privileged to only the filers of these forms, as information requests are inherently public records. Indeed, the state Committee on Open Government has specifically addressed the issue of FOIL logs in advisory opinions saying that the records of information requests are disclosable under FOIL and that "No one has an advantage over anyone else with respect to the right or capacity to seek government records."⁶

Making information regarding the requesters of financial disclosure forms only available to the filers limits public access and is counter to the presumption of access to public records at state agencies under FOIL.

Proactive, Online Disclosure of More Financial Disclosure Forms

We also believe that more financial disclosure forms should be proactively disclosed online, as this would increase public access to these records and negate the need for requests for this type of information from JCOPE staff. At a minimum, financial disclosure forms for individuals directly appointed by the Governor and/or other elected officials should be proactively posted online, such as members of state boards and commissions, agency commissioners, and other

³ Reinvent Albany Backs Three of the 2018 FOIL Recommendations Proposed by Governor and Committee on Open Government. January 10, 2018.

<https://reinventalbany.org/2018/01/%E2%80%8Breinvent-albany-backs-select-2018-foil-recommendations-proposed-by-governor-and-committee-on-open-government/>

⁴ See OTDA's FOIL Subject Matter List here: <https://otda.ny.gov/legal/foil/subject-matter.asp>

⁵ See Reinvent Albany's past reports on FOIL: "FOIL that Works" October 2018, <https://reinventalbany.org/wp-content/uploads/2019/03/FOIL-that-Works-MTA-FOIL-Report-October-2018.pdf> "Listening to FOIL: NYC DOITT" November 2015,

<https://reinventalbany.org/wp-content/uploads/2017/03/DOITT-FOIL-Report-Nov-2015-copy.pdf> and "Listening to FOIL: DEC" July 2014, <https://reinventalbany.org/wp-content/uploads/2014/07/Final-DEC-FOIL-Analysis.pdf>

⁶ See COOG Opinions on FOIL requests being publicly disclosable: FOIL-AO-17692, June 26, 2009, <https://docs.dos.ny.gov/coog/ftext/f17692.html> and FOIL-AO-19168, August 21, 2014, <https://docs.dos.ny.gov/coog/ftext/f19168.html>

senior officials or directors. These positions are of high public interest, and the forms of these individuals are likely the bulk of information requests made by the public to JCOPE.

Thank you for your consideration. Should you wish to discuss this matter further please contact Rachael Fauss, Senior Research Analyst for Reinvent Albany, rachael@reinventalbany.org.

Sincerely,

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