



STATE ETHICS COMMISSION
MEETING

August 13, 2021

PUBLIC MEETING MATERIALS PACKET

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STATE ETHICS COMMISSION

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

Friday, August 13, 2021, 9:00 a.m. to 3:00 p.m. (Mountain Time).

Public Meeting and Rule Hearing (via Zoom):

Join Zoom meeting through internet browser:

<https://us02web.zoom.us/j/87394204244?pwd=RGdnK05yZmRpelJhMDVveStBakNndz09>

Meeting ID: 873 9420 4244

Join Zoom meeting telephonically: (346) 248-7799

Telephone Passcode: 926730

Chairman Lang Calls the Meeting to Order

1. Roll Call
2. Approval of Agenda
3. Approval of Minutes of June 4, 2021, Commission Meeting

Commission Meeting Items

Action Required

- | | |
|--|-----|
| 1. Advisory Opinion 2021-10
(Farris) | Yes |
| 2. Advisory Opinion 2021-11
(Boyd) | Yes |
| 3. Resolution No. 2021-01
(Boyd) | Yes |
| 4. Amendments to joint powers agreements with Secretary of State | No |

(*Farris*)

- | | |
|---|----|
| 5. Discussion of Oct. 1, 2021 special report on jurisdiction
(<i>Farris</i>) | No |
|---|----|

Beginning of Public Rule Hearing

NMSA 1978, § 14-4-5.3 & 1.24.25.13 NMAC

- | | |
|--|----|
| 6. Presentation of (i) any written public comments received regarding amendments to Rules 1.8.1 (general rules) and 1.8.3 (administrative hearings); and
(ii) Commission staff recommended amendments to proposed rules
(<i>Farris & Boyd</i>) | No |
| 7. Public comment on amendments to Rules 1.8.1 and 1.8.3 | No |

End of Public Rule Hearing and Continuation of Commission Open Meeting for Actions on Rules and Other Matters

1.24.25.14(D) NMAC

-
- | | |
|---|-----|
| 8. Adoption of amendments to Rules 1.8.1 (general rules)
(<i>Farris</i>) | Yes |
| 9. Adoption of amendments to Rules 1.8.3 (administrative hearings)
(<i>Farris</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)

- | |
|---|
| 10. Discussions regarding administrative complaints
(<i>Farris, Boyd & Branch</i>) |
| a. Administrative Complaint No. 2021-031 |
| b. Administrative Complaint Nos. 2021-034 & 2021-035 |
| c. Administrative Complaint No. 2021-009 |
| d. Administrative Complaint No. 2021-010 |
| e. Administrative Complaint No. 2021-011 |
| f. Administrative Complaint No. 2021-014 |
| g. Administrative Complaint No. 2021-015 |
| 11. Discussions regarding pending civil litigation
(<i>Farris & Boyd</i>) |

Upon applicable motion, Commission returns from executive session

12. Actions on Administrative Complaints (<i>Farris</i>)	Yes
a. Administrative Complaint No. 2021-009	
b. Administrative Complaint No. 2021-010	
c. Administrative Complaint No. 2021-011	
d. Administrative Complaint No. 2021-014	
e. Administrative Complaint No. 2021-015	
13. Discussion of next meeting (<i>Lang</i>)	No
14. Public Comment	No
15. Adjournment	

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

SEC Office
800 Bradbury Dr. SE,
Suite 215
Albuquerque, NM 87106



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 June 4, 2021 | 8:00AM-3:00PM

Virtually Via Zoom

[View Recording Here](#)

[SUBJECT TO RATIFICATION BY COMMISSION]

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
Hon. Garrey Carruthers, Commissioner
Ronald Solimon, Commissioner
Frances Williams, Commissioner
Judy Villanueva, Commissioner
Hon. William Lang, Chair

1. APPROVAL OF AGENDA

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

2. APPROVAL OF APRIL 2, 2021 COMMISSION MEETING MINUTES

- Chair Lang sought a motion to approve the minutes of the April 2, 2021 Commission meeting. Commissioner Solimon moved to approve the minutes; Commissioner Williams seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the minutes were approved unanimously.

3. INTRODUCTION TO SEC APPOINTMENTS TO THE CRC

- Director Farris provided an introduction, overview, and orientation to the morning portion of the meeting related to the Citizen Redistricting Committee. Director Farris provided an overview of the Commission's application process, the staff's state-wide

outreach, an overview of the applications submitted, the shortlist selection process, and the Commission's voting process for appointments.

4. INTERVIEWS OF APPLICANTS FOR CITIZEN REDISTRICTING COMMITTEE CHAIR

- The Commission interviewed the following applicants for the position of Chair of the Citizen Redistricting Committee:
 - Retired New Mexico Supreme Court Justice Edward Chavez.
 - New Mexico Supreme Court Justice Barbara Vigil.
- Upon conclusion of the interviews of the Chair applicants, Chair Lang sought a motion to vote on who would be appointed as the Chair. Commissioner Bluestone moved to appoint Justice Edward Chavez as the Chair of the Citizen Redistricting Committee; Commissioner Baker seconded. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and Justice Edward Chavez was unanimously appointed to serve as Chair of the Citizen Redistricting Committee.

5. INTERVIEWS OF APPLICANTS FOR CITIZEN REDISTRICTING COMMITTEE NON-MAJOR-PARTY MEMBERS

- The Commissioners interviewed each applicant selected for an interview in alphabetical order by surname:
 - Lisa Abeyta
 - Jarratt Applewhite
 - Vicki Ballinger
 - Treciafaye Blancett
 - William Jason Fisher
 - Robert Rhatigan
 - Joaquin Sanchez
- Following the interviews, Director Farris notified the Commissioners that during the meeting, the staff received two letters in support of specific applicants to the CRC. After discussion, the Commissioners asked Director Farris to read the letters.
- Director Farris read the two letters. The first letter was sent by the League of Women Voters, which indicated support for Justice Chavez to be selected as Chair of the Committee.
- The second letter was sent by the New Mexico Civic Engagement Table and indicated that the following organizations supported Robert Rhatigan and Joaquin Sanchez for the non-major-party positions on the Citizen Redistricting Committee: the Center for Civic Policy, the Nava Education Project, the New Mexico Asian Family Center, New Mexico CAFé, the New Mexico Dream Team, OLE, New Mexico Voices for Children, New

Mexico Working Families Party, and Somos Un Pueblo Unido. *Each letter is attached to these minutes in the appendix, labeled “Letter 1” and “Letter 2” respectively.*

- After a short discussion, the Commissioners took a break to complete their voting sheets on which each Commissioner provided a complete preference ranking of the seven interviewees for the two appointments.
- Upon returning from break, Director Farris announced the Commission’s decision to select the following applicants to serve as the non-major-party members of the Citizen Redistricting Committee:
 - Robert Rhatigan
 - Joaquin Sanchez
- Following the appointments, the Commissioner Carruthers moved to adjourn until the start of the afternoon session at 1:00PM; Commissioner Baker Seconded. Hearing no opposition, the Commission adjourned.

- **BEGINNING OF AFTERNOON SESSION**

The Commission began the afternoon session with Chair Lang calling the roll; the following Commissioners were present:

Jeffrey Baker, Commissioner
Stuart Bluestone, Commissioner
Hon. Garrey Carruthers, Commissioner
Ronald Solimon, Commissioner
Frances Williams, Commissioner
Judy Villanueva, Commissioner
Hon. William Lang, Chair

6. ADVISORY OPINION 2021-08

- Director Farris provided an overview of Advisory Opinion 2021-08, noting that it originated from an informal advisory opinion request and has been converted into a formal advisory opinion. Advisory Opinion 2021-08 presents the following questions and provides the following responses:
 1. (a) May a legislator or a legislator’s family apply for or receive state funds following passage of legislation making such funds available?
 1. (b) If a legislator or their family members may not apply for or receive state funds made available by a statute, does a member who recuses from the vote on that legislation obviate the prohibition?
 2. May a legislator or a legislator’s family apply for a small business loan made available by the Small Business Recovery Act of 2020, Laws 2020 (1st

S.S.), ch. 6, §§ 1–7?

3. May a legislator or a legislator’s family apply for “recovery grant” funds made available by Laws 2021, Chapter 3, Sections 10 through 13?

Decisions:

1. (a) It depends on how funds allocated to state agencies are made available.

1. (b) No. Recusal from a related vote would not obviate any constitutional or statutory limitation.

2. No. The loans provided through the Act are contracts with the state which, under Article IV, Section 28 of the New Mexico Constitution may not be entered into by a legislator nor their business while serving as a legislator or for one year after their final day of service. The Governmental Conduct Act also imposes additional prohibitions that apply to contracts involving the state and legislators, their immediate family, and their businesses.

3. Yes. A business owned by a legislator or a legislator’s family members may apply for “recovery grant” funds made available by Laws 2021, Chapter 3, Sections 10 through 13.

- Chair Lang sought a motion to approve Advisory Opinion 2021-08. Commissioner Baker moved to approve Advisory Opinion 2021-08; Commissioner Carruthers seconded. After a discussion to clarify elements of the opinion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and Advisory Opinion 2021-08 was approved.

7. ADVISORY OPINION 2021-09

- Deputy General Counsel Rebecca Branch provided an overview of Advisory Opinion 2021-09, noting that 2021-09 also originated from an informal advisory opinion request and has been converted into a formal advisory opinion as well. Advisory Opinion 2021-09 presents the following question and provides the following response:

May a legislator or a business a legislator owns apply for a small business loan made available by the Small Business Recovery Act of 2020, Laws 2020 (1st S.S.), Chapter 6, Sections 1 through 7 (“2020 Act”), and the Small Business Recovery and Stimulus Act, Laws 2021 Chapter 5, Sections 1 through 8 (“2021 Act”)?

Decision:

No. The 2020 Act and 2021 Act authorize small business loans, which are contracts. As a result, Article IV, Section 28 of the New Mexico Constitution prohibits a legislator from being directly or indirectly interested in any small

business loan authorized by the 2020 Act or the 2021 Act for the duration of the legislator's term and for one year after their term expires.

- Chair Lang sought a motion to approve Advisory Opinion 2021-09. Commissioner Williams moved to approve Advisory Opinion 2021-09; Commissioner Solimon seconded. After a discussion led by Commissioner Villanueva to correct certain elements of the opinion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and Advisory Opinion 2021-09 was approved as revised.

8. ISSUANCE OF AMENDMENTS TO PARTS 1.8.1 AND 1.8.3 NMAC FOR PUBLIC COMMENT

- Director Farris first provided an overview of proposed amendments to the Commission's administrative rules in 1.8.1 NMAC, and suggested that the Commissioners act on the amendments one section at a time beginning with 1.8.1 NMAC.
- Chair Lang opened the matter for discussion. Hearing no discussion, Chair Lang sought a motion to adopt the amendments to 1.8.1 NMAC as drafted. Commissioner Williams moved as stated above; Commissioner Solimon seconded. Hearing no further discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the proposed amendments to 1.8.1 NMAC were approved for issuance for public comment.
- Director Farris next provided an overview of proposed amendments to the Commission's administrative rules in 1.8.3 NMAC. Chair Lang sought a motion to adopt the amendments to 1.8.3 NMAC as drafted. Commissioner Bluestone recommended striking proposed subsection 1.8.3.9(A)(7)(b)(2), which provided that respondents to Commission proceedings are not entitled to state-provided counsel to respond to alleged violations of the Financial Disclosure Act.
- After discussion, Commissioner Bluestone moved to strike subsection 1.8.3.9(A)(7)(b)(2) from the proposed amendments to 1.8.3 NMAC; Commissioner Solimon seconded. After some discussion to clarify aspects of the provision, Chair Lang conducted a roll-call vote. Commissioner Baker and Chair Lang voted against the motion; all other Commissioners voted in the affirmative. Subsection 1.8.3.9(A)(7)(b)(2) was struck from the proposed amendments.
- Next, Commissioner Bluestone moved to amend the proposed amendment to subsection 1.8.2.9(H) to include prefatory language to clarify the provision's meaning and offered specific language to that effect. Commissioner Carruthers seconded the motion as stated above. After limited discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and amendment was revised as stated.

- Chair Lang sought to approve the proposed amendments, as revised, for issuance for public comment. Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the proposed amendments, as revised, were issued for public comment.

9. EXECUTIVE SESSION

- Chair Lang sought a motion to enter executive session under NMSA 1978, §§ 10-15-1(H)(2) (limited personnel matters), 10-15-1(H)(3) (administrative adjudicatory proceedings), and 10-15-1(H)(7) (attorney-client privilege pertaining to litigation). Commissioner Carruthers 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 executive session.

---BEGINNING OF EXECUTIVE SESSION---

- The following matters were discussed in executive session:
 - a. Administrative Complaint No. 2020-07
 - b. Administrative Complaint No. 2020-31
 - c. Administrative Complaint Nos. 2020-034 & 2020-035
 - d. Administrative Complaint No. 2021-004
- 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 appropriate motion.

---END OF EXECUTIVE SESSION---

10. ACTIONS ON ADMINISTRATIVE CASES

- **Administrative Complaint Nos. 2020-07, 2020-31, 2020-034, 2020-035, & 2020-004**
Director Farris asked the Commission for a motion to instruct staff to continue its investigation for another 90 days in Administrative Case Nos. 2020-07, 2020-31, 2020-034, 2020-035, & 2020-004 under 10-16G-11(A) of the State Ethics Commission Act.
- Chair Lang sought a motion to authorize the staff as stated above. Commissioner Carruthers moved to authorize the staff as stated above; Commissioner Villanueva seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the motion was approved unanimously and the extensions were granted.

11. FY22 BUDGET OUTLOOK AND POSSIBLE INTERAGENCY AGREEMENT

- Director Farris provided an overview of the agency's FY22 budget and the agency's inability to fund the Special Projects Coordinator II position. Director Farris also

proposed a possible solution via the implementation of an interagency agreement with the new Citizen Redistricting Committee, under which the Commission would provide agency staff support to the CRC on a reimbursement basis.

12. DISCUSSION OF RETURN TO IN-PERSON MEETING

- The Commissioners agreed to resume meetings in person starting from the next meeting. Director Farris also indicated that the staff should be able to continue providing the opportunity for the public to attend virtually.

13. COMMENTS

- Members of the public were invited to address the Commission.
- No public comments were offered.

14. DETERMINATION OF NEXT MEETING

- The Commissioners agreed to meet next on Friday, August 13, 2021, no earlier than 10AM.

15. ADJOURNMENT

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

[SUBJECT TO RATIFICATION BY COMMISSION]

Fw: [EXT] Selecting a chair for the CRC

Farris, Jeremy, NMSEC <Jeremy.Farris@state.nm.us>

Mon 6/7/2021 6:40 AM

To: Haquani, Sonny, NMSEC <Sonny.Haquani@state.nm.us>

Good morning Sonny, please also refer to this email in the meeting minutes.

Jeremy Farris, DPhil, J.D.
Executive Director
New Mexico State Ethics Commission
800 Bradbury Dr. SE, Suite 215
Albuquerque, NM 87106
www.sec.state.nm.us
(505) 490 0951 (mobile)
jeremy.farris@state.nm.us

From: Richard Mason <polirich@aol.com>

Sent: Thursday, June 3, 2021 1:13 PM

To: Farris, Jeremy, NMSEC <Jeremy.Farris@state.nm.us>

Subject: [EXT] Selecting a chair for the CRC

Jeremy,

I am not sure whether the SEC Board will consider references, but just in case they do:

The League of Women Voters of New Mexico has the utmost respect for Justice Barbara Vigil, but the League's support goes to Justice Edward Chavez for Chair of the Citizen Redistricting Committee (CRC)

Justice Chavez showed excellent leadership as co-Chair of the New Mexico First Redistricting Task Force. He also was one of the key witnesses in legislative hearings for the legislation that created the CRC.

Throughout the entire process it was clear that Justice was committed to making the 2021 redistricting process as fair, transparent and accountable as possible.

Justice Chavez was also the Justice that oversaw the redrawing of the New Mexico State House of Representatives districts.

The League feels that experience will be a great advantage in moving the work of the CRC forward.

If the SEC is not considering any recommendations, just ignore this email.

Thanks for your help in this whole project.

Dick Mason
Chair of the Action Committee
League of Women Voters of NM

LETTER 2**[EXT] [URGENT] Letter of Support for Citizens Redistricting Committee candidates - 06.04.21**

Isaac De Luna <isaac@civicpolicy.com>

Fri 6/4/2021 10:12 AM

To: Commission, Ethics, NMSEC <Ethics.Commission@state.nm.us>; Farris, Jeremy, NMSEC <Jeremy.Farris@state.nm.us>**Cc:** Elizabeth Cuna <eli@semillastrategies.org>; Oriana Sandoval <oriana@civicpolicy.com>

To the honorable members of the New Mexico State Ethics Commission,

In representation of the NM Civic Engagement Table, the state's largest 501c3 progressive advocacy hub with mission to ensure broad and inclusive civic engagement among New Mexico's diverse and underrepresented communities, the undersigned organizations write to you all today to express strong support for two of the candidates currently being considered to serve in the Citizens Redistricting Committee: Robert Rhatigan and Joaquín Sánchez.

As the state of New Mexico nears the beginning of our redistricting process, we believe it is of utmost importance that the general public is informed, and is granted adequate access to the decision-making process that will go on over the next months. This is because our non-partisan, community-led work is grounded on the values of transparency and accountability.

With these values in mind, we'd like to strongly encourage your leadership body to consider Robert Rhatigan, who has served as our state's demographer and played a crucial role in ensuring and accurate population count during the 2020 Census, and Joaquín Sánchez, a teacher and community leader whose background allows him to have a good understanding of how important accurate representation is necessary for a strong democracy. Beyond the qualifications of both individuals, we also uplift the fact their track record and professional background aligns with our values that represent the people of New Mexico.

We thank you all for the tremendous work you each carry to ensure our democracy continues to be transparent. And because you serve as a key component to our checks and balances system that continues to provide a fair voice and representation to each and every New Mexican.

Thank you for your consideration,

Signed by:

Center for Civic Policy

NAVA Education Project

NM Asian Family Center

NM CAFé

NM Dream Team

New Mexico Voices for Children

New Mexico Working Families Party

OLÉ

Somos Un Pueblo Unido

--

Isaac J. De Luna

Communications Director

625 Silver Ave SW | Suite 320 | Albuquerque, NM 87102

Email: isaac@civicpolicy.com**Office:** 505-842-5539 | **Cell:** 505-917-5501



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-10

August 13, 2021¹

QUESTION PRESENTED²

Who is included in NMSA 1978, Section 10-16A-3(C)'s classification "state agency head" and, therefore, must file an annual financial disclosure statement?

ANSWER

Under Subsection 10-16A-3(C), a "state agency head" is the person or persons who are ultimately responsible for exercising the powers of a state agency's official acts or expending the agency's appropriated funds. Every state entity that receives an annual appropriation in section 4 of the General Appropriations Act or the feed bill is a "state agency" for the purposes of Subsection 10-16A-

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)). 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. On June 22, 2021, the Commission received a request for a formal advisory opinion that detailed the issues 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).

3(C), and their respective “heads” must file annual financial disclosure statements.

ANALYSIS

The Financial Disclosure Act, NMSA 1978, §§ 10-16A-1 to -8 (1993, as amended 2021), requires several categories of individuals to file annual financial disclosure statements with the Secretary of State: persons holding legislative or statewide office; candidates for legislative or statewide office; officials whose appointment to a board or commission is subject to senate confirmation; members of the insurance nominating committee; state ethics commissioners; and state agency heads. *See* NMSA 1978, § 10-16A-3(A)-(C) (1993, as amended 2019). For all but one of those categories, it is relatively clear whom the statutory language includes and excludes.

The category of “state agency head” differs: the New Mexico Statutes Annotated reference at least 241 separate state entities, from the Acequia Commission, NMSA 1978, § 73-2-65 (1993), to the Youth Conversation Corps Commission, NMSA 1978, § 9-5B-5 (1992). *See* App. Of these 241 separate entities, it is not obvious which are “state agencies” and, for the “state agencies” among the 241 entities, who are their respective “heads.” The Financial Disclosure Act defines neither “state agency” nor “state agency head.” *See* NMSA 1978, § 10-16A-2 (1993). And no New Mexico appellate court has interpreted the term.

We begin with the meaning of “state agency” in Subsection 10-16A-3(C). Both New Mexico and federal administrative procedures statutes and freedom of information statutes provide definitions of the term “agency.” *See, e.g.*, 5 U.S.C. § 551(1) (Administrative Procedures Act); 5 U.S.C. § 552(f) (Freedom of Information Act); NMSA 1978, § 12-8-2(A) (1969) (Administrative Procedures Act); *cf. also* NMSA 1978, § 14-2-6(F) (Inspection of Public Records Act) (defining “public body”). New Mexico’s Administrative Procedures Act defines an “agency,” in part, to mean “any state board, commission, department or officer authorized by law to make rules, conduct adjudicatory proceedings, make determinations, grant licenses, impose sanctions, grant or withhold relief or perform other actions or duties delegated by law” NMSA 1978, § 12-8-2(A) (1969). Any general definition of “agency,” however, is only of “limited utility . . . [when] confronted with one of the myriad organizational arrangements for getting the business of government done.” *Washington Rsch. Project, Inc. v. Dep’t of Health, Ed. & Welfare*, 504 F.2d 238, 246 (D.C. Cir. 1974) (citations

omitted). While useful, we hesitate to import to the Financial Disclosure Act part of the definition of “agency” provided by the Administrative Procedures Act.

Rather, when construing the term “state agency head,” we consider the objective and purpose of the Financial Disclosure Act—particularly in the light of the governmental ethics statutes enacted in the same session of the legislature. *See* NMSA 1978, § 12-2A-18(A)(1) (“A statute or rule is construed, if possible, to give effect to its objective and purpose . . .”). “[W]here a plain language analysis does not provide a clear interpretation, . . . ‘other statutes in pari materia [may be considered] in order to determine legislative intent.’” *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 22, 148 N.M. 426, 237 P.3d 728. “This approach ‘has the greatest probative force in the case of statutes relating to the same subject matter passed at the same session of the legislature.’” *Id.* (citation omitted).

The Financial Disclosure Act was enacted in 1993 as part of a broad set of statutory enactments and amendments related to governmental ethics. *See* Laws 1993, Chapter 46, §§ 39-45; *see also id.* §§ 1-60. These reforms responded to the January 20, 1993, recommendations of the Governmental Ethics Task Force, and included not only the Financial Disclosure Act but also campaign disclosure requirements, a prohibition on fundraising during the legislative session, lobbyist disclosure requirements, the enactment of the Governmental Conduct Act, and the creation of an interim legislative ethics committee. *See* Laws 1993, Chapter 46, §§ 1-60; *see also* Rep. H. John Underwood & James B. Mulcock, *Governmental Ethics Task Force, Final Report—Findings and Recommendations*, N.M. Legis. Council Service Info. Memo No. 202.90785 (Jan. 27, 1993). When considered alongside other contemporaneously enacted governmental ethics statutes, particularly the Governmental Conduct Act, the Financial Disclosure Act furthers two principles of public service. *See* NMSA 1978, § 10-16-3. First, financial disclosure requirements provide state officials and employees with a formal means of disclosing “real and potential conflicts of interest . . .” NMSA 1978, § 10-16-3(C) (1993). Second, financial disclosure requirements provide the public with a means to check that a legislator or public officer is using “the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.” NMSA 1978, § 10-16-3(A) (1993, as amended 2011).

Section 10-16A-4 further underscores these twin purposes. That statute provides that state officials and employees who are not otherwise required to file a financial disclosure statement under section 10-16A-3 nevertheless must disclose

their private financial interests if those interests might reasonably affect their “official acts” taken in the course of their public service. *See* NMSA 1978, § 10-16A-4 (1993). Section 10-16A-4’s concern with the “official acts” of certain state officers and employees supports a reading of the Financial Disclosure Act’s main governmental-ethics-related purposes. If public servants must disclose financial interests that reasonably could affect their “official acts” in public office, § 10-16A-4, then it is correspondingly easier to ascertain if their decisions regarding the “powers and resources” of their office benefits the public only, and not themselves, § 10-16-3(A).

In light of the Financial Disclosure Act’s governmental-ethics-related purpose, we conclude that a “state agency,” under the Act, is a state entity that has “powers and resources”—more specifically, the (i) legally authorized powers to alter the rights, duties, or privileges of others; and (ii) appropriated funds. This interpretation of “state agency” accords with other elements in definitions of state agencies or public bodies in New Mexico law. *Cf.* § 12-8-2(A) (Administrative Procedure Act) (defining “agency” to emphasize the legal power of the state to alter the rights and privileges of others);³ § 14-2-6(F) (Inspection of Public Records) (defining “public body” to include any branch of government that receives public funding). The “head” of such a “state agency” is the person or persons who are ultimately responsible for exercising the agency’s powers or expending the agency’s appropriated funds. To verify those persons are using the agency’s powers and funds “only for the public interest and not to obtain personal benefits,” § 10-16-3(A), the Act requires such individuals to disclose details about, *inter alia*, their employer, general sources of gross income, real estate holdings, business interests, memberships on for-profit businesses, professional licenses, and dealings with state agencies. *See generally* NMSA 1978, § 10-16A-3(D)(1)–(8).

This construction might not perfectly resolve all the ambiguities that may arise when considering, under section 10-16A-3(C), whether a particular individual at a particular state entity is a “state agency head” or not. *Cf. Washington Rsch. Project*, 504 F.2d at 246 (“The unavoidable fact is that each new arrangement must be examined anew and in its own context.”). But the construction supplies the two agencies who administer the Financial Disclosure Act—namely, the Secretary of State and the State Ethics Commission—with a definition that comports with the Act’s overall purpose. *See generally* NMSA 1978, §§ 10-16A-3 through 10-16A-

³*See generally, e.g.,* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions As Applied in Legal Reasoning*, 23 YALE LAW JOURNAL 16 (1913).

9. For example, state governmental entities that are purely advisory in their functions and which do not receive appropriations are not “state agencies” for the purpose of the Financial Disclosure Act. Those agencies neither exercise the legal powers of the state, nor expend appropriated state funds. Accordingly, the law does not require annual disclosure of the private finances of their members or employees (assuming there are any) because there is a lessened concern that these individuals could misuse state power or resources in the service of private ends.⁴

This construction also provides the State Ethics Commission and the Secretary of State with a reliable method to ascertain who must annually file financial disclosure statements. If a state entity annually receives an appropriation either through section 4 of the annual General Appropriations Act, *e.g.*, Laws 2021, Chapter 137, § 4, or the annual feed bill, *e.g.*, Laws 2021, Chapter 1, §§ 1–13, then that entity is a “state agency” for the purposes of the Financial Disclosure Act. Consequently, the head of that agency, who is ultimately responsible for expending the appropriated funds, must annually file a financial disclosure statement.

CONCLUSION

Under Subsection 10-16A-3(C), a “state agency head” is the person or persons who are ultimately responsible for exercising the powers of a state agency’s official acts or expending the agency’s appropriated funds. Every state entity that receives an annual appropriation in section 4 of the General Appropriations Act or the feed bill is a “state agency” for the purposes of Section 10-16A-3(C), and their respective “heads” must file annual financial disclosure statements.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

⁴ Individuals who remain uncertain whether or not they are a “state agency head” under Subsection 10-16A-3(C) may always submit a request to the Commission staff for an informal advisory letter. *See* 1.8.1.9(B) NMAC. Informal advisory letters are specific to the person who requests the advice and the facts presented in the request. *See* 1.8.1.9(B)(2) NMAC.

HON. CELIA FOY CASTILLO, Commissioner
RONALD SOLIMON, Commissioner
JUDY VILLANUEVA, Commissioner



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-11

August 13, 2021¹

QUESTION PRESENTED²

Does the Campaign Reporting Act, NMSA 1978, Sections 1-19-1 to -37 (1979, as amended through 2021) ("CRA") prohibit a candidate for an office covered by the CRA from donating campaign funds to a candidate for a municipal, school board, or special district election?

ANSWER

No.

ANALYSIS

The CRA defines "candidate" as "an individual who seeks or considers an office in an election covered by the Campaign Reporting Act," § 1-19-26(G), and

¹ This 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).

² The 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)). 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. On June 22, 2021, the Commission received a request for a formal advisory opinion that detailed the issues 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).

defines “election” as “any primary, general or statewide special election in New Mexico and includes county and judicial retention elections but excludes federal, municipal, school board and special district elections[.]” § 1-19-26(K).

The CRA governs a candidate’s solicitation and receipt of contributions. *See, e.g.*, § 1-19-34.1 (prohibiting solicitation of contributions during the legislative session by certain candidates); § 1-19-34.2 (prohibiting candidates for a regulatory office from “knowingly solicit[ing] a contribution from an entity . . . that is directly regulated by the office”); § 1-19-34.7(A) (prohibiting aggregate contributions in excess of \$5,000 per election cycle).

The CRA also restricts what a candidate may do with contributions received:

It is unlawful for a candidate or the candidate’s agent to make an expenditure of contributions received, except for the following purposes or as otherwise provided in this section:

- (1) expenditures of the campaign;
- (2) expenditures of legislators that are reasonably related to performing the duties of the office held, including mail, telephone and travel expenditures to serve constituents, but excluding personal and legislative session living expenses;
- (3) donations to the state general fund;
- (4) donations to an organization to which a federal income tax deduction would be permitted under Subparagraph (A) of Paragraph (1) of Subsection (b) of Section 170 of the Internal Revenue Code of 1986, as amended;
- (5) expenditures to eliminate the campaign debt of the candidate for the office sought or expenditures incurred by the candidate when seeking election to another public office covered by the Campaign Reporting Act;
- (6) donations to a political committee or to another candidate seeking election to public office; or
- (7) disbursements to return unused funds pro rata to the contributors if no campaign debt exists.

§ 1-19-29.1(A).

The request for an advisory opinion concerns Paragraph 6, which states that contributions received may be used as “donations to a political committee or to another candidate seeking election to public office.” Does Paragraph 6 of

Subsection 1-19-29.1(A) prohibit a candidate from donating contributions received to a candidate for a municipal, school board, or special district election (i.e., an election excluded from the CRA’s definition of “election”)? *See* § 1-19-26(K). For the reasons below, our answer is “No.”

We start with text because “[t]he text of a statute . . . is the primary, essential source of its meaning.” NMSA 1978, § 12-2A-19 (1997). Further:

Unless a word or phrase is defined in the statute . . . being construed, its meaning is determined by its context, the rules of grammar and common usage. A word or phrase that has acquired a technical or particular meaning in a particular context has that meaning if it is used in that context.

NMSA 1978, § 12-2A-2 (1997).

The CRA contains a special definition of “election”: “any primary, general or statewide special election in New Mexico and includes county and judicial retention elections but excludes federal, municipal, school board and special district elections[.]” *See* § 1-19-26(K). So the word “election” in Paragraph 6 of Subsection 1-19-29.1(A) would be accorded this definition. *See* § 12-2A-2. An appeal to a “common sense reading of the law,” *see* July 23, 2009 N.M. Att’y Gen. Advisory Letter, cannot control when the law provides a specific definition. *See* § 12-2A-2 (stating that the meaning of a word is determined by “common usage” except when “[it] is defined in the statute or rule being construed[.]”).

But that does not mean that “election” in Paragraph 6 of Subsection 1-19-29.1(A) must be accorded the definition set forth in Subsection 1-19-26(K). That is because when a term has a “particular meaning in a particular context[.]” the technical or particular meaning controls. *See* § 12-2A-2. Here, we conclude that Paragraph 6 of Subsection 1-19-29.1(A) is an instance where the word “election” must be given a different meaning than the definition set out in Subsection 1-19-26(K). Our conclusion is based on two considerations.

First, Paragraph 6 states that “donations to a political committee or to another candidate seeking election *to public office*” are permitted. (emphasis added). The phrase “to public office” modifies “election” and therefore supplies a “particular context” that controls over the general definition. *See* § 12-2A-2. A statute must be construed to give effect to its entire text. *See* § 12-2A-18(A)(2); *see also Rodriguez v. Williams*, 2015-NMCA-074, ¶ 15 (“In construing a statute,

we determine the Legislature’s intent by giving effect to its entire text in accordance with its objective and purpose.”) (citing § 12-2A-18). The phrase “public office” is not defined in the CRA, so it must be given the meaning accorded by context, the rules of grammar and common usage. § 12-2A-2. A public office is “[a] position whose occupant has legal authority to exercise a government’s sovereign powers for a fixed period,” *see Public Office*, Black’s Law Dictionary (11th ed. 2019), and municipal, school board, or special district offices meet this definition. Interpreting “election” in Paragraph 6 to refer only to “election” as defined in Subsection 1-19-26(K) would ignore the phrase “to public office,” which we cannot do. *See, e.g.,* § 12-2A-18(A)(2). Accordingly, Paragraph 6 of Subsection 1-19-29.1(A) permits donations of contributions received to candidates for public offices, including municipal, school-board, and special-district offices.³

Second, related statutes support interpreting “candidate seeking election to public office” in Paragraph 6 to extend beyond candidates subject to the CRA. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 15 (“In interpreting statutes, we should read the entire statute as a whole so that each provision may be considered in relation to every other part.”) (internal quotation marks and citation omitted); *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) (explaining that statutes *in pari materia* must be construed in reference to each other). Paragraph 5 of the same subsection states that a candidate may make an expenditure of contributions received “to eliminate the campaign debt of the candidate for the office sought or expenditures incurred by the

³ We note that the Attorney General’s Office similarly has interpreted Paragraph 6 to allow expenditures of contributions received as donations to a candidate in a local election because Paragraph 6 “does not make a distinction between a federal, state or local candidate and a common sense reading of the law is that a donation to a candidate for any public office – federal, state or local is permissible.” July 23, 2009 N.M. Att’y Gen. Advisory Letter to Paula Tackett; *see also* June 17, 2020 Att’y Gen. Advisory Letter to Sen. Mark Moores (reiterating this position). This “common sense reading” is bolstered by other state statutes expressly permitting contributions in the other direction—namely, from candidates for school board offices to candidates subject to the CRA. *See* NMSA 1978, § 1-22A-10(E) (2013) (permitting “donations [of contributions received] to a political committee or to another candidate seeking election to a public office that is subject to the reporting provisions of the School District Campaign Reporting Act or the Campaign Reporting Act[.]”) (emphasis added). This reading is also bolstered by municipal ordinances allowing candidates to receive contributions from any source—including candidates for elections covered by the CRA—except city contractors, so long as the amount does not exceed a certain percentage of the salary for the sought-after office. *See* Charter of the City of Albuquerque, art. XIII, § 4(d), (e).

candidate when seeking election to another public office *covered by the Campaign Reporting Act*[.]” *See* § 1-19-29.1(A)(5). The legislature’s use of the phrase “covered by the Campaign Reporting Act” to modify “public office” in Paragraph 5 of Subsection 1-19-29.1(A), but not in Paragraph 6, supports interpreting the phrase “election to public office” in Paragraph 6 to extend beyond candidates for offices covered by the CRA.

CONCLUSION

The CRA does not prohibit a covered candidate from donating campaign funds to a candidate for a municipal, school board, or special district election.⁴

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY L. BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

CELIA FOY CASTILLO, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner

⁴ These contributions would still be disclosed by the candidate in periodic reports. *See* § 1-19-31(A) (2019).



STATE ETHICS COMMISSION

Hon. William F. Lang, Chair
Jeffrey L. Baker, Member
Stuart M. Bluestone, Member
Hon. Garrey Carruthers, Member
Hon. Celia Foy Castillo, Member
Ronald Solimon, Member
Judy Villanueva, Member

Resolution No. 2021-01: Authorizing publication of advisory opinions with the New Mexico Compilation Commission

WHEREAS, THE NEW MEXICO STATE ETHICS COMMISSION
("Commission") met on August 13, 2021, at 9:00 a.m.;

WHEREAS, under NMSA 1978, Section 10-16G-8(A), the Commission "may
issue advisory opinions on matters related to ethics," and advisory opinions "shall
be published after omitting the requester's name and identifying information;"

WHEREAS, the New Mexico Compilation Commission has agreed to publish
advisory opinions issued by the Commission; and

WHEREAS, the Compilation Commission will preserve the Commission's
advisory opinions for posterity and make them accessible to the general public;

NOW, THEREFORE, BE IT RESOLVED by the New Mexico State Ethics
Commission:

1. Upon issuance of an advisory opinion by the Commission, the Executive
Director shall authenticate the opinion, assign it a number, and transmit it to
the Compilation Commission for publication.

2. An authenticated advisory opinion provided to the Compilation Commission and published by the Compilation Commission is the official advisory opinion of the Commission.
3. Commission staff may publish slip advisory opinions on the Commission website or social media. If there is a difference between a slip advisory opinion and an authenticated advisory opinion published by the Compilation Commission, the latter controls.

Adopted by the New Mexico State Ethics Commission this 13th day of August 2021.

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



STATE ETHICS COMMISSION

Jeremy Farris, Executive Director
800 Bradbury Drive Southeast, Suite 215
Albuquerque, NM 87106
505.490.0951 | jeremy.farris@state.nm.us

Hon. William F. Lang (Chair)
Jeffrey Baker
Stuart M. Bluestone
Hon. Garrey Carruthers
Hon. Celia Foy Castillo
Ronald Solimon
Dr. Judy Villanueva

Jeremy D. Farris, Executive Director

August 4, 2021

Re: Draft amendment to joint powers agreement for the Campaign Reporting Act between the Secretary of State and the State Ethics Commission

New material:

NOW, THEREFORE, the Parties agree as follows:

I. DEFINITIONS: The following terms are defined as follows:

- A. Complainant: a person, as defined in Section 1-19-26(P), who files a written complaint alleging a violation of the Campaign Reporting Act;
- B. Respondent: a person against whom a complaint alleging a violation of the Campaign Reporting Act has been filed;
- C. Internal Compliance Violation: a violation of the Campaign Reporting Act identified by the SOS or SEC based on incomplete, misleading, false or incorrect campaign reports or a failure to file reports or failure to file timely reports;
- D. External Complaint: a complaint filed by a Complainant and not instituted by either the SOS or the SEC; and
- E. Voluntary compliance: a respondent's agreement to correct all violations alleged in a complaint or as identified by the SOS or SEC.

II. PARTIES' SHARED JURISDICTION. The Parties' shared jurisdiction to investigate, adjudicate, and enforce the provisions of the Campaign Reporting Act will be administered according to the following provisions:

- A. External Complaints filed with the SEC: Where an external complaint alleging a Campaign Reporting Act violation is filed with the SEC, the following procedures will apply:
 - 1. If the SEC receives any written complaint alleging a violation of the Campaign Reporting Act, and if the SEC has jurisdiction, the SEC shall refer that part of the complaint alleging the Campaign Reporting Act violation to the SOS, and the SEC shall promptly inform the complainant and the respondent that the complaint has been referred.
 - 2. The SOS will review all external complaints and complaints forwarded by the SEC that allege a violation of the Campaign Reporting Act.

3. After the SOS has reviewed the external complaint and if applicable, any response provided by the respondent, the SOS, within 35 days of receiving the external complaint from the SEC, will certify to the SEC whether or not the SOS achieved voluntary compliance.
 4. If, within 35 days of receiving the external complaint, the SOS certifies to the SEC that the SOS has achieved voluntary compliance, then the SEC will dismiss the claim alleging a violation of the Campaign Reporting Act.
 5. If the SOS does not certify to the SEC that the SOS achieved voluntary compliance within 35 days of receiving the complaint—either because the Respondent disputes the claim or because the Respondent otherwise does not voluntarily comply, or there is not enough information to certify that a violation has occurred—then the complaint automatically reverts to the SEC, and the SEC shall proceed on the complaint pursuant to the State Ethics Commission Act and the SEC’s rules of procedure, 1.8.3 NMAC.
- B. External Complaints filed with the SOS: Where an external complaint alleging a Campaign Reporting Act violation is filed with the SOS, but not with the SEC, the following procedures will apply:
1. If the SOS receives any written complaint alleging a violation of the Campaign Reporting Act that is not also received by the SEC, the SOS shall review the complaint and attempt to achieve voluntary compliance.
 2. Within 35 days after receiving the complaint, unless an extension is granted for good cause, the SOS shall forward that complaint to the SEC under Section 1-19-34.8(B) and, if applicable, a certification to the SEC that the SOS achieved voluntary compliance.
 3. Upon receiving a complaint filed with the SOS but not the SEC and notice from the SOS that the SOS was unable to achieve voluntary compliance, the SEC may:
 - a. proceed with the complaint pursuant to the terms of the State Ethics Commission Act and the SEC’s rules of procedure; or
 - b. pursue a civil enforcement action in state district court pursuant to Section 1-19-34.6 and Section 10-16G-9(F).
- C. Internal Compliance Violations: Under Section 1-19-32.1(A), the SOS must examine “at least ten percent of all reports filed during a year by reporting individuals, selected at random at least forty days after the general election and ten days after the April reports are filed in a non-election year, to determine compliance with the Campaign Reporting Act.” Where the SOS identifies a

discrepancy or potential violation of the Campaign Reporting Act through those examinations, the following procedures shall apply:

1. The SOS will notify the reporting individual in writing if a potential discrepancy is found in the report that the reporting individual filed. The reporting individual may file a written explanation for the potential discrepancy and come into voluntary compliance within ten working days of the notice.
2. If the discrepancy remains unresolved after 10 working days of the date of the notice, unless there is an extension granted for good cause, the SOS shall record the discrepancy and any records or communications relating to the discrepancy in an annual report.
3. The SOS shall transmit a copy of the annual report of unresolved discrepancies to the SEC for enforcement pursuant to the provisions of Section 1-19-34.6.
4. Based on the findings of the SOS's annual report, the SEC will consider pursuing a civil action in district court to remedy any violation of the Campaign Reporting Act or to prevent a violation of any provision of the Campaign Reporting Act.

D. Late Filings and Failures to File: The following provisions relate to the SOS's power to impose and collect fines under Section 1-19-35:

1. Under Section 1-19-35, the SOS has the power to impose fines where a reporting individual fails to file or files a late report of expenditures or contributions.
2. If the SOS imposes any fine related to a late filing or a failure to file, as provided by Section 1-19-35(H), and the reporting individual refuses to pay that fine, the SOS may refer the matter to the SEC, which may institute an appropriate civil enforcement action in district court.

E. Other Alleged Violations: If the SOS receives any other information or allegations concerning a potential violation of the Campaign Reporting Act, separate from the categories provided above, the following procedures will apply:

1. If the SOS receives any other information or allegation concerning to a potential violation of the Campaign Reporting Act, the SOS may refer the matter to the SEC.
2. Upon receiving a referral from the SOS under Section II(E)(1) of this agreement, the SEC may:

- c. initiate a complaint pursuant to the terms of the State Ethics Commission Act and the SEC's rules of procedure; or
 - d. pursue a civil enforcement action in state district court pursuant to Section 1-19-34.6.
- F. Concurrent Jurisdiction: To facilitate concurrent jurisdiction over complaints that are separately or contemporaneously filed with the Parties, the SEC and the SOS will confer at least monthly to review the list of complaints forwarded by the SOS to the SEC and those complaints jointly received by both Parties.



STATE ETHICS COMMISSION

Jeremy Farris, Executive Director
800 Bradbury Drive Southeast, Suite 215
Albuquerque, NM 87106
505.490.0951 | jeremy.farris@state.nm.us

Hon. William F. Lang (Chair)
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Stuart M. Bluestone
Hon. Garrey Carruthers
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Ronald Solimon
Dr. Judy Villanueva

Jeremy D. Farris, Executive Director

August 4, 2021

Re: Draft amendment to joint powers agreement for the Financial Disclosure Act between the Secretary of State and the State Ethics Commission

New material:

NOW, THEREFORE, the Parties agree as follows:

I. DEFINITIONS: The following terms are defined as follows:

- A. Complainant: a person who files a written complaint alleging a violation of the Financial Disclosure Act;
- B. Respondent: a person against whom a complaint alleging a violation of the Financial Disclosure Act has been filed;
- C. Internal Compliance Violation: a violation of the Financial Disclosure Act identified by the SOS or the SEC based on incomplete, misleading, false or incorrect campaign reports or a failure to file reports or failure to file timely reports;
- D. External Complaint: a complaint filed by a Complainant and not instituted by either the SOS or the SEC; and
- E. Voluntary compliance: a respondent's correction of all violations alleged in a complaint or after receiving a notification from the SOS or the SEC of an internal compliance violation.

II. PARTIES' SHARED JURISDICTION. The Parties' shared jurisdiction to investigate, adjudicate, and enforce the provisions of the Financial Disclosure Act will be administered according to the following provisions:

- A. External complaints filed with the SOS: Where an external complaint alleging a Financial Disclosure Act violation is filed with the SOS, but not with the SEC, the following procedures will apply:
 - 1. If the SOS receives any written complaint alleging a violation of the Financial Disclosure Act that is not also received by the SEC, the SOS shall review the complaint and, if the SOS perceives a violation of the Act,

attempt to achieve voluntary compliance. In attempting to achieve voluntary compliance:

- a. The SOS shall provide the respondent with ten days' notice either to correct the matter or to respond.
 - b. The SOS may extend the response deadline for good cause shown.
 - c. A failure to either correct the matter or to respond is a failure to come into voluntary compliance with the Financial Disclosure Act.
 - d. A respondent achieves voluntary compliance if they correct the matter the SOS's satisfaction.
 2. If the SOS achieves voluntary compliance, then the SOS will not refer the complaint to the SEC.
 3. If the SOS does not achieve voluntary compliance, the SOS will certify that it was not able to achieve voluntary compliance and will refer the complaint and any response received to the SEC.
 4. Upon receiving a complaint referred from the SOS, a notice from the SOS that the SOS was unable to achieve voluntary compliance, and any other related materials, the SEC may:
 - a. Proceed with the complaint pursuant to the terms of the State Ethics Commission Act and the SEC's rules of procedure; or
 - b. Pursue a civil enforcement action in state district court pursuant Sections 10-16A-8(B) and 10-16G-9(F).
- B. External complaints filed with the SEC Where an external complaint alleging a Financial Disclosure Act violation is filed with the SEC, but not with the SOS, the SEC will not refer the complaint to the SOS and will proceed with the complaint pursuant to the terms of the State Ethics Commission Act and the SEC's rules of procedure.
- C. Internal compliance violations. Where either the SEC or the SOS identifies an internal compliance violation, the following procedures will apply:
1. The SOS shall notify the person responsible for the internal compliance violation and provide the person ten days to correct the matter.

2. If a person responsible for the internal compliance violation does not correct the matter within ten days of receiving a notice from the SOS, the SOS shall notify the SEC and transmit to the SEC any documents related to the internal compliance violation.
 3. After receiving notification from the SOS, the SEC:
 - a. shall notify the person of the violation; and
 - b. may either initiate a complaint under the terms of the State Ethics Commission Act and the SEC's rules of procedure or pursue a civil enforcement action in state district court pursuant Sections 10-16A-8(B) and 10-16G-9(F).
- D. Concurrent Jurisdiction: To facilitate concurrent jurisdiction over complaints that are separately or contemporaneously filed with the Parties, or to review internal compliance violations, the SEC and the SOS will confer at least monthly to review the list of complaints forwarded by the SOS to the SEC and those complaints jointly received by both Parties.



STATE ETHICS COMMISSION

Jeremy Farris, Executive Director
800 Bradbury Drive Southeast, Suite 215
Albuquerque, NM 87106
505.490.0951 | jeremy.farris@state.nm.us

Hon. William F. Lang (Chair)
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Stuart M. Bluestone
Hon. Garrey Carruthers
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Ronald Solimon
Dr. Judy Villanueva

Jeremy D. Farris, Executive Director

August 4, 2021

Re: Draft amendment to joint powers agreement for the Lobbyist Regulation Act between the Secretary of State and the State Ethics Commission

New material:

NOW, THEREFORE, the Parties agree as follows:

I. DEFINITIONS: The following terms are defined as follows:

- A. Complainant: a person who files a written complaint alleging a violation of the Lobbyist Regulation Act;
- B. Respondent: a person against whom a complaint alleging a violation of the Lobbyist Regulation Act has been filed;
- C. Internal Compliance Violation: a violation of the Lobbyist Regulation identified by the SOS or SEC based on incomplete, misleading, false or incorrect reports or a failure to file reports or failure to file timely reports;
- D. External Complaint: a complaint filed by a Complainant and not instituted by either the SOS or the SEC; and
- E. Voluntary compliance: a respondent's agreement to correct all violations alleged in a complaint or as identified by the SOS or SEC.

II. PARTIES' SHARED JURISDICTION. The Parties' shared jurisdiction to investigate, adjudicate, and enforce the provisions of the Lobbyist Regulation Act will be administered according to the following provisions:

- A. External Complaints filed with the SEC: Where an external complaint alleging a Lobbyist Regulation Act violation is filed with the SEC, the following procedures will apply:
 - 1. If the SEC receives any written complaint alleging a violation of the Lobbyist Regulation Act, and if the SEC has jurisdiction, the SEC shall refer that part of the complaint alleging the Lobbyist Regulation Act violation to the SOS, and the SEC shall promptly inform the complainant and the respondent that the complaint has been referred.

2. The SOS will review all external complaints and complaints forwarded by the SEC that allege a violation of the Lobbyist Regulation Act.
 3. After the SOS has reviewed the external complaint and if applicable, any response provided by the respondent, the SOS, within 20 days of receiving the external complaint from the SEC, will certify to the SEC whether or not the SOS achieved voluntary compliance.
 4. If, within 20 days of receiving the external complaint, the SOS certifies to the SEC that the SOS has achieved voluntary compliance, then the SEC will dismiss the claim alleging a violation of the Lobbyist Regulation Act.
 5. If the SOS does not certify to the SEC that the SOS achieved voluntary compliance within 20 days of receiving the complaint—either because the Respondent disputes the claim or because the Respondent otherwise does not voluntarily comply, or there is not enough information to certify that a violation has occurred—then the complaint automatically reverts to the SEC, and the SEC shall proceed on the complaint pursuant to the State Ethics Commission Act and the SEC’s rules of procedure, 1.8.3 NMAC.
- B. External Complaints filed with the SOS: Where an external complaint alleging a Lobbyist Regulation Act violation is filed with the SOS, but not with the SEC, the following procedures will apply:
1. If the SOS receives any written complaint alleging a violation of the Lobbyist Regulation Act that is not also received by the SEC, the SOS shall review the complaint and attempt to achieve voluntary compliance.
 2. Within 20 days after receiving the complaint, unless an extension is granted for good cause, the SOS shall forward that complaint to the SEC and, if applicable, a certification to the SEC that the SOS achieved voluntary compliance.
 3. Upon receiving a complaint filed with the SOS but not the SEC and notice from the SOS that the SOS was unable to achieve voluntary compliance, the SEC may:
 - a. proceed with the complaint pursuant to the terms of the State Ethics Commission Act and the SEC’s rules of procedure; or
 - b. pursue a civil enforcement action in state district court pursuant to Section 1-19-34.6 and Section 10-16G-9(F).
- C. Internal Compliance Violations: Under Section 2-11-8.2(B), the SOS may conduct examinations of reports and the SEC may initiate investigations to

determine whether the Lobbyist Regulation Act has been violated. Where the SOS identifies a discrepancy or potential violation of the Lobbyist Regulation Act, the following procedures shall apply:

1. The SOS will notify the reporting person in writing if a potential discrepancy is found in the report that the reporting person filed. The reporting person may file a written explanation for the potential discrepancy and come into voluntary compliance within ten working days of the notice.
2. If the discrepancy remains unresolved after 10 working days of the date of the notice, unless there is an extension granted for good cause, the SOS shall record the discrepancy and any records or communications relating to the discrepancy.
3. The SOS may transmit all records and communications relating to the discrepancy to the SEC for enforcement pursuant to the provisions of Section 2-11-8.2(F).
4. The SEC may consider pursuing a civil action in district court to remedy any violation of the Lobbyist Regulation Act or to prevent a violation of any provision of the Lobbyist Regulation Act.

D. Late Filings and Failures to File: The following provisions relate to the SOS's power to impose and collect fines under Subsections 2-11-8.2(D) and (E):

1. Under Section 2-11-8.2(D), the SOS has the power to impose fines where a person fails to file or files a report after the deadline imposed by the Lobbyist Regulation Act.
2. If the SOS imposes any fine related to a late filing or a failure to file, as provided by Subsection 2-11-8.2(D), and the person refuses to pay that fine, the SOS may refer the matter to the SEC under Subsection 2-11-8.2(E), which may institute an appropriate civil enforcement action in district court pursuant to Subsection 2-11-8.2(F).

E. Other Alleged Violations: If the SOS receives any other information or allegations concerning a potential violation of the Lobbyist Regulation Act, separate from the categories provided above, the following procedures will apply:

1. If the SOS receives any other information or allegation concerning to a potential violation of the Lobbyist Regulation Act, the SOS may refer the matter to the SEC.

2. Upon receiving a referral from the SOS under Section II(E)(1) of this agreement, the SEC may:
 - c. initiate a complaint pursuant to the terms of the State Ethics Commission Act and the SEC's rules of procedure; or
 - d. pursue a civil enforcement action in state district court pursuant to Section 2-11-8.2(F) and Section 10-16G-9(F).
- F. Concurrent Jurisdiction: To facilitate concurrent jurisdiction over complaints that are separately or contemporaneously filed with the Parties, the SEC and the SOS will confer at least monthly to review the list of complaints forwarded by the SOS to the SEC and those complaints jointly received by both Parties.



STATE ETHICS COMMISSION

Jeremy Farris, Executive Director
800 Bradbury Drive Southeast, Suite 215
Albuquerque, NM 87106
505.490.0951 | jeremy.farris@state.nm.us

Hon. William F. Lang (Chair)
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Stuart M. Bluestone
Hon. Garrey Carruthers
Hon. Celia Foy Castillo
Ronald Solimon
Dr. Judy Villanueva

Jeremy D. Farris, Executive Director

August 4, 2021

Re: Draft amendment to joint powers agreement for the Voter Action Act between the Secretary of State and the State Ethics Commission

New material:

NOW, THEREFORE, the Parties agree as follows:

I. DEFINITIONS: The following terms are defined as follows:

- A. Complainant: a person who files a written complaint alleging a violation of the Voter Action Act;
- B. Respondent: a person against whom a complaint alleging a violation of the Voter Action Act has been filed;
- C. Internal Compliance Violation: a violation of the Voter Action Act that the SOS identifies through its administration of the Voter Action Act and not through the filing or referral of an external complaint;
- D. External Complaint: a complaint alleging a violation of the Voter Action Act, which is not generated by the SOS and is filed by the Complainant. External complaints do not include appeals made pursuant to NMSA 1978, Section 1-19A-16.

II. PARTIES' SHARED JURISDICTION. The Parties' shared jurisdiction to investigate, adjudicate, and enforce the provisions of the Financial Disclosure Act will be administered according to the following provisions:

- A. External complaints filed with the SOS: Where an external complaint alleging a Voter Action Act violation is filed with the SOS, but not with the SEC, the following procedures will apply:
 - 1. If the SOS receives any written complaint alleging a violation of the Voter Action Act that is not also received by the SEC, the SOS shall review the complaint and, if the SOS perceives a violation of the Act, attempt to achieve voluntary compliance. In attempting to achieve voluntary compliance:

- a. The SOS shall provide the respondent with ten days' notice either to correct the matter or to respond.
 - b. The SOS may extend the response deadline for good cause shown.
 - c. A failure to either correct the matter or to respond is a failure to come into voluntary compliance with the Voter Action Act.
 - d. A respondent achieves voluntary compliance if they correct the matter the SOS's satisfaction.
2. If the SOS achieves voluntary compliance, then the SOS will not refer the complaint to the SEC.
3. If the SOS does not achieve voluntary compliance, the SOS will certify that it was not able to achieve voluntary compliance and will refer the complaint and any response received to the SEC, pursuant to Subsection 1-19A-15.1(B).
4. Upon receiving a complaint referred from the SOS, a notice from the SOS that the SOS was unable to achieve voluntary compliance, and any other related materials, the SEC may:
 - a. Proceed with the complaint pursuant to the terms of the State Ethics Commission Act and the SEC's rules of procedure; or
 - b. Pursue a civil enforcement action in state district court pursuant Sections 10-16A-8(B) and 10-16G-9(F).
- B. External complaints filed with the SEC Where an external complaint alleging a Voter Action Act violation is filed with the SEC, but not with the SOS, the SEC will not refer the complaint to the SOS and will proceed with the complaint pursuant to the terms of the State Ethics Commission Act and the SEC's rules of procedure.
- C. Internal compliance violations. Where either the SEC or the SOS identifies an internal compliance violation, the following procedures will apply:
 1. The SOS shall notify the person responsible for the internal compliance violation and provide the person ten days to correct the matter.

2. If a person responsible for the internal compliance violation does not correct the matter within ten days of receiving a notice from the SOS, the SOS shall notify the SEC and transmit to the SEC any documents related to the internal compliance violation.
 3. After receiving notification from the SOS, the SEC:
 - a. shall notify the person of the violation; and
 - b. may either initiate a complaint under the terms of the State Ethics Commission Act and the SEC's rules of procedure or pursue a civil enforcement action in state district court pursuant to Subsection 10-16G-9(F).
- D. Appeals of SOS certification decisions under Section 1-19A-16: If the SEC receives any complaint, filing, or submission that the SEC interprets as an appeal pursuant to Section 1-19A-16 of an SOS certification decision or a decision regarding the distribution of matching funds, then the SEC shall promptly forward that appeal to the SOS. If the SOS revokes a candidate's certification or concludes, pursuant to Subsection 1-19A-16D) that an appeal was made frivolously or to result in delay or hardship, and, consequent to that conclusion, sanctions the moving party by requiring the party to pay costs of the administrative hearing, the court hearing and the opposing parties, and where the sanctioned party does not comply with the SOS-imposed sanction, then the SOS may refer the matter to the SEC for potential civil enforcement pursuant to Subsection 10-16G-9(F).
- E. Concurrent Jurisdiction: To facilitate concurrent jurisdiction over complaints that are separately or contemporaneously filed with the Parties, or to review internal compliance violations, the SEC and the SOS will confer at least monthly to review the list of complaints forwarded by the SOS to the SEC and those complaints jointly received by both Parties.



STATE ETHICS COMMISSION

Jeremy Farris, Executive Director
800 Bradbury Drive Southeast, Suite 215
Albuquerque, NM 87106
505.490.0951 | jeremy.farris@state.nm.us

Hon. William F. Lang (Chair)
Jeffrey L. Baker
Stuart M. Bluestone
Hon. Garrey Carruthers
Hon. Celia Foy Castillo
Ronald Solimon
Dr. Judy Villanueva

Jeremy D. Farris, Executive Director

August 4, 2021

To: State Ethics Commission
From: Jeremy Farris, Executive Director
Re: October 1, 2021 recommendations to Legislature and Governor on expansion of the Commission's jurisdiction

Dear Commissioners,

As you know, Laws 2019, Chapter 86, Section 37 requires the Commission to submit a report by October 1, 2021 to the Legislature and the Office of the Governor “whether to extend commission jurisdiction.” In anticipation of sharing a draft report (a version of which I anticipate the Commission would issue on October 1), I want to share with you some preliminary thoughts on the Commission's jurisdiction and any recommendations regarding its enlargement.

By “jurisdiction,” I mean—and understand Laws 2019, Chapter 86, Section 37 to mean—the Commission's power to decide an administrative complaint alleging a violation of a provision of law and to enforce a remedy for a violation against a person. *See, e.g., Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019). This concept combines both the Commission's subject-matter jurisdiction (*i.e.*, the Commission's authority to decide whether a particular provision of law has been violated) and the Commission's personal jurisdiction (*i.e.*, the legal requirement that certain persons are subject to the Commission's adjudicative process and the Commission's authority to issue remedies against such persons). *See Subject-matter jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Personal jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019). This authority differs from the Commission's separate discretionary authority to file civil enforcement actions in state court, requesting that a court adjudicate a violation and issue a remedy.

The only extension of the Commission's jurisdiction that I currently recommend is an extension of the Commission's subject-matter jurisdiction to adjudicate complaints alleging violations of Article IV, Section 28; Article V, Section 12; and Article XX, Section 9 of the New Mexico Constitution. These are the clauses prohibiting legislators' interests in contracts and any extra compensation and emoluments to state officers.¹ These constitutional clauses concern the

¹ Article IV, Section 28 provides:

No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or

bedrock principle of government ethics—namely, that legislators should use the powers of their offices “only to advance the public interest and not to obtain personal benefits and not to obtain personal benefits or pursue private interests.” *See* NMSA 1978, § 10-16-3(A). And, because it furthers the same principle, the Commission already has jurisdiction for the Anti-Donation Clause. *See* NMSA 1978, § 10-16G-9(A)(9). The Commission has already issued three formal advisory opinions advising how Article IV, Section 28 applies in various circumstances. *See* State Ethics Comm’n Adv. Op. 2021-09 (Jun. 4, 2021); State Ethics Comm’n Adv. Op. 2021-08 (Jun. 4, 2021); State Ethics Comm’n Adv. Op. 2021-02 (Feb. 5, 2021). Accordingly, these constitutional provisions seem to have a natural home within the Commission’s subject-matter jurisdiction.

In contrast to these recommended extensions of the Commission’s subject-matter jurisdiction, I *do not* advise that the Commission recommend expansion of the Commission’s personal jurisdiction—i.e., an expansion that would require the Commission to adjudicate complaints filed against, for example, the officials and employees of counties, municipalities, special districts, and school districts. Such expansion might be a sound idea in the medium-term future of this Commission, after other statutory amendments have been enacted. It is not a good idea now—for several reasons:

1. The Commission currently interacts with the officials and employees of local governments in several ways.
 - a. The Commission issues letter advisory opinions to local government officials and employees about the Governmental Conduct Act. (Moreover, requests for formal advisory opinions about the ways that the Procurement Code and the Campaign Reporting Act interact with local government officials and employees have little trouble finding their way to the Commission.)
 - b. The Commission offers trainings to local government officials and employees regarding the applicable ethics laws.
 - c. Most significantly, the Commission has the discretionary authority to pursue civil enforcement actions against local government officials and employees for violations of the laws that apply to them. *See* NMSA 1978, §§ 10-16-18(B) (Governmental Conduct Act); 10-16G-9(F) (State Ethics Commission Act); 13-1-

indirectly in any contract with the state or any municipality thereof,
which was authorized by any law passed during such term.

N.M. Const., art. IV, § 28. Article V, Section 12, in pertinent part provides “The compensation herein fixed [for certain executive officers] shall be full payment for all services rendered by said officers and they shall receive no other fees or compensation whatsoever.” And Article XX, Section 9 provides “No officer of the state who receives a salary, shall accept or receive to his own use any compensation, fees, allowance or emoluments for or on account of his office, in any form whatever, except the salary provided by law.”

196 (Procurement Code). And the Commission already receives informal complaints and information relating to such violations, which the Commission staff assess for potential civil enforcement actions.

Expansion of the Commission's personal jurisdiction for administrative cases would be a responsibility in addition to these three responsibilities. Accordingly, any benefit such expansion would provide to vindicating the State's ethics laws would be marginal to the benefits that the full exercise of these authorities already could, in principle, provide—an exercise of authority which the Commission's limited staff cannot now meet.

2. To vindicate the Governmental Conduct Act, the Procurement Code, the Campaign Reporting Act, and the Anti-Donation Clause (those laws that apply in part to the officials and employees of local governments) civil enforcement actions are a more efficient use of limited Commission resources than the adjudications of administrative complaints. The first 18 months of the Commission's jurisdiction for administrative complaints have been a lesson in how inefficient the Commission's adjudicatory process is to vindicate the State's interests in its ethics laws. There are several reasons why:
 - a. The first is the Commission's investigatory and adjudicatory processes for administrative complaints do not incentivize settlements. The penalties for violations of the ethics laws are likely too slight to motivate either deterrence or settlement. *See, e.g.*, NMSA 1978, § 10-16-18(B) (authorizing a \$250 civil fine for a violation of the Governmental Conduct Act). Moreover, Section 10-16G-10(K) of the State Ethics Commission Act provides representation, funded by the state, for any respondents to an administrative complaint. For a respondent with free legal counsel and the prospect of, at worst, a \$250 fine, there is very little reason to settle. Rather, the incentives are the opposite. The respondents' counsel, paid hourly on contracts with the Risk Management Division, have incentives to litigate every conceivable issue (no matter how lacking in merit), particularly with respect to district court proceedings surrounding the Commission's subpoenas and any appeals or petitions arising therefrom.
 - b. Complainants file ethics complaints for political reasons. For these complainants, the filing of the complaint and the ensuing media coverage is the goal—irrespective of the merits of complaint or even whether it is properly within the Commission's jurisdiction. Such complaints are a drag on Commission resources. Expansion of jurisdiction for local government officials is likely to invite additional complaints that lack merit (assuming that they are even within the Commission's jurisdiction) and are motivated for political and media-coverage reasons.

3. The Commission is understaffed to handle a wider range of personal jurisdiction in the Commission's quasi-judicial capacity. There are few considerations here:
 - a. The Commission currently has three attorneys. Conversations with the leadership of other state ethics commissions that have jurisdiction for local government officials and employees suggest that the Commission would need between double and triple its annual budget appropriation to handle the increased workload that comes with jurisdiction for local public officials and employees. It is difficult to reasonably anticipate an appropriation at 100% to 200% of current appropriations, and so I don't recommend the Commission recommend an expansion of jurisdiction that would require for those additional resources.
 - b. The Legislature tasks the Commission with other resource-intensive jobs, such as selecting three members to the Citizen Redistricting Commission. There is also an effort to authorize the Commission to set the salaries of state elected officials. Until the Commission's main responsibilities are less in play, I do not advise that the Commission recommend expansion of personal jurisdiction.

Please note that this is merely a preview of my preliminary views as to the wisdom of expanding personal jurisdiction at this point. The October 1 report will include information relating to surveys that the Commission staff have conducted with respect to local governments themselves—some of which are sanguine about expansions, others far less so or not at all. As always, I am happy to discuss any of these points at length.

Very truly yours,

/s/ Jeremy Farris

This is an amendment to 1.8.1 NMAC, Sections 9 & 13; amendments to 1.8.3 NMAC, Sections 1, 7, 9, 10, 11, 12, 13, 14, 15, 16.

1.8.1.9 ADVISORY OPINIONS AND INFORMAL ADVISORY OPINIONS

A. Advisory opinions. The commission may issue advisory opinions on matters related to ethics upon request.

(1) A request for an advisory opinion must be in writing, and must be submitted by a public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist or lobbyist's employer. The request is confidential and not subject to the provisions of the Inspection of Public Records Act.

(2) Upon receiving a request for an advisory opinion, the commission must provide the requester with a written confirmation of receipt.

(3) Within sixty days of receiving a request for an advisory opinion, the commission must either:

(a) issue an advisory opinion;

(b) inform the requester that the commission will not be issuing an advisory opinion and provide an explanation for the commission's decision; or

(c) inform the requester that the commission requires more than sixty days to issue an advisory opinion, and notifies the requester about the status of the request every thirty days thereafter.

(4) Unless amended or revoked, an advisory opinion shall be binding on the commission in any subsequent commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion.

(5) At the request of any commissioner, the director or the director's designee shall draft an advisory opinion based on any legal determination issued by the director, the general counsel, or a hearing officer for the commission to consider for issuance as an advisory opinion.

B. Informal advisory opinions. A person may submit the request for an informal advisory opinion to the director or general counsel, who may answer the request.

(1) A request for an informal advisory opinion must be in writing, and must be submitted by a public official, public employee, candidate, person subject to the Campaign Reporting Act or the Governmental Conduct Act, government contractor, lobbyist or lobbyist's employer. The request is confidential and not subject to the provisions of the Inspection of Public Records Act.

(2) An informal advisory opinion is specific to the person who requests the advice and the facts presented in the request.

(3) An informal advisory opinion is not binding on the commission unless and until the commission votes to adopt the informal advisory opinion as an advisory opinion. 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.

(4) If the commission determines that a person committed a violation after reasonably relying on an informal advisory opinion and the violation is directly related to the informal advisory opinion, the commission may consider that the person acted in good faith.

(5) If a person submits a request for an advisory opinion and does not specify whether the request is for a formal advisory opinion or an informal advisory opinion, the director or the director's designee may answer the request through an informal advisory opinion. The director may also relay the request to the commission to issue a formal advisory opinion.

[1.8.1.9 NMAC-N, xx/xx/2021]

1.8.1.13 ADDRESS ~~[FOR FILING DOCUMENTS]:~~

A. By mail: Director, State Ethics Commission, 800 Bradbury Dr. SE, Ste. [247] 215, Albuquerque, NM 87106.

B. In person: State Ethics Commission, 800 Bradbury Dr. SE, Ste. [247] 215, Albuquerque, NM 87106.

C. By email: ethics.commission@state.nm.us.

[1.8.1.13 NMAC-N, 1/1/2020; Rn & A, 10/15/2020]

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION

CHAPTER 8 STATE ETHICS COMMISSION
PART 3 ADMINISTRATIVE HEARINGS

1.8.3.1 ISSUING AGENCY: State ethics commission (the commission), 800 Bradbury Dr. SE, Ste. [247] 215, Albuquerque, New Mexico 87106.

[1.8.3.1 NMAC-N, 01/01/2020; A, 08/13/2021]

1.8.3.7 DEFINITIONS: The following terms apply to these rules unless their context clearly indicates otherwise:

A. **“Appellant”** is a party who requests that the commission review and change the decision of the hearing officer.

B. **“Appellee”** is a party to an appeal arguing that the hearing officer’s decision is correct and should stand.

C. **“Blackout period”** means the period beginning 60 days before a primary or general election in which a person against whom a complaint is filed is a candidate, and ending on the day after that election.

D. **“Brief”** is a document summarizing the facts and points of law of a party’s case. It may be offered to or requested by a hearing officer or filed in an appeal to the commission. For example, a “brief in chief” is filed with the commission by the appellant. An “answer brief” is filed by the appellee in response to the brief-in-chief.

E. **“Candidate”** as used in this part, has the same meaning as it does in Subsection G of Section 1-19-26 of the Campaign Reporting Act, Section 1-19-25 NMSA 1978.

F. **“Case management system”** is the commission’s electronic filing and notification system for complaints, which may be accessed at <https://proceedings.sec.state.nm.us>.

~~[E]~~ **G.** **“Claim”** is a complainant’s allegation that a respondent violated a particular provision of law.

~~[F]~~ **H.** **“Designated district court judge”** is an active or pro tempore district judge who has been appointed by the chief justice of the supreme court to consider the issuance and enforcement of subpoenas applied for by the commission.

~~[G]~~ **I.** **“Discriminatory practice,”** as used in this part, has the same meaning as it does in Subsection L of Section 28-1-2 of the Human Rights Act, Section 28-1-1 NMSA 1978.

~~[H]~~ **J.** **“Lobbyist’s employer”** as used in this part, has the same meaning as it does in Subsection F of Section 2-11-2 of the Lobbyist Regulation Act, Section 2-11-1 NMSA 1978.

~~[I]~~ **K.** **“Meeting”** means a meeting of the commission duly noticed and conducted in compliance with the requirements of the Open Meetings Act, Section 10-15-1 NMSA 1978.

~~[J]~~ **L.** **“Party” and “Parties”** means the named persons in a proceeding before the commission or a hearing officer.

~~[K]~~ **M.** **“Person”** means any individual or entity.

~~[L]~~ **N.** **“Pleading”** means any written request, motion, or proposed action filed by a party with the hearing officer or commission.

~~[M]~~ **O.** **“Qualified hearing officer”** means an official appointed by the director in accordance with these rules to conduct an administrative hearing to enable the commission to exercise its statutory powers.

~~[N]~~ **P.** **“Records”** means all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, whether or not the records are required by law to be created or maintained.

[1.8.3.7 NMAC-N, 01/01/2020; A, 08/13/2021]

1.8.3.9 COMPLAINTS: FILING REQUIREMENTS AND LIMITATIONS; AMENDMENTS; NOTICE; TIME LIMITATIONS; CONSOLIDATION; COMMISSION-INITIATED COMPLAINTS:

A. The commission shall investigate allegations of violations of any statutes or constitutional provisions over which the legislature gives it jurisdiction. Such complaints may be filed against any public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist, or lobbyist’s employer, or a restricted donor subject to the Gift Act.

(1) The commission may initiate a proceeding before the commission concerning an alleged violation:

(a) through the filing of a complaint with the commission by any person which alleges that the complainant has actual knowledge of the alleged violation of such statutes or constitutional provisions;

(b) by initiating its own complaint alleging a violation of any statute or constitutional provision over which the commission has jurisdiction against a person subject to the jurisdiction of the commission, pursuant to Paragraph (1) of Subsection C of Section 10-16G-5 NMSA (1978); or

(c) by accepting a complaint filed with another public agency or legislative body and forwarded by that agency or legislative body to the commission pursuant to Subsection B or E of Section 10-16G-9 NMSA 1978.

(2) A complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC, shall:

(a) be filed electronically on the commission's case management system, or on a form prescribed by the commission and provided at no cost to the complainant or in a substantially equivalent form, which the director or the director's designee shall record electronically on the commission's case management system;

(b) state the name and, to the extent known to the complainant, the respondent's mailing address, email address, telephone number, and public office or other position ~~of the person against whom the complaint is filed;~~

(c) set forth in detail the specific claims against the respondent and the supporting factual allegations, including, if known to the complainant, any law that the respondent has allegedly violated;

(d) include any evidence that the complainant has that supports the complaint, which may include documents, records and names of witnesses; and

(e) be signed and sworn to by the complainant, under penalty of false statement.

(3) The director shall reject any complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC that fails to state either the respondent's mailing address or email address, or is not signed, notarized and sworn to by the complainant, under penalty of false statement, shall be dismissed without prejudice, and the complainant will have the opportunity to refile the complaint.

(4) A complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC may be amended once as a matter of course at any time before a responsive pleading is served. Otherwise, the complainant may amend the complaint by leave of the director. An amended complaint must be filed within seven days of the director's determination under Paragraph (3) of Subsection A of 1.8.3.10 NMAC that the commission has jurisdiction over the complaint.

(5) Unless the director grants the complainant leave, the commission shall not accept a complaint filed by a complainant who, within the previous calendar year, filed two complaints that were subsequently dismissed. In applying for leave to file a third or subsequent complaint within the same calendar year, the complainant shall explain how, as compared to the dismissed complaints, the proposed complaint concerns different facts, asserts different claims, or asserts claims against different respondents.

(6) By registering and filing a complaint through the commission's case management system, a party agrees to accept electronic service of subpoenas, notices, and other filings as a condition of submitting filings with the commission.

(14) 7) Any party may represent themselves or may be represented by a licensed attorney. Corporations and other non-natural persons must be represented by counsel.

(a) Any ~~[legal counsel]~~ attorney representing ~~[any]~~ party shall enter an appearance with the commission and register on the commission's case management system. Upon receipt of the appearance, the commission shall direct all official notices and correspondence to the attorney named in the written appearance, at the address or location stated therein, ~~and a~~ Any official notice, ~~[including a subpoena issued pursuant to Subsection J of Section 10-16G-10 NMSA 1978],~~ received by any named attorney shall be deemed to have been received by the represented party. An attorney may withdraw from representing a party before the commission only with leave of the director and for a reason provided for by Section B of Rule 16-116 NMRA.

(b) If the respondent is a public official or state public employee subject to a complaint alleging a violation made in the performance of the respondent's duties, the respondent ~~shall be~~ is entitled to representation by the risk management division of the general services department. "Respondent's duties," within the meaning of Subsection K of Section 10-16G-10 NMSA 1978 and this rule, excludes:

(i) conduct undertaken by an elected public official in furtherance of his or her campaign for election or reelection; and

(ii) any duty or obligation that by law is personal, rather than official, in nature.

(15) 8) The commission may proceed with any complaint~~[-irrespective of whether the complaint is notarized,]~~ that is forwarded to the commission by another ~~[state]~~ public agency, or by the legislature or a

legislative committee pursuant to Subparagraph (c) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC, according to the terms of any agreement for shared jurisdiction between the commission and the referring agency or the legislative body, pursuant to Subsection E of Section 10-16G-9 NMSA 1978.

(16) 2) No complaint may be accepted or considered by the commission unless the date on which the complaint is received by the commission, or the date on which the commission votes to initiate a complaint, falls within the later of two years from the date:

- (a) on which the alleged conduct occurred; or
- (b) the alleged conduct could reasonably have been discovered.

(17) 10) For the purpose of applying the two-year statute of limitations established in Subsection A of Section 10-16G-15 NMSA 1978, the date on which a complaint is filed with a public agency that refers the complaint to the commission under the law, or under an agreement for shared jurisdiction, shall be deemed the date of filing with the commission.

B. The commission shall not adjudicate a complaint filed against a candidate, except under the Campaign Reporting Act or Voter Action Act, fewer than 60 days before a primary or general election.

(1) This paragraph does not preclude during the blackout period:

(a) the dismissal of frivolous or unsubstantiated complaints, or dismissal or referral of complaints outside the jurisdiction of the commission, as provided by these rules; or

(b) an investigation related to the commission's discretion to file a court action to enforce the civil compliance provisions of any statute or constitutional provision over which the commission has jurisdiction.

(2) For complaints filed during and subject to the blackout period, the director, or the director's designee, shall notify the complainant:

- (a) of the provisions of this section regarding the blackout period;
- (b) that the complainant may refer allegations of criminal conduct to the attorney general or appropriate district attorney at any time; and
- (c) of the deferral of commission action on the complaint for the duration of the blackout period.

(3) The director, or the director's designee, shall within five days notify a ~~person~~ candidate named as a respondent in a complaint filed during the 60-day pre-election blackout period of:

- (a) the filing of the complaint;
- (b) the specific allegations and violations charged in the complaint; and
- (c) the deferral of commission action on the complaint for the duration of the blackout period.

C. The commission shall not adjudicate a complaint that alleges conduct occurring only before July 1, 2019. Any complaint filed with the commission or referred to the commission that alleges conduct occurring only before July 1, 2019 shall be ~~either dismissed or~~ and, if applicable, returned to the referring entity.

D. The director may consolidate a complaint with any other pending complaint involving related questions of fact or laws; provided that the consolidation will not unduly delay resolution of an earlier-filed complaint, unduly prejudice any complainant, or compromise the right of any complainant or respondent to confidentiality under these rules.

E. The Commission may initiate a complaint alleging a violation of any statute or constitutional provision over which the commission has jurisdiction against a public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist, lobbyist's employer, or a restricted donor subject to the Gift Act., if:

- (1) any commissioner or the director presents to the commission information or documents showing a violation of any statute or constitutional provision over which the commission has jurisdiction;
 - (2) the director determines that the complaint would be within the commission's jurisdiction;
- and
- (3) five commissioners vote to initiate the complaint and sign under oath and subject to penalty of perjury that the information in the complaint, and any attachments provided with the complaint, are true and accurate.

F. If the commission initiates any complaint under Paragraph (1) of Subsection (C) of Section 10-16G-5 NMSA 1978 and Subsection (E) of 1.8.3.9 NMAC, then the director shall:

- (1) provide the respondent with notice of the complaint in accordance with Subsection (A) of 1.8.3.10 NMAC; and

(2) forward the complaint to the general counsel to initiate an investigation in accordance with Section 1.8.3.11 NMAC.

G. If the director determines that the complaint, either in whole or in part, is subject to referral to another state or federal agency in accordance with Subsection D of Section 10-16G-9, the terms of an agreement entered into pursuant to the terms of Subsection E of Section 10-16G-9 NMSA 1978, Subsection D of Section 10-16-14 NMSA 1978, Subsection C of Section 1-19-34.4 NMSA 1978, or Subsection B of Section 2-11-8.2, the director shall refer some or all claims within the complaint to the appropriate agency and, within ten days of the referral, provide notice to the respondent of the referral.

H. When the commission initiates its own administrative complaint, the commission may serve in an appellate role after a hearing officer decision, and the commission will be limited to reviewing the record developed at the hearing. As such, except as provided in subsection (E) of 1.8.3.9 NMAC, Subsections (I) & (J) of Section 10-16G-10(I) NMSA 1978, Section (A) of Section 10-16G-11 NMSA 1978, Subsection A of 1.8.3.12 NMAC, or Subsection (J) of 1.8.3.14 NMAC, the commission shall not receive any information related to a complaint filed pursuant to Paragraph (1) of Subsection (C) of Section 10-16G-5 NMSA 1978 and Section (E) of 1.8.3.9 NMAC until an appeal is made pursuant to Section 1.8.3.15 NMAC.

[1.8.3.9 NMAC-N, 01/01/2020; A, 08/13/2021]

1.8.3.10 DIRECTOR'S RESPONSIBILITIES UPON RECEIVING A COMPLAINT; RESPONDENT'S OPPORTUNITY TO RESPOND; JURISDICTIONAL REVIEW; REFERRALS; NOTIFICATION TO PARTIES:

A. Within seven days of receiving a complaint, the director shall notify the respondent of the filing of the complaint; provided that, for any complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC, the director shall ensure that the complaint satisfies the filing requirements set forth in Paragraph (1) of Subsection A of 1.8.3.9 NMAC before notifying the respondent of the filing of the complaint.

~~[(1) The respondent may file with the commission a responsive pleading within 15 days from the date of receiving the director's notification and serve the same upon the complainant. Also, within 15 days from the date of receiving the director's notification, the respondent may file with the commission, and serve upon the complainant, a motion to dismiss the complaint for:~~

- ~~(a) lack of subject matter jurisdiction;~~
- ~~(b) lack of personal jurisdiction; or~~
- ~~(c) failure to state a claim upon which relief may be granted.~~

~~(2) The complainant may file a response to the respondent's motion. A response to a motion is due 15 calendar days from the date of the filing of the motion.~~

~~(3) If the respondent fails to submit a responsive pleading or motion within 15 days from the date of receiving the director's notification, then the director shall review the complaint for jurisdiction, and if jurisdiction lies, shall refer the complaint to the general counsel.]~~

B. Upon receiving a complaint pursuant to Subparagraph (a) or (c) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC, ~~[and any responsive pleading, or motion and corresponding response,]~~ the director shall, within 10 days, review the ~~[submissions]~~ complaint to determine whether ~~[the complaint]~~ it is within the commission's jurisdiction.

C. If the director determines that a complaint lies wholly or in part within the jurisdiction of the commission, unless otherwise provided below, the director shall:

(1) provide the complainant with notice that the commission has jurisdiction for the complaint;

(2) provide the respondent with notice of the complaint and inform the respondent that the respondent may file with the commission a responsive pleading within 15 days from the date of receiving the director's notification and serve the same upon the complainant; and

(3) forward the complaint to the general counsel to initiate an investigation. Upon receiving the respondent's responsive pleading, the general counsel may request the complainant to file a response, which, if requested, is due within 15 days from the date of the respondent's responsive pleading. The response may answer the complaint's assertion of facts and present arguments that the complaint is frivolous, unsubstantiated or not supported by probable cause.

D. If the director determines that the complaint, either in whole or in part, is ~~[not wholly within the commission's jurisdiction, or is within the jurisdiction of]~~ subject to referral to another state or federal agency[; ~~either in whole or in part]~~, pursuant to Subsection D of Section 10-16G-9, the terms of an agreement entered into pursuant to the terms of Subsection E of Section 10-16G-9 NMSA 1978, ~~or~~ Subsection D of Section 10-16-14

NMSA 1978, Subsection C of Section 1-19-34.4 NMSA 1978, or Subsection B of Section 2-11-8.2, the director shall refer some or all claims within the complaint to the appropriate agency and, within ten days of the referral, provide notices to the complainant and the respondent of the referral.

~~E.~~ If the director determines that the complaint is within the jurisdiction of the commission and recommends that the commission should not act on some or all aspects of the complaint, then the commission shall decide whether to dismiss some or all aspects of the complaint under Subsection C of Section 10-16G-9(C).

~~[E] F.~~ If the director determines that the complaint is neither within the jurisdiction of the commission nor subject to referral to another agency [under the terms of an agreement entered into pursuant to Subsection E of Section 10-16G-9 NMSA 1978], the commission shall dismiss the complaint.

~~[F] G.~~ Subject to Subsection E of Section 1.8.3.15 NMAC, the director shall notify the complainant and respondent in writing of any action taken under Subsections B through E of 1.8.3.10 NMAC, unless notification has been delayed by the commission pursuant to Subsection H of Section 10-16G-10 NMSA 1978 and Subsection E of 1.8.3.15 NMAC. Neither the complaint nor the action taken on the complaint shall be made public by the commission or any staff member or contractor of the commission, but the complainant or respondent shall not be prevented from making public the complaint or any action taken on the complaint.

~~[G] H.~~ The director shall consult with the attorney general, an appropriate district attorney or the United States attorney if:

(1) when reviewing a complaint for jurisdiction, the director determines that the complaint alleges conduct on the part of the respondent or another that appears reasonably likely to amount to a criminal violation; or

(2) the commission, any commission staff member, or any commission hearing officer finds at any time that a respondent's conduct appears reasonably likely to amount to a criminal violation.

(3) Nothing in Section 10-16G-14 NMSA 1978 or in this section prevents the commission from taking any action authorized by the State Ethics Commission Act or deciding to suspend an investigation pending resolution of any criminal charges.

[1.8.3.10 NMAC-N, 01/01/2020; A, 08/13/2021]

1.8.3.11 GENERAL COUNSEL'S RESPONSIBILITY TO INVESTIGATE COMPLAINTS; DISCOVERY AND SUBPOENAS; PROBABLE CAUSE DETERMINATIONS AND CONSEQUENCES; SETTLEMENT AUTHORITY INVESTIGATION:

A. Upon receiving notice of the director's determination that the commission has full or partial jurisdiction over the complaint, the general counsel shall determine whether the complaint is frivolous or unsubstantiated, or supported by probable cause.

~~[B.] If the respondent moves to dismiss a complaint, either in whole or in part, for failure to state a claim for which relief can be granted, and if the director determines that the commission has jurisdiction over the claim that is the subject of the respondent's motion to dismiss, the general counsel shall review the motion and any corresponding response. After reviewing the motion and any corresponding response, the general counsel shall make a recommendation on the disposition of the motion. Based on the general counsel's recommendation, the hearing officer may either:~~

~~(1) grant the motion, either in whole or in part, dismiss the complaint or part of the complaint that fails to state a claim upon which relief can be granted, and notify the complainant and respondent in writing of the decision and the reasons for dismissal; or~~

~~(2) deny the motion and notify the parties in writing of the denial. In that event, the general counsel shall initiate an investigation into whether the complaint is supported by probable cause.]~~

[C] B. To perform the investigation into whether probable cause supports the complaint, the general counsel, or the general counsel's designee, may administer oaths, interview witnesses under oath, and examine books, records, documents and other evidence reasonably related to the complaint. The general counsel, or the general counsel's designee, may:

(1) The general counsel, or the general counsel's designee, may send to any party requests for production of Request to inspect books, records, documents and other evidence reasonably related to a complaint; requests for admission the complainant or respondent to admit certain facts; and serve written interrogatories, to be responded to under oath at a time therein specified;

~~[(a) The general counsel shall serve a copy of the request for production of books, records, documents and other evidence and interrogatories on the respondent.~~

~~(b) If a claim is made that documents responsive to a request made under this subparagraph are privileged, the party asserting the claim of privilege must, within 14 days after making the claim of~~

privilege, provide the general counsel with a written description of each document withheld that is sufficient to permit the general counsel to assess the applicability of the asserted privilege.]

(2) Interview a witness under oath and outside the presence of the parties; and

(12) (3) [The general counsel, or the general counsel's designee, may n] Notice and take the deposition of any person, including any party, subject to the following provisions:

(a) The general counsel, or the general counsel's designee, may put the witness on oath or affirmation and shall personally, or by someone acting at the general counsel's direction, record the testimony of the witness.

(b) Any objection during a deposition shall be stated concisely in a non-argumentative and non-suggestive manner. Objections to form or foundation may only be made by stating "objection—form" or "objection—foundation". [It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.] When a question is pending, or a document has been presented to the witness, no one may interrupt the deposition until the answer is given, except when necessary to preserve a privilege.

(c) All objections shall be noted by the general counsel or the general counsel's designee upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections, except where the objection is based on an assertion of privilege made in good faith.

(d) The general counsel, or the general counsel's designee, shall certify on the deposition that the witness was duly sworn by the general counsel or the general counsel's designee and that the deposition is a true record of the testimony given by the witness.

~~[(e) If a party refuses to respond to discovery requests, to attend a deposition, or to answer questions at a deposition noticed under this subsection, unless the party's refusal is based on an assertion of privilege made in good faith, the general counsel, when deciding whether a complaint is supported by probable cause, may draw an adverse inference against the party refusing to testify. If a party fails to provide information or identify a witness in response to a request by the general counsel, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or on appeal, unless the failure was substantially justified or is harmless.]~~

~~(3) If the general counsel determines it is necessary, the director shall request the commission's authority to petition a district court:~~

~~(a) to issue a subpoena to obtain testimony of a person or the production of books, records, documents or other evidence reasonably related to an investigation;~~

~~(b) to order enforcement if the person subpoenaed neglects or refuses to comply; or~~

~~(c) to resolve any assertion of privilege.]~~

C. It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. If a party refuses to respond to the general counsel's request for information or discovery requests, to attend a deposition, or to answer questions at a deposition noticed under this subsection, unless the party's refusal is based on an assertion of privilege made in good faith, the general counsel, when deciding whether a complaint is supported by probable cause, may draw an adverse inference against the party refusing to testify. If a party fails to provide information or identify a witness in response to a request by the general counsel, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or on appeal, unless either a hearing officer or the commission determines the failure was substantially justified or is harmless.

D. Upon the commission's approval, the director, or the director's designee, may petition the designated district court judge, or another district court judge if the designated judge is not available, for a subpoena pursuant to the previous subsection. If a person neglects or refuses to comply with a subpoena, the director or the director's designee, upon the commission's approval, may apply to a district court for an order enforcing the subpoena and compelling compliance.

E. If the general counsel finds probable cause to support the allegations of the complaint, the director shall promptly notify both the complainant and the respondent:

(1) of the specific claims and allegations in the complaint that were the subject of the general counsel's investigation;

(2) of the finding of probable cause as to specific claims; and

(3) that a public hearing before a hearing officer will be set, provided that the notification has not been delayed by order of the commission pursuant to Subsection H of Section 10-16G-10 NMSA 1978.

F. If, after completing the investigation, the general counsel determines that a complaint is not supported by probable cause, a hearing officer must dismiss the complaint. In that event, the complainant and the

respondent shall be notified in writing of the decision and the reasons for the dismissal. Neither the complaint nor the action taken on the complaint shall be made public by the commission or any staff member or contractor of the commission, but the complainant or respondent shall not be prevented from making public the complaint or any action taken on the complaint.

G. The general counsel may at any time enter into a proposed settlement agreement of the complaint with the respondent. The proposed settlement agreement shall be presented to the commission for approval. If the complaint alleges, or the general counsel has found probable cause to support, a discriminatory practice or action by the respondent against the complainant, no settlement agreement may be reached without prior consultation with the complainant. If approved by the commission, the settlement agreement shall be subject to public disclosure.

H. At any time, the complainant may voluntarily dismiss the complaint, either in whole or in part, by filing a notice of voluntary dismissal with the commission; however, any notice of voluntary dismissal does not diminish the power of the commission to initiate a complaint under Paragraph (1) of Subsection C of Section 10-16G-5 NMSA 1978. If the general counsel has determined the complaint is supported by probable cause, the complainant may dismiss the complaint only on motion and on such terms and conditions as the hearing officer deems proper.]

[1.8.3.11 NMAC-N, 01/01/2020; A, 08/13/2021]

1.8.3.12 SUBPOENAS; ENFORCEMENT:

A. If the general counsel determines it is necessary, the director shall request the commission's authority to file a petition with the designated district court judge or other judge pro tempore as designated pursuant to order of the chief judge of the supreme court:

(1) to issue a subpoena to obtain testimony of a person or the production of books, records, documents or other evidence reasonably related to an investigation;

(2) to order enforcement if the person subpoenaed neglects or refuses to comply; or

(3) to resolve any assertion of privilege.

B. Upon the commission's approval, the director, or the director's designee, may petition the designated district court judge, or another district court judge if the designated judge is not available, for a subpoena. The petition shall be filed *ex parte* and under seal pursuant to procedures for filing established by the designated district court judge.

C. If the petition is granted, subpoenas shall be issued by the general counsel and served as follows:

(1) If the subject of the subpoena is the complainant or the respondent, by email to the complainant or respondent if the complainant or respondent has previously agreed to receive notice of filings with the commission by email;

(2) On a department or agency of the state by service on the department or agency's general counsel, or by service in the manner set out by law for serving the department or agency; and

(3) On any other person by handing it to the person or their attorney, leaving it at the person's office or dwelling house with some person of suitable age and discretion then residing there.

D. A subpoena issued pursuant to this Section may command the appearance of a witness at a deposition or at a hearing pursuant to Section 1.8.3.14 NMAC. A person who is not a party or an officer of a party may not be commanded to travel to a place more than one hundred (100) miles from the place where that person resides, is employed, or regularly transacts business in person unless the subpoena is to attend and give testimony at a hearing. A subpoena ordering a person to attend a deposition via telephone or web conference complies with the requirements of this Subsection.

E. A party claiming an interest in the materials responsive to the commission's subpoena or the recipient of the subpoena may serve a written objection on the general counsel or the general counsel's designee within 14 days after service of the subpoena. If an objection is timely served, the person subject to a subpoena need not comply with the subpoena until the commission files a motion to compel compliance pursuant to Subsection F of Section 1.8.3.12 and the motion is granted.

F. If a person, including a party, neglects or refuses to comply with a subpoena, the director or the director's designee, upon the commission's approval, may apply to a district court for an order enforcing the subpoena and compelling compliance. The designated district judge or other district court may impose sanctions or other relief permitted by law, including contempt, if a person neglects or refuses to comply with an order enforcing the subpoena and compelling compliance.

[1.8.13.12 NMAC-N, 08/13/2021]

1.8.3.13 GENERAL COUNSEL'S PROBABLE CAUSE DETERMINATIONS AND CONSEQUENCES; INVESTIGATION REPORTS AND RECOMMENDATIONS TO COMMISSION; DISPOSITION BY AGREEMENT; NOTICE TO PARTIES:

~~[A.]~~ Upon completion of the investigation of a complaint found to be supported by probable cause, the general counsel shall report promptly the general counsel's findings and recommendations to the director.

~~(1)~~ Upon the receipt of the general counsel's findings and recommendations, the director will designate a qualified hearing officer to conduct a hearing on the complaint if so recommended by the general counsel. Based on the report of the general counsel, the hearing officer will set a public hearing as soon as practicable.

~~(2)~~ In referring a complaint to the hearing officer, the director may consolidate the complaint with any other pending complaint involving related questions of law or fact; *provided* that consolidation will not unduly delay resolution of an earlier filed complaint, unduly prejudice any complaint, or compromise the right of any complainant or respondent to confidentiality under these rules.]

A. If the general counsel finds probable cause to support the allegations of the complaint, the general counsel shall report promptly the general counsel's findings and recommendations to the director, and the director shall:

(1) promptly notify both the complainant and the respondent:

(a) of the specific claims and allegations in the complaint that were the subject of the general counsel's investigation;

(b) of the finding of probable cause as to specific claims; and

(c) that a public hearing before a hearing officer will be set, *provided* that the notification has not been delayed by order of the commission pursuant to Subsection H of Section 10-16G-10 NMSA 1978; and

(2) designate a qualified hearing officer to conduct a hearing on the complaint if so recommended by the general counsel. Based on the report of the general counsel, the hearing officer will set a public hearing as soon as practicable.

B. If, after completing the investigation, the general counsel determines that a complaint is not supported by probable cause, a hearing officer must dismiss the complaint. In that event, the complainant and the respondent shall be notified in writing of the decision and the reasons for the dismissal. Neither the complaint nor the action taken on the complaint shall be made public by the commission or any staff member or contractor of the commission, but the complainant or respondent shall not be prevented from making public the complaint or any action taken on the complaint.

C. The general counsel may at any time enter into a proposed settlement agreement of the complaint with the respondent. The proposed settlement agreement shall be presented to the commission for approval. If the complaint alleges, or the general counsel has found probable cause to support, a discriminatory practice or action by the respondent against the complainant, no settlement agreement may be reached without prior consultation with the complainant. If approved by the commission, the settlement agreement shall be subject to public disclosure.

D. At any time, the complainant may voluntarily dismiss the complaint, either in whole or in part, by filing a notice of voluntary dismissal with the commission; however, any notice of voluntary dismissal does not diminish the power of the commission to initiate a complaint under Paragraph 1 of Subsection C of Section 10-16G-5 NMSA 1978. If the general counsel has determined the complaint is supported by probable cause, the complainant may dismiss the complaint only on motion and on such terms and conditions as the hearing officer deems proper.

~~[B]~~ E. If a hearing has not been scheduled concerning the disposition of a complaint within 90 days after the complaint has been received from the complainant or after referral from another agency, whichever is later, the director shall report to the commission at a duly convened meeting on the status of the investigation. The commission and the director shall thereafter proceed in accordance with Section 10-16G-11 NMSA 1978.

~~[C]~~ E. At any time before or during a hearing, the hearing officer may, at a duly convened public meeting, approve a disposition of a complaint agreed to by the general counsel and the respondent, provided that:

- (1) the complainant shall be consulted on the proposed agreement prior to its execution, and
- (2) the agreement shall be effective upon approval by the commission at a public meeting.

[1.8.3.13 NMAC-N, 01/01/2020; Rn & A, 08/13/2021]

1.8.3.14 HEARING OFFICERS; SUMMARY DISPOSITION; HEARINGS; INTERPRETERS; EVIDENCE:

A. The commission shall authorize the director to contract, for reasonable hourly compensation, with qualified persons to act as hearing officers. Hearing officers shall be assigned to act on or preside over hearings on complaints. Hearing officers must be currently licensed attorneys, or retired judges of the appellate, district, or metropolitan courts of New Mexico or any federal court, who are familiar with the ethics and election laws enforced by the commission. A hearing officer shall conduct a hearing fairly and impartially.

B. All hearings before the hearing officer will occur in Santa Fe or Albuquerque, or at such other location within the state as may be determined by the hearing officer. In selecting the location of a hearing other than in Santa Fe or Albuquerque, the hearing officer shall consider and give weight to the location and reasonable concerns of the respective parties, witnesses, and representatives in the proceeding. Upon a showing by any party of an undue burden, the hearing officer may move the hearing to a more appropriate venue.

C. If a hearing officer has not already notified the parties of a hearing through the issuance of a scheduling order, the director will notify the parties to the hearing by mail, directed to the address provided by the parties, of the date, time, and place scheduled for the hearing, at least 15 days before the scheduled hearing.

D. The hearing shall be conducted pursuant to the rules of evidence governing proceedings in the state courts, Rule 11-101 NMRA, and these procedural rules. In the event of a conflict between these procedural rules and the rules of evidence governing proceedings in the state courts, these procedural rules control. All hearings shall be open to the public in accordance with the Open Meetings Act, Section 10-15-1 NMSA 1978, except for hearings or portions thereof exempted from the requirements of that Act.

E. Audio recordings shall be made of all hearings conducted pursuant to this section.

F. The parties may be represented by counsel, who shall enter an appearance at the earliest opportunity, pursuant to Paragraph (37) of Subsection A of 1.8.3.9 NMAC.

G. The hearing officer shall permit the general counsel to intervene upon request. If the complaint was initiated by the commission under Paragraph (1) of Subsection (C) of Section 10-16G-5 NMSA 1978 and Section (E) of 1.8.3.9 NMAC, then the general counsel shall represent the commission at the hearing.

H. The hearing officer shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the proceedings and to maintain order. The hearing officer shall have the powers necessary to carry out these duties, including the following:

- (1) to administer or have administered oaths and affirmations;
- (2) to cause depositions to be taken;
- (3) to require the production or inspection of documents and other items;
- (4) to require the answering of interrogatories and requests for admissions;
- (5) to rule upon offers of proof and receive evidence;
- (6) to regulate the course of the hearings and the conduct of the parties and their representatives therein;
- (7) to issue a scheduling order, schedule a prehearing conference for simplification of the issues, or any other proper purpose;
- (8) to schedule, continue and reschedule hearings;
- (9) to consider and rule upon all procedural and other motions appropriate in the proceeding;
- (10) to require the filing of briefs on specific legal issues prior to or after the hearing;
- (11) to cause a complete audio record of hearings to be made;
- (12) to make and issue decisions and orders; and
- (13) to reprimand, or with warning in extreme instances exclude from the hearing, any person for engaging in a continuing pattern of disruptive or other improper conduct that interferes with the conduct of a fair and orderly hearing or development of a complete record.

I. In the performance of these adjudicative functions, the hearing officer is prohibited from engaging in any improper *ex parte* communications about the substantive issues with any party on any matter, but may communicate with parties separately solely on scheduling issues if all parties are notified of such communications and do not object to them. An improper *ex parte* communication occurs when the hearing officer discusses the substance of a case without the opposing party being present, except that it is not an improper *ex parte* communication for the hearing officer to go on the record with only one party when the other party has failed to appear at a scheduled hearing despite having received timely notice thereof.

J. Parties who appear at the hearing may:

- (1) request the director to request the commission's authority to petition a district court to compel the presence of witnesses. Subpoenas may be requested by the commission from a district court in the same

manner as provided for in Subsection J of Section 10-16G-10 NMSA 1978 and Subsections C and D of 1.8.3.11 NMAC;

- (2) present evidence and testimony;
- (3) examine and cross-examine witnesses; and
- (4) introduce evidentiary material developed by the general counsel. Before the hearing, the

general counsel shall timely disclose to the parties all evidence in the possession or within the control of the general counsel, other than privileged information.

K. Evidence shall be presented by the parties at the hearing consistent with the terms agreed to in a prehearing conference or as set forth in a scheduling order entered under Subsection H of Section 1.8.3.14 NMAC. The hearing officer may allow a deviation from the agreed-upon process for good cause.

(1) The general counsel shall present any evidence collected in the investigation relating to the complaint that is relevant to the matters at issue as set forth in the general counsel's findings under Subsection A of Section 1.8.3.12 NMAC; evidence that is agreed to be relevant by the parties; or evidence that is allowed by the hearing officer.

(2) The respondent may present evidence that is relevant to the matters at issue as set forth in the general counsel's findings under Subsection A of Section 1.8.3.12 NMAC; evidence that is agreed to be relevant by the parties; or evidence that is otherwise allowed by the hearing officer.

(3) The general counsel or the general counsel's designee may authenticate evidence produced during an investigation if the source of the evidence declines a request to appear and testify about the evidence and the hearing officer determines that there are no other reasonable means for authenticating the evidence.

~~[K]~~ **L.** Any person may timely file an amicus brief, not to exceed ten pages, with the director, for consideration by the hearing officer.

~~[L]~~ **M.** Upon reasonable notice by the party to the director, a party needing language interpreter services for translation of one language into another, and any interpreter required to be provided under the American with Disabilities Act, shall be provided for by the commission. While the person serving as an interpreter need not be a court-certified interpreter in order to provide interpretation at a hearing, any person serving as an interpreter in a hearing before the commission must affirm the interpreter's oath applicable in courts across this state.

~~[M]~~ **N.** After the termination of the hearing, or in lieu of a hearing if, upon a motion by a party or the general counsel, the hearing officer concludes there is no genuine dispute as to any material facts, if the hearing officer finds by a preponderance of shall issue written findings and conclusions on whether the evidence establishes that the respondent's conduct as alleged in the complaint constituted a violation of any law within the jurisdiction of the commission., ~~[the hearing officer]~~ The hearing officer's written decision:

- (1)** may
 - (a)** impose any fines provided for by law; and
 - (b)** recommend to the appropriate authority commensurate disciplinary action
- (2)** and must
 - (a)** state the reasons for the hearing officer's decision; and
 - (b)** provide the parties with notice of the right of appeal to the commission.

[N] O. Clear and convincing evidence is required to support a finding by a hearing officer that a respondent's conduct was fraudulent or willful.

[O] P. If the hearing officer finds by a preponderance of the evidence that the respondent's conduct as alleged in the complaint constituted a violation of the Governmental Conduct Act and was either unintentional or for good cause, then the hearing officer shall give the respondent 10 days to correct the violation, pursuant to Subsection (B) of Section 10-16-13.1, before taking any action under Subsection M of Section 1.8.3.13 NMAC.

[P] Q. If the hearing officer finds by a preponderance of the evidence that the respondent's conduct as alleged in the complaint does not constitute a violation of any law within the jurisdiction of the commission, the hearing officer, in a written decision, shall dismiss the complaint and inform the complainant of their right to appeal to the commission.

[Q] R. ~~Either~~ A party may request copies of ~~[exhibits, documents, records in the administrative file,]~~ evidence considered by the hearing officer or a copy of the audio recording of the ~~proceeding~~ hearing by submitting a written request to the director. The director may charge a reasonable fee for copies made, consistent with its fee schedule under the Inspection of Public Records Act. The director may also require the requesting party to submit a new, sealed computer storage device, such as a compact disc, dvd disc, or usb drive, or other tangible device for copying of any audio or video recording that is part of the administrative record. Every party is responsible for paying the cost of any transcription of the audio recording.

[1.8.3.14 NMAC-N, 01/01/2020; Rn & A, 08/13/2021]

1.8.3.15 APPEALS:

A. ~~[Except as provided by Subsections E and F of 1.8.3.14 NMAC,]~~ The complainant or respondent may appeal the final decision of the hearing officer within 30 days of the issuance of the decision to the full commission by filing a notice stating:

- (1) each party taking the appeal and each party against whom the appeal is taken;
- (2) the name, address, telephone number and email address of counsel for the appellant;
- (3) the decision or part of a decision from which the party appeals; and
- (4) the specific grounds for the appeal, including specific references to any evidence or law interpreted by the hearing officer.

(5) If the hearing officer issued a final decision on a complaint that was initiated by the commission under Paragraph (1) of Subsection (C) of Section 10-16G-5 NMSA 1978 and Section (E) of 1.8.3.9 NMAC, or where the general counsel has intervened under Section (G) of 1.8.3.14 NMAC, then the general counsel may appeal the hearing officer's decision within 30 days of the issuance by filing a notice stating the information required in subsections (1) through (4) above.

B. For the purpose of this rule, briefing time shall commence from the date the appellant files a notice of appeal to the full commission. Unless otherwise provided for by the commission,

- (1) The appellant shall file and serve a brief in chief within 15 days;
- (2) The appellee shall file and serve an answer brief within 15 days after service of the brief of the appellant; and
- (3) Neither the brief in chief nor the answer brief shall exceed 10 pages.

C. The commission shall schedule oral arguments, if requested by either party or ordered by the commission within sixty days of the notice of appeal.

D. Any person may timely file an amicus brief, not to exceed ten pages, with the director for consideration by the commission.

E. The commission shall review the whole record of the proceeding and shall, within 180 days of receiving the notice of appeal, issue its decision upholding or reversing the decision of the hearing officer. The commission may reverse all or part of the hearing officer's decision and remand the matter to the hearing officer for further proceedings.

~~[F. If a hearing officer issues a decision granting a respondent's motion to dismiss for failure to state a claim and dismisses a complaint or part of a complaint pursuant to Paragraph (1) of Subsection B of 1.8.3.11 NMAC, then the complainant may appeal the hearing officer's decision to the commission as provided in these rules. If, however, a hearing officer issues a decision denying a respondent's motion to dismiss for failure to state a claim, then the respondent has no right to an interlocutory appeal of that decision to the commission, but may appeal any final decision of the hearing officer to the commission.]~~

~~[G] F.~~ If a hearing officer dismisses a complaint, pursuant to Subsection B of 1.8.3.13 NMAC, following the general counsel's determination that the complaint is not supported by probable cause, then the complainant has no right to an appeal of that dismissal to the commission.

~~[H] G.~~ A party may seek review of the commission's final decision by filing for a petition of writ of certiorari pursuant to Rule 1-075 NMRA.

[1.8.3.15 NMAC-N, 01/01/2020; Rn & A, 08/13/2021]

~~[1.8.3.15]~~ 1.8.3.16 OPEN RECORDS AND CONFIDENTIALITY:

A. Thirty days after the director provides notice pursuant to Subsection ~~FA~~ of 1.8.3.413 NMAC to the respondent of the allegations of a complaint, the general counsel's finding of probable cause, and the setting of the public hearing:

- (1) the director shall make public the specific allegations of the complaint, the notification to the respondent, and any response filed by the respondent, and any related records, *provided that*:
- (2) prior to the publication of any commission records pursuant to the preceding subparagraph, any proceedings in district court initiated by the commission to obtain subpoenas shall be sealed, and shall remain so until such time as the commission notifies the court that the commission has made the complaint public or the parties enter into an approved settlement agreement.

B. If a complaint is dismissed because the general counsel has found it to be frivolous or unsubstantiated, as provided in Subsection E of Section 10-16G-10 NMSA 1978, the commission shall not release to

the public the complaint, the reason for its dismissal, or any related records. Nothing in this subsection shall prevent the making public of any document by a complainant or respondent to the proceeding.

C. Notwithstanding any other requirement in these rules or the law requiring notification to the complainant or respondent of commission actions on a complaint, the director may delay notifying parties or releasing to the public the complaint and related information if the director deems it necessary to protect the integrity of a criminal investigation.

(1) The director shall, within 10 days of making the decision to delay release of a complaint pursuant to this subsection, present to the commission the records and information to be withheld and the reasons for delaying their release.

(2) The commission may, by a majority vote pursuant to Subsection H of Section 10-16G-10 NMSA 1978, confirm the director's decision in a meeting closed pursuant to the requirements of the Open Meetings Act, Section 10-15-1 NMSA 1978, and the commission's open meetings resolution.

[1.8.3.156 NMAC-N, 01/01/2020; Rn & A, 08/13/2021]

Note to Commissioners: This version of the rules includes amendments that were initially noticed as well as in highlighted text language that the staff recommends to address an issue raised by Commissioner Villanueva. This language should be considered after the completion of a rulemaking hearing on the initially noticed rules. (August 4, 2021 / JDF)

This is an amendment to 1.8.1 NMAC, Sections 9 & 13; amendments to 1.8.3 NMAC, Sections 1, 7, 9, 10, 11, 12, 13, 14, 15, 16.

1.8.1.9 ADVISORY OPINIONS AND INFORMAL ADVISORY OPINIONS

A. Advisory opinions. The commission may issue advisory opinions on matters related to ethics upon request.

(1) A request for an advisory opinion must be in writing, and must be submitted by a public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist or lobbyist's employer. The request is confidential and not subject to the provisions of the Inspection of Public Records Act.

(2) Upon receiving a request for an advisory opinion, the commission must provide the requester with a written confirmation of receipt.

(3) Within sixty days of receiving a request for an advisory opinion, the commission must either:

(a) issue an advisory opinion;

(b) inform the requester that the commission will not be issuing an advisory opinion and provide an explanation for the commission's decision; or

(c) inform the requester that the commission requires more than sixty days to issue an advisory opinion, and notifies the requester about the status of the request every thirty days thereafter.

(4) Unless amended or revoked, an advisory opinion shall be binding on the commission in any subsequent commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion.

(5) At the request of any commissioner, the director or the director's designee shall draft an advisory opinion based on any legal determination issued by the director, the general counsel, or a hearing officer for the commission to consider for issuance as an advisory opinion.

B. Informal advisory opinions. A person may submit the request for an informal advisory opinion to the director or general counsel, who may answer the request.

(1) A request for an informal advisory opinion must be in writing, and must be submitted by a public official, public employee, candidate, person subject to the Campaign Reporting Act or the Governmental Conduct Act, government contractor, lobbyist or lobbyist's employer. The request is confidential and not subject to the provisions of the Inspection of Public Records Act.

(2) An informal advisory opinion is specific to the person who requests the advice and the facts presented in the request.

(3) An informal advisory opinion is not binding on the commission unless and until the commission votes to adopt the informal advisory opinion as an advisory opinion. 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.

(4) If the commission determines that a person committed a violation after reasonably relying on an informal advisory opinion and the violation is directly related to the informal advisory opinion, the commission may consider that the person acted in good faith.

(5) If a person submits a request for an advisory opinion and does not specify whether the request is for a formal advisory opinion or an informal advisory opinion, the director or the director's designee may answer the request through an informal advisory opinion. The director may also relay the request to the commission to issue a formal advisory opinion.

[1.8.1.9 NMAC-N, xx/xx/2021]

1.8.1.13 ADDRESS [FOR FILING DOCUMENTS]:

A. By mail: Director, State Ethics Commission, 800 Bradbury Dr. SE, Ste. [217] 215, Albuquerque, NM 87106.

B. In person: State Ethics Commission, 800 Bradbury Dr. SE, Ste. [247] 215, Albuquerque, NM 87106.

C. By email: ethics.commission@state.nm.us.
[1.8.1.13 NMAC-N, 1/1/2020; Rn & A, 10/15/2020]

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 8 STATE ETHICS COMMISSION
PART 3 ADMINISTRATIVE HEARINGS

1.8.3.1 ISSUING AGENCY: State ethics commission (the commission), 800 Bradbury Dr. SE, Ste. [247] 215, Albuquerque, New Mexico 87106.
[1.8.3.1 NMAC-N, 01/01/2020; A, 08/13/2021]

1.8.3.7 DEFINITIONS: The following terms apply to these rules unless their context clearly indicates otherwise:

A. “**Appellant**” is a party who requests that the commission review and change the decision of the hearing officer.

B. “**Appellee**” is a party to an appeal arguing that the hearing officer’s decision is correct and should stand.

C. “**Blackout period**” means the period beginning 60 days before a primary or general election in which a person against whom a complaint is filed is a candidate, and ending on the day after that election.

D. “**Brief**” is a document summarizing the facts and points of law of a party’s case. It may be offered to or requested by a hearing officer or filed in an appeal to the commission. For example, a “brief in chief” is filed with the commission by the appellant. An “answer brief” is filed by the appellee in response to the brief-in-chief.

E. “**Candidate**” as used in this part, has the same meaning as it does in Subsection G of Section 1-19-26 of the Campaign Reporting Act, Section 1-19-25 NMSA 1978.

F. “**Case management system**” is the commission’s electronic filing and notification system for complaints, which may be accessed at <https://proceedings.sec.state.nm.us>.

[E] G. “**Claim**” is a complainant’s allegation that a respondent violated a particular provision of law.

[E] H. “**Designated district court judge**” is an active or pro tempore district judge who has been appointed by the chief justice of the supreme court to consider the issuance and enforcement of subpoenas applied for by the commission.

[G] I. “**Discriminatory practice**,” as used in this part, has the same meaning as it does in Subsection L of Section 28-1-2 of the Human Rights Act, Section 28-1-1 NMSA 1978.

[H] J. “**Lobbyist’s employer**” as used in this part, has the same meaning as it does in Subsection F of Section 2-11-2 of the Lobbyist Regulation Act, Section 2-11-1 NMSA 1978.

[I] K. “**Meeting**” means a meeting of the commission duly noticed and conducted in compliance with the requirements of the Open Meetings Act, Section 10-15-1 NMSA 1978.

[J] L. “**Party**” and “**Parties**” means the named persons in a proceeding before the commission or a hearing officer.

[K] M. “**Person**” means any individual or entity.

[L] N. “**Pleading**” means any written request, motion, or proposed action filed by a party with the hearing officer or commission.

[M] O. “**Qualified hearing officer**” means an official appointed by the director in accordance with these rules to conduct an administrative hearing to enable the commission to exercise its statutory powers.

[N] P. “**Records**” means all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, whether or not the records are required by law to be created or maintained.

[1.8.3.7 NMAC-N, 01/01/2020; A, 08/13/2021]

1.8.3.9 COMPLAINTS: FILING REQUIREMENTS AND LIMITATIONS; AMENDMENTS; NOTICE; TIME LIMITATIONS; CONSOLIDATION; COMMISSION-INITIATED COMPLAINTS:

A. The commission shall investigate allegations of violations of any statutes or constitutional provisions over which the legislature gives it jurisdiction. Such complaints may be filed against any public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist, ~~or~~ lobbyist’s employer, or a restricted donor subject to the Gift Act.

(1) The commission may initiate a proceeding before the commission concerning an alleged violation:

(a) through the filing of a complaint with the commission by any person which alleges that the complainant has actual knowledge of the alleged violation of such statutes or constitutional provisions;

(b) by initiating its own complaint alleging a violation of any statute or constitutional provision over which the commission has jurisdiction against a person subject to the jurisdiction of the commission, pursuant to Paragraph (1) of Subsection C of Section 10-16G-5 NMSA (1978); or

(c) by accepting a complaint filed with another public agency or legislative body and forwarded by that agency or legislative body to the commission pursuant to Subsection B or E of Section 10-16G-9 NMSA 1978.

(2) A complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC, shall:

(a) be filed electronically on the commission's case management system, or on a form prescribed by the commission and provided at no cost to the complainant or in a substantially equivalent form, which the director or the director's designee shall record electronically on the commission's case management system;

(b) state the name and, to the extent known to the complainant, the respondent's mailing address, email address, telephone number, and public office or other position ~~of the person against whom the complaint is filed;~~

(c) set forth in detail the specific claims against the respondent and the supporting factual allegations, including, if known to the complainant, any law that the respondent has allegedly violated;

(d) include any evidence that the complainant has that supports the complaint, which may include documents, records and names of witnesses; and

(e) be signed and sworn to by the complainant, under penalty of false statement.

(3) The director shall reject any complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC that fails to state either the respondent's mailing address or email address, or is not signed, ~~notarized~~ and sworn to by the complainant, under penalty of false statement, ~~shall be dismissed without prejudice,~~ and the complainant will have the opportunity to refile the complaint.

(4) A complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC may be amended once as a matter of course at any time before a responsive pleading is served. Otherwise, the complainant may amend the complaint by leave of the director. An amended complaint must be filed within seven days of the director's determination under Paragraph (3) of Subsection A of 1.8.3.10 NMAC that the commission has jurisdiction over the complaint.

(5) Unless the director grants the complainant leave, the commission shall not accept a complaint filed by a complainant who, within the previous calendar year, filed two complaints that were subsequently dismissed. In applying for leave to file a third or subsequent complaint within the same calendar year, the complainant shall explain how, as compared to the dismissed complaints, the proposed complaint concerns different facts, asserts different claims, or asserts claims against different respondents.

(6) By registering and filing a complaint through the commission's case management system, a party agrees to accept electronic service of subpoenas, notices, and other filings as a condition of submitting filings with the commission.

(14) (7) Any party may represent themselves or may be represented by a licensed attorney. Corporations and other non-natural persons must be represented by counsel.

(a) Any ~~[legal counsel]~~ attorney representing ~~[any]~~ party shall enter an appearance with the commission and register on the commission's case management system. Upon receipt of the appearance, the commission shall direct all official notices and correspondence to the attorney named in the written appearance, at the address or location stated therein, ~~and a~~ Any official notice, ~~[including a subpoena issued pursuant to Subsection J of Section 10-16G-10 NMSA 1978],~~ received by any named attorney shall be deemed to have been received by the represented party. An attorney may withdraw from representing a party before the commission only with leave of the director and for a reason provided for by Section B of Rule 16-116 NMRA.

(b) If the respondent is a public official or state public employee subject to a complaint alleging a violation made in the performance of the respondent's duties, the respondent ~~shall be~~ is entitled to representation by the risk management division of the general services department. "Respondent's duties," within the meaning of Subsection K of Section 10-16G-10 NMSA 1978 and this rule, excludes:

(i) conduct undertaken by an elected public official in furtherance of his or her campaign for election or reelection; and
(ii) any duty or obligation that by law is personal, rather than official, in nature.

~~(15)~~ **8** The commission may proceed with any complaint~~[-, irrespective of whether the complaint is notarized,]~~ that is forwarded to the commission by another ~~[state]~~ public agency, or by the legislature or a legislative committee pursuant to Subparagraph (c) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC, according to the terms of any agreement for shared jurisdiction between the commission and the referring agency or the legislative body, pursuant to Subsection E of Section 10-16G-9 NMSA 1978.

~~(16)~~ **2** No complaint may be accepted or considered by the commission unless the date on which the complaint is received by the commission, or the date on which the commission votes to initiate a complaint, falls within the later of two years from the date:

- (a) on which the alleged conduct occurred; or
- (b) the alleged conduct could reasonably have been discovered.

~~(17)~~ **10** For the purpose of applying the two-year statute of limitations established in Subsection A of Section 10-16G-15 NMSA 1978, the date on which a complaint is filed with a public agency that refers the complaint to the commission under the law, or under an agreement for shared jurisdiction, shall be deemed the date of filing with the commission.

B. The commission shall not adjudicate a complaint filed against a candidate, except under the Campaign Reporting Act or Voter Action Act, fewer than 60 days before a primary or general election.

(1) This paragraph does not preclude during the blackout period:
(a) the dismissal of frivolous or unsubstantiated complaints, or dismissal or referral of complaints outside the jurisdiction of the commission, as provided by these rules; or
(b) an investigation related to the commission's discretion to file a court action to enforce the civil compliance provisions of any statute or constitutional provision over which the commission has jurisdiction.

(2) For complaints filed during and subject to the blackout period, the director, or the director's designee, shall notify the complainant:

(a) of the provisions of this section regarding the blackout period;
(b) that the complainant may refer allegations of criminal conduct to the attorney general or appropriate district attorney at any time; and
(c) of the deferral of commission action on the complaint for the duration of the blackout period.

(3) The director, or the director's designee, shall within five days notify a ~~person~~ candidate named as a respondent in a complaint filed during the 60-day pre-election blackout period of:

(a) the filing of the complaint;
(b) the specific allegations and violations charged in the complaint; and
(c) the deferral of commission action on the complaint for the duration of the blackout period.

C. The commission shall not adjudicate a complaint that alleges conduct occurring only before July 1, 2019. Any complaint filed with the commission or referred to the commission that alleges conduct occurring only before July 1, 2019 shall be ~~either dismissed or~~ and, if applicable, returned to the referring entity.

D. The director may consolidate a complaint with any other pending complaint involving related questions of fact or laws; provided that the consolidation will not unduly delay resolution of an earlier-filed complaint, unduly prejudice any complainant, or compromise the right of any complainant or respondent to confidentiality under these rules.

E. The Commission may initiate a complaint alleging a violation of any statute or constitutional provision over which the commission has jurisdiction against a public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist, lobbyist's employer, or a restricted donor subject to the Gift Act., if:

(1) any commissioner or the director presents to the commission information or documents showing a violation of any statute or constitutional provision over which the commission has jurisdiction;
(2) the director determines that the complaint would be within the commission's jurisdiction;
(3) five commissioners vote to initiate the complaint; and
(4) the director signs the complaint under oath and subject to penalty of perjury that the information in the complaint, and any attachments provided with the complaint, are true and accurate.

A commissioner's vote to initiate a complaint pursuant to this subsection E is not grounds for recusal pursuant to Subsection A of 1.8.2.8 NMAC if the commissioner affirms in writing that the commissioner will make a fair and impartial decision on any appeal from a hearing officer decision on the complaint.

F. If the commission initiates any complaint under Paragraph (1) of Subsection (C) of Section 10-16G-5 NMSA 1978 and Subsection (E) of 1.8.3.9 NMAC, then the director shall:

(1) provide the respondent with notice of the complaint in accordance with Subsection (A) of 1.8.3.10 NMAC; and

(2) forward the complaint to the general counsel to initiate an investigation in accordance with Section 1.8.3.11 NMAC.

G. If the director determines that the complaint, either in whole or in part, is subject to referral to another state or federal agency in accordance with Subsection D of Section 10-16G-9, the terms of an agreement entered into pursuant to the terms of Subsection E of Section 10-16G-9 NMSA 1978, Subsection D of Section 10-16-14 NMSA 1978, Subsection C of Section 1-19-34.4 NMSA 1978, or Subsection B of Section 2-11-8.2, the director shall refer some or all claims within the complaint to the appropriate agency and, within ten days of the referral, provide notice to the respondent of the referral.

H. When the commission initiates its own administrative complaint, the commission may serve in an appellate role after a hearing officer decision, and the commission will be limited to reviewing the record developed at the hearing. As such, except as provided in subsection (E) of 1.8.3.9 NMAC, Subsections (I) & (J) of Section 10-16G-10(I) NMSA 1978, Section (A) of Section 10-16G-11 NMSA 1978, Subsection A of 1.8.3.12 NMAC, or Subsection (J) of 1.8.3.14 NMAC, the commission shall not receive any information related to a complaint filed pursuant to Paragraph (1) of Subsection (C) of Section 10-16G-5 NMSA 1978 and Section (E) of 1.8.3.9 NMAC until an appeal is made pursuant to Section 1.8.3.15 NMAC.

[1.8.3.9 NMAC-N, 01/01/2020; A, 08/13/2021]

1.8.3.10 DIRECTOR'S RESPONSIBILITIES UPON RECEIVING A COMPLAINT; RESPONDENT'S OPPORTUNITY TO RESPOND; JURISDICTIONAL REVIEW; REFERRALS; NOTIFICATION TO PARTIES:

A. Within seven days of receiving a complaint, the director shall notify the respondent of the filing of the complaint; provided that, for any complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC, the director shall ensure that the complaint satisfies the filing requirements set forth in Paragraph (1) of Subsection A of 1.8.3.9 NMAC before notifying the respondent of the filing of the complaint.

[~~(4) The respondent may file with the commission a responsive pleading within 15 days from the date of receiving the director's notification and serve the same upon the complainant. Also, within 15 days from the date of receiving the director's notification, the respondent may file with the commission, and serve upon the complainant, a motion to dismiss the complaint for:~~

~~(a) lack of subject matter jurisdiction;~~

~~(b) lack of personal jurisdiction; or~~

~~(c) failure to state a claim upon which relief may be granted.~~

(2) The complainant may file a response to the respondent's motion. A response to a motion is due 15 calendar days from the date of the filing of the motion.

(3) If the respondent fails to submit a responsive pleading or motion within 15 days from the date of receiving the director's notification, then the director shall review the complaint for jurisdiction, and if jurisdiction lies, shall refer the complaint to the general counsel.]

B. Upon receiving a complaint pursuant to Subparagraph (a) or (c) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC, [and any responsive pleading, or motion and corresponding response,] the director shall, within 10 days, review the [submissions] complaint to determine whether [the complaint] it is within the commission's jurisdiction.

C. If the director determines that a complaint lies wholly or in part within the jurisdiction of the commission, unless otherwise provided below, the director shall:

(1) provide the complainant with notice that the commission has jurisdiction for the complaint;

(2) provide the respondent with notice of the complaint and inform the respondent that the respondent may file with the commission a responsive pleading within 15 days from the date of receiving the director's notification and serve the same upon the complainant; and

(3) forward the complaint to the general counsel to initiate an investigation. Upon receiving the respondent's responsive pleading, the general counsel may request the complainant to file a response, which, if

requested, is due within 15 days from the date of the respondent's responsive pleading. The response may answer the complaint's assertion of facts and present arguments that the complaint is frivolous, unsubstantiated or not supported by probable cause.

D. If the director determines that the complaint, either in whole or in part, is [not wholly within the commission's jurisdiction, or is within the jurisdiction of] subject to referral to another state or federal agency[; either in whole or in part], pursuant to Subsection D of Section 10-16G-9, the terms of an agreement entered into pursuant to the terms of Subsection E of Section 10-16G-9 NMSA 1978, or Subsection D of Section 10-16-14 NMSA 1978, Subsection C of Section 1-19-34.4 NMSA 1978, or Subsection B of Section 2-11-8.2, the director shall refer some or all claims within the complaint to the appropriate agency and, within ten days of the referral, provide notices to the complainant and the respondent of the referral.

E. If the director determines that the complaint is within the jurisdiction of the commission and recommends that the commission should not act on some or all aspects of the complaint, then the commission shall decide whether to dismiss some or all aspects of the complaint under Subsection C of Section 10-16G-9(C).

~~[E]~~ **E.** If the director determines that the complaint is neither within the jurisdiction of the commission nor subject to referral to another agency ~~[under the terms of an agreement entered into pursuant to Subsection E of Section 10-16G-9 NMSA 1978]~~, the commission shall dismiss the complaint.

~~[F]~~ **G.** Subject to Subsection E of Section 1.8.3.15 NMAC, the director shall notify the complainant and respondent in writing of any action taken under Subsections B through E of 1.8.3.10 NMAC, unless notification has been delayed by the commission pursuant to Subsection H of Section 10-16G-10 NMSA 1978 and Subsection E of 1.8.3.15 NMAC. Neither the complaint nor the action taken on the complaint shall be made public by the commission or any staff member or contractor of the commission, but the complainant or respondent shall not be prevented from making public the complaint or any action taken on the complaint.

~~[G]~~ **H.** The director shall consult with the attorney general, an appropriate district attorney or the United States attorney if:

(1) when reviewing a complaint for jurisdiction, the director determines that the complaint alleges conduct on the part of the respondent or another that appears reasonably likely to amount to a criminal violation; or

(2) the commission, any commission staff member, or any commission hearing officer finds at any time that a respondent's conduct appears reasonably likely to amount to a criminal violation.

(3) Nothing in Section 10-16G-14 NMSA 1978 or in this section prevents the commission from taking any action authorized by the State Ethics Commission Act or deciding to suspend an investigation pending resolution of any criminal charges.

[1.8.3.10 NMAC-N, 01/01/2020; A, 08/13/2021]

1.8.3.11 GENERAL COUNSEL'S RESPONSIBILITY TO INVESTIGATE COMPLAINTS; DISCOVERY AND SUBPOENAS; PROBABLE CAUSE DETERMINATIONS AND CONSEQUENCES; SETTLEMENT AUTHORITY INVESTIGATION:

A. Upon receiving notice of the director's determination that the commission has full or partial jurisdiction over the complaint, the general counsel shall determine whether the complaint is frivolous or unsubstantiated, or supported by probable cause.

~~[B.]~~ If the respondent moves to dismiss a complaint, either in whole or in part, for failure to state a claim for which relief can be granted, and if the director determines that the commission has jurisdiction over the claim that is the subject of the respondent's motion to dismiss, the general counsel shall review the motion and any corresponding response. After reviewing the motion and any corresponding response, the general counsel shall make a recommendation on the disposition of the motion. Based on the general counsel's recommendation, the hearing officer may either:

~~(1)~~ grant the motion, either in whole or in part, dismiss the complaint or part of the complaint that fails to state a claim upon which relief can be granted, and notify the complainant and respondent in writing of the decision and the reasons for dismissal; or

~~(2)~~ deny the motion and notify the parties in writing of the denial. In that event, the general counsel shall initiate an investigation into whether the complaint is supported by probable cause.]

[C] B. To perform the investigation into whether probable cause supports the complaint, the general counsel, or the general counsel's designee, may administer oaths, interview witnesses under oath, and examine books, records, documents and other evidence reasonably related to the complaint. The general counsel, or the general counsel's designee, may:

(1) ~~The general counsel, or the general counsel's designee, may send to any party requests for production of~~ Request to inspect books, records, documents and other evidence reasonably related to a complaint; requests ~~for admission~~ the complainant or respondent to admit certain facts; and serve written interrogatories, to be responded to under oath at a time therein specified;

~~[(a) The general counsel shall serve a copy of the request for production of books, records, documents and other evidence and interrogatories on the respondent.~~

~~(b) If a claim is made that documents responsive to a request made under this subparagraph are privileged, the party asserting the claim of privilege must, within 14 days after making the claim of privilege, provide the general counsel with a written description of each document withheld that is sufficient to permit the general counsel to assess the applicability of the asserted privilege.]~~

(2) Interview a witness under oath and outside the presence of the parties; and

~~[(2)] (3) [The general counsel, or the general counsel's designee, may n]~~ Notice and take the deposition of any person, including any party, subject to the following provisions:

(a) The general counsel, or the general counsel's designee, may put the witness on oath or affirmation and shall personally, or by someone acting at the general counsel's direction, record the testimony of the witness.

(b) Any objection during a deposition shall be stated concisely in a non-argumentative and non-suggestive manner. Objections to form or foundation may only be made by stating "objection—form" or "objection—foundation". ~~[It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.]~~ When a question is pending, or a document has been presented to the witness, no one may interrupt the deposition until the answer is given, except when necessary to preserve a privilege.

(c) All objections shall be noted by the general counsel or the general counsel's designee upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections, except where the objection is based on an assertion of privilege made in good faith.

(d) The general counsel, or the general counsel's designee, shall certify on the deposition that the witness was duly sworn by the general counsel or the general counsel's designee and that the deposition is a true record of the testimony given by the witness.

~~[(e) If a party refuses to respond to discovery requests, to attend a deposition, or to answer questions at a deposition noticed under this subsection, unless the party's refusal is based on an assertion of privilege made in good faith, the general counsel, when deciding whether a complaint is supported by probable cause, may draw an adverse inference against the party refusing to testify. If a party fails to provide information or identify a witness in response to a request by the general counsel, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or on appeal, unless the failure was substantially justified or is harmless.~~

~~(3) If the general counsel determines it is necessary, the director shall request the commission's authority to petition a district court:~~

~~(a) to issue a subpoena to obtain testimony of a person or the production of books, records, documents or other evidence reasonably related to an investigation;~~

~~(b) to order enforcement if the person subpoenaed neglects or refuses to comply; or~~

~~(c) to resolve any assertion of privilege.]~~

C. It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. If a party refuses to respond to the general counsel's request for information or discovery requests, to attend a deposition, or to answer questions at a deposition noticed under this subsection, unless the party's refusal is based on an assertion of privilege made in good faith, the general counsel, when deciding whether a complaint is supported by probable cause, may draw an adverse inference against the party refusing to testify. If a party fails to provide information or identify a witness in response to a request by the general counsel, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or on appeal, unless either a hearing officer or the commission determines the failure was substantially justified or is harmless.

D. Upon the commission's approval, the director, or the director's designee, may petition the designated district court judge, or another district court judge if the designated judge is not available, for a subpoena pursuant to the previous subsection. If a person neglects or refuses to comply with a subpoena, the director or the director's designee, upon the commission's approval, may apply to a district court for an order enforcing the subpoena and compelling compliance.

~~_____ E. _____ If the general counsel finds probable cause to support the allegations of the complaint, the director shall promptly notify both the complainant and the respondent:~~

~~_____ (1) _____ of the specific claims and allegations in the complaint that were the subject of the general counsel's investigation;~~

~~_____ (2) _____ of the finding of probable cause as to specific claims; and~~

~~_____ (3) _____ that a public hearing before a hearing officer will be set, *provided* that the notification has not been delayed by order of the commission pursuant to Subsection H of Section 10-16G-10 NMSA 1978.~~

~~_____ F. _____ If, after completing the investigation, the general counsel determines that a complaint is not supported by probable cause, a hearing officer must dismiss the complaint. In that event, the complainant and the respondent shall be notified in writing of the decision and the reasons for the dismissal. Neither the complaint nor the action taken on the complaint shall be made public by the commission or any staff member or contractor of the commission, but the complainant or respondent shall not be prevented from making public the complaint or any action taken on the complaint.~~

~~_____ G. _____ The general counsel may at any time enter into a proposed settlement agreement of the complaint with the respondent. The proposed settlement agreement shall be presented to the commission for approval. If the complaint alleges, or the general counsel has found probable cause to support, a discriminatory practice or action by the respondent against the complainant, no settlement agreement may be reached without prior consultation with the complainant. If approved by the commission, the settlement agreement shall be subject to public disclosure.~~

~~_____ H. _____ At any time, the complainant may voluntarily dismiss the complaint, either in whole or in part, by filing a notice of voluntary dismissal with the commission; however, any notice of voluntary dismissal does not diminish the power of the commission to initiate a complaint under Paragraph (1) of Subsection C of Section 10-16G-5 NMSA 1978. If the general counsel has determined the complaint is supported by probable cause, the complainant may dismiss the complaint only on motion and on such terms and conditions as the hearing officer deems proper.]~~

[1.8.3.11 NMAC-N, 01/01/2020; A, 08/13/2021]

1.8.3.12 SUBPOENAS; ENFORCEMENT:

_____ A. _____ If the general counsel determines it is necessary, the director shall request the commission's authority to file a petition with the designated district court judge or other judge pro tempore as designated pursuant to order of the chief judge of the supreme court:

_____ (1) _____ to issue a subpoena to obtain testimony of a person or the production of books, records, documents or other evidence reasonably related to an investigation;

_____ (2) _____ to order enforcement if the person subpoenaed neglects or refuses to comply; or

_____ (3) _____ to resolve any assertion of privilege.

_____ B. _____ Upon the commission's approval, the director, or the director's designee, may petition the designated district court judge, or another district court judge if the designated judge is not available, for a subpoena. The petition shall be filed *ex parte* and under seal pursuant to procedures for filing established by the designated district court judge.

_____ C. _____ If the petition is granted, subpoenas shall be issued by the general counsel and served as follows:

_____ (1) _____ If the subject of the subpoena is the complainant or the respondent, by email to the complainant or respondent if the complainant or respondent has previously agreed to receive notice of filings with the commission by email;

_____ (2) _____ On a department or agency of the state by service on the department or agency's general counsel, or by service in the manner set out by law for serving the department or agency; and

_____ (3) _____ On any other person by handing it to the person or their attorney, leaving it at the person's office or dwelling house with some person of suitable age and discretion then residing there.

_____ D. _____ A subpoena issued pursuant to this Section may command the appearance of a witness at a deposition or at a hearing pursuant to Section 1.8.3.14 NMAC. A person who is not a party or an officer of a party may not be commanded to travel to a place more than one hundred (100) miles from the place where that person resides, is employed, or regularly transacts business in person unless the subpoena is to attend and give testimony at a hearing. A subpoena ordering a person to attend a deposition via telephone or web conference complies with the requirements of this Subsection.

_____ E. _____ A party claiming an interest in the materials responsive to the commission's subpoena or the recipient of the subpoena may serve a written objection on the general counsel or the general counsel's designee within 14 days after service of the subpoena. If an objection is timely served, the person subject to a subpoena need

not comply with the subpoena until the commission files a motion to compel compliance pursuant to Subsection F of Section 1.8.3.12 and the motion is granted.

F. If a person, including a party, neglects or refuses to comply with a subpoena, the director or the director's designee, upon the commission's approval, may apply to a district court for an order enforcing the subpoena and compelling compliance. The designated district judge or other district court may impose sanctions or other relief permitted by law, including contempt, if a person neglects or refuses to comply with an order enforcing the subpoena and compelling compliance.

[1.8.13.12 NMAC-N, 08/13/2021]

1.8.3.13 GENERAL COUNSEL'S PROBABLE CAUSE DETERMINATIONS AND CONSEQUENCES; INVESTIGATION REPORTS AND RECOMMENDATIONS TO COMMISSION; DISPOSITION BY AGREEMENT; NOTICE TO PARTIES:

[A. Upon completion of the investigation of a complaint found to be supported by probable cause, the general counsel shall report promptly the general counsel's findings and recommendations to the director.

(1) Upon the receipt of the general counsel's findings and recommendations, the director will designate a qualified hearing officer to conduct a hearing on the complaint if so recommended by the general counsel. Based on the report of the general counsel, the hearing officer will set a public hearing as soon as practicable.

(2) In referring a complaint to the hearing officer, the director may consolidate the complaint with any other pending complaint involving related questions of law or fact; provided that consolidation will not unduly delay resolution of an earlier filed complaint, unduly prejudice any complaint, or compromise the right of any complainant or respondent to confidentiality under these rules.]

A. If the general counsel finds probable cause to support the allegations of the complaint, the general counsel shall report promptly the general counsel's findings and recommendations to the director, and the director shall:

(1) promptly notify both the complainant and the respondent:
(a) of the specific claims and allegations in the complaint that were the subject of the general counsel's investigation;
(b) of the finding of probable cause as to specific claims; and
(c) that a public hearing before a hearing officer will be set, provided that the notification has not been delayed by order of the commission pursuant to Subsection H of Section 10-16G-10 NMSA 1978; and

(2) designate a qualified hearing officer to conduct a hearing on the complaint if so recommended by the general counsel. Based on the report of the general counsel, the hearing officer will set a public hearing as soon as practicable.

B. If, after completing the investigation, the general counsel determines that a complaint is not supported by probable cause, a hearing officer must dismiss the complaint. In that event, the complainant and the respondent shall be notified in writing of the decision and the reasons for the dismissal. Neither the complaint nor the action taken on the complaint shall be made public by the commission or any staff member or contractor of the commission, but the complainant or respondent shall not be prevented from making public the complaint or any action taken on the complaint.

C. The general counsel may at any time enter into a proposed settlement agreement of the complaint with the respondent. The proposed settlement agreement shall be presented to the commission for approval. If the complaint alleges, or the general counsel has found probable cause to support, a discriminatory practice or action by the respondent against the complainant, no settlement agreement may be reached without prior consultation with the complainant. If approved by the commission, the settlement agreement shall be subject to public disclosure.

D. At any time, the complainant may voluntarily dismiss the complaint, either in whole or in part, by filing a notice of voluntary dismissal with the commission; however, any notice of voluntary dismissal does not diminish the power of the commission to initiate a complaint under Paragraph 1 of Subsection C of Section 10-16G-5 NMSA 1978. If the general counsel has determined the complaint is supported by probable cause, the complainant may dismiss the complaint only on motion and on such terms and conditions as the hearing officer deems proper.

[B] E. If a hearing has not been scheduled concerning the disposition of a complaint within 90 days after the complaint has been received from the complainant or after referral from another agency, whichever is later, the

director shall report to the commission at a duly convened meeting on the status of the investigation. The commission and the director shall thereafter proceed in accordance with Section 10-16G-11 NMSA 1978.

~~[C]~~ **E.** At any time before or during a hearing, the hearing officer may, at a duly convened public meeting, approve a disposition of a complaint agreed to by the general counsel and the respondent, provided that:

- (1) the complainant shall be consulted on the proposed agreement prior to its execution, and
- (2) the agreement shall be effective upon approval by the commission at a public meeting.

[1.8.3.13 NMAC-N, 01/01/2020; Rn & A, 08/13/2021]

1.8.3.14 HEARING OFFICERS; SUMMARY DISPOSITION; HEARINGS; INTERPRETERS; EVIDENCE:

A. The commission shall authorize the director to contract, for reasonable hourly compensation, with qualified persons to act as hearing officers. Hearing officers shall be assigned to act on or preside over hearings on complaints. Hearing officers must be currently licensed attorneys, or retired judges of the appellate, district, or metropolitan courts of New Mexico or any federal court, who are familiar with the ethics and election laws enforced by the commission. A hearing officer shall conduct a hearing fairly and impartially.

B. All hearings before the hearing officer will occur in Santa Fe or Albuquerque, or at such other location within the state as may be determined by the hearing officer. In selecting the location of a hearing other than in Santa Fe or Albuquerque, the hearing officer shall consider and give weight to the location and reasonable concerns of the respective parties, witnesses, and representatives in the proceeding. Upon a showing by any party of an undue burden, the hearing officer may move the hearing to a more appropriate venue.

C. If a hearing officer has not already notified the parties of a hearing through the issuance of a scheduling order, the director will notify the parties to the hearing by mail, directed to the address provided by the parties, of the date, time, and place scheduled for the hearing, at least 15 days before the scheduled hearing.

D. The hearing shall be conducted pursuant to the rules of evidence governing proceedings in the state courts, Rule 11-101 NMRA, and these procedural rules. In the event of a conflict between these procedural rules and the rules of evidence governing proceedings in the state courts, these procedural rules control. All hearings shall be open to the public in accordance with the Open Meetings Act, Section 10-15-1 NMSA 1978, except for hearings or portions thereof exempted from the requirements of that Act.

E. Audio recordings shall be made of all hearings conducted pursuant to this section.

F. The parties may be represented by counsel, who shall enter an appearance at the earliest opportunity, pursuant to Paragraph (37) of Subsection A of 1.8.3.9 NMAC.

G. The hearing officer shall permit the general counsel to intervene upon request. If the complaint was initiated by the commission under Paragraph (1) of Subsection (C) of Section 10-16G-5 NMSA 1978 and Section (E) of 1.8.3.9 NMAC, then the general counsel shall represent the commission at the hearing.

H. The hearing officer shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the proceedings and to maintain order. The hearing officer shall have the powers necessary to carry out these duties, including the following:

- (1) to administer or have administered oaths and affirmations;
- (2) to cause depositions to be taken;
- (3) to require the production or inspection of documents and other items;
- (4) to require the answering of interrogatories and requests for admissions;
- (5) to rule upon offers of proof and receive evidence;
- (6) to regulate the course of the hearings and the conduct of the parties and their representatives therein;
- (7) to issue a scheduling order, schedule a prehearing conference for simplification of the issues, or any other proper purpose;
- (8) to schedule, continue and reschedule hearings;
- (9) to consider and rule upon all procedural and other motions appropriate in the proceeding;
- (10) to require the filing of briefs on specific legal issues prior to or after the hearing;
- (11) to cause a complete audio record of hearings to be made;
- (12) to make and issue decisions and orders; and
- (13) to reprimand, or with warning in extreme instances exclude from the hearing, any person for engaging in a continuing pattern of disruptive or other improper conduct that interferes with the conduct of a fair and orderly hearing or development of a complete record.

I. In the performance of these adjudicative functions, the hearing officer is prohibited from engaging in any improper *ex parte* communications about the substantive issues with any party on any matter, but may communicate with parties separately solely on scheduling issues if all parties are notified of such communications and do not object to them. An improper *ex parte* communication occurs when the hearing officer discusses the substance of a case without the opposing party being present, except that it is not an improper *ex parte* communication for the hearing officer to go on the record with only one party when the other party has failed to appear at a scheduled hearing despite having received timely notice thereof.

J. Parties who appear at the hearing may:

(1) request the director to request the commission's authority to petition a district court to compel the presence of witnesses. Subpoenas may be requested by the commission from a district court in the same manner as provided for in Subsection J of Section 10-16G-10 NMSA 1978 and Subsections C and D of 1.8.3.11 NMAC;

(2) present evidence and testimony;

(3) examine and cross-examine witnesses; and

(4) introduce evidentiary material developed by the general counsel. Before the hearing, the general counsel shall timely disclose to the parties all evidence in the possession or within the control of the general counsel, other than privileged information.

K. Evidence shall be presented by the parties at the hearing consistent with the terms agreed to in a prehearing conference or as set forth in a scheduling order entered under Subsection H of Section 1.8.3.14 NMAC. The hearing officer may allow a deviation from the agreed-upon process for good cause.

(1) The general counsel shall present any evidence collected in the investigation relating to the complaint that is relevant to the matters at issue as set forth in the general counsel's findings under Subsection A of Section 1.8.3.12 NMAC; evidence that is agreed to be relevant by the parties; or evidence that is allowed by the hearing officer.

(2) The respondent may present evidence that is relevant to the matters at issue as set forth in the general counsel's findings under Subsection A of Section 1.8.3.12 NMAC; evidence that is agreed to be relevant by the parties; or evidence that is otherwise allowed by the hearing officer.

(3) The general counsel or the general counsel's designee may authenticate evidence produced during an investigation if the source of the evidence declines a request to appear and testify about the evidence and the hearing officer determines that there are no other reasonable means for authenticating the evidence.

~~[K]~~ **L.** Any person may timely file an amicus brief, not to exceed ten pages, with the director, for consideration by the hearing officer.

~~[L]~~ **M.** Upon reasonable notice by the party to the director, a party needing language interpreter services for translation of one language into another, and any interpreter required to be provided under the American with Disabilities Act, shall be provided for by the commission. While the person serving as an interpreter need not be a court-certified interpreter in order to provide interpretation at a hearing, any person serving as an interpreter in a hearing before the commission must affirm the interpreter's oath applicable in courts across this state.

~~[M]~~ **N.** After the termination of the hearing, or in lieu of a hearing if, upon a motion by a party or the general counsel, the hearing officer concludes there is no genuine dispute as to any material facts, if the hearing officer finds by a preponderance of shall issue written findings and conclusions on whether the evidence establishes that the respondent's conduct as alleged in the complaint constituted a violation of any law within the jurisdiction of the commission., ~~[the hearing officer]~~ The hearing officer's written decision:

(1) may

(a) impose any fines provided for by law; and

(b) recommend to the appropriate authority commensurate disciplinary action

against the respondent;

(2) and must

(a) state the reasons for the hearing officer's decision; and

(b) provide the parties with notice of the right of appeal to the commission.

~~[N]~~ **O.** Clear and convincing evidence is required to support a finding by a hearing officer that a respondent's conduct was fraudulent or willful.

~~[O]~~ **P.** If the hearing officer finds by a preponderance of the evidence that the respondent's conduct as alleged in the complaint constituted a violation of the Governmental Conduct Act and was either unintentional or for good cause, then the hearing officer shall give the respondent 10 days to correct the violation, pursuant to Subsection (B) of Section 10-16-13.1, before taking any action under Subsection M of Section 1.8.3.13 NMAC.

~~[P]~~ Q. If the hearing officer finds by a preponderance of the evidence that the respondent's conduct as alleged in the complaint does not constitute a violation of any law within the jurisdiction of the commission, the hearing officer, in a written decision, shall dismiss the complaint and inform the complainant of their right to appeal to the commission.

~~[Q]~~ R. ~~Either A party may request copies of [exhibits, documents, records in the administrative file,] evidence considered by the hearing officer or a copy of the audio recording of the proceeding hearing by submitting a written request to the director. The director may charge a reasonable fee for copies made, consistent with its fee schedule under the Inspection of Public Records Act. The director may also require the requesting party to submit a new, sealed computer storage device, such as a compact disc, dvd disc, or usb drive, or other tangible device for copying of any audio or video recording that is part of the administrative record. Every party is responsible for paying the cost of any transcription of the audio recording.~~
[1.8.3.14 NMAC-N, 01/01/2020; Rn & A, 08/13/2021]

1.8.3.15 APPEALS:

A. ~~[Except as provided by Subsections E and F of 1.8.3.14 NMAC,]~~ The complainant or respondent may appeal the final decision of the hearing officer within 30 days of the issuance of the decision to the full commission by filing a notice stating:

- (1) each party taking the appeal and each party against whom the appeal is taken;
- (2) the name, address, telephone number and email address of counsel for the appellant;
- (3) the decision or part of a decision from which the party appeals; and
- (4) the specific grounds for the appeal, including specific references to any evidence or law interpreted by the hearing officer.

(5) If the hearing officer issued a final decision on a complaint that was initiated by the commission under Paragraph (1) of Subsection (C) of Section 10-16G-5 NMSA 1978 and Section (E) of 1.8.3.9 NMAC, or where the general counsel has intervened under Section (G) of 1.8.3.14 NMAC, then the general counsel may appeal the hearing officer's decision within 30 days of the issuance by filing a notice stating the information required in subsections (1) through (4) above.

B. For the purpose of this rule, briefing time shall commence from the date the appellant files a notice of appeal to the full commission. Unless otherwise provided for by the commission,

- (1) The appellant shall file and serve a brief in chief within 15 days;
- (2) The appellee shall file and serve an answer brief within 15 days after service of the brief of the appellant; and
- (3) Neither the brief in chief nor the answer brief shall exceed 10 pages.

C. The commission shall schedule oral arguments, if requested by either party or ordered by the commission within sixty days of the notice of appeal.

D. Any person may timely file an amicus brief, not to exceed ten pages, with the director for consideration by the commission.

E. The commission shall review the whole record of the proceeding and shall, within 180 days of receiving the notice of appeal, issue its decision upholding or reversing the decision of the hearing officer. The commission may reverse all or part of the hearing officer's decision and remand the matter to the hearing officer for further proceedings.

~~[F. If a hearing officer issues a decision granting a respondent's motion to dismiss for failure to state a claim and dismisses a complaint or part of a complaint pursuant to Paragraph (1) of Subsection B of 1.8.3.11 NMAC, then the complainant may appeal the hearing officer's decision to the commission as provided in these rules. If, however, a hearing officer issues a decision denying a respondent's motion to dismiss for failure to state a claim, then the respondent has no right to an interlocutory appeal of that decision to the commission, but may appeal any final decision of the hearing officer to the commission.]~~

~~[G]~~ F. If a hearing officer dismisses a complaint, pursuant to Subsection B of 1.8.3.13 NMAC, following the general counsel's determination that the complaint is not supported by probable cause, then the complainant has no right to an appeal of that dismissal to the commission.

~~[H]~~ G. A party may seek review of the commission's final decision by filing for a petition of writ of certiorari pursuant to Rule 1-075 NMRA.

[1.8.3.15 NMAC-N, 01/01/2020; Rn & A, 08/13/2021]

~~[1.8.3.15]~~ 1.8.3.16 OPEN RECORDS AND CONFIDENTIALITY:

A. Thirty days after the director provides notice pursuant to Subsection FA of 1.8.3.4+13 NMAC to the respondent of the allegations of a complaint, the general counsel's finding of probable cause, and the setting of the public hearing:

(1) the director shall make public the specific allegations of the complaint, the notification to the respondent, and any response filed by the respondent, and any related records, *provided* that:

(2) prior to the publication of any commission records pursuant to the preceding subparagraph, any proceedings in district court initiated by the commission to obtain subpoenas shall be sealed, and shall remain so until such time as the commission notifies the court that the commission has made the complaint public or the parties enter into an approved settlement agreement.

B. If a complaint is dismissed because the general counsel has found it to be frivolous or unsubstantiated, as provided in Subsection E of Section 10-16G-10 NMSA 1978, the commission shall not release to the public the complaint, the reason for its dismissal, or any related records. Nothing in this subsection shall prevent the making public of any document by a complainant or respondent to the proceeding.

C. Notwithstanding any other requirement in these rules or the law requiring notification to the complainant or respondent of commission actions on a complaint, the director may delay notifying parties or releasing to the public the complaint and related information if the director deems it necessary to protect the integrity of a criminal investigation.

(1) The director shall, within 10 days of making the decision to delay release of a complaint pursuant to this subsection, present to the commission the records and information to be withheld and the reasons for delaying their release.

(2) The commission may, by a majority vote pursuant to Subsection H of Section 10-16G-10 NMSA 1978, confirm the director's decision in a meeting closed pursuant to the requirements of the Open Meetings Act, Section 10-15-1 NMSA 1978, and the commission's open meetings resolution.

[1.8.3.156 NMAC-N, 01/01/2020; Rn & A, 08/13/2021]