



STATE ETHICS COMMISSION MEETING

February 5, 2021

PUBLIC MEETING MATERIALS PACKET

TABLE OF CONTENTS

Agenda for February 5, 2021 Meeting	1
2020-12-04 Commission Meeting Minutes	4
Advisory Opinion 2021-01	10
Advisory Opinion 2021-02	14
Advisory Opinion 2021-03	19
Advisory Opinion 2021-04	24
Advisory Opinion 2021-05	34
Senate Bill 311 Lobbying and Ad Campaign Changes	38
Senate Bill 314 Post-Session Lobbying Reports	49
Report on Lobbyist Compensation	52



STATE ETHICS COMMISSION

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

Friday, February 5, 2021, 9:00 a.m. to 12:00 p.m.

Zoom Meeting

Location: Virtual Meeting Via Zoom

Join Zoom meeting through internet browser:

<https://us02web.zoom.us/j/82175843167?pwd=WkJzb3N6ZVlrd3RXbFJ6U3ZVeDZWdz09>

Meeting ID: 821 7584 3167

Online Meeting Passcode: 90bN6v

Join Zoom meeting telephonically: 669 900 9128 US

Telephone Passcode: 422523

COMMISSION MEETING

Chairman Lang Calls the Meeting to Order

1. Roll Call
2. Approval of Agenda
3. Approval of Minutes of December 4, 2020 Commission Meeting

Commission Meeting Items

Action Required

- | | |
|---|-----|
| 4. Advisory Opinion 2021-01
(Farris) | Yes |
|---|-----|

- | | |
|--|-----|
| 5. Advisory Opinion 2021-02
(<i>Branch</i>) | Yes |
| 6. Advisory Opinion 2021-03
(<i>Boyd</i>) | Yes |
| 7. Advisory Opinion 2021-04
(<i>Farris</i>) | Yes |
| 8. Advisory Opinion 2021-05
(<i>Boyd</i>) | Yes |

Upon applicable motion, Commission goes into Executive Session under NMSA 1978, §§ 10-15-1(H)(3) (administrative adjudicatory proceedings) & 10-15-1(H)(7) (attorney client privilege pertaining to litigation)

9. Discussions regarding Administrative Complaints
(*Farris & Boyd*)
- a. Administrative Complaint No. 2020-31
 - b. Administrative Complaint No. 2020-34, consolidated with No. 2020-35
 - c. Administrative Complaint No. 2020-39
 - d. Administrative Complaint No. 2021-01
10. Discussions regarding pending civil litigation
(*Farris & Boyd*)

Upon applicable motion, Commission returns from Executive Session

-
- | | |
|--|-----|
| 11. Actions on Administrative Complaints
(<i>Farris</i>) | Yes |
| <ul style="list-style-type: none"> a. Administrative Complaint No. 2020-31 b. Administrative Complaint No. 2020-34, consolidated with No. 2020-35 c. Administrative Complaint No. 2020-039 d. Administrative Complaint No. 2021-01 | |
| 12. Consideration of endorsement of lobbyist disclosure bills
(<i>Bluestone</i>) | Yes |
| 13. Consideration of endorsement of other bills affecting the Commission
(<i>Farris</i>) | Yes |

- | | |
|---|----|
| 14. Commission staff performance evaluations
(<i>Williams</i>) | No |
| 15. Public comment | No |
| 16. Determination of next meeting
(<i>Lang</i>) | No |
| 17. Adjournment | |

*For inquiries or special assistance, please contact Sonny Haquani at
Ethics.Commission@state.nm.us*

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Hon. William F. Lang
Jeffrey L. Baker
Stuart M. Bluestone
Hon. Garrey Carruthers
Ronald Solimon
Judy Villanueva
Frances F. Williams

STATE ETHICS COMMISSION

Commission Meeting Minutes of December 4, 2020 | 9:00pm-12:30pm
Virtually Via Zoom
[View Recording Here](#)

[SUBJECT TO RATIFICATION BY COMMISSION]

1. CALL TO ORDER AND ROLL CALL:

The meeting was called to order by Chair Lang. The roll was called; the following Commissioners were present:

Jeffrey Baker, Commissioner
Stuart Bluestone, Commissioner (joined shortly after minutes were approved)
Hon. Garrey Carruthers, Commissioner
Ronald Solimon, Commissioner
Judy Villanueva, Commissioner
Frances Williams, Commissioner
Hon. William Lang, Chair

2. APPROVAL OF AGENDA:

- Chair Lang sought a motion to approve the agenda. Commissioner Carruthers moved to approve the agenda; Commissioner Solimon seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the agenda was approved unanimously.

3. APPROVAL OF OCTOBER 2, 2020 COMMISSION MEETING MINUTES:

- Chair Lang sought a motion to approve the minutes of the October 2, 2020 Commission meeting. Commissioner Carruthers moved to approve the minutes; Commissioner Villanueva seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the minutes were approved unanimously.

4. APPROVAL OF PROPOSED CODE OF ETHICS FOR STATE AGENCIES 1.8.4. NMAC

- Director Farris provided an overview of the proposed code of ethics and the revisions made based on Commissioner feedback since the last Commission meeting.
- Chair Lang sought a motion to approve the proposed code of ethics for state agencies as drafted. Commissioner Carruthers moved to approve the proposed code; Commissioner Baker seconded.

After discussion on the motion, Chair Lang conducted a roll-call vote. All other Commissioners voted in the affirmative, and the proposed code was approved unanimously.

5. AMENDMENT TO RESOLUTION 4, INVESTIGATIONS OF REFERRALS AND INFORMAL COMPLAINTS AND INITIATION OF CIVIL ACTIONS.

- Director Farris provided an overview of the amendment and asked the Commission for a motion to adopt resolution 4 as amended.
- Chair Lang sought a motion to adopt resolution 4 as amended. Commissioner Carruthers moved to adopt resolution 4 as amended; Commissioner Baker seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the amended resolution 4 was adopted unanimously.

6. APPROVAL OF 2020 ANNUAL REPORT

- Director Farris provided an overview of the 2020 annual report and asked the Commission for a motion to submit the annual report to the Governor and the Legislature, including any changes to legislative recommendations as approved later in the meeting (item 13 *infra*).
- Chair Lang sought a motion to approve the 2020 annual report. Commissioner Bluestone moved to submit the annual report as stated above; Commissioner Villanueva seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the annual report was unanimously approved for submission.

7. RESOLUTION 6, AUTHORIZATION OF STAFF ACTION DURING 2021 LEGISLATIVE SESSION

- Director Farris provided an update on the upcoming legislative session and an overview of resolution 6, which authorizes staff action during the legislative session.
- Chair Lang sought a motion to approve resolution 6 as drafted. Commissioner Bluestone moved to approve resolution 6 as drafted; Commissioner Solimon seconded. After concluding a brief discussion, Chair Lang conducted a roll call vote. All Commissioners voted in the affirmative, and resolution 6 was approved unanimously.

8. COMMISSIONER PER DIEM REIMBURSEMENTS FOR VIRTUAL ATTENDANCE

- Director Farris provided an overview of the law on per diem and explained that the Department of Finance and Administration was permitting agencies to decide for themselves whether they want to receive per diem for attendance at virtual agency meetings.
- Chair Lang sought a motion to permit or deny Commissioners to take per diem for virtual meetings. Commissioner Carruthers moved that the Commission should not accept per diem for virtual meetings; Commissioner Baker seconded. After a discussion of the merits and demerits of the Commissioners taking per diem for virtual meetings, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the motion was approved unanimously. The Commissioners will not submit and Commission staff will not process per diem reimbursements for Commissioner attendance at virtual meetings.

9. EXECUTIVE SESSION

Chair Lang sought a motion to enter executive session under NMSA 1978, §§ 10-15-1(H)(3) (administrative adjudicatory proceedings) & 10-15-1(H)(7) (attorney-client privilege pertaining to litigation). Commissioner Williams moved to enter executive session; Commissioner Solimon

seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and the Commissioners entered an executive session.

---BEGINNING OF EXECUTIVE SESSION---

- The following matters were discussed in executive session:
 - Administrative Case No. 2020-007
 - Administrative Case No. 2020-031
 - Administrative Case No. 2020-033
 - Discussion of Council for a Competitive New Mexico and Campaign Reporting Act
 - Discussion of *State v. Gutierrez et al.* (N.M. Sup. Ct.)
- The matters discussed in the closed meeting were limited to those specified in the motion to enter executive session. After concluding its discussion of these matters, the Commission resumed public session upon an applicable motion.

---END OF EXECUTIVE SESSION---

10. ACTIONS ON ADMINISTRATIVE CASES

Administrative Case 2020-007:

- Director Farris asked the Commission for a motion to instruct staff to continue the investigation of the complaint under 10-16G-11(A) of the State Ethics Commission Act.
- Chair Lang sought a motion to authorize the staff to continue its investigation in case 2020-007. Commissioner Villanueva moved to authorize the staff as stated above; Commissioner Solimon seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and the motion was approved unanimously.

Administrative Case 2020-031:

- Director Farris asked the Commission for a motion to enter an order dismissing the claims the complainant alleged against the respondent based on conduct occurring prior to July 1, 2019.
- Chair Lang sought a motion to dismiss claims related to conduct prior to July 1, 2019 in administrative case 2020-031. Commissioner Carruthers moved to dismiss the claims in administrative case 2020-031 as stated above; Commissioner Williams seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and the order was approved unanimously.

Administrative Case 2020-033:

- Director Farris asked the Commission for a motion to dismiss case 2020-033 for lack of jurisdiction.
- Chair Lang sought a motion to dismiss case 2020-033 for lack of jurisdiction. Commissioner Williams moved dismiss administrative case 2020-033 as stated above; Commissioner Solimon seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners

voted in the affirmative and the motion was approved unanimously.

11. AUTHORIZATION REGARDING COUNCIL FOR A COMPETITIVE NEW MEXICO

- Director Farris asked the Commission to approve Resolution 7 authorizing staff to issue a demand letter and take subsequent civil action to enforce the Campaign Reporting Act against the Council for a Competitive New Mexico.
- Chair Lang sought a motion to authorize the staff as stated above. Commissioner Carruthers moved to authorize the staff as stated above; Commissioner Bluestone seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the motion was approved unanimously.

12. PUBLIC COMMENTS

Members of the public were invited to provide comments to the Commission.

- **Cliff Rees:**
- Agreed with the Commission's strategy to propose limited, necessary legislation in the 2021 legislative session.
- Regarding the 2021 interim starting next spring: suggested the Commission request its staff to appoint a working group to look at broader ethics legislative reform, including:
 - o Enacting a "public ethics code", similar to other ethics legislation already in NM statutory law, such as the Children's Code, Election Code, Motor Vehicle Code, and the Insurance Code.
 - o Including within a proposed public ethics code a "Public Contracts Ethics Act (SB 372 introduced but not passed in the 2019 legislature) combining the ethics provisions in the Governmental Conduct Act (GCA) and the Procurement Code.
 - o Updating the GCA per recommendations made by Paul Biderman and Mr. Rees in the GCA Attorney General's compliance guide published in 2013 and in accordance with the likely ruling by the NM Supreme Court in the pending consolidated cases (*State v. Gutierrez, et al.*).
- **Jim Harrington (State Chair of Common Cause):** Stated that he would support comments made by Sydney Tellez later in the meeting if needed and thanked the Commission and staff for their work.
- **Kathleen Sabo (New Mexico Ethics Watch):** Stated that the New Mexico Ethics Watch (NMEW) board is of two minds with respect to strategies for recommending amendments to the state's ethics laws during the upcoming legislative session in 2021. Ultimately, the NMEW board defers to the Commission on which specific recommendations to make to the legislature. Ms. Sabo also thanked the Commission and staff for their work and wished the Commission luck with respect to recommending legislative amendments.
- **Lilly Irvin-Vitela (New Mexicans for Ethics Coalition):** Echoed concerns raised by Common Cause New Mexico in their public comments regarding legislative recommendations in the upcoming 2021 legislative session and cautioned only making recommendations that are critical

and reserve other legislative recommendations for a period when necessary public discussion is possible.

- **Paul Biderman:** Thanked the Commission for approving the proposed model code and explained that the proposed code does contribute to clarity on the state's ethics laws. Additionally, Mr. Biderman echoed the points raised by Mr. Cliff Rees and thanked the Commission and staff for its work.
- **Rikki-Lee Chavez (Capital Council and Consulting):** Thanked the Commission and staff for their work and transparency.
- **Sydney Tellez (Associate Director, Common Cause New Mexico):** Thanked the Commissioners and staff for their work during its first year and shared concerns regarding recommendations to the State Ethics Commission Act and Campaign Reporting Act. Ms. Tellez noted that Common Cause New Mexico supports proposing limited amendments and refraining from most others for the purpose of ensuring transparency on any related discussion during the legislative process.
- **Tony Ortiz:** Thanked the Commission and staff for their work and wished everyone a happy and safe holiday season.
- **Chris Mechels:** Noted his efforts to advise the board members of the Law Enforcement Academy Board and other boards and commissions of the duty to file financial disclosures. Mr. Mechels concluded that board and commission members should be advised of their responsibility to file financial disclosures.
- No additional public comments were offered.

13. AUTHORIZATIONS REGARDING SPECIFIC LEGISLATION

- Director Farris invited feedback from the Commissioners on the legislative recommendations section of the annual report.
- Commissioner Bluestone stated his approval of staff proposing recommendations in a measured and strategic way using a two-tiered system. Commissioner Bluestone moved that Commission staff should amend the annual report to reflect the following within the second tier of legislative recommendations which would not be actively pursued by the Commission but would be supported by the Commission if proposed during the 2021 legislative session:
 - o The Commission recommends that Campaign Reporting Act should require funds raised on the premise that they will not be used for independent expenditures be deposited into segregated bank accounts.
 - o The Commission recommends requiring lobbyists to make two additional disclosures: The first due a week after the start of a legislative session, and a second report due one week after the bill introduction deadline, both indicating (i) what bills the lobbyist is taking a position; and (ii) whether they are supporting or opposing them, including the specific items they are supporting or opposing within those bills.
 - o The Commission recommends delegating to the Secretary of State's Office rulemaking authority in both the Lobbyist Regulation Act and the Financial Disclosure Act.

- Commissioner Williams seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the motion was approved unanimously.

14. LETTER FROM THE COMMISSIONERS TO STAFF

- Chair Lang read a letter drafted by Commissioner Williams and signed by all of the Commissioners thanking Director Farris and the staff for their achievements in the Commission's first year.

15. DETERMINATION OF NEXT MEETING

- The Commissioners agreed to meet next on Friday, February 5, 2021.

16. ADJOURNMENT

- Chair Lang moved to adjourn. Hearing no discussion, the meeting was adjourned.

[SUBJECT TO RATIFICATION BY COMMISSION]



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-01

February 5, 2021¹

FACTS AND QUESTIONS PRESENTED²

A newly-elected legislator owns a construction company. Before the legislator was elected to office, the state purchasing agent awarded two statewide price agreements to the construction company. The statewide price agreements with the construction company will expire within the year after the legislator assumes legislative office.

1. May state agencies purchase goods and services from the construction company under the current statewide price agreement?
2. May the state purchasing agent enter another statewide price agreement with the construction company while the legislator holds legislative office?

¹This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). On December 14, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1).

ANSWERS

1. Yes, but only if the legislator first discloses to the procuring state agency the legislator's ownership interest in the construction company.
2. Yes, but only if the legislator first discloses to the state purchasing agent the legislator's ownership interest in the construction company.

ANALYSIS

Price agreements are a well-established procurement vehicle. The state purchasing agent may enter a price agreement with a contractor, providing that the contractor will furnish items of tangible personal property, services or construction to a state agency at an established price. *See* NMSA 1978, §§ 13-1-71 (1984); NMSA 1978, § 13-1-95(E) (1984, as amended 2015); *see also generally* General Services Department, Statewide Price Agreements, <https://tinyurl.com/ybvpo5m2> (last accessed December 17, 2020) (providing a searchable database of all statewide price agreements in New Mexico). Price agreements are entered into based on competitive bids or proposals. *See* NMSA 1978, § 13-1-102 (1984, as amended 2007). Once the state purchasing agent has entered a price agreement with a contractor, then any state agency may, under the terms of the price agreement, procure services, construction, or items of tangible personal property from the contractor without the use of competitive sealed bids or competitive sealed proposals. *See* NMSA 1978, § 13-1-129 (1984, as amended 1991); NMSA 1978, § 13-1-102(E) (1984, as amended 2007). By contracting at scale, the state purchasing agent secures a better price than would ordinarily be available to state agencies contracting independently and for lesser quantities. Price agreements, therefore, promote the Procurement Code's purpose "to maximize the purchasing value of public funds" NMSA 1978, § 13-1-29 (1984).

Both price agreements and state agency procurements relying on price agreements are contracts. Thus, if a legislator, a legislator's family member, or a legislator's business seeks to enter either a price agreement with the state purchasing agent or a contract with a state agency relying on a price agreement's terms, then the Governmental Conduct Act applies. In pertinent part, subsection 10-16-9(A) of that Act provides:

A state agency shall not enter into a contract for services, construction or items of tangible personal property with a legislator, the legislator's family or with a business in

which the legislator or the legislator's family has a substantial interest unless the legislator has disclosed the legislator's substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code, except the potential contractor shall not be eligible for a sole source or small purchase contract. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this subsection.

NMSA 1978, § 10-16-9(A) (1969, as amended 2007).

Under subsection 10-16-9(A), if a state agency seeks to contract with the legislator's construction company under the terms of an existing price agreement, then the legislator must disclose their ownership interest in the construction company to the state agency. Ordinarily, the legislator should make this disclosure before the contract is executed. If, however, a state agency enters a purchase order to the construction company based on the price agreement before the legislator has disclosed the ownership interest, the legislator should make the disclosure to the procuring agency as soon as possible after the purchase order is executed.

Also, if the legislator's construction company seeks to enter a subsequent price agreement with the state purchasing agent, the legislator must also disclose their ownership interest to the state purchasing agent before the price agreement is executed. The disclosure should be part of the bid or proposal made in response to an invitation for bids or request for proposals. *See* 1.4.1.16(D) NMAC (referring to "all other necessary submissions" that accompany a bid form submitted in response to an invitation for bids).

When disclosing the interest, the legislator should simply state that the legislator has an ownership interest in the business that exceeds twenty percent and that the legislator is a member of the New Mexico Legislature. *See* NMSA 1978, § 10-16-2(L) (1967, as amended 2011); § 10-16-9(A). Beyond this straightforward disclosure, the legislator should not take any additional action in terms of representing or assisting the construction company before the state agency. *See* NMSA 1978, § 10-16-9(B) (1967, as amended 2007). Furthermore, the required disclosure should not be made on legislative stationary. *See id.* Nor should the legislator refer to their legislative capacity or make any implication relating to legislative action. *See id.*; cf. NMSA 1978, § 10-16-3(A) (1993, as amended 2011) ("The legislator . . . shall use the powers and resources of public office only to

advance the public interest and not to obtain personal benefits or pursue private interests.”).

Last, under subsection 10-16-9(A) of the Governmental Conduct Act, a state agency cannot enter a sole source or small purchase contract with the legislator’s construction company. § 10-16-9(A). These prohibitions are of limited relevance to the facts presented in this advisory opinion. Where a state agency relies on a statewide price agreement to procure tangible personal property, services or construction from the legislator’s construction company, the state agency would have no need to resort to a sole source or small purchase contract. The price agreement is the procurement vehicle and, moreover, is subject to a competitive procurement. Accordingly, where the state purchasing agent has entered a price agreement with a vendor, a state agency has no need to bypass a competitive procurement by using a sole source or small purchases contract.

CONCLUSION

State agencies may procure tangible personal property, services or construction, based on the terms of a price agreement, from the legislator’s construction company, so long as the legislator discloses their ownership interest in the construction company to the procuring state agency. The state purchasing agent may also award a subsequent price agreement to the legislator’s construction company, provided that the legislator discloses their ownership interest in the construction company to the state purchasing agent when the company submits its bid or proposal.

SO ISSUED.

HON. WILLIAM F. LANG, Chair
JEFF BAKER, Commissioner
STUART M. BLUESTONE, Commissioner
HON. GARREY CARRUTHERS, Commissioner
RONALD SOLIMON, Commissioner
JUDY VILLANUEVA, Commissioner
FRANCES F. WILLIAMS, Commissioner



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-02

February 5, 2021¹

QUESTION PRESENTED

The requester is a member of the legislature and serves as a volunteer member on the board of directors of a nonprofit organization that assists victims of sexual assault and advocates on their behalf. The nonprofit organization receives contract and grant money from federal, state, and local governments. How should the requester and the non-profit organization “handle any [of the nonprofit’s] applications for state funds?” Additionally, the request asks whether a legislator may vote on legislation on sexual assault laws and appropriations for programs helping victims of sexual assault.

ANSWER

The Governmental Conduct Act does not prohibit a legislator from sitting on the board of a nonprofit organization that receives state contracts or grants. Article IV, Section 28 of the New Mexico Constitution, however, prohibits the nonprofit organization from seeking a contract with the state during the legislator’s term and for one year after the end of the legislator’s term if the contract is authorized by legislation passed during the legislator’s term.

ANALYSIS

The request asks two questions: (1) how should the non-profit organization handle its applications for state funds?; and (2) may a legislator vote on legislation

¹This is an official advisory opinion of the New Mexico State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion. NMSA 1978, § 10-16G-8(C).

that affects the nonprofit's work, such as legislation on sexual assault laws or appropriations for programs assisting sexual assault victims? In answering these questions, the Commission provides an overview of how relevant ethics laws and constitutional provisions apply to legislators who serve on the boards of nonprofits which have contracts with state and local governments. The Commission then applies those laws to the specific questions raised by the request.

I. Overview of applicable ethics laws and constitutional provisions

The Governmental Conduct Act (GCA), NMSA 1978, Sections 10-16-1 to -18 does not prohibit a legislator from serving on the board of a nonprofit that holds contracts with the state, but may apply to a legislator's votes on legislation directly affecting the nonprofit or to a legislator's representation of the nonprofit before state agencies. Separately, Article IV, Section 28 of the New Mexico Constitution might prohibit a nonprofit from entering into contracts authorized by laws passed during the legislator's term of office.

A. GCA

Unpaid membership on the board of directors of a nonprofit is not a financial interest subject to disclosure or regulation under the GCA. *See* § 10-16-2(F) (defining "financial interest" as "an ownership interest in business or property" or "any employment or prospective employment for which negotiations have already begun"); *see also* § 10-16-2(D) (defining "employment" as "rendering of services for compensation in the form of salary as an employee").²

While a legislator is not prohibited from holding membership on the board of a nonprofit, the GCA sets out guidelines that a legislator should consider in assessing whether to recuse from votes that might impact the nonprofit on whose board they serve:

- A legislator may not use "the powers and resources of public office" to "obtain personal benefits or pursue private interests." § 10-16-3(A).
- A legislator must make full "disclosure of real or potential conflicts of interest," and at "all times reasonable efforts shall be made to avoid undue influence and abuse of office in public service." § 10-16-3(C).

²For similar reasons, nonprofit board membership is not subject to regulation under the Financial Disclosure Act, NMSA 1978, Sections 10-16A-1 to -8. *See* NMSA 1978, § 10-16A-2(C) (adopting GCA definition of "financial interest"). And although the Procurement Code defines "financial interest" to include board membership on a nonprofit organization, *see* § 13-1-57(A), its restrictions on conflicted transactions apply only to employees of state agencies involved in procurement. *See* §§ 13-1-190 & 13-1-194.

- A legislator may not receive money or the promise thereof that is conditioned upon or given in exchange for promised performance of an official act, *see* § 10-16-3(D), where an “official act” means “an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority,” § 10-16-2(H).
- “A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall refrain from references to the legislator’s legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.” § 10-16-9(B).

The facts in the request are not detailed enough to say whether the legislator’s votes on pending legislation or work for the nonprofit implicates these statutory provisions. But it is worth noting that these provisions may require disclosure, *see* § 10-16-3(B), and possibly recusal, *see* § 10-16-3(A), if the legislator is asked to vote on legislation that may result in a direct benefit to the nonprofit on whose board the legislator serves. Although the request indicates that the legislator may vote on legislation amending sexual assault laws and increasing state funding for programs that help victims of sexual assault, analysis of whether the GCA permits the legislator to vote on this legislation turns on the specific legislation in question and whether it would result in a direct financial benefit to the nonprofit.

The request indicates that the legislator’s work for the nonprofit is unpaid, and as a result the legislator generally may represent the nonprofit in its dealings with state agencies. When conducting such representation, however, the legislator should avoid making reference to the legislator’s official status outside of matters related to scheduling or using legislative stationery in dealings involving the nonprofit. *See* § 10-16-9(B).

B. Article IV, Section 28 of the New Mexico Constitution

Article IV, Section 28 of the New Mexico Constitution provides:

No member of the legislature shall, . . . during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the

state or any municipality thereof, which was authorized by any law passed during such term.

According to the request, the nonprofit on whose board the legislator sits holds some contracts with state and local governments. These contracts may be prohibited if (1) they were entered into during the legislator's term of office and for one year after the end of that term; (2) they were authorized by legislation passed during the legislator's term; and (3) the legislator has a direct or indirect interest in the contract.

Even though the legislator is not paid for serving on the board of the nonprofit, the membership alone is likely sufficient to confer an "indirect" interest in contracts between the nonprofit and government agencies. In a thorough opinion on this issue which the Commission finds persuasive, the Attorney General's office found that a legislator's membership on the board of a nonprofit could constitute a prohibited "indirect" interest in a government contract because by "actively participat[ing] in the affairs of the organization," the legislator has an implied interest in the welfare of that organization that could conflict with the legislator's duty to exercise the powers of legislative office only in furtherance of the public trust. *See* Attorney General Opinion No. 90-17 (1990).

But just because a legislator may have an indirect interest in a contract between a nonprofit and a government entity does not mean that the contract is a prohibited emolument under Article IV, Section 28. To perform that analysis, the Commission would need to know the effective date of the contracts and consider whether they were "authorized" by a law passed during the legislator's term. *See State ex rel. Baca v. Otero*, 1928-NMSC-021, ¶ 11, 33 N.M. 310 (stating that an appropriation for a contract does not "authorize" the contract for purposes of determining whether the contract is a prohibited emolument; instead, whether the contract is "authorized" by a law passed during a legislator's term is based on the law authorizing the specific contract); *see also State ex rel. Stratton v. Roswell Indep. Schs.*, 1991-NMCA-013, ¶ 37, 111 N.M. 495 (citing *Otero*, 1928-NMSC-021) ("*Otero* held that an appropriations bill does not 'authorize' a contract of employment with the state within the meaning of this provision."). Because the request does not provide these facts, the Commission offers no opinion on whether Article IV, Section 28 prohibits the nonprofit's government contracts.

II. Application

How should the requester and the non-profit organization "handle any [of the nonprofit's] applications for state funds?" Under the Governmental Conduct Act,

the requester is prohibited from representing the nonprofit for pay in its applications for state funds. *See* § 10-16-9(B). According to the request, the legislator does not receive pay for serving on the nonprofit's board, so representation is not prohibited outright. But the legislator is generally prohibited from making reference to the legislator's official status or using legislative stationary during the course of the representation.

May the requester vote on legislation on sexual assault laws and appropriations for programs helping victims of sexual assault? As a general matter, yes. But the GCA and Article IV, Section 28 could be implicated depending on the specific provisions contained in the legislation.

CONCLUSION

The GCA and Article IV, Section 28 do not prohibit a legislator from serving on the board of a nonprofit. However, the GCA may restrict the legislator's ability to represent a nonprofit in its dealings with state agencies. And Article IV, Section 28 may restrict the nonprofit's ability to enter into contracts authorized by laws passed during the legislator's term.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

DR. JUDY VILLANUEVA, Commissioner

FRANCES F. WILLIAMS, Commissioner



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-03

February 5, 2021¹

QUESTION PRESENTED

May a business significantly owned by a legislator apply for and receive a grant from the Department of Finance and Administration and the New Mexico Finance Authority for economic hardship suffered as a result of the COVID-19 pandemic?

FACTS

The legislature passed, and the governor signed into law, amendments to the General Appropriations Act of 2020 to provide direct grants to New Mexico businesses suffering economic hardship as a result of the COVID-19 pandemic. See Laws 2020 (2nd S.S.), ch. 1, § 2 (55th Leg., 2nd Special Sess.). Specifically, the legislature appropriated \$100,000,000 of federal Coronavirus Aid, Relief, and Economic Security Act relief funds to the Department of Finance and Administration (“DFA”) to contract for services with the New Mexico Finance Authority (“NMFA”) to provide grants of up to \$50,000 to eligible New Mexico businesses (“CARES relief grants”). Businesses eligible for the grants include (i) tax-exempt nonprofits subject to the New Mexico Nonprofit Corporation Act; sole proprietorships owned by New Mexico residents; and corporations, partnerships, joint ventures, limited liability companies or limited partnerships at least 51 percent of which are owned by one or more New Mexico residents, that (ii) do not employ more than one hundred employees. Laws 2020 (2nd S.S.), ch. 1 § 2(a)(2)(a).

Commission staff received a request on December 15, 2020 for an informal advisory opinion asking whether a business formerly owned by a current legislator

¹This is an official advisory opinion of the New Mexico State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion. NMSA 1978, § 10-16G-8(C).

(and now owned by the legislator’s family members) could apply for and receive a CARES relief grant. *See* 1.8.1.9(B) NMAC (permitting a person subject to the Commission’s jurisdiction to request an informal advisory opinion). Commission staff issued an informal advisory opinion on the next day, December 16, 2020. Because the issue addressed by the informal opinion is likely to reoccur, the Commission’s executive director presented a formal advisory opinion based on the informal advisory opinion. *See* 1.8.1.9(B)(3) NMAC (“The director, based on any informal advisory opinion issued, may draft an advisory opinion for the commission to consider for issuance as an advisory opinion.”). The Commission has elected to issue a formal advisory opinion on a broader factual scenario, covering businesses that are currently owned by a legislator.

ANSWER

Yes.

ANALYSIS

Two provisions of the Governmental Conduct Act (“GCA”), NMSA 1978, §§ 10-16-1 to -18 (1967, amended 2019), potentially apply to the facts presented: Sections 10-16-3 and Section 10-16-9. The Procurement Code does not apply because CARES relief grants are not procurements.

1. GCA

The GCA does not prohibit a business significantly owned by a legislator from applying for and receiving a CARES relief grant.

Section 10-16-3 requires legislators to treat their offices “as a public trust,” and directs “us[ing] the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.” § 10-16-3(A). It also requires legislators to “conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service,” and to take “reasonable efforts . . . to avoid undue influence and abuse of office in public service.” § 10-16-3(B), (C). Finally, Section 10-16-3 prohibits a legislator from requesting or receiving “any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act.” § 10-16-3(D).

Because a legislator is not directly responsible for DFA’s and NMFA’s distribution of CARES relief grants, the decision to award grant money to a

business owned by the legislator has no direct connection with an exercise of the powers and responsibilities of the legislator's public office. The only basis for finding a GCA violation based entirely on the legislator's status *qua* legislator would be if the legislator voted for the appropriations bill under consideration in exchange for a promise that DFA or NMFA would award a CARES relief grant to the legislator's business.

Section 10-16-9 provides more specific proscriptions that apply to contracts involving legislators, their immediate family members, and their businesses and to a legislator's representation of others before a state agency:

A. A state agency shall not enter into a contract for services, construction or items of tangible personal property with a legislator, the legislator's family or with a business in which the legislator or the legislator's family has a substantial interest unless the legislator has disclosed the legislator's substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code, except the potential contractor shall not be eligible for a sole source or small purchase contract. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this subsection.

B. A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall refrain from references to the legislator's legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.

NMSA 1978, § 10-16-9 (1967, amended 2007).

Section 10-16-9(A) prohibits a state agency like NMFA from "enter[ing] into a contract for services, construction or items of tangible personal property" with a business owned by a legislator or the legislator's family unless three conditions are met. First, the legislator must disclose their substantial interest in the business with which the state agency is contracting. *See* § 10-16-9(A); *see also* NMSA 1978, § 10-16-2(L) (defining "substantial interest" to mean an ownership interest that is greater than twenty percent). Second, the contract must be awarded in accordance with the Procurement Code. *See* § 10-16-9(A). Third, the contract

must not be awarded pursuant to the Procurement Code's exceptions for sole source and small purchase contracts. *See id.*

The limitations that Section 10-16-9(A) imposes, however, do not apply to the CARES relief grant awards authorized by Laws 2020 (2nd S.S.), ch. 1, § 2. A CARES relief grant is not a contract for services, construction, or items of tangible personal property; it is a payment of an allocation of federal funds to New Mexico businesses to lessen the “impact from the public health orders issued by the secretary of health and related to the coronavirus disease 2019 public health emergency.” Laws 2020 (2nd S.S.), ch. 1, § 2(A)(2). The State does not receive any services, construction, or property in return for the grant of federal funds, and therefore the CARES relief grants are not contracts for services, construction or items of tangible personal property that are subject to the prohibition in Section 10-16-9(A). *See also* New Mexico Finance Authority, Small Business CARES Relief Grants, <https://www.nmfinance.com/cares-continuity-grants/> (last accessed Jan. 5, 2021) (“What is a grant? A grant is money given for a specific purpose without any obligation to repay the funding. In this case, grants will be given to help New Mexico businesses weather the economic hardship due to the pandemic. This grant does not need to be paid back.”); *see also Grant*, *Black’s Law Dictionary* (11th ed. 2019) (defining “grant” as a “subsidy”).

Next, Section 10-16-9(B) does not prohibit a business in which a legislator has an interest from applying for a CARES relief grant. Rather, the statutory provision prohibits a legislator from appearing on behalf of the business or otherwise assisting the business in applying for and receiving a CARES relief grant. Under section 10-16-9(B), the legislator’s business is a “person.” § 10-16-9(B); *see also* NMSA 1978, § 12-2A-3(E) (Uniform Statutory and Rules Construction Act) (defining “person” as “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or any legal or commercial entity”). And the application to NMFA for the grant is “a matter before a state agency.” § 10-16-9(B). Accordingly, the application for the CARES relief grant and other related matters should be accomplished by someone other than the legislator who has the interest.

2. Procurement Code

Subject to certain exceptions not relevant here, the Procurement Code applies “to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.” NMSA 1978, § 13-1-30(A). *See also* Advisory Opinion No. 2020-04 (June 5, 2020) at 3-6 (providing overview of Procurement Code). The Procurement Code defines “procurement” as “purchasing, renting, leasing, lease purchasing or

otherwise acquiring items of tangible personal property, services or construction[.]” NMSA 1978, § 13-1-74(A). But CARES relief grants do not result in the acquisition of tangible personal property, services or construction. Accordingly, the Procurement Code (and its attendant conflict-of-interest provisions) does not apply to the application for CARES relief grants by a business in which the legislator has an interest.

CONCLUSION

The GCA and the Procurement Code do not prohibit a business in which a legislator has an interest from applying for and receiving a CARES relief grant.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

DR. JUDY VILLANUEVA, Commissioner

FRANCES F. WILLIAMS, Commissioner



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-04

February 5, 2021¹

QUESTIONS PRESENTED

Does it violate the Governmental Conduct Act for the State Auditor to make public statements that threaten to “apply pressure” on the Martin Luther King, Jr. Commission?

Does it violate the Governmental Conduct Act for a Senator to make public statements about lawsuits that the Senator, in their capacity as a private attorney, filed on behalf of clients against the Martin Luther King, Jr. Commission?

Does it violate the Governmental Conduct Act for a Senator and the State Treasurer, who is also a member of the Martin Luther King, Jr. Commission, to send at total of nine separate requests under the Inspection of Public Records Act to the Martin Luther King, Jr. Commission’s sole employee?

SUMMARY AND ANSWERS

¹This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

Martin Luther King, Jr. is one of the greatest Americans to have ever lived. This advisory opinion concerns a small eponymous state agency that promotes his memory and vision. *See* NMSA 1978, §§ 28-19-1 to -4 (1991). This advisory opinion also concerns the efforts of three elected public officials to hold the Commission accountable to its purpose but which the requester views as damaging affronts. The request for an advisory opinion asked us to opine on whether the conduct of three elected public officials is consistent with the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019).

While the facts the request alleges fail to establish any violation of the Governmental Conduct Act, they also provide a vantage to understand the requester's view that the alleged conduct of the elected public officials was disproportionate and unfair. We think consideration of the requester's perspective might improve working relations among the MLK Commission and the elected public officials charged to oversee it and, further, elicit solutions for some of the underlying issues that gave rise to this request.

FACTS²

I.

On December 2, 2019, the State Auditor sent a letter to the Martin Luther King, Jr. Commission's Members and Executive Director, communicating concerns arising out of the Commission's audits in fiscal years 2015 and 2016. The State Auditor remarked that some of his concerns surrounding the FY15 and FY16 audits related to fraud and embezzlement that had occurred at the MLK Commission. The State Auditor encouraged the MLK Commission to ask the Department of Finance and Administration for assistance regarding the Commission's FY17, FY18, and FY19 audits.

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." *See* NMSA 1978, § 10-16G-8(A)(2) (2019). "When the Commission issues an advisory opinion, the opinion is tailored to the 'specific set' of factual circumstances that the request identifies." State Ethics Comm'n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). On January 7, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity.

A year later, on December 7, 2020, the State Auditor sent another letter to the MLK Commission's Members and Executive Director. In that letter, the State Auditor communicated his continued concern regarding the MLK Commission's financial statements and controls and expressed disappointment in the MLK Commission's failure to remedy certain findings in the FY15 and FY16 audits, noting that the MLK Commission's FY17, FY18, FY19 and FY20 audits contained numerous findings of material weaknesses and material noncompliance. The State Auditor also noted that, in respect to each of these four audits, the MLK Commission's Executive Director had provided a similar response—namely, that the Executive Director had imposed procedures that should resolve the audit finding in the subsequent fiscal year. To verify that response, the State Auditor requested copies of the written policies and procedures that the Commission implemented to address each individual audit finding.

The following day, on December 8, 2020, the Office of the State Auditor (“OSA”) issued a press release. The press release stated that “[f]indings from four years’ worth of late audit reports show pervasive and troubling issues continue to afflict the Commission under the leadership of the current Executive Director.” In a related statement to the media, the State Auditor concluded, “Frankly, the African American community deserves better leadership. And so, for me, the next steps are really taking an aggressive public stand on applying pressure on the commission to really give us some answers.” Request at 3.

According to the request, the Commission experienced the State Auditor's press release and related statements to the media as a harmful affront. The request states that the OSA gave the MLK Commission approximately forty-five minutes advance notice of the press release. *Id.* at 4. The request also states that the press release omitted reference to the circumstances that caused the reports to be late. *Id.* at 4. According to the request, the Commission's audits were delayed not because of negligence or nefarious intent, but rather by “a backlog caused by a prior investigation of the MLK Commission which occurred before Executive Director Waites was hired and before many of the current commissioners were on the board.” *Id.* at 3. The request characterizes these omissions as “attempts to mislead the public, and to marginalize and perpetuate implicit biases through racially tinged statements and thinly veiled public threats” *Id.* at 4. Last, the request states the MLK Commission's belief “that the State Auditor's Office, which is funded by taxpayers, should be expected to assist agencies such as the MLK Commission with annual audits in light of the statutory authority of the State Auditor's Office under the NM Audit Act.” *Id.* at 3.

II.

Separately, a member of the New Mexico Senate, in the Senator's capacity as a private attorney, filed three separate discrimination and public-records lawsuits against the MLK Commission and spoke about one or more of those lawsuits to the media. *Id.* at 5. The request states that, in comments to the media, the Senator reiterated some of the State Auditors' concerns with the Commission's audits and financial controls. *Id.* The request also notes that the Senator made six requests for public records under the Inspection of Public Records Act ("IPRA"), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended 2019), to the Commission's Executive Director, who is currently the Commission's only employee. *Id.* at 6.³

III.

Last, the State Treasurer, who is a statutorily designated member of the MLK Commission, made three additional IPRA requests to the MLK Commission's Executive Director. *Id.* These IPRA requests sought documents related to timesheets submitted for Commission employees during FY20; the Commission's contract with its external auditor and a log of the external auditor's work on the Commission's audit; and information related to the Commemoration Grants that the MLK Commission awarded in 2018 and 2019, including an explanation of projects the grants funded and receipts. *Id.* at 6-7. After submitting these IPRA requests and receiving responses, the State Treasurer told the media that while he "was disappointed in the materials that were provided, I think they tried to honor the request." *Id.* at 7.

According to the request, the State Treasurer, in his capacity as member of the MLK Commissioner, already possessed some details about the 2018 and 2019 Commemoration grants. *Id.* The request emphasized that, in his statement to the press, the State Treasurer referred to the MLK Commission and its staff as "they," even though the State Treasurer is a member of the Commission. *Id.* at 8. The request further alleges that, while the aforementioned Senator told the press that "it is troubling" that a sitting commissioner would have to submit an official records request, in fact, the State Treasurer voluntarily chose to frame his email to the Commission's Executive Director as an IPRA request. *Id.* at 7.

IV.

³ The request suggests that the MLK Commission has been constrained to one employee due to the hiring freeze that the Governor and the State Personnel Office implemented in April 2020. *See* Request at 8. *See generally* State Personnel Office General Memorandum 2020-02 (Apr. 22, 2020), available at <https://tinyurl.com/yyn5erbj> (last accessed January 12, 2021) (placing a freeze on hiring and personnel actions).

Together, the statements to the press made by the State Auditor, the State Treasurer, and a Senator, acting in the capacity as a private attorney, directed negative publicity to the MLK Commission and, unsurprisingly, subjected the Commission and its staff to more than “pressure.” According to the request:

As a direct result of this negative publicity the MLK Commission Office has been bombarded with complaints from irate citizens. The Executive Director has received threatening phone calls. The statements to the press by elected officials have put MLK Commissioners and the Executive Director in danger. And, invited speakers have declined previously coveted invitations to speak at future MLK events. The MLK Commission brand has been severely damaged.

Id. at 1. The requester further states that the MLK Commission “received numerous calls to action from its constituents who perceive [the above described] actions as slanderous, collusive and deliberate acts of sabotage by elected officials.” *Id.* at 8. “Conversely,” the request states, “the Commission has received a barrage of complaints by citizens who have taken the negative publicity regarding the MLK Commission to heart.” *Id.* Therefore, the request seeks an advisory opinion and “a course of action.” *Id.*

ANALYSIS

I.

The Governmental Conduct Act requires legislators, public officers, and public employees to treat their government positions “as a public trust.” NMSA 1978, § 10-16-3(A (1993, as amended 2011). It does not violate “the public trust” for the head of an oversight agency, such as the State Auditor, to release to the public his concerns about the operation of a state agency. Nor does it violate “the public trust” for the head of an oversight agency to convey to the public that the oversight agency will “apply pressure” to remedy perceived shortcomings in another agency. These two conclusions are related: in a well-functioning democratic government, public disclosure is pressure.

A state agency head, however, may not intentionally mislead the public about the operations of another state government, particularly where the misleading statements are intended to redound to the personal, political benefit of the state

agency head. Not only would such conduct break with “the public trust,” but also would amount to the use of “the powers and resources of public office . . . to pursue private interests,” in direct contravention of Section 10-16-3(A) of the Governmental Conduct Act. Although the request characterizes the State Auditor’s omissions regarding details concerning the timing of the Commission’s audit as “attempts to mislead the public,” *see* Request at 4, the facts presented by the request do not establish that the State Auditor violated the Governmental Conduct Act.

The request says that the State Auditor’s December 8, 2020 press release and related statements to the media did not provide the context surrounding the MLK Commission’s FY17, FY18, FY19 and FY20 audits. *See* Request at 3. According to the request, the State Auditor did not explain that those audits were late because of “a previous investigation and incidents which occurred years ago.” *Id.* at 3. While we understand why the requester might perceive this omission as unfair, the State Auditor’s press release and statements to the media, as noted in the request and above, do not undermine the public trust. Based on the materials presented to us, the State Auditor’s statements were not directly concerned with the timing of the MLK Commission’s FY17, FY18, FY19 and FY20 audits; rather, the State Auditor was primarily concerned with the audits’ findings of material weakness and noncompliance and the MLK Commission’s responses to those findings. Accordingly, in view of the State Auditor’s primary purpose in his December 7, 2020 letter to the MLK Commission, the State Auditor’s alleged failure to provide the full context regarding the tardiness of the Commission’s audits would not amount to a violation of the Governmental Conduct Act’s requirement that public officers treat their government positions “as a public trust.” § 10-16-3(A).⁴

⁴ The request compares the State Auditor’s statements to the media about these audit findings against the requester’s expectation that the State Auditor should “assist agencies such as the MLK Commission with annual audits in light of the statutory authority of the State Auditor’s Office.” Request at 3. While the State Auditor may audit the financial affairs of every agency, *see* NMSA 1978, § 12-6-3 (1969, as amended 2011), the State Auditor may also allow independent auditors, subject to the State Auditor’s approval, to conduct audits, *see id.*; *see also generally* 2.2.2 NMAC. But even where the Office of the State Auditor audits an agency’s financial affairs, the State Auditor’s role is to provide an independent review, which limits the assistance the State Auditor can provide in terms of managing and presenting an agency’s finances. *See* § 12-6-3 (“The audits shall be conducted in accordance with generally accepted auditing standards and rules issued by the state auditor.”); 2.2.2.8(L) NMAC (requiring independence between auditors and client agencies); Governing Auditing Standards § 3.18 (U.S. Comptroller Gen. July 2018) (“In all matters relating to the . . . engagement, auditors and audit organizations must be independent from the audited entity.”) Accordingly, the State Auditor’s failure to meet an agency’s expectation of “assist[ance] . . . with annual audits” does not constitute a violation of the Governmental Conduct Act. *See* Request at 3.

For a similar set of reasons, it does not violate the Governmental Conduct Act for a legislator, public officer or public employee to submit an IPRA request to a public agency. In Section 14-2-5 of the IPRA, the Legislature declared that it is “the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees” and that “to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.” NMSA 1978, § 14-2-5 (1993). Given the Legislature’s policy statement, a legislator or public officer does not violate the Governmental Conduct Act by submitting IPRA requests to other state agencies.⁵

Last, the request does not present facts that establish that the Senator, in representing clients asserting claims against the MLK Commission as a private attorney, violated the Governmental Conduct Act. The request adverts to Section 10-16-6 of the Governmental Conduct Act, which prohibits legislators from using or disclosing confidential information acquired by virtue of their position for their or another’s private gain. *See* § 10-16-6. However, the request alleges no facts that suggest the Senator received, much less disclosed, confidential information about the MLK Commission that the Senator acquired through their office as a member of the New Mexico Senate. Further, we cannot conclude that the Senator violated any duty that the Governmental Conduct Act imposes on legislators when, while acting in the capacity of a private attorney acting on behalf of clients, the Senator allegedly spoke to the media about their clients’ claims against the MLK Commission. *E.g.*, §§ 10-16-3 & 10-16-6.

II.

While we conclude that the alleged conduct of the elected public officials does not violate the Governmental Conduct Act, we also address why the requester perceives their alleged conduct as disproportionate and unfair. Consideration of this perspective, we believe, might not only improve working relations among the MLK Commission and the elected public officials charged to oversee it, but also elicit remedies for some of the underlying causes of the rupture of those relationships.

⁵ Furthermore, because IPRA requests may be submitted by “any person wishing to inspect public records,” NMSA 1978, 14-2-8(A) (1993, as amended 2009), we are uncertain whether the submission of an IPRA request amounts to a use of “the powers and resources of public office” that implicate the requirements of Section 10-16-3(A) of the Governmental Conduct Act.

First, the MLK Commission is a stand-alone state agency and is not administratively attached to a larger executive department. *See generally* NMSA 1978, § 9-1-7 (1977) (providing for the relationship of administrative attachment). As a stand-alone state agency, the MLK Commission must comply, to the letter, with myriad statutes and rules that comprise the basic financial architecture of state government. These laws include: the State Budget Act, NMSA 1978, §§ 6-3-1 to -25 (1957, as amended 2011); the Accountability in Government Act, NMSA 1978, §§ 6-3A-1 to -10 (1999, as amended 2019); the Financial Control Act, NMSA 1978, §§ 6-5-1 to -11 (1957, as amended 2003); the 279-page Model Accounting Practices Manual issued annually by the Department of Finance and Administration, available at <https://tinyurl.com/y4pq77o7> (last accessed Jan. 12, 2021); the Audit Act, NMSA 1978, §§ 12-6-1 to -15 (1969, as amended 2019); the Requirements for Contracting and Conducting Audits of Agencies promulgated by the State Auditor at 2.2.2 NMAC; the Procurement Code, NMSA 1978, §§ 13-1-28 to -199 (1984, as amended 2019); the Procurement Code Regulations promulgated by the State Purchasing Division of the General Services Department, 1.4.1 NMAC; the Regulations Governing the Approval of Contracts for Professional Services promulgated by the Department of Finance and Administration at 2.40.2 NMAC; the State Use Act, NMSA 1978, §§ 13-1C-1 to -7 (2005). To hire employees, the Commission must familiarize itself with the Personnel Act, NMSA 1978, §§ 10-9-1 to -25 (1961, as amended 2009); the regulations promulgated by the State Personnel Board at 1.7.1 NMAC through 1.7.13; and, for those employees that are not subject to the Personnel Act, the Policies for the Governor Exempt Employees, available at <https://tinyurl.com/y3r5ykwk> (last accessed Jan. 11, 2021). In addition, the MLK Commission must comply with New Mexico's transparency laws, the Open Meetings Act ("OMA"), NMSA 1978, §§ 10-15-1 to -4 (1974, as amended 2013); and the Inspection of Public Records Act, each of which is enforceable by lawsuits promising for prevailing plaintiffs (and their attorneys) an award of costs and attorney's fees, *see* § 10-15-3(C) (OMA) (1974, as amended 1997); § 14-2-12 (IPRA), and even criminal penalties, § 10-15-4 (OMA) (1974, as amended 1989). Therefore, in order to run a state agency that exists for the comparatively limited purpose "to develop, promote, coordinate and review statewide plans and activities for the annual commemoration and celebration of the birthday of Martin Luther King Jr.," NMSA 1978, § 28-19-1(A) (1991), the MLK Commission must operate a state agency that strictly conforms to the legal requirements imposed by all of the foregoing statutes and regulations.

In other agencies, the burden of these laws is carried by many shoulders—the agency head, a general counsel, a chief financial officer, a procurement officer, a human resources head, and their respective staffs. The MLK Commission, by contrast, currently has a single employee. Request at 6. The MLK Commission's

members, who are eligible for *neither* compensation *nor even* per diem and mileage, must count on the Commission's single employee to ensure the Commission complies with its many and weighty legal duties. *See* NMSA 1978, § 28-19-1(E) (1991).⁶

Next, we also observe that in the General Appropriations Act of 2020, the Legislature appropriated \$356,500 to the MLK Commission. Laws 2020, ch. 83, § 4(F). As far as legislative appropriations go, the MLK Commission's total annual budget appropriation is meager. *See generally* Laws 2020, ch. 83, § 4 (appropriating funds to state agencies for their FY21 budgets). Two examples suffice to show just how little money the MLK Commission receives in comparison to other legislative appropriations. First, in 2019, the Legislature appropriated nearly twice as much to the Tourism Department to market and promote a Virgin Galactic flight. *See* Laws 2019, ch. 87, § 10 (appropriating \$600,000 to the Tourism Department “[f]or the marketing and promotion of the inaugural Virgin Galactic flight in New Mexico”). Second, on a much larger scale, the Legislature authorized payment of \$100,000,000 of film production tax credits claimed by film production companies operating in New Mexico through the end of FY19 and approved by the Taxation and Revenue Department. *See* Laws 2019, ch. 87, § 10. To be sure, the officers and employees of state government should be held accountable for every dollar of public funds. But if the accountability of every public dollar matters, it follows that the accountability of more public dollars matters more. From this vantage, we understand why the request communicates a sense of unfairness and disproportionate treatment of the MLK Commission.

Like all state agencies, the MLK Commission requires oversight; but it is clear that the MLK Commission also needs help. To that end, and because the request asked that we recommend a course of action, we encourage the MLK Commission, if it has not already done so, to consider requesting an exemption from the hiring freeze from either the Governor or the State Personnel Office to hire another Governor's exempt or personnel-service staff member, respectively. *See generally* State Personnel Office General Memorandum 2020-02 (Apr. 22, 2020), available at

⁶ We do not understand why members of the MLK Commission should not receive per diem and mileage for their service to the State when members of other state commissions are so entitled. *Compare* NMSA 1978, § 28-19-1(E) (1991) (providing that members of the MLK Commission shall receive no compensation), *with, e.g.,* NMSA 1978, § 28-11B-1(1991, as amended 1999) (providing that “[m]embers of the commission for deaf and hard-of-hearing persons shall be compensated as provided in the Per Diem and Mileage Act and shall receive no other compensation, perquisite or allowance”), *and* NMSA 1978, § 10-16G-3(G) (“[State Ethics] Commissioners are entitled to receive per diem and mileage as provided in the Per Diem and Mileage Act and shall receive no other compensation, perquisite or allowance.”).

<https://tinyurl.com/yyn5erbj> (last accessed January 12, 2021). Alternatively, we suggest the MLK Commission consider using some of its limited budget for contractual services to enter a services agreement with a larger state agency for administrative services support. *See N.M. Mining Ass'n v. N.M. Mining Comm'n*, 1996-NMCA-098, ¶ 1, 122 N.M. 332 (upholding a transfer of funds from the Mining Commission to the Department of Game and Fish for assistance in implementing the State Mining Act). Last, we also encourage the MLK Commission to consider requesting the Legislature to administratively attach the MLK Commission to a larger department, so that the MLK Commission staff can devote more time to the agency's mission of commemorating and promoting Dr. King's vision, and less time to the incidental mission of administering a state agency. *See generally* § 9-1-7 (providing for the relationships between an agency and the department to which it is administratively attached).

CONCLUSION

The request does not present facts that establish a violation of the Governmental Conduct Act.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner

FRANCES F. WILLIAMS, Commissioner



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-05

February 5, 2021¹

QUESTION PRESENTED

May a member of the legislature who is also a candidate for United States representative solicit contributions for their campaign for federal office during a legislative session?

FACTS²

Members of the legislature and certain other elected officials are prohibited from “knowingly solicit[ing] a contribution governed by the Campaign Reporting Act” from January 1 to the adjournment of any regular legislative session or from the date of proclamation to the adjournment of any special session. *See* NMSA 1978, Section 1-19-34.1 (1993, as amended 2019).

¹This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). On January 7, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity.

In the November 3, 2020 general election, Deb Haaland was elected the United States Representative for New Mexico’s District 1 in the 117th United States Congress. *See* Secretary of State, Official Results, 2020 General, November 3, 2020, <https://nmresults.azurewebsites.net/resultsSW.aspx?type=FED&map=CTY> (last accessed February 5, 2021). But President Joe Biden nominated Representative Haaland to serve as Secretary of the Department of the Interior. *See* Biden-Harris Transition, *Congresswoman Deb Haaland*, <https://buildbackbetter.gov/nominees-and-appointees/deb-haaland/> (last accessed Feb. 5, 2021). If confirmed, Representative Haaland will leave her congressional office, triggering a special election sometime this year. *See* NMSA 1978, § 1-15-18.1(A) (2019) (“Within ten days after a vacancy occurs in the office of United States representative, the secretary of state shall, by proclamation, call an election to be held not less than seventy-seven nor more than ninety-one days after the date of the vacancy for the purpose of filling the vacancy”).

The First Session of the 55th Legislature began on January 18, 2021. Some members of the legislature are soliciting donations to their campaigns for the CD 1 special election. The request asks whether this fundraising activity is prohibited by Section 1-19-34.1.

ANALYSIS

Section 1-19-34.1 does not prohibit a member of the legislature from soliciting donations to a campaign for United States representative because those donations are not subject to the Campaign Reporting Act.

Section 1-19-34.1 provides:

A. It is unlawful during the prohibited period for a state legislator, the attorney general, the secretary of state, the state treasurer, the commissioner of public lands or the state auditor or a candidate for state legislator, attorney general, secretary of state, state treasurer, commissioner of public lands or state auditor, or any agent on behalf of the attorney general, the secretary of state, the state treasurer, the commissioner of public lands or the state auditor or a candidate for attorney general, the secretary of state, state treasurer, commissioner of public lands or state auditor, to knowingly solicit a contribution governed by the Campaign Reporting Act. For purposes of this subsection, “prohibited period” means that period beginning January 1 prior to any regular session of the legislature or, in the case of a special

session, after the proclamation has been issued, and ending on adjournment of the regular or special session.

B. It is unlawful during the prohibited period for the governor or the lieutenant governor, or any agent on the governor's or the lieutenant governor's behalf, to knowingly solicit a contribution governed by the Campaign Reporting Act. For purposes of this subsection, "prohibited period" means that period beginning January 1 prior to any regular session of the legislature or, in the case of a special session, after the proclamation has been issued, and ending on the twentieth day following the adjournment of the regular or special session.

Section 1-19-34.1 prohibits a member of the legislature or one of the other above-referenced elected offices from soliciting "a contribution governed by the Campaign Reporting Act" during the "prohibited period," i.e., between January 1 and the adjournment of any regular legislative session and between the proclamation and adjournment of any special session. So the issue is whether a contribution to a campaign for United States representative is a contribution "governed by the Campaign Reporting Act."

What is a "contribution governed by the Campaign Reporting Act"? "[A] gift, subscription, loan, advance or deposit of money or other thing of value . . . made or received for a political purpose[.]" § 1-19-26(H)(1). What does "political purpose" mean? Something "supporting or opposing . . . the nomination or election of a *candidate*." § 1-19-26(S) (emphasis added). What is a "candidate"? Someone "who seeks or considers an office in an election covered by the Campaign Reporting Act[.]" § 1-19-26(G).

Thus, whether a member of the legislature (or another one of the offices mentioned in Section 1-19-34.1) is prohibited from soliciting contributions for a campaign for United States representative turns on whether that office is "covered by the Campaign Reporting Act" See § 1-19-26(G). It is not: the Campaign Reporting Act only applies to candidates in "any primary, general or statewide special election in New Mexico . . . *but excludes federal . . . elections*." § 1-19-26(K). The text of the Campaign Reporting Act thus excludes contributions to campaigns for federal elections from regulation, and as a result Section 1-19-34.1 does not preclude soliciting donations for campaigns for federal office during the legislative session.

In addition to following from the text of the Campaign Reporting Act itself, this conclusion is supported by federal campaign finance laws. Federal campaign finance law “supersede[s] and preempt[s] any provision of State law with respect to election to Federal office.” 52 U.S.C. § 30143. As the Attorney General noted in an opinion interpreting an earlier version of Section 1-19-34.1, federal law does not prohibit fundraising for a campaign for federal office prior to or during a state legislative session; as a result, state laws which “place a limitation on . . . fundraising for [a] federal campaign” are unenforceable. *See* 2007 Op. Att’y Gen. No. 07-01 (Feb. 7, 2007) (citing and discussing federal cases invalidating state law restrictions on the solicitation of contributions to campaigns for federal office). This likely explains the legislative history of Section 1-19-34.1, which before 2019 prohibited a member of a covered office from “knowingly solicit[ing] a contribution for a political purpose” during the prohibited period. *See* § 1-19-34.1 (1995). The 2019 amendments replaced “for a political purpose” with “governed by the Campaign Reporting Act,” clarifying that the fundraising prohibition applies only to donations that are subject to regulation by state campaign finance law. *See* Laws 2019, ch. 86, § 18.

CONCLUSION

The Campaign Reporting Act does not prohibit a member of the legislature from soliciting contributions for a campaign for United States representative.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner

FRANCES F. WILLIAMS, Commissioner

SENATE BILL 311

55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021

INTRODUCED BY

Jeff Steinborn

AN ACT

RELATING TO LOBBYING; AMENDING THE LOBBYIST REGULATION ACT;
DEFINING "ADVERTISING CAMPAIGN"; REQUIRING LOBBYISTS TO REPORT
COMPENSATION RECEIVED FOR LOBBYING; MAKING TECHNICAL CHANGES TO
THE ADVERTISING CAMPAIGN REPORTING REQUIREMENTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 2-11-2 NMSA 1978 (being Laws 1977,
Chapter 261, Section 2, as amended) is amended to read:

"2-11-2. DEFINITIONS.--As used in the Lobbyist Regulation
Act:

A. "advertising campaign" means a notice that
appears in public media, including radio, television,
newspapers, periodicals and internet websites, or in marketing
materials that is intended to influence legislative or official
action;

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1 ~~[A.]~~ B. "compensation" means any money, per diem,
2 salary, fee or portion thereof or the equivalent in services
3 rendered or in-kind contributions received or to be received in
4 return for lobbying services performed or to be performed;

5 ~~[B.]~~ C. "expenditure" means a payment, transfer or
6 distribution or obligation or promise to pay, transfer or
7 distribute any money or other thing of value, but does not
8 include a lobbyist's own personal living expenses and the
9 expenses incidental to establishing and maintaining an office
10 in connection with lobbying activities or compensation paid to
11 a lobbyist by a lobbyist's employer;

12 ~~[C.]~~ D. "legislative committee" means a committee
13 created by the legislature, including interim and standing
14 committees of the legislature;

15 ~~[D.]~~ E. "lobbying" means attempting to influence:
16 (1) a decision related to any matter to be
17 considered or being considered by the legislative branch of
18 state government or any legislative committee or any
19 legislative matter requiring action by the governor or awaiting
20 action by the governor; or

21 (2) an official action;

22 ~~[E.]~~ F. "lobbyist" means any individual who is
23 compensated for the specific purpose of lobbying; is designated
24 by an interest group or organization to represent it on a
25 substantial or regular basis for the purpose of lobbying; or in

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1 the course of [~~his~~] employment, is engaged in lobbying on a
2 substantial or regular basis. "Lobbyist" does not include:

3 (1) an individual who appears on [~~his~~] the
4 individual's own behalf in connection with legislation or an
5 official action;

6 (2) [~~any~~] an elected or appointed officer of
7 the state or its political subdivisions or an Indian tribe or
8 pueblo acting in [~~his~~] the officer's official capacity;

9 (3) an employee of the state or its political
10 subdivisions, specifically designated by an elected or
11 appointed officer of the state or its political subdivision,
12 who appears before a legislative committee or in a rulemaking
13 proceeding only to explain the effect of legislation or a rule
14 on [~~his~~] the designated employee's agency or political
15 subdivision, provided the elected or appointed officer of the
16 state or its political subdivision keeps for public inspection
17 and files with the secretary of state such designation;

18 (4) [~~any~~] a designated member of the staff of
19 an elected state official, provided the elected state official
20 keeps for public inspection and files with the secretary of
21 state such designation;

22 (5) a member of the legislature, the staff of
23 [~~any~~] a member of the legislature or the staff of [~~any~~] a
24 legislative committee when addressing legislation;

25 (6) [~~any~~] a witness called by a legislative

.219428.1

1 committee or administrative agency to appear before that
2 legislative committee or agency in connection with legislation
3 or an official action;

4 (7) an individual who provides only oral or
5 written public testimony in connection with a legislative
6 committee or in a rulemaking proceeding and whose name and the
7 interest on behalf of which ~~[he]~~ the individual testifies have
8 been clearly and publicly identified; or

9 (8) a publisher, owner or employee of the
10 print media, radio or television, while gathering or
11 disseminating news or editorial comment to the general public
12 in the ordinary course of business;

13 ~~[F.]~~ G. "lobbyist's employer" means the person
14 whose interests are being represented and by whom a lobbyist is
15 directly or indirectly retained, compensated or employed;

16 ~~[G.]~~ H. "official action" means the action or
17 nonaction of a state official or state agency, board or
18 commission acting in a rulemaking proceeding;

19 ~~[H.]~~ I. "person" means an individual, partnership,
20 association, committee, federal, state or local governmental
21 entity or agency, however constituted, public or private
22 corporation or any other organization or group of persons who
23 are voluntarily acting in concert;

24 ~~[I.]~~ J. "political contribution" means a gift,
25 subscription, loan, advance or deposit of ~~[any]~~ money or other

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1 thing of value, including the estimated value of an in-kind
2 contribution, that is made or received for the purpose of
3 influencing a primary, general or statewide election, including
4 a constitutional or other question submitted to the voters, or
5 for the purpose of paying a debt incurred in any such election;

6 ~~[J.]~~ K. "prescribed form" means a form prepared and
7 prescribed by the secretary of state;

8 ~~[K.]~~ L. "rulemaking proceeding" means a formal
9 process conducted by a state agency, board or commission for
10 the purpose of adopting a rule, regulation, standard, policy or
11 other requirement of general applicability and does not include
12 adjudicatory proceedings; and

13 ~~[L.]~~ M. "state public officer" means a person
14 holding a statewide office provided for in the constitution of
15 New Mexico."

16 SECTION 2. Section 2-11-6 NMSA 1978 (being Laws 1977,
17 Chapter 261, Section 6, as amended) is amended to read:

18 "2-11-6. EXPENDITURE REPORT TO BE FILED--CONTENTS--
19 REPORTING PERIODS.--

20 A. Each lobbyist who receives compensation or
21 lobbyist's employer who makes or incurs expenditures or makes
22 political contributions for the benefit of or in opposition to
23 a state legislator or candidate for the state legislature, a
24 state public officer or candidate for state public office, a
25 board or commission member or state employee who is involved in

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1 an official action affecting the lobbyist's employer or in
2 support of or in opposition to a ballot issue or pending
3 legislation or official action shall file an expenditure report
4 with the secretary of state using an electronic reporting
5 system approved by the secretary of state in accordance with
6 Section 2-11-7 NMSA 1978. The expenditure report shall include
7 a sworn statement that sets forth:

8 (1) the cumulative total of all individual
9 expenditures of less than one hundred dollars (\$100) made or
10 incurred by the employer or lobbyist during the covered
11 reporting period, separated into the following categories:

12 (a) meals and beverages;

13 (b) other entertainment expenditures;

14 and

15 (c) other expenditures;

16 (2) each individual expenditure of one hundred
17 dollars (\$100) or more made or incurred by the employer or
18 lobbyist during the covered reporting period, indicating the
19 amount spent and a description of the expenditure. The list
20 shall be separated into the following categories:

21 (a) meals and beverages;

22 (b) other entertainment expenditures;

23 and

24 (c) other expenditures;

25 (3) each political contribution made, and

.219428.1

1 whether the contribution is from the lobbyist's employer or the
2 lobbyist on the lobbyist's own behalf, identified by amount,
3 date and name of the candidate or ballot issue supported or
4 opposed; ~~and~~

5 (4) the names, addresses, employers and
6 occupations of other contributors and the amounts of their
7 separate political contributions if the lobbyist or lobbyist's
8 employer delivers directly or indirectly separate contributions
9 from those contributors to a candidate, a campaign committee or
10 anyone authorized by a candidate to receive funds on the
11 candidate's behalf; and

12 (5) the total compensation and expenses paid
13 or owed, if any, to a lobbyist by each lobbyist's employer for
14 that covered reporting period. If a lobbyist is a full-time
15 employee of the lobbyist's employer, or is paid by means of an
16 annual fee or retainer, the lobbyist shall estimate and report
17 the portion of the salary, fee or retainer salary that is
18 reasonably allocated for lobbying.

19 B. The expenditure report shall be filed
20 electronically and shall be electronically authenticated by the
21 lobbyist or the lobbyist's employer using an electronic
22 signature as prescribed by the secretary of state in
23 conformance with the Electronic Authentication of Documents Act
24 and the Uniform Electronic Transactions Act. For the purposes
25 of the Lobbyist Regulation Act, a report that is electronically

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1 authenticated in accordance with the provisions of this
2 subsection shall be deemed to have been subscribed and sworn to
3 by the lobbyist or the lobbyist's employer that is required to
4 file the report.

5 C. In identifying expenditures pursuant to the
6 provisions of Paragraphs (1) and (2) of Subsection A of this
7 section, in the case of special events, including parties,
8 dinners, athletic events, entertainment and other functions, to
9 which all members of the legislature, to which all members of
10 either house or any legislative committee or to which all
11 members of a board or commission are invited, expenses need not
12 be allocated to each individual who attended, but the date,
13 location, name of the body invited and total expenses incurred
14 shall be reported.

15 D. A lobbyist who accepts compensation for lobbying
16 but does not incur expenditures or make political contributions
17 during a reporting period may file a statement of no activity
18 in lieu of a full report for that period in accordance with the
19 reporting schedule in Subsection E of this section.

20 E. The reports required pursuant to the provisions
21 of the Lobbyist Regulation Act shall be filed:

22 (1) no later than January 15 for all
23 expenditures and political contributions made or incurred
24 during the preceding year and not previously reported;

25 (2) within forty-eight hours for each separate

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1 expenditure made or incurred during a legislative session that
2 was for five hundred dollars (\$500) or more;

3 (3) no later than the first Wednesday after
4 the first Monday in May for all expenditures and political
5 contributions made or incurred through the first Monday in May
6 of the current year and not previously reported; and

7 (4) no later than the first Wednesday after
8 the first Monday in October for all expenditures and political
9 contributions made or incurred through the first Monday in
10 October of the current year and not previously reported.

11 F. A lobbyist's personal living expenses and the
12 expenses incidental to establishing and maintaining an office
13 in connection with lobbying activities [~~or compensation paid to~~
14 ~~a lobbyist by a lobbyist's employer~~] need not be reported
15 unless they are directly paid for or reimbursed to a lobbyist
16 by a lobbyist's employer.

17 G. A lobbyist or lobbyist's employer shall obtain
18 and preserve all records, accounts, bills, receipts, books,
19 papers and documents necessary to substantiate the financial
20 statements required to be made under the Lobbyist Regulation
21 Act for a period of two years from the date of filing of the
22 report containing such items. When the lobbyist is required
23 under the terms of the lobbyist's employment to turn over any
24 such records to the lobbyist's employer, responsibility for the
25 preservation of them as required by this section and the filing

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1 of reports required by this section shall rest with the
2 employer. Such records shall be made available to the
3 secretary of state or attorney general upon written request.

4 H. A lobbyist's employer who also engages in
5 lobbying shall also comply with the provisions of this section.
6 A lobbyist and the lobbyist's employer shall coordinate their
7 reporting to ensure that the contributions and expenditures
8 that each have reported are not duplicative.

9 I. An organization of two or more persons,
10 including an individual who makes any representation as being
11 an organization, that within one calendar year expends funds in
12 excess of two thousand five hundred dollars (\$2,500) not
13 otherwise reported under the Lobbyist Regulation Act to conduct
14 an advertising campaign for the purpose of lobbying shall
15 register and file a report with the secretary of state within
16 forty-eight hours after expending two thousand five hundred
17 dollars (\$2,500). [~~Such~~] The registration shall indicate the
18 name of the organization and the names, addresses and
19 occupations of any of its principals, organizers or officers
20 and shall include the name of any lobbyist or lobbyist's
21 employer who is a member of the organization. [~~Within fifteen~~
22 ~~days after a legislative session the organization shall report~~]
23 The report shall include the contributions, pledges to
24 contribute, expenditures and commitments to expend for the
25 advertising campaign for the purpose of lobbying, including the

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1 names, addresses, employers and occupations of the
2 contributors, and be submitted to the secretary of state on a
3 prescribed form."

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SENATE BILL 314

55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021

INTRODUCED BY

Jeff Steinborn

AN ACT

RELATING TO LOBBYING; REQUIRING POST-SESSION REPORTS ON WHAT
LEGISLATION A LOBBYIST OR LOBBYIST'S EMPLOYER LOBBIED; AMENDING
SECTION 2-11-7 NMSA 1978 (BEING LAWS 1977, CHAPTER 261, SECTION
7, AS AMENDED).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. A new section of the Lobbyist Regulation Act
is enacted to read:

"[NEW MATERIAL] LOBBYING REPORTS.--Prior to the
adjournment of a legislative session, each lobbyist or
lobbyist's employer that is required to file an expenditure
report pursuant to Section 2-11-6 NMSA 1978 or registration
statement pursuant to Section 2-11-3 NMSA 1978 shall file a
report or reports with the secretary of state disclosing the
lobbyist's or lobbyist's employer's lobbying activity on

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1 legislation and identifying the specific legislation lobbied,
2 the support, opposition or other position taken on the
3 legislation by the lobbyist or lobbyist's employer and the name
4 of the lobbyist's employer that lobbied on the legislation,
5 either directly or by the registered lobbyist. Each lobbyist
6 shall only be required to report the lobbyist's lobbying
7 activity on a piece of legislation one time. Covered lobbying
8 activity shall include any lobbying on the development of
9 legislation prior to its introduction in a legislative session.
10 If a lobbyist or lobbyist's employer commences lobbying on
11 legislation after the adjournment of a legislative session, a
12 lobbying report shall be filed prior to the end of the time
13 period in which the governor may act on legislation. The
14 reports shall be filed at a time and in an electronic format as
15 prescribed by rule of the secretary of state."

16 SECTION 2. Section 2-11-7 NMSA 1978 (being Laws 1977,
17 Chapter 261, Section 7, as amended) is amended to read:

18 "2-11-7. REGISTRATION, [~~AND~~] EXPENDITURE [~~REPORT~~] AND
19 LOBBYING REPORTS--PRESERVATION AS PUBLIC RECORD--ONLINE
20 REPORTS.--

21 A. Each registration, [~~and~~] expenditure and
22 lobbying report as required by the Lobbyist Regulation Act
23 shall be archived and accessible on the secretary of state's
24 lobbyist disclosure website for a period of at least ten years
25 from the date of filing as a public record, open to public

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1 inspection at any reasonable time. Unless an action or
2 prosecution is pending that requires preserving the report, it
3 may be destroyed ten years after the date of filing.

4 B. Lobbyist [~~registrations and~~] registration,
5 expenditure and lobbying reports shall be kept and maintained
6 on the secretary of state's lobbyist disclosure website and
7 shall be available in searchable and downloadable formats.

8 C. With respect to the secretary of state's
9 lobbyist disclosure website, all items in the records shall be
10 easily searchable, sortable and downloadable by the public to
11 the extent technically practicable.

12 D. The secretary of state shall ensure that
13 contributions reported by persons pursuant to the Lobbyist
14 Regulation Act are reported in a manner that is nonduplicative
15 and as consistent as practicable with the reporting
16 requirements of the Campaign Reporting Act. To the extent
17 possible, the electronic reporting system used for registration
18 and reporting required by the Lobbyist Regulation Act shall be
19 integrated with the electronic reporting system used for
20 compliance with the Campaign Reporting Act.

21 E. Reporting individuals under the Campaign
22 Reporting Act shall receive automatic electronic notice of the
23 contributions to them reported by lobbyists and lobbyists'
24 employers within twenty-four hours of the filing of each
25 expenditure report."

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STATE ETHICS COMMISSION

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Jeremy D. Farris, Executive Director

To: Commissioners, JDF

Date: January 11, 2021

Subject: Research on state laws requiring disclosure of lobbyist compensation

I understand that a legislator has asked the Commission to endorse amendments to the Lobbyist Regulation Act which would require disclosure of the amount of compensation paid to lobbyists for lobbying activities. The Commission will discuss whether to endorse the legislation at its February 5, 2021 meeting. Jeremy asked me to research and summarize other state laws requiring disclosure of lobbyist compensation.

What does New Mexico law currently require lobbyists and lobbyist employers to disclose? The Lobbyist Regulation Act, NMSA 1978, §§ 2-11-1 to -9 (1993), requires any individual “employed or retained as a lobbyist” to register with the secretary of state. § 2-11-3(A). The registration must identify each of the lobbyist’s employers, and must contain (1) a full disclosure of the sources of funds used for lobbying; (2) an affirmation from each of the lobbyist’s employers authorizing the lobbyist to lobby on the employer’s behalf; (3) a brief description of the matters in reference to which the service is to be rendered; and (4) the name and address of the person, if other than the lobbyist or the lobbyist’s employer, who will have custody of the accounts, bills, receipts, books, papers and documents required to be kept under the provisions of the Lobbyist Regulation Act. *See* § 2-11-3(D). A compensated lobbyist or lobbyist employer who makes or incurs expenditures or political contributions for the benefit of or in opposition to a state legislator or candidate for the state legislature, a state public officer or candidate for state public office, a board or commission member or state employee who is involved in an official action affecting the lobbyist’s employer or in support of or in opposition to a ballot issue or pending legislation or official action must file periodic “expenditure reports” containing:

- (1) the cumulative total of all individual expenditures of less than one hundred dollars (\$100) made or incurred by the employer or lobbyist during the covered reporting period, separated into the following categories:
 - (a) meals and beverages;
 - (b) other entertainment expenditures; and
 - (c) other expenditures;
- (2) each individual expenditure of one hundred dollars (\$100) or more made or incurred by the employer or lobbyist during the covered reporting period, indicating the amount spent and a description of the expenditure. The list shall be separated into the following categories:
 - (a) meals and beverages;
 - (b) other entertainment expenditures; and
 - (c) other expenditures;

See § 2-11-5(A).

By contrast, the Lobbyist Regulation Act does not require a lobbyist or lobbyist employer to disclose the amount of compensation paid or received for lobbying services, either in total or from specific lobbying clients.

Table 1 describes state laws obligating disclosure lobbyist compensation by lobbyists, lobbyist employers, or both. The states below were identified using a Council on Government Ethics Laws (COGEL) compilation as a starting point. (COGEL is the preeminent organization of government ethics administrators, and the Commission is a COGEL member.) If the COGEL compilation identified a state as requiring disclosure of lobbyist compensation, I verified using Westlaw. If a state is not listed below, it is because the COGEL compilation does not say that the state requires disclosure of lobbyist compensation. It is unlikely but possible the COGEL compilation is erroneous; I did not undertake a comprehensive survey of state laws because of the need to get research to Commissioners before the February 5, 2021 meeting.

(Table 1 begins on the next page).

Table 1

JURISDICTION	DISCLOSURE BY LOBBYIST OF COMPENSATION AMOUNT	DISCLOSURE BY PRINCIPAL OF LOBBYIST COMPENSATION
CALIFORNIA	Lobbying firms are required to file period reports which state in part “the total payments, including fees and the reimbursement of expenses, received from [each client] for lobbying services during the reporting period.” Cal. Gov’t Code § 86114(3).	Each lobbyist employer must file a periodic report identifying each lobbyist or lobbyist firm employed and the amount of compensation paid. Cal. Gov’t Code § 86116(c).
COLORADO	<p>A professional lobbyist must file a monthly disclosure report identifying each client and the amount received from that client, with the exception of “trade association, public interest group, or governmental organization” clients. Colo. Rev. Stat. § 24-6-302(2.5)(c).</p> <p>A professional lobbyist must annually disclose “the name of and total gross income for lobbying received from each client or other professional lobbyist for whom the lobbyist lobbied during the previous fiscal year.” Colo. Rev. Stat. § 24-6-302(3)(b).</p>	A principal is not obligated to disclose amounts paid for lobbying services.
CONNECTICUT	“Individual communicator lobbyists” are required to file periodic reports stating “the fundamental terms of contracts, agreements or promises to pay or receive compensation or reimbursement or to make expenditures in furtherance of lobbying, including the categories of work to be performed and the dollar value or compensation rate of the contract, at the time of registration[.]” Conn. Gen. Stat. § 1-96(b).	“Each client lobbyist registrant financial report shall be on a form prescribed by the board and shall state expenditures made and the fundamental terms of contracts, agreements or promises to pay compensation or reimbursement or to make expenditures in furtherance of lobbying. Any such fundamental terms shall be reported once in the monthly, quarterly or post-termination report next following the entering into of such contract.” Conn. Gen. Stat. § 1-96(e).
FLORIDA	Every executive branch lobbying firm must submit a “compensation report” stating both total compensation received (in one of the following categories: \$0; \$1 to \$49,999; \$50,000 to \$99,999; \$100,000 to \$249,999; \$250,000 to \$499,999; \$500,000 to \$999,999; \$1 million or more), and per-principal compensation. Fla. Stat. § 112.3215(5)(a)	For each principal represented by more than one lobbying firm, the commission on ethics shall aggregate the reporting-period and calendar-year compensation reported as provided or owed by the principal. Fla. Stat. § 112.3215(5)(a)(4)(b)

INDIANA	Each lobbyist required to file an activity report containing “total expenditures on lobbying (prorated, if necessary)” broken down into categories, which include compensation and reimbursement to others who perform lobbying services. Ind. Code § 2-7-3-3.	“Lobbyist” is defined as anyone making any payment for lobbying, so principals appear to be subject to reporting obligations under Indiana law. <i>See</i> Ind. Code §§ 2-7-1-9 & -10.
IOWA	A lobbyist is not required to disclose compensation received for lobbying services.	Each lobbyist’s client is required to file an annual report that contains information on all salaries, fees, retainers, and reimbursement of expenses paid by the lobbyist’s client to the lobbyist for lobbying purposes during the preceding twelve calendar months, concluding on June 30 of each year. The amount reported to the general assembly shall include the total amount of all salaries, fees, retainers, and reimbursement of expenses paid to a lobbyist for lobbying both the legislative and executive branches. Iowa Code § 68B.38.
KANSAS	A lobbyist must file a registration statement setting forth the method of determining and computing the compensation of the lobbyist. If the lobbyist is compensated or to be compensated for lobbying by more than one employer or is to be engaged in more than one employment, the relevant facts listed above shall be stated separately for each employer and each employment. Kan. Stat. Ann. § 46-265	A principal is not obligated to disclose amounts paid for lobbying services.
KENTUCKY	Executive branch lobbyists must identify their principals and amount of compensation received after compensation is received by, or paid to, each lobbyist, employer, and real party in interest as determined by the terms of the engagement, and shall be listed by the amount paid or received, the intervals on which the payment is paid or received, and shall include any other compensation received or paid as part of the engagement.. Ky. Rev. Stat. Ann. § 11A.211(1)	Legislative branch lobbyist employers must file periodic reports disclosing compensation earned by each legislative agent, prorated to reflect the time the legislative agent was engaged in lobbying during the period covered by the statement. Ky. Rev. Stat. Ann. § 6.821(4)(a)(4).
LOUISIANA	Each lobbyist must annually file a registration stating the name of each person by whom he is paid or is to be paid, the amount he is paid or is to be paid for the purpose of lobbying, and a	A principal is not obligated to disclose amounts paid for lobbying services.

	characterization of such payment as paid, earned but not received, or prospective. La. Stat. Ann. § 24:53(3)(a).	
MAINE	Lobbyists must file a monthly report containing the specific dollar amount of compensation received for lobbying activities during the month. The amount of compensation received for lobbying officials in the legislative branch, officials in the executive branch and constitutional officers must be reported separately. In the case of a regular employee, the specific dollar amount must be computed by multiplying the number of hours devoted to the preparation of documents and research for the primary purpose of influencing legislative action and to lobbying by the employee's regular rate of pay based on a 40-hour week	A principal is not obligated to disclose amounts paid for lobbying services.
MARYLAND	Lobbyists must report biannually total individual regulated lobbyist compensation, including expenses. Md. Code Ann., State Gov't, § 5-705.	A principal is not obligated to disclose amounts paid for lobbying services.
MONTANA	A lobbyist is not required to disclose compensation received for lobbying services.	A principal is required to report all lobbying expenditures above \$2,150 (this amount is adjusted for inflation by the commissioner of political practices), including salaries and fees, including allowances, rewards, and contingency fees. Mont. Code Ann. § 5-7-208(5)(a)(v).
NEBRASKA	A lobbyist is required to submit periodic reports detailing expenditures and receipts related to lobbying, including compensation. For part-time lobbyists, compensation reasonably attributable to lobbying activities must be reported. Neb. Rev. Stat. § 49-1483(2).	A principal is required to report the same information as a lobbyist. Neb. Rev. Stat. § 49-1483(1) In addition, a principal shall report electronically the name and address of every person from whom it has received more than one hundred dollars in any one month for lobbying purposes. Neb. Rev. Stat. § 49-1483(7)
NEW HAMPSHIRE	A registered lobbyist is required to submit periodic statements containing an itemization of all fees received from any lobbying client that are related, directly or indirectly, to	A principal is not obligated to disclose amounts paid for lobbying services.

	lobbying, such as public advocacy, government relations, or public relations services including research, monitoring legislation, and related legal work. N.H. Rev. Stat. Ann. § 15:6(I)(a).	
NEW JERSEY	Only lobbyists retained by government agencies are required to report the specific amount of compensation received for lobbying activities. N.J. Stat. Ann. § 52:13C-21(8).	A principal is not obligated to disclose amounts paid for lobbying services.
NEW YORK	Lobbyists who spend or receive more than \$5,000 on lobbying activities must disclose the amount of compensation paid or owed to the lobbyist. N.Y. Legis. Law § 1-h(b)(5).	A corporation engaging in lobbying and which spend more than \$5,000 / year on lobbying activities must file a bi-monthly report disclosing the amount of money the corporation paid to any person hired to perform lobbying. N.Y. Legis. Law § 1-i(b)(6).
PENNSYLVANIA	A lobbyist is not required to disclose compensation received for lobbying services.	Principals must disclose the amount of money spent on lobbying <u>and</u> any contributions received by any other individual, corporation, etc. representing 10% or more of the total resources received by the principal during the reporting period. 65 Pa. Cons. Stat. § 13A05.
SOUTH CAROLINA	Lobbyist must report each person from whom they received income attributable to lobbying and the amount of income from that person. S.C. Code Ann. § 2-17-30(a)(4).	Principals disclose lobbyist expenditures. S.C. Code Ann. § 2-17-35(a)(5).
TENNESSEE	A lobbyist is not required to disclose compensation received for lobbying services.	Lobbyist employers are required to report every six months “the aggregate total amount of lobbyist compensation paid by the employer” within a set of numerical ranges (less than \$10,000, between \$25 and \$50 thousand, etc.). Tenn. Code. Ann. § 3-6-303(a)(1).
TEXAS	A lobbyist registration statement is required to set forth “the amount of compensation or reimbursement paid by each person who reimburses, retains, or employs the registrant for the purpose of communicating directly with a member of the legislative or executive branch or on whose behalf the registrant communicates directly with a member of the legislative or executive branch.” Tex. Gov’t Code Ann. § 305.005(f)(6). The amount of compensation is reported by reference to a dollar range (less than \$10,000; at least \$10,000 but less than	A principal is not obligated to disclose amounts paid for lobbying services.

	<p>\$25,000, etc.). Tex. Gov't Code Ann. § 305.005(g). If compensation exceeds \$500,000, then the exact amount of compensation must be reported. Tex. Gov't Code. Ann. § 305.005(g-1).</p>	
VERMONT	<p>A lobbyist is required to file a disclosure stating “[t]he total amount of compensation paid to a lobbyist, who is not employed by, subcontracted by, or affiliated with a lobbying firm, for lobbying, including the name and address of each registered employer who engaged the services of the lobbyist reporting.” Vt. Stat. Ann. tit. 2, § 264(c)(2).</p> <p>Lobbying firms are required to file a disclosure stating “[t]he total amount of compensation paid to a lobbying firm for lobbying with the name and address of each registered employer who engaged the services of the lobbying firm reporting.” Vt. Stat. Ann. tit. 2, § 265b(b)(2).</p>	<p>A lobbyist employer is required to file a disclosure stating “[t]he total amount of compensation paid to lobbyists or lobbying firms for lobbying.” Vt. Stat. Ann. tit. 2, § 264(b)(2).</p>
VIRGINIA	<p>Lobbyist reports must disclose the name of the principal employing the lobbyist and the principal's contact information; the executive and legislative actions for which the lobbyist lobbied and a description of the activities conducted; expenditure totals for entertainment, gifts, communications, personal living and travel expenses, compensation of lobbyists, honoraria, and other; the lobbyist's name and contact information; and lobbyist's compensation information. Va. Code Ann. § 2.2-426</p>	<p>A principal is not obligated to disclose amounts paid for lobbying services.</p>
WASHINGTON	<p>Monthly lobbying reports must describe compensation for lobbying activities made or incurred by the lobbyist or on behalf of the lobbyist by the lobbyist's employer during the reporting period. Wash. Rev. Code. § 42.17A.615(2)(a).</p>	<p>A principal is not obligated to disclose amounts paid for lobbying services.</p>