



STATE ETHICS COMMISSION

Hon. William F. Lang, Chair
Jeff Baker, Member
Stuart M. Bluestone, Member
Hon. Garrey Carruthers, Member
Ronald Solimon, Member
Judy Villanueva, Member
Frances F. Williams, Member

Resolution No. 4: Investigations of Referrals and Informal Complaints and Initiation of Civil Actions

WHEREAS, THE NEW MEXICO STATE ETHICS COMMISSION
("Commission") met virtually, on December 4, 2020, at 9:00 a.m.;

WHEREAS, the Commission has the power to investigate violations of the ethics laws pursuant to the State Ethics Commission Act, the Governmental Conduct Act, the Financial Disclosure Act, the Gift Act, the Campaign Reporting Act, the Procurement Code, and the Voter Action Act, *see* NMSA 1978, §§ 1-19-34.8(A), 1-19A-15.1(A), 10-16-14, 10-16-18(B), 10-16A-6, 10-16A-8, 10-16B-5 10-16G-10(J), 10-16G-13(C), and 13-1-196.1 (2019);

WHEREAS, the Commission desires to adopt a policy that ensures the fair and uniform handling and disposition of its investigation of potential violations of ethics laws referenced above, and to ensure that a referral for impeachment or the initiation of a civil action is based on evidence that, if credited, would be sufficient to impeach or to award civil relief;

NOW, THEREFORE, BE IT RESOLVED by the New Mexico State Ethics Commission adopts the following **Policy for Investigations of Referrals and Informal Complaints and Initiation of Civil Actions**:

1. Authority.

{1} The State Ethics Commission investigates and enforces violations of the Ethics Laws in two ways: (1) upon receiving a sworn complaint alleging violations against a respondent, *see* NMSA 1978, § 10-16G-10(A)-(K); or (2) by “fil[ing] a court action to enforce the civil compliance provisions” of the State Ethics Laws. *See* NMSA 1978, § 10-16G-9(F). In other words, the Commission has the authority to investigate and adjudicate reactively (in response to a sworn complaint) or proactively on its own initiative.

{2} Provisions of the State Ethics Commission Act, the Governmental Conduct Act, the Gift Act, the Campaign Reporting Act, and the Voter Action Act confirm the Commission’s independent authority to investigate violations those acts outside of the Administrative Complaint process:

{3} State Ethics Commission Act

NMSA 1978, Section 10-16G-10(J) permits the commission to “petition the [district] court for a subpoena for the attendance and examination of witnesses or for the production of books, records, documents or other evidence reasonably related to an investigation.” Section 10-16G-13(C) further provides that “complaints, reports, files, records and communications collected *or generated* by the commission, hearing officer, general counsel or director that pertain to alleged violations” are confidential.

{4} Governmental Conduct Act

- Under NMSA 1978, § 10-16-14(A), “The state ethics commission may investigate suspected violations of the Governmental Conduct Act.”
- Under NMSA 1978, § 10-16-14(C), “If the state ethics commission determines that there is sufficient cause to file a complaint to remove from office a public officer removable only by impeachment, the commission shall refer the matter to the house of representatives of the legislature.”
- Under NMSA 1978, § 10-16-14(E), “Subject to the provisions of this section, the provisions of the Governmental Conduct Act may be enforced by the state ethics commission. . . . Enforcement actions may include seeking civil injunctive or other appropriate orders.”
- Under NMSA 1978, § 10-16-14(E), “The state ethics commission may institute a civil action in district court . . . if a violation has

occurred or to prevent a violation of any provision of the Governmental Conduct Act. Relief may include a permanent or temporary injunction, a restraining order or any other appropriate order, including an order for a civil penalty of two hundred fifty dollars (\$250) for each violation not to exceed five thousand dollars (\$5,000).”

{5} Financial Disclosure Act

- Under NMSA 1978, § 10-16A-6(A), “The state ethics commission and the secretary of state may conduct thorough examinations of statements and initiate investigations to determine whether the Financial Disclosure Act has been violated.”
- Under NMSA 1978, § 10-16A-6(F), “The secretary of state may refer a matter to the state ethics commission, attorney general or a district attorney for a civil injunctive or other appropriate order or enforcement.”
- Under NMSA 1978, § 10-16A-8(B), “The state ethics commission may institute a civil action in district court or refer a matter to the attorney general or a district attorney to institute a civil action in district court if a violation has occurred or to prevent a violation of any provision of the Financial Disclosure Act. Relief may include a permanent or temporary injunction, a restraining order or any other appropriate order, including an order for a civil penalty of two hundred fifty dollars (\$250) for each violation not to exceed five thousand dollars (\$5,000).”

{6} Gift Act

- Under NMSA 1978, § 10-16B-5(A), “The state ethics commission may initiate investigations to determine whether the provisions of the Gift Act have been violated.”

{7} Campaign Reporting Act

- Under NMSA 1978, § 1-19-34.8(A), “the state ethics commission shall have jurisdiction to investigate . . . a [written] complaint alleging a civil violation of a provision of the Campaign Reporting Act in accordance with the provisions of that act[.]”

{7} Voter Action Act

- Under NMSA 1978, § 1-19A-15.1(A), “the state ethics commission shall have jurisdiction to investigate . . . a [written] complaint alleging a civil violation of a provision of the Voter Action Act in accordance with the provisions of that act[.]”

{8} Procurement Code

- Under NMSA 1978, § 13-1-196.1, “[t]he state ethics commission may investigate complaints against a contractor who has a contract with a state agency or a person who has submitted a competitive sealed proposal or a competitive sealed bid for a contract with a state agency. The state ethics commission may impose the civil penalties authorized in Sections 13-1-196 through 13-1-198 NMSA 1978 pursuant to the provisions of those sections.”

These statutes and others make it clear that the Commission has authority to initiate its own investigations of potential ethics violations, petition the district court to issue subpoenas in furtherance of an investigation, and, where appropriate, file an action in the district court to enforce the relevant provisions of the statutes within its jurisdiction.

2. Objective.

{1} This Policy’s objective is the fair and uniform handling and disposition of alleged violations of ethics laws received by the Commission that are not in the form of either (i) an administrative complaint or (ii) a referral within the scope of a joint powers agreement that is treated as an administrative complaint.

3. Limitations.

{1} This Policy applies to the Commission, Executive Director, General Counsel, other Commission staff, and Commission contractors. It does not give any enforceable rights to others.

4. Definitions.

{1} As used in this Policy,

- a. “Administrative complaint” means an allegation of an actual or potential violation of ethics laws in a sworn and notarized complaint, as fully described in NMSA 1978, Section 10-16G-2(D) (2019).
- b. “Commission” means the State Ethics Commission.
- c. “Commission staff” refers to the State Ethics Commission’s executive director or authorized agents. It does not include the general counsel.
- d. “Ethics laws” means the anti-donation clause and state statutes within the Ethics Commission’s jurisdiction.
- e. “Government agency” means an instrumentality of the United States or an agency of a state, county, or municipal government.
- f. “Person” means any natural person or organization that is not a government agency.
- g. “Referral” means any allegation of an actual or potential violation of ethics laws received by the Commission or its staff from a government agency.
- h. “Informal complaint” means an allegation of an actual or potential violation of ethics laws from a person, which is not an administrative complaint.

{2} All other terms used in this policy are given the definition provided by the State Ethics Commission Act, NMSA 1978, §§ 10-16G-1 to -16 (2019) or ordinary usage.

5. Administrative complaints; referrals.

{1} Administrative complaints will be handled in the manner set forth in the State Ethics Commission Act and the Commission’s regulations for administrative complaints and adjudications. *See* §§ 10-16G-9 to -16; 1.8.3 NMAC. A referral that sufficiently identifies (i) the complainant; (ii) the respondent; and (iii) the factual basis for alleged violations of the Ethics laws may be treated as an administrative complaint, even if it is not sworn and notarized. *See* NMSA 1978, §§ 1-19-34.8(A)(2); 1-19A-15.1(A)(2); 2-11-8.3(A)(2); 10-16A-6(E) (permitting referrals of complaints received by other state agencies); *see also* 1.8.3.9(A)(5) (“The commission may proceed with any complaint, irrespective of whether the complaint is notarized, that is forwarded to the commission by another state agency, or by the legislature or a legislative committee . . . according to the terms of any agreement for shared jurisdiction between the commission and the referring agency or the legislative body . . .”). All other referrals will be handled in the same manner as informal complaints pursuant to the terms of this Policy.

{2} An administrative complaint that is voluntarily dismissed by the complainant before the Commission has an opportunity to act on the complaint may be handled as an informal complaint pursuant to the terms of this Policy.

6. Assessments by Commission staff.

{1} Assessments. Commission staff may assess whether a referral or an informal complaint alleges violations of laws that are (i) within the Commission's jurisdiction and (ii) supported by sufficient evidence to support a sworn affirmation that a violation of the laws within the Commission's jurisdiction has occurred. During an assessment, Commission staff may seek information, proactively or in response to investigative leads, relating to activities constituting violations of the ethics laws. Assessments may result in (i) a request for the Commission's approval to commence a civil action; (ii) an investigation pursuant to terms of this Policy; or (iii) a determination of no further action.

{2} Policy. Detecting and preventing violations of ethics laws is preferable to allowing violations to occur. Hence, assessments may be undertaken proactively with such objectives as detecting violations of ethics laws and obtaining information on individuals, groups, or organizations of possible investigative interest, without prior approval by the Commission.

{3} Executive Director approval. Before initiating or approving an assessment, the Executive Director must determine whether (i) the assessment is based on factors other than the exercise of First Amendment activities or the race, ethnicity, national origin, religion, other protected status of the subject, or a subject's political party membership or political affiliation; and (ii) the assessment is an appropriate use of personnel and financial resources.

{4} Scope. In making an assessment, Commission staff may seek and review information that is available to the public. For example, Commission staff may review public social media accounts and news media. Commission staff may also issue written requests for records under the Inspection of Public Records Act. In making an assessment, Commission staff may not interview witnesses, monitor communications, engage in undercover operations, or utilize compulsory process, other than written requests for records under the Inspection of Public Records Act.

{5} Memorandum. Regardless of whether an assessment results in a request for the Commission's approval to commence a civil action, an investigation, or no further action by the Commission staff, the Executive Director or his or her designee shall memorialize the results of the assessment.

{6} Notice to referring agency or informal complainant. The Executive Director may provide a written notice to the referring agency or informal complainant about the outcome of the Commission staff's assessment.

{7} No assessments based on protected conduct or status. Although a potential violation of the ethics laws need not be supported by a factual predication in order to merit an assessment by Commission staff, Commission staff should not perform an assessment based on arbitrary or groundless speculation. An assessment also may not be performed based solely on conduct that is protected by the First Amendment or on subject's race, ethnicity, national origin, religion, or other status protected under State or federal law. Nor may an assessment be performed based solely on a subject's political party membership.

7. Investigations.

{1} Investigations. Commission staff may initiate an investigation if there is an articulable factual basis that reasonably indicates that the subject of the investigation has or in the immediate future will violate the ethics laws. Investigations may result in (i) a request for the Commission's approval to commence a civil action; or (ii) a determination of no further action.

{2} Policy. Under the State Ethics Commission Act, "[t]he commission may file a court action to enforce the civil compliance provisions of [the Ethics laws]." *See* NMSA 1978, § 10-16G-9(F) (2019). When a referral or informal complaint is supported by an articulable factual basis, Commission staff may investigate to determine whether there is enough evidence for the Commission to initiate a civil action under Section 10-16G-9(F). A civil action initiated under Section 10-16G-9(F) does not require a sworn complaint or a final order from the Commission; in initiating such a complaint, the Commission is asking the district court to adjudicate alleged violations of the ethics laws. This Policy is designed to ensure that the Commission's decision to initiate a civil action is fair and impartial. In addition, a quorum of the Commission may instruct the Commission's staff to investigate a matter within the Commission's jurisdiction.

{3} Executive Director and General Counsel approval. Prior to initiating an investigation, Commission staff must obtain approval from the Executive Director and General Counsel. In deciding whether to approve the initiation of an investigation, the Executive Director and the General Counsel must approve written findings that (i) a sufficient factual predicate exists to support an investigation; (ii) the proposed investigation is a reasonable use of Commission resources and personnel; and (iii) a formal complaint from the source of the

referral or informal complaint is unlikely to be obtained or notice to the subject of the investigation is highly likely to result in the destruction of relevant evidence.

{4} Scope. In performing an investigation, Commission staff may take any action available to the Commission staff when making an assessment, interview witnesses, and, pursuant to the approval of a quorum of Commissioners, petition a district court for leave to serve subpoenas. *See* NMSA 1978, § 10-16G-10(J) (2019).

{5} Memorandum. Regardless of whether an investigation results in a civil action or in no further action by the Commission, the Executive Director or his or her designee shall summarize the results of an investigation in a confidential memorandum and send the summary to the Commission.

{6} Notice to referring agency or informal complainant. The Executive Director may provide a written notice to the referring agency or informal complainant about the outcome of the Commission staff's investigation.

8. Notice to Commission and Commission Chair

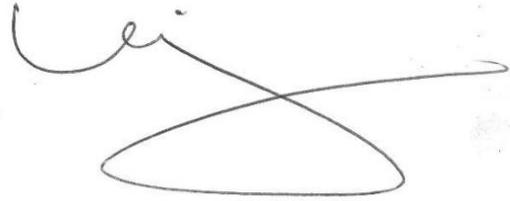
{1} The Executive Director shall alert the Commission Chair about the initiation of an investigation. The Executive Director shall also inform the Commission about investigations at Commission meetings in closed session.

9. Civil actions or referral for impeachment proceedings.

{1} Commission approval. To initiate a civil action under Section 10-16G-9(F) or to refer a matter for impeachment proceedings under Section 10-16-14(C), the Executive Director shall obtain approval from a quorum of Commissioners pursuant to Section 10-16G-3(H).

{2} Request for Commission approval; contents. In seeking approval from the Commission to initiate a civil action alleging violations of the ethics laws, the Executive Director shall provide a written explanation of the factual basis for the proposed civil action and the list of remedies sought. In seeking approval from the Commission to refer a matter to the house of representatives for impeachment proceedings, the Executive Director shall provide a written explanation of the factual basis for the proposed referral and explain why a referral under Section 10-16-14(C) is appropriate.

Adopted by the New Mexico State Ethics Commission this 4th day of December 2020.

A handwritten signature in black ink, appearing to read 'W. Lang', with a large, stylized loop at the end.

The Hon. William F. Lang
New Mexico State Ethics Commission
Chair

History: Adopted April 3, 2020; Amended December 4, 2020.