

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

DONALD J. TRUMP, individually and on behalf of
THE TRUMP ORGANIZATION,
Petitioners,

For a Judgment Under Article 78 of the CPLR,

Index No. 4134-14
RJI No. 01-14-ST5994

v.

NEW YORK STATE JOINT COMMISSION ON
PUBLIC ETHICS,
Respondent.

**RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO
ARTICLE 78 PETITION AND IN SUPPORT OF MOTION TO DISMISS**

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Petitioners Donald J. Trump and the Trump Organization (collectively "Trump Parties") bring this action pursuant to Article 78 of the New York Civil Practice Law and Rules seeking an order compelling respondent New York State Joint Commission on Public Ethics ("Commission") to (1) vote whether to commence an investigation of a complaint filed by the Trump Parties alleging that New York State Attorney General Eric T. Schneiderman ("Mr. Schneiderman") violated state ethics laws, and (2) formally notify the Trump Parties of its decision. This memorandum is submitted in opposition to that petition and in support of the Commission's motion to dismiss. For the reasons which follow, it is respectfully requested that the petition be denied and dismissed.

I. Summary of Argument

First, the Trump Parties have failed to demonstrate their entitlement to the requested relief. It is beyond argument that Article 78 relief in the form of mandamus is an "extraordinary remedy" which is available only to compel performance of a ministerial duty. Here, however, the Trump Parties seek an order compelling the Commission to vote on whether to open an investigation against a state-wide elected official. This act, by its very nature, involves the exercise of official discretion and judgment of the Commission. Thus, the Trump Parties have not established – and cannot establish – a basic requirement for the requested relief: that the action is one to compel the performance of a purely ministerial act.

Second, mandamus may be granted only upon a showing of a "clear legal right" to the requested relief. It is clear that a complainant has no statutory right to compel the

Commission to take any particular action with respect to a complaint filed with the Commission. The Trump Parties do not prove or even claim otherwise.

Third, the statute governing Commission proceedings provides that all matters related to the issues raised here by the Trump Parties are confidential. The requirements of confidentiality, mandated by statute and enforced by criminal and civil sanctions, necessarily prohibits the relief the Trump Parties seek. The Trump Parties have failed to demonstrate any basis for a court to find otherwise and compel the Commission to provide the Trump Parties with the notice they seek.

II. Background

A. The Commission

As described in the affirmation of Monica J. Stamm, Esq., the Commission was created in 2011 by the Public Integrity Reform Act, Chapter 399 of the Laws of 2011, to consolidate into one body ethics oversight of those involved in the functions of state government previously performed by multiple bodies. See N.Y. Exec. Law § 94(1). As relevant here, the Commission's jurisdiction includes the Office of the New York State Attorney General. Id. (jurisdiction includes "statewide elected officials"). Among its duties, the Commission is charged with receiving, investigating, and taking action on complaints that state officials and employees within its purview have violated ethical requirements of the New York State Public Officers Law. Id. at §§ 94(9)(g), 13, 14

The Commission consists of fourteen members appointed for terms of up to five years by specified elected state officials. Exec. Law § 94(2)-(5). The Governor and

Lieutenant Governor select six members, including the Chairperson, three of whom must be enrolled members of the opposing political party; three each are selected by the Temporary President of the Senate and the Speaker of the Assembly; and one each is selected by the Minority Leaders of the Senate and Assembly. Id. at § 94(2). The Commission is supported by a staff consisting of an Executive Director, counsel, investigators, and others. Id. at § 94(9)(a) & (b).

Any person may file a complaint with the Commission alleging a violation of state ethics laws. As required by Executive Law § 94(18), the Commission has published on its website procedures, forms, and guidance for filing a complaint. See New York State Joint Comm'n on Pub. Ethics, Sworn Complaint Procedures, <http://www.jcope.ny.gov/complaint/complaintguidelines.html> (last visited Oct. 1, 2014).

In accordance with Executive Law § 94, the Commission proceeds on a written complaint against any individual in two stages.¹ As explained in more detail below, in the first, or preliminary, stage, the Commission must decide whether to commence an investigation into the allegations in the complaint to determine whether a substantial basis exists to conclude that a violation of law has occurred. See Exec. Law § 94(13)(a). In the second stage, after undertaking a “substantial basis” investigation, the Commission must determine whether to find that a substantial basis exists to conclude that a violation of law has occurred and issue a substantial basis investigation report setting forth its findings of fact and conclusions of law. Id. at § 94(14-b). Upon a finding that a violation

¹The Commission may also commence an investigation on its own initiative without a sworn complaint. Exec. Law § 94(13)(a).

has occurred, the Commission may impose certain enumerated penalties or, in the case of members of the Legislature or its employees, forward its report and evidence to the Legislative Ethics Commission for action by that body. Id. at § 94(14).

The issues raised by the Trump Parties here concern only the first, or preliminary, stage of an investigation. Section 94(13) provides, in relevant part, that upon receipt of a complaint which:

reveals a possible violation of [ethics laws,] the commission shall notify the individual in writing, describe the possible or alleged violation of such laws and provide the person with a fifteen day period in which to submit a written response setting forth information relating to the activities cited as a possible or alleged violation of law. The commission shall, within forty-five calendar days after a complaint . . . is received . . . , vote on whether to commence a full investigation of the matter under consideration to determine whether a substantial basis exists to conclude that a violation of law has occurred. The staff of the joint commission shall provide to the members prior to such vote information regarding the likely scope and content of the investigation, and a subpoena plan, to the extent such information is available. Such investigation shall be conducted if at least eight members of the commission vote to authorize it. . . .

Exec. Law § 94(13).

Thus, upon receipt of a complaint, the Commission must first determine whether the complaint states a possible violation of ethics laws. If the complaint sufficiently alleges such a violation, the Commission must then provide written notice of the complaint and the ethical laws allegedly violated to the subject of the complaint and allow that individual to submit a written response within fifteen days. The Commission must then vote on whether to proceed with a full investigation of the complaint and provide staff of the Commission with the authority to issue subpoenas and take testimony in accordance with a proposed investigation plan. Id.

For an investigation to proceed, at least eight members of the Commission must vote to authorize the investigation and where, as here, the subject of the complaint is a statewide elected official, at least two of the affirmative votes must be by members (1) appointed by the Governor or Lieutenant Governor, and (2) enrolled in the same political party as that of the subject of the complaint if such person is enrolled in a political party. Id. If the Commission determines to commence an investigation, it must so notify the subject of the complaint in writing and afford that individual an opportunity to be heard by the Commission. Id.

At this stage of the investigation, the statute makes abundantly clear that all proceedings are confidential. Exec. Law § 94(13)(b) (“All of the foregoing proceedings shall be confidential.”). The statute explicitly provides for notice to a complainant in two circumstances only. Section 94(13)(b) states that “[i]f the commission determines at any stage that there is no violation or that any conflict of interest has been rectified, it shall so advise the individual and the complainant, if any....” Id. The statute is similarly specific that the existence of an investigation can only be made public after the Commission votes to issue a substantial basis investigation report or enter into a settlement agreement. Id. at § 94(14-a, 14-b, 14-c, 19)

This requirement of confidentiality is reinforced in section 94(9-a), which provides in pertinent part:

(a) When an individual becomes a commissioner or staff of the commission, that individual shall be required to sign a non-disclosure statement.

(b) Except as otherwise required or provided by law, testimony received or any other information obtained by a commissioner or staff of the commission shall not be disclosed by any such individual to any person or entity outside the commission during the pendency of any matter. Any confidential communication to any person or entity outside the commission related to the matters before the commission may occur only as authorized by the commission.

(c) The commission shall establish procedures necessary to prevent the unauthorized disclosure of any information received by any member of the commission or staff of the commission. Any breaches of confidentiality shall be investigated by the inspector general and appropriate action shall be taken. Any commissioner or person employed by the commission who intentionally and without authorization releases confidential information received by the commission shall be guilty of a class A misdemeanor.

Thus, Commission members and staff are specifically admonished to refrain from disclosing any matters before or information obtained by the Commission and are subject to sanctions, including criminal prosecution, for breaches of that obligation. The Commission's website notifies those who file complaints of the confidentiality as follows:

5. Confidentiality - A sworn complaint upon filing becomes a confidential record of the Commission and remains so unless and until the Commission concludes there was a violation of the . . . law(s) and issues a Substantial Basis Investigation Report ("SBIR") alleging such violation. At such time, the complaint or facts therein may be made part of the [SBIR] which may become a public document pursuant to Executive Law §94(19)(a)(6).

New York State Joint Comm'n on Pub. Ethics, Sworn Complaint Procedures,

<http://www.jcope.ny.gov/complaint/complaintguidelines.html> (last visited Oct. 1, 2014).

Further underscoring the confidentiality of Commission proceedings, the statute exempts the Commission from the requirements of both the Open Meetings Law, N.Y. Pub. Off. Law art. 7, and the Freedom of Information Law ("FOIL"), Pub. Off. Law art. 6, which typically provide for public access to proceedings and records of state agencies. See Exec. Law § 94(18, 19); see also John v. New York State Ethics Comm'n, 178 A.D.2d 51, 54-55 (3d Dep't 1992) (upholding exemption from FOIL of one of the Commission's predecessor agencies).

B. The Trump Parties' Complaint

According to the Trump Parties' petition, on December 3, 2013, the Trump Parties filed a sworn complaint with the Commission. The complaint, which is attached to the petition,² alleged that Mr. Schneiderman solicited campaign contributions and other considerations from the Trump Parties while the Office of the Attorney General was investigating and prosecuting a civil fraud action against the Trump Parties and related entities. The complaint asserts that, if proven, Mr. Schneiderman's conduct violated Public Officers Law § 74, which generally proscribes state officials and employees from acting where conflicts of interest exist.

In this action, the Trump Parties contend that under Executive Law § 94(13)(a), the Commission was required to vote on whether to commence a substantial basis investigation within forty-five days of receiving that complaint. Id. at ¶ 13. The Trump Parties further contend that, upon information and belief, the Commission has failed to conduct such a vote. Id. at ¶ 16. The Trump Parties now seek to compel the Commission to vote on whether to commence a substantial basis investigation and to notify the Trump Parties of the outcome of that vote. Id. at ¶ 13-18.

² Given the requirements of confidentiality described above, the Commission cannot confirm or deny the existence or receipt of a complaint from the Trump Parties. References herein to the Trump Parties' complaint and attachments are to those documents filed with their petition in this proceeding.

III. Argument

Point 1: The Trump Parties have failed to demonstrate that the vote they seek is “a purely ministerial act which does not involve the exercise of official discretion or judgment.”

Under Article 78, a party may seek an order compelling a state entity to act, inter alia, where “the body or officer failed to perform a duty enjoined upon it by law” N.Y. C.P.L.R. § 7803(1). In an Article 78 proceeding which is, as here, in the nature of mandamus, the petitioner bears the initial burden to demonstrate an entitlement to the relief sought. Matter of Henriquez v. NYS Dep’t of Corr., 61 A.D.3d 1191, 1192 (3d Dep’t 2009) The “extraordinary remedy” of mandamus is available “in limited circumstances only to compel the performance of a purely ministerial act which does not involve the exercise of official discretion or judgment, and only when a clear legal right to the relief has been demonstrated.” Matter of Horowitz v. New York City Police Dep’t, 82 A.D.3d 887, 887-88 (2d Dep’t 2011) (emphasis added) (collecting cases). As the Court of Appeals has stated, “the standards governing the availability of article 78 relief in the nature of mandamus are [] clear. It will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion.” Matter of Crain Communications, Inc. v. Hughes, 74 N.Y.2d 626, 628 (1989) (internal quotation marks omitted) (citing Matter of Gimprich v. Bd. of Educ., 306 N.Y. 401, 406 (1953) (other citation omitted)).

The Court of Appeals has further explained that “[a] discretionary act involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.” N.Y. Civ. Liberties Union v. State, 4 N.Y.3d 175, 184 (2005)

(internal quotation marks and citation omitted). Ministerial acts are clerical or perfunctory in nature, require no exercise of judgment or discretion, and are limited to, for example, mathematical computations. See, e.g., Matter of Bottom v. Goord, 96 N.Y.2d 870, 872 (2001) (upholding grant of Article 78 mandamus relief to inmate for calculation of credit on sentence for time previously served).

A vote by the Commission is not a purely ministerial act. Rather, the Commission must exercise discretion to determine whether and how to proceed on a complaint based on its considered judgment in light of the particular circumstances before it as to both the substance and timing of the vote. The Commission necessarily exercises discretion in determining when and whether to authorize a particular matter for investigation, an action far removed from a “purely ministerial act.” It requires those voting to evaluate evidence in light of applicable law and to insure that Commission procedures have been conducted fully and fairly. The Commission must determine, for example, whether sufficient information is available, whether the subject of a complaint requires, or should be granted, more time to respond to allegations before a vote is taken, and whether a subject's response creates a need for further fact gathering or legal analysis. Cf., e.g., Matter of Ward v. Mohr, 109 A.D.3d 694, 696 (4th Dep't 2013) (holding that certification of ballot by election commissioner required exercise of discretion as to eligibility of candidates and was not, therefore, purely ministerial).

Therefore, the Commission may authorize interim actions such as extensions of time to accommodate the requests of subjects of investigations, or to conduct further evidentiary or legal analysis after receiving a subject's written response. Such

determinations by the Commission would be reasonable and entitled to deference. See Samiento v. World Yacht Inc., 10 N.Y.3d 70, 79 (2008) (“[T]he [agency]’s interpretation of a statute it is charged with enforcing is entitled to deference. The construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld.”); see also Matter of O’Connor v. Ginsberg, 106 A.D.3d 1207, 1210 (3d Dep’t 2013) (“The interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference and should be upheld if not irrational or unreasonable.”).³

The Trump Parties have not and cannot demonstrate that the vote they seek is a purely ministerial act subject to the extraordinary relief of mandamus under Article 78 and, therefore, the petition should be denied and this proceeding dismissed.

Point 2: The Trump Parties have no “clear legal right” to compel the vote and notification they seek.

The Trump Parties cannot demonstrate, as they must, a “clear legal right” to compel the Commission to conduct a vote or to notify the Trump Parties of its decision. See Matter of Horowitz, 82 A.D.3d at 887-88. Executive Law § 94 contains no provision permitting a complainant to compel any particular action by the Commission. Moreover, pursuant to Executive Law § 94(13)(b), the very fact that a vote to commence a substantial basis investigation has occurred is confidential. Thus, the notification the Trump Parties seek is patently precluded by statute.

³ Executive Law § 94(17)(b) grants the Commission the “power and duty to ... administer and enforce all the provisions of this section....”

The Legislature has not granted a complainant a right to compel the Commission to take any particular action following receipt of a complaint. Cases have consistently held that absent express statutory language, complainants for and subjects of investigations have no clear legal right to compel authorities to take any particular action in an investigation. See Exec. Law §94(14-b); see also Matter of Houston v. D'Emic, 82 A.D.3d 1099, 1099-1100 (2d Dep't 2011) (dismissing Article 78 petition seeking to prohibit a pending criminal prosecution and to compel an investigation of the prosecutor); Matter of Brown v. Apeiman, 241 A.D.2d 279, 281-82 (2d Dep't 1998) (granting prosecutor's Article 78 petition to overturn a pre-indictment order of the trial court allowing the subject of an investigation to participate in investigators' forensic examinations where no clear legal right to participate was shown); Matter of Pirro v. LaCava, 230 A.D.2d 909, 910-11 (2d Dep't 1996) (granting Article 78 petition of prosecutor to overturn trial court's orders permitting pre-indictment discovery to subject of criminal investigation on the ground that such discovery was nowhere authorized by statute); Matter of Grzyb v. Constantine, 182 A.D.2d 942 (3d Dep't 1992) (dismissing Article 78 petition for failure to state a cause of action where petitioner sought to compel police to conduct further investigation of his criminal complaint of election law violations after proceedings were terminated by police following preliminary investigation).

When the Legislature has provided only limited access to investigative information, courts have consistently deferred to that determination. In Matter of Harper v. Angiolillo, 89 N.Y.2d 761 (1997), the petitioner had been indicted for criminal offenses, but the Westchester County Court dismissed the indictment for insufficient evidence upon a

review of the grand jury minutes. The petitioner subsequently brought a civil action alleging false arrest and malicious prosecution, and sought disclosure of the complete records of the District Attorney's office. When the request was denied, the petitioner brought an Article 78 proceeding to compel disclosure, pursuant to Criminal Procedure Law § 160.50 which provides, in pertinent part, that "[U]pon the termination of a criminal action or proceeding against a person in favor of such person ... all official records and papers ... shall be sealed ... [and] shall be made available to such person....".

The Court of Appeals affirmed denial of the Article 78 petition and noted the high bar to establish entitlement to the "extraordinary remedy" of mandamus:

[T]he nature of our review in this appeal is circumscribed by the form of action brought by the petitioner – an article 78 proceeding in the form of mandamus to compel. Mandamus, of course, is an extraordinary remedy that, by definition, is available only in limited circumstances. Indeed, mandamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought.

Matter of Harper, 89 N.Y.2d at 765 (quotation marks and citations omitted). The Court held that petitioner had failed to demonstrate a "clear legal right" to the complete records because with CPL § 160.50, the Legislature had balanced

[t]he right of a former defendant ... against the interest of various law enforcement agencies and representatives in the same materials. *Given the absence of a clear and unequivocal expression of intent from the Legislature to dispense with existing limitations on the ability of a former defendant to obtain unrestricted access to law enforcement records, petitioner here has failed to demonstrate a clear legal right to the records he seeks.*

Id. at 767-68 (emphasis added). The Court found that because the statute specified those records to which the petitioner was entitled, he had no clear legal right to any others.

Id.

Here, the Legislature has expressed its intent that before a final decision is made, a complainant shall not control, participate, or be notified in any way of the status of any investigation. ~~In light of the confidentiality provisions in section 94, the Trump Parties cannot discover whether the Commission has voted on their complaint or taken any other action with respect to it. They may speculate or infer from other facts what they believe has or has not occurred before the Commission, but they can do no more than they have done here – allege “upon information and belief” that the Commission has failed to vote on their complaint. See Pet. at ¶ 16 (alleging that “upon information and belief, the Commission has never even voted on the Complaint. . .”).~~

This is not to say, by inference or otherwise, that the Commission has or has not voted whether to conduct a full investigation on the Trump Parties' complaint. The Trump Parties have not, and cannot, meet their burden of alleging as a fact that the Commission has failed to take the required vote, and in fact, the Trump Parties fail to allege any basis or source for their information or belief. If the Trump Parties are found to have demonstrated a clear legal right based on such vague and unsupported allegations, the Trump Parties will be able to discover by an Article 78 petition what is otherwise prohibited from disclosure by the strict confidentiality rules of section 94 – the status of proceedings on their complaint, a fact not even the subject of a complaint may be entitled to learn.

As discussed above, the Legislature's intention to maintain the confidentiality of Commission proceedings is further supported by the fact that the Commission is exempt

from producing documents under FOIL, Pub. Off. Law art. 6, and the Open Meetings Law, Pub. Off. Law art. 7. See Exec. Law § 94(19); Thus, not only is the Commission barred from disclosing matters concerning its proceedings, but those outside the Commission ~~are barred from compelling Commission disclosure by lawful means.~~

Given the absence of any clear legal right to compel the vote sought here by the Trump Parties, confirmed by the confidentiality protecting the Commission's proceedings, and the extraordinary relief sought here, no basis exists for granting the petition or the relief requested. It is respectfully submitted, therefore, that the petition should be denied and dismissed in its entirety on this ground as well.

Point 3: This Court should not compel the Commission to disclose to the Trump Parties information that the Legislature has determined is confidential.

As discussed above, Executive Law § 94 contains extensive provisions to ensure the confidentiality of the Commission's proceedings and investigations. Moreover, Executive Law § 94 requires the Commission to provide notice of a decision to a complainant in only two circumstances: (1) "[i]f the commission determines at any stage that there is no violation or that any potential conflict of interest violation has been rectified, it shall so advise the individual and the complainant, if any..." Executive Law § 94(13)(b); and (2) if the Commission proceeds with a full ("substantial basis") investigation and concludes that sufficient evidence has been shown that an individual has committed the alleged misconduct, the Commission's report on that matter will be made public. Id. at § 94(19)(a)(6). Other than these two circumstances, the Commission has no legal obligation to provide the Trump Parties with notice of any of its decisions. See Matter of

O'Connor, 106 A.D.3d at 1207 (denying Article 78 petition of subject of investigation against predecessor of Commission to limit subpoena power and to compel agency to hold a hearing where there is no express right in the Executive Law).

The Legislature was careful to ensure that the proceedings and investigations of the Commission were not publicly disclosed, including communications to anyone outside the Commission. The confidentiality of Commission proceedings, mandated by statute and enforced by sanctions for violations, necessarily means that no party can compel the Commission to reveal what is confidential, whether by informal request, an Article 78 proceeding, or otherwise. The Trump Parties are improperly attempting to use Article 78 not to compel a ministerial act, but, rather, as a vehicle to override the clear intent of the Legislature.⁴

The strict confidentiality requirements of section 94 serve purposes critical to the Commission's fulfillment of its duties. First, confidentiality encourages potential whistleblowers to report possible violations without fear of retribution. Second, confidentiality protects the subjects of complaints and investigations from public stigma

⁴The Commission is not, however, without oversight. First, oversight is embedded in the very structure of the Commission. Its fourteen members are appointed in varying numbers, none a majority, by five different state officials. Exec. Law § 94(2). The structure guarantees that at least five members of the Commission will always be appointed by members of an opposing political party, although currently, seven members were so appointed. The voting requirements of the Commission also frequently require that a minimum of two members of an opposing political party vote in favor of any investigation or finding of misconduct before such a vote can be effective even if a majority of members otherwise supports the vote. See, e.g., id. at §§ 94(13)(a), (14-b). This structure affords internal oversight of the Commission's proceedings simultaneously by members with opposing political interests. Second, the Commission is required to file annual reports with the Governor and the Legislature summarizing its activities during that year. Id. at § 94(9)(l). Third, the Commission was created by and functions under a statute. Exec. Law § 94. Any dissatisfaction with or concerns about the confidentiality of Commission proceedings or Commission activities can always be addressed by the Governor and the Legislature by new or amending legislation. Indeed, the creation of the Commission, a successor to multiple prior ethics oversight agencies, exemplifies the power of the Governor and the Legislature to act in this manner.

where they may otherwise be exonerated or never charged. Individuals, particularly those subject to the jurisdiction of the Commission, rely on their reputations with the public for integrity and honest services. There are those, including the political adversaries of elected officials, who would use the mere fact of allegations of misconduct or the Commission's consideration or investigation of such allegations to undermine subjects' public reputations even where, ultimately, no charges are brought or, if brought, the subject is exonerated. The rule of confidentiality serves to protect the subjects of investigations from such unfair consequences where remediation of a reputation can never be fully achieved. Cf., In re Dist. Att'y of Suffolk County, 58 N.Y.2d 436, 443 (1983) (noting as to the similar confidentiality of grand jury proceedings that "it is not open to question that one of the goals advanced by the time-honored Grand Jury secrecy principle is the protection of an innocent accused from unfounded accusations if in fact no indictment is returned") (internal quotation marks and citation omitted). Finally, confidentiality protects the Commission, its members, and its staff from attempts to exert improper influence on Commission proceedings. Where complaints or investigations are prematurely disclosed to the public, Commission members and staff may find themselves subjected to threats, inducements, or other efforts by those attempting to affect the outcome of a matter. Confidentiality serves to protect the integrity of Commission proceedings in this way as well.

Thus, the relief sought by the Trump Parties is precluded under Executive Law § 94 and the Trump Parties' petition should be denied and dismissed on this ground as well.


IV. Conclusion

For the reasons stated above, it is respectfully requested that the Trump Parties' petition be denied and dismissed.

DATED: October 8, 2014

Respectfully submitted,

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