



November 11, 2022

Sanford N. Berland, Interim Executive Director
New York State Commission on Ethics and Lobbying in Government
540 Broadway
Albany, New York 12207

Re: Request Investigation of JCOPE’s Approval of Governor Cuomo’s Book Deal and Compliance with and Enforcement of the Terms of that Approval

Dear Mr. Berland:

The undersigned organizations hereby submit this verified complaint requesting that the Commission on Ethics and Lobbying in Government (the “Commission”):

1. Undertake a review of the approval and decision-making process by your predecessor agency, the Joint Commission on Public Ethics (JCOPE) of former Governor Andrew Cuomo’s contract with Penguin Random House Crown Publishing Group.¹
2. In addition, we request the Commission determine whether the former Governor complied with the requirements that JCOPE stipulated in its approval decision.²

Information produced in recent reports issued by the New York State Assembly Judiciary Committee³ and the outside review⁴ commissioned by JCOPE have raised serious concerns about JCOPE’s decision-making as well as the former Governor’s adherence to the JCOPE agreement.

We understand that the Commission recently approved a resolution to continue “any pending matter of inquiry” not closed by JCOPE.⁵ We believe that the information contained in these reports easily meets the threshold for the Commission to open and/or

¹ Complainants base this complaint upon information and belief, relying upon the essential facts laid out in the two reports cited, which we believe have not been fundamentally disputed. Whether there have been violations of law or the terms of JCOPE’s approval in this matter is for the Commission and staff to determine after appropriate review.

² We will refer to the process for JCOPE’s approval of outside income activities and compliance with that approval collectively as the “Book Deal.”

³ “Impeachment Investigation Report to the Judiciary Committee, Chair Charles Lavine and the New York State Assembly Judiciary Committee,” prepared by Davis Polk & Wardell LLP, November 22, 2021. Available at: https://nyassembly.gov/write/upload/postings/2021/pdfs/20211122_99809a.pdf

⁴ Investigative Report on JCOPE’s Approval of Governor Cuomo’s July 10, 2022 Outside Activity Request, Hogan Lovells US LLP, July 1, 2022. Available at: https://ethics.ny.gov/system/files/documents/2022/07/hogan-lovells-jcope-report_2022.07.01.pdf

⁵ Bragg, Chris. “New state ethics watchdog agrees to chew on old cases.” Times Union. October 6, 2022. Available at: <https://www.timesunion.com/state/article/New-ethics-commission-to-continue-old-cases-17491985.php>

continue preliminary reviews of JCOPE’s actions in these matters. Under section 94 of the Executive Law, the Commission has the authority and ample tools to undertake these reviews and, if appropriate, to engage in full-scale investigations and hearings to resolve triable issues of fact.⁶

These reviews are important to the operations of the new Commission itself. In your September 12, 2022 meeting, you approved a resolution that you will follow “precedent”⁷ in determining how to make decisions going forward. We believe that such a resolution must be amended to include new ethical guardrails, such as those outlined in our September 26, 2022 letter to the Commission.⁸ Those guardrails, including requiring Commission approval of all opinions regarding agency heads and statewide officials, are necessary to ensure that future decisions to permit or deny outside income are based on the lessons learned from the controversy surrounding the decision to permit the former Governor’s book deals.

The Commission is charged with enforcing the law with respect to executive branch employees, including enforcement of the Code of Ethics, Public Officers Law section 74, *et seq.* Accordingly, your agency has both the authority and the obligation to examine the issues exposed in recent official government reports.

We have reviewed the reports issued by the New York State Assembly Judiciary Committee and by the Joint Commission on Public Ethics regarding former Governor Cuomo’s book, *American Crisis: Leadership Lessons from the COVID-19 Pandemic*.

Both of these reports provided detailed, comprehensive information on how the Book deal was approved and how the former Governor complied with ethical restrictions. The Assembly report did cite that difficulties in obtaining the former Governor’s cooperation with its investigation:

“the former Governor failed to cooperate in any meaningful way with the Committee’s investigation including with respect to the Book.”⁹

Thus, the Commission should step in to ensure that the public knows fully what happened.

Both reports outlined that the JCOPE staff decision-making, while based on prior advisory opinions cited as precedent, had allowed a multi-million dollar publishing agreement without proper verification at its most basic level. Moreover, the reports detail that the former Governor ignored the ethical restrictions placed on him, particularly through the use of state resources to

⁶ We note that the 63-page report produced by law firm Davis Polk and Wardwell for the Assembly Judiciary Committee includes an 11-page section on the Book Deal and was based on a review of documents and interviews with persons on the governor’s staff at the time as well as persons with knowledge of the book’s production. Report to the Assembly Judiciary Committee p. 27.

⁷ Commission On Ethics And Lobbying In Government, Resolution 22-01, 15.

⁸ Letter from Citizens Union, the Committee to Reform the State Constitution, Common Cause NY, League of Women Voters of NYS, New York City Bar, N.Y. Public Interest Research Group, Reinvent Albany, and the Sexual Harassment Working Group. “Resetting Expectations about State Ethics Enforcement in New York,” September 22, 2022. Available at:

<https://reinventalbany.org/wp-content/uploads/2022/09/Watchdog-Letter-to-Ethics-Commissioners-Sept-22-2022.pdf>

⁹ Davis Polk, p. 27.

write the book. While the reports speak for themselves, our review leads us to conclude that your Commission must take seriously the allegations that were raised.

We are in no position to determine whether those reports are accurate, nor are we offering an opinion of whether laws were broken, or the Book Deal agreement was violated. Yet, our review of these reports makes clear that your Commission must review these reports and determine whether their findings are true. If they are true, you must act.

Furthermore, not only is it important that ethical rules be enforced, but that watchdog agencies act independently without political fear or favor. As you develop your own guidelines and hire or retain staff, if the findings of these reports are meritorious, it must inform how you proceed in the development of staffing plans, agency guidelines and Commission authority.

Background.

The controversy stems from the misapplication of advisory opinions used as precedent. In approving the first of the former Governor's book deals, JCOPE relied on two previous opinions, A.O. Nos. 89-10¹⁰ and 96-21.¹¹ In A.O. 89-10, a state lawyer wanted to earn royalties for a book he co-authored that was written on personal time and without state resources. The State Ethics Commission concluded that despite the fact that the lawyer relied on expertise derived from his state employment, the book was beyond the scope of his duties and therefore he could be paid to write the book.

The Commission noted that the audience for the book was not an audience regulated by the relevant state agency.

Advisory Opinion 96-2 also involved an agency lawyer, who in that case sought to write a book on legal practice that was unrelated to his state employment. The State Ethics Commission ruled that since the publication of the book was to be conducted by a company with no dealing with the state and that the lawyer would not promote the book as part of his official duties, he could receive royalties. In its 1996 advisory opinion, the Ethics Commission enumerated the nine conditions laid out in the 1989 advisory opinion.

It is those opinions and those nine conditions that provided the precedent for both of former Governor Cuomo's book deals. Neither of the aforementioned opinions considered royalties that would result in compensation for the former Governor of hundreds of thousands of dollars for the first book, then millions of dollars for his second; neither considered the discrepancy in power between the state's chief executive and agency attorneys.

Report Findings Regarding JCOPE's Decision-Making.

It is plainly obvious that the facts being considered that led to the precedent contained in both A.O. 89-10 and 96-12 were dramatically different from what was being contemplated for the former Governor's book agreements. Yet, in both cases, all of JCOPE's Commissioners were

¹⁰ This advisory opinion may be accessed at <https://ethics.ny.gov/advisory-opinion-no-89-10>.

¹¹ This advisory opinion may be accessed at <https://ethics.ny.gov/advisory-opinion-no-96-21>.

not given the opportunity to review the agreement. Precedent was the basis that allowed the staff to make a decision without Commission approval.¹²

Yet, subsequent investigations paint a picture of the former Governor failing to be completely transparent about the discussions with the Book's publisher as well as with the JCOPE staff. The Hogan Lovells report simply stated that:

“JCOPE disregarded potential ethical issues arising from Governor Cuomo’s contemporaneously writing and commercializing a book about this handling of the COVID-19 pandemic.”¹³

Moreover, the report found that JCOPE didn’t seek to verify the truth:

“JCOPE staff accepted as true the Governor’s representation that the Book was a continuation of his prior book, without taking steps to verify that and while disregarding indications to the contrary.”¹⁴

As you know, under current regulations, any state agency head or statewide elected official who requires approval by the Commission must submit an “outside Activity Approval Form.”¹⁵ Despite this requirement codified in regulation, JCOPE’s Chairman said the requirement was unnecessary:

“Chairman Rozen stated in an email on July 21 that staff had advised him that no form was necessary when all the required information is in the request letter.”¹⁶

As a consequence, the decision to eliminate the requirement that an approval form be submitted deprived JCOPE of full information:

“JCOPE never requested nor received a request form for the Book, or certain information required by that form.”¹⁷

Again, according to Hogan Lovells, the former Governor was well aware that he could control JCOPE:

“These emails suggest that Governor Cuomo treated the JCOPE approval process as an afterthought.”¹⁸

¹² We note that for both book deals, it appears that the former Governor exclusively relied on Executive Chamber staff counsels to draft the requests for approval of outside income and interact with JCOPE staff to secure the approvals.

¹³ Hogan Lovells, p. 29.

¹⁴ Hogan Lovells, p. 29.

¹⁵ Pursuant to 19 NYCRR 932.6(c).

¹⁶ Hogan Lovells, p. 33.

¹⁷ Hogan Lovells, p. 33.

¹⁸ Hogan Lovells, p. 11.

Had they dug deeper, JCOPE may have found out that work had already commenced on the Book and that negotiations with the publishing company were coming to a close – despite the former Governor’s staff representing via omission that the work had not yet started.

According to Hogan Lovells:

“On July 1, 2020 ... [T]he literary agency represented that the then-Governor already had 70,000 words written.”¹⁹

“On July 10, 2020 ...the then-Governor told WAMC Northeast Public Radio with Alan Chartock, ‘I am now thinking about writing a book.’”²⁰

“on July 16, 2020, the then-Governor entered into a contract with PRH [NAME]...A senior Executive Chamber official provided a rough draft manuscript to PRH that same day.”²¹

Furthermore, had JCOPE staff more thoroughly reviewed this matter, they would have found that a publisher had already been approached, and negotiations had already started:

“The letter [requesting JCOPE approval] also stated that Governor Cuomo ‘will select’ a publisher, which was true from a literal standpoint, but misleadingly suggested that the decision had not yet been made, when in reality negotiations with PRH [Penguin Random House Crown Publishing Group] were underway, and PRH’s internal emails later that day reflect their understanding that they were selected as the publisher.”²²

Ultimately, the Hogan Lovells report concluded:

“we agree with the conclusion in the JCOPE Notice that Governor Cuomo ‘misused the power and authority of his office to create, market and promote for enormous personal profit a work that not only was derivative of his official duties but could only have been brought into existence and completed on schedule through the ...assistance of a group of Executive Chamber and other state officials.’”²³

And as a result, that:

“JCOPE failed to assert itself as a watchdog agency against the Governor.”²⁴

¹⁹ Davis Polk, p. 28.

²⁰ Davis Polk, p. 28.

²¹ Davis Polk, p. 30.

²² Hogan Lovells, p. 12.

²³ “Investigative Report on JCOPE’s Approval of Governor Cuomo’s July 10, 2022 Outside Activity Request,” Hogan Lovells US LLP, July 1, 2022.

²⁴ Hogan Lovells, p. 4.

Former Governor's Cuomo's compliance.

As mentioned, there is a nine-point standard that the former Governor was required to follow in order to adhere to JCOPE's decision to allow royalties. Some key provisions of that standard include:

“The book must be written on the Governor's own time and not on State time;”

“No State property, personnel or other resources may be utilized for activities associated with the book;”

“The subject matter must be sufficiently unrelated to the Governor's official duties so that authorship or the advice or material produced in the book cannot be viewed as part of the Governor's job;”

The Assembly report highlighted actions that were at odds with the above restrictions. In its report, Davis Polk found that public resources had been used in the writing of the book and the negotiations over its publication:

“Evidence obtained by our investigation demonstrates that junior members of the Executive Chamber worked on the Book and the work was not voluntary. Junior staff members were asked by senior Executive Chamber officials to perform tasks that were related to the Book as part of their regular course of work.”²⁵

“Certain senior members of the former Governor's Executive Chamber and other New York State officials worked extensively on the book... That senior official sent or received over 1,000 emails regarding the Book, from July to December 2020.”²⁶

“In a text message to a colleague in early August 2020, that state official expressed frustration for the time spent on the Book that could have been spent dedicated to work-related tasks responding to the pandemic.”²⁷

The Assembly report also identified a potential violation dealing with promotion of the book:

“The then-Governor was also involved in promoting the book. His contract guaranteed he would be available for ten days of media and appearances related to the Book, and at least one such appearance was scheduled during a typical workday.”²⁸

As mentioned earlier, our organizations are in no position to verify the findings of the two official reports cited in this letter. However, those works contain serious allegations that impact both JCOPE staff, the former Governor, and perhaps his staff as well.

²⁵ “Impeachment Investigation Report to the Judiciary Committee, Chair Charles Lavine and the New York State Assembly Judiciary Committee,” prepared by Davis Polk & Wardell LLP, November 22, 2021, p.26.

²⁶ Davis Polk, p. 26.

²⁷ Davis Polk, p. 33.

²⁸ Davis Polk, p. 36.

If you determine after a due process hearing to resolve any triable issues of fact that such allegations are true, you must act. Not only to enforce the law, but to establish new precedents for ethics agencies to follow. As the Hogan Lovells report stated:

“It follows from these observations that any successor agency that is created to replace JCOPE should put in place mechanisms to make it more difficult for statewide elected officials to quickly push ethically questionable or problematic requests through the approval process.”²⁹

Our organizations look forward to your response.

Sincerely,

Blair Horner
Executive Director
N.Y. Public Interest Research Group

Betsy Gotbaum
Executive Director
Citizens Union

Susan Lerner
Executive Director
Common Cause/NY

John Kaehny
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²⁹ Hogan Lovells, p. 4.