



## STATE ETHICS COMMISSION

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

June 5, 2020, 9:00 a.m. to 12:00 p.m.

### Zoom Meeting

Join Zoom meeting through internet browser: <https://us02web.zoom.us/j/84373718165>

Join Zoom meeting telephonically: (669) 900 9128

Meeting ID: 843 7371 8165

### **COMMISSION MEETING**

Chairman Lang Calls the Meeting to Order

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

### **Commission Meeting Items**

### **Action Required**

- |                                                  |     |
|--------------------------------------------------|-----|
| 1. Operations and Legislative Update<br>(Farris) | No  |
| 2. Advisory Opinion 2020-003<br>(Farris)         | Yes |

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|----------------------------------------------------------------------------------------|-----|
| 3. Advisory Opinion 2020-004<br>( <i>Farris</i> )                                      | Yes |
| 4. Proposed Rule 1.8.1.16 NMAC – Commission Meetings<br>( <i>Boyd</i> )                | Yes |
| 5. Proposed Rule 1.8.1.9-10 NMAC – Informal Advisory Opinions<br>( <i>Boyd</i> )       | Yes |
| 6. Proposed Rule 1.8.4 NMAC – Code of Ethics<br>( <i>Farris, Boyd &amp; Biderman</i> ) | Yes |
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**Upon applicable motion, Commission goes into Executive Session**

- |                                                                         |    |
|-------------------------------------------------------------------------|----|
| 7. Discussions regarding Administrative Complaints<br>( <i>Farris</i> ) | No |
| 1. Refresher on procedure under 1.8.3 NMAC                              |    |
| 2. Administrative Complaint No. 2020-002                                |    |
| 3. Administrative Complaint No. 2020-003                                |    |
| 4. Administrative Complaint No. 2020-005                                |    |

**Upon applicable motion, Commission returns from Executive Session**

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|-----------------------------------------------------------------|-----|
| 8. Actions on Administrative Complaints<br>( <i>Farris</i> )    | Yes |
| 1. Administrative Complaint No. 2020-002                        |     |
| 2. Administrative Complaint No. 2020-003                        |     |
| 3. Administrative Complaint No. 2020-005                        |     |
| 9. Commissioner Appointments<br>( <i>Farris</i> )               | Yes |
| 10. Discussion of Commission Visibility<br>( <i>Bluestone</i> ) | No  |
| 11. Determination of next meeting<br>( <i>Lang</i> )            | No  |
| 12. Public comment                                              | No  |
| 13. Adjournment                                                 |     |

*For inquires or special assistance, please contact Sonny Haquani at [Ethics.Commission@state.nm.us](mailto:Ethics.Commission@state.nm.us)*



## **STATE ETHICS COMMISSION**

### **Minutes of the State Ethics Commission's April 3, 2020 Meeting** Conducted Virtually View Recording [Here](#)

The meeting began with introductions from public attendees.

#### **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  
Garrey Carruthers, Commissioner  
Ronald Solimon, Commissioner  
Judy Villanueva, Commissioner  
Frances Williams, Commissioner  
William Lang, Chair

#### **APPROVAL OF AGENDA:**

Chair Lang sought a motion to approve the agenda. Commissioner Williams moved to approve the agenda. Commissioner Baker seconded. Chair Lang conducted the vote by roll call. All Commissioners voted in the affirmative, and the agenda was approved unanimously.

#### **APPROVAL OF FEBRUARY 7, 2020 COMMISSION MEETING MINUTES:**

Chair Lang sought a motion to approve the meeting minutes. Commissioner Carruthers moved to approve the minutes. Commissioner Baker seconded. Chair Lang conducted the vote by roll call. Commissioner Solimon abstained based on his absence from the previous meeting. All other Commissioners voted in the affirmative, and the minutes were approved unanimously.

#### **1. OPERATIONAL UPDATES:**

Director Jeremy Farris provided updates on the following matters:

- **Operational changes made by the staff in response to the COVID-19 pandemic.**
  - o All staff have transitioned to teleworking.
  - o All Commission duties and obligations continue to be met as usual.

- **New memorandum on the legal basis for virtual Commission meetings consistent with the Open Meetings Act.**
  - o The memorandum provides a legal basis for the Commission to conduct meetings via Zoom and has been posted on the Commission website.
- **New Standing Orders.**

Director Farris noted he had issued two standing orders under 1.8.3.8 NMAC-N, 1/1/2020.

- Standing order 1 directs parties to administrative cases to appear before the Commission virtually through a telecommunications platform.
  - Standing order 2 allows parties to administrative cases up to 21-day extensions for procedural deadlines upon request.
- ***State v. Padilla***
  - o The Commission filed the motion for leave to participate as amicus curiae with the Court of Appeals in *State v. Padilla*, and the Court of Appeals granted the Commission's motion and accepted the Commission's amicus brief.
- **First Quarterly Report Published.**
  - o The staff published the Commission's first quarterly report (January-March 2020) on the Commission's website.
    - Six complaints were filed with the Commission. Two have been referred, four are currently under review for jurisdiction.
    - Three complaints present complaints under the Governmental Conduct Act. One complaint raises an Anti-Donation clause claim. The remaining complaints raise claims under laws that are not within the Commission's jurisdiction.
- **Rulemakings and the Next Commission Meeting.**
  - o The Commission staff are drafting rules to be issued for public comment at the next Commission meeting.
    - The first rulemaking effort involves the proposed code of ethics.
      - Paul Biderman, a contractor with the Commission, provided an update on the work related to the proposed code of ethics.
      - Based on the approved timeline, the Commission will receive from staff a complete draft of a proposed code in middle May, issue the code for notice and public comment at the next Commission meeting, and conduct a rulemaking hearing in August.
    - The second rulemaking amends the Commission's administrative rule, NMAC 1.8.1, regarding Commission meetings.

- The third rulemaking amends NMAC 1.8.1 to address advisory opinions and to create a process for Commission staff to issue informal expedited advisory opinions. The Commission addressed this item later in the meeting.
- **Commission Budget and Hiring.**
  - The State Budget Division allotted the Commission’s FY20 \$200,000 supplemental appropriation, and the Commission now has the authority to spend those funds.
    - The staff are working to secure several professional services contracts and purchase additional furniture and IT infrastructure.
  - The State Personnel Office has created the Finance and Administration Director job posting and the application is accessible in several locations and websites.
  - The Commission will engage Annie Swift and Lane Towery as contractors for their summer internships, rather than as exempt hires.
  - The Commission is taking steps to move into a larger adjacent office, Suite 215, to accommodate new staff members in FY21.

2. **ADVISORY OPINION 2020-002.**

Prior to the overview of Advisory Opinion 2020-002, Commissioner Bluestone publicly noted his recusal for the purposes of avoiding a potential conflict of interest given his association with the matter. General Counsel Walker Boyd provided an overview of Advisory Opinion 2020-002.

- Advisory Opinion 2020-002 responds to a question regarding whether, under the Governmental Conduct Act and the Rules of Professional Conduct, a former state agency attorney is prohibited by the Governmental Conduct Act or the Rules of Professional Conduct for Attorneys from representing Nuclear Watch New Mexico on a matter that is the subject of litigation that the attorney previously worked on while at the state agency.
- The advisory opinion concludes that the conduct would violate section 10-16-8(B) of the Governmental Conduct Act, which prohibits the attorney from representing Nuclear Watch in the federal district court litigation. The advisory opinion did not address whether the Rules of Professional Conduct were violated, because the Commission lacks jurisdiction for those rules.
- Chair Lang sought a motion to approve Advisory Opinion 2020-002 as written. Commissioner Baker moved to approve the advisory opinion as written. Commissioner Williams seconded. Chair Lang conducted the vote by roll call. All Commissioners voted in the affirmative, and the advisory opinion was approved unanimously.

3. **RESOLUTION NO. 4.**

Director Farris provided an overview of Resolution No. 4.

- Resolution No. 4 outlines the Commission’s framework and procedures for Commission-initiated state court actions that result from any source other than a formal administrative complaint.
- The resolution clarifies the Commission’s legal authority to initiate civil litigation actions; the framework for the Commission to conduct assessments and investigations of potential violations

of ethics laws; and how the Commission will use assessments and investigations to collect evidence necessary to support a civil action in state court.

- Chair Lang sought a motion to approve Resolution No. 4 as written. Commissioner Carruthers moved to approve resolution as written. Commissioner Solimon seconded. Chair Lang conducted the vote by roll call. All Commissioners voted in the affirmative, and the resolution was approved unanimously.

#### **4. RULEMAKING ON EXPEDITED INFORMAL ADVISORY OPINIONS**

Mr. Boyd provided a review of the effort to create an administrative rule for expedited informal advice.

- The rulemaking would amend the Commission's rule in NMAC 1.8.1 and allow the General Counsel to provide expedited informal advice to requestors within a shorter time frame than the formal advisory opinion process, which is based on Commission meetings and has a 60-day stator limit.
  - o The rule would allow the General Counsel to provide advice to requestors within a few days, thereby being more useful on time-sensitive issues.
  - o Commissioner Bluestone requested that the final draft of the rule specify a distinction between the formal advisory opinion process and the proposed expedited advice process and that the nomenclature reflect the distinction.
  - o Staff will present another draft of the rule to the Commission at the next scheduled meeting.

#### **5. RESEARCH ON COMPLAINT REQUIREMENTS OF OTHER ETHICS COMMISSIONS**

Director of Communications Sonny Haquani provided a review of the research he conducted and compiled at the request of Commissioner Carruthers.

- The research listed the complaint-initiation requirements of all other state ethics commissions and gave insight on which commissions require notarization of administrative complaints as well as how other commissions address bad-faith complaints.

#### **6. EXECUTIVE SESSION**

Chair Lang sought a motion to enter executive session. Commissioner Williams moved to enter into executive session to discuss complaints filed with the Commission. Commissioner Baker seconded. Chair Lang conducted the vote by roll call. All Commissioners voted in the affirmative and the Commission entered into executive session.

- The Commission entered executive session at 11:30 AM. The Commission resumed public session at 11:58 AM. The matters discussed in the closed executive session were limited to those specified in the motion for closure.

#### **7. ACTIONS ON ADMINISTRATIVE COMPLAINTS**

- The Commission resumed action on Administrative Complaint 2020-001.

- Chair Lang sought a motion to approve the order of dismissal for complaint 2020-001. Commissioner Carruthers moved to approve the order to dismiss complaint 2020-001. Commissioner Bluestone seconded. Chair Lang conducted the vote by roll call. All Commissioners voted in the affirmative, and the order was approved.

**8. SCHEDULING THE NEXT COMMISSION MEETING**

- The Commissioners agreed to continue meeting bi-monthly and meet next on June 5<sup>th</sup>.

**9. PUBLIC COMMENT**

- State Auditor Brian Colón thanked the Commission for its work.
- Tony Ortiz echoed the sentiment of Auditor Colón and requested that NM Ethics Watch present its recent findings and recommendations for statutory changes to ethics laws at a future meeting.

**ADJOURNMENT**

- Commissioner Carruthers moved to adjourn.
- The Commission adjourned at 12:15 PM



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2020-03**

June 5, 2020<sup>1</sup>

#### **QUESTIONS PRESENTED**

1. Holtec International offers to provide flights, meals, refreshments, and lodging to New Mexico legislators as part of a two-day tour of Holtec's Callaway Nuclear Generating Station near Reform, Missouri. Does the Gift Act, NMSA 1978, §§ 10-16B-1 to -5, permit Holtec's donations?
2. Does the Campaign Reporting Act, NMSA 1978, §§ 1-19-25 to -36, require the legislators who attend Holtec's tour of the Callaway station to report the flights, meals, refreshments, and lodging accommodations as in-kind campaign contributions?

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<sup>1</sup>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 proceedings concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).



## FACTS<sup>2</sup>

Holtec is an energy company that seeks to build an interim storage facility in southeastern New Mexico.<sup>3</sup> To this end, Holtec seeks to conduct a series of two-day educational programs for members of the New Mexico Legislature at Holtec's Callaway Nuclear Generating Station near Reform, Missouri. Holtec offers to fly small groups of legislators from central gathering points in Santa Fe, Albuquerque, Farmington, and Las Cruces to Jefferson City, Missouri and, then, to shuttle the legislators to the Callaway site. There, Holtec proposes to inform legislators about Holtec's operations, structure, environmental protections, safety precautions, and general business practices. During the two-day program, Holtec offers to provide legislators with flights, meals, refreshments, and lodging, the total cost of which would exceed \$250 per legislator.

## ANSWERS

1. Holtec's donation of flights, meals, refreshments, and lodging incidental to an educational tour for legislators is not subject to the Gift Act's limitations on gifts.
2. Because Holtec's donations are incidental to an educational purpose, and not a political purpose, the Campaign Reporting Act does not require legislators to report the flights, meals, refreshments, and lodging as in-kind contributions on filings with the Secretary of State.

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<sup>2</sup>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)). On April 7, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein.

<sup>3</sup>While the request does not specify details about Holtec's proposed interim storage facility, Holtec's website indicates that the proposed facility is intended to store "used nuclear fuel and high-level radioactive waste." HI-STORE CISF Overview, <https://historecisf.com/overview/> (last accessed May 27, 2020).

## ANALYSIS

1. Holtec may pay for the legislators' reasonable expenses related to the tour of the Callaway facility.

The Gift Act limits gifts from restricted donors to state officers and employees. The request stipulates that Holtec is a restricted donor. *See* § 10-16B-2(D).<sup>4</sup> Legislators are state officers. *See* § 10-16B-2(E). Under the Gift Act, restricted donors may not give—and state officers, state employees, candidates for state office, and their family members, may not knowingly accept—a gift of a market value greater than \$250. *See* § 10-16B-3(A). Furthermore, lobbyists registered with the Secretary of State, lobbyist's employers, and government contractors cannot donate gifts of an aggregate value greater than \$1000 in a calendar year to any one state officer, state employee, or candidate for state office. *See* § 10-16B-3(B).

The Gift Act excepts certain transfers from the Act's definition of a "gift." *See* § 10-16B-2(B)(1)–(10). Consequently, the \$250 single/\$1000 aggregate limitations do not apply to donations that satisfy an enumerated, statutory exception.

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<sup>4</sup>The Gift Act defines a "restricted donor" to include any person who:

- (1) is or is seeking to be a party to any one or any combination of sales, purchases, leases or contracts to, from or with the agency in which the donee holds office or is employed;
- (2) will personally be, or is the agent of a person who will be, directly and substantially affected financially by the performance or nonperformance of the donee's official duty in a way that is greater than the effect on the public generally or on a substantial class of persons to which the person belongs as a member of a profession, occupation, industry or region;
- (3) is personally, or is the agent of a person who is, the subject of or party to a matter that is pending before a regulatory agency and over which the donee has discretionary authority as part of the donee's official duties or employment within the regulatory agency; or
- (4) is a lobbyist or a client of a lobbyist with respect to matters within the donee's jurisdiction.

§ 10-16B-2(D).

*See id.* Under the “educational program” exception, for example, a donor can pay the “reasonable expenses for a bona fide educational program that is directly related to the state officer’s or employee’s official duties.” § 10-16B-2(B)(9).

No court has interpreted or applied the Gift Act’s “educational program” exception.<sup>5</sup> But the statutory text is clear: a restricted donor may make payments in excess of the Gift Act’s \$250 single/\$1000 aggregate limitations for (i) “reasonable expenses” for (ii) “a bona fide educational program” that (iii) is “directly related to official duties.” As described by the request, Holtec’s proposed donations satisfy these elements.

First, the costs associated with flights, meals, refreshments, and lodging are “reasonable expenses” incidental to the tour of the Callaway facility. § 10-16B-2(B)(9). To ascertain the meaning of a statutory phrase, it is common to look to other statutory provisions in *pari materia*. *See, e.g., Roth v. Thompson*, 1992-NMSC-011, ¶ 15, 113 N.M. 331, 825 P.2d 1241. In a paragraph neighboring the “educational program” exception, the Gift Act excepts payments for “*travel, subsistence and related expenses* accepted by a state agency in connection with a state officer’s or employee’s official duties that take place away from the state official’s or employee’s station of duty.” § 10-16B-2(B)(7) (emphasis added).

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<sup>5</sup>The Office of the Attorney General, however, has issued two letter opinions addressing the exception. *See* Att’y Gen. Adv. Ltr. to Senators Leavell and Kernan, N.M. Senate, from Att’y Gen. Hector Balderas and Asst. Att’y Gen. Caroline Manierre (Aug. 10, 2015); Att’y Gen. Adv. Ltr. to Representatives Gray and Tyler, N.M. House of Representatives, from Att’y Gen. Gary King and Asst. Att’y Gen. Zachary Shandler (Jun. 5, 2007). The State Ethics Commission considers the Advisory Opinions and Advisory Letters issued by the New Mexico Attorney General as persuasive authority. The Attorney General’s opinions and letters, however, do not necessarily dictate the advisory opinions that the Commission may issue. *See* NMSA 1978, §§ 8-5-2(D) (requiring the Attorney General to issue opinions in writing upon questions of law submitted by state officials); 10-16G-8 (authorizing the Commission to issue advisory opinions on matters related to ethics upon request); *cf. also First Thrift & Loan Ass’n v. State ex rel. Robinson*, 1956-NMSC-099, ¶ 28, 62 N.M. 61, 304 P.2d 582 (“We are not bound by [opinions of the Attorney General’s office] in any event, giving them such weight only as we deem they merit and no more. If we think them right, we follow and approve, and if convinced they are wrong . . . we reject and decline to feel ourselves bound.”).

The Commission’s advisory opinion on this request accords with the Attorney General’s two letter opinions addressing the application of the “educational program” exception. § 10-16G-2(B)(9).

Accordingly, the costs of flights, meals, refreshments and lodging are “reasonable expenses” for the purposes of the “educational program” exception. § 10-16B-2(B)(9).<sup>6</sup>

Second, the tour of the Callaway site constitutes a “bona fide educational program.” § 10-16B-2(B)(9). Holtec proposes to inform legislators on its “operations, structure, environmental protections, safety precautions, and general business practices.” Request at 1. It is reasonable to expect that, through its two-day program, Holtec seeks to persuade legislators of the benefits of, and the safety precautions attending to, the nuclear waste storage facility that Holtec proposes to build in southeastern New Mexico. This reasonable expectation regarding Holtec’s motives, however, does not undermine the educational usefulness of the program. Nor do Holtec’s motives prevent legislators from treating the Callaway site visit as a bona fide opportunity to learn about the merits and risks of Holtec’s proposed storage site.

Third, the educational program is directly related to the legislators’ official duties. Legislators are required to attend legislative sessions and, prescinding from certain exceptions, to vote on every question and motion appearing before them. *See* House Rule 7-1 & 7-5; Senate Rule 7-1 & 7-5. A legislator’s power to vote is a public trust, and legislators must exercise their powers only to advance the public interest. *See* NMSA 1978, § 10-16-3; *see also Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2010) (“The legislative power [to vote] thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it.”). To discern the public interest and to exercise their trust responsibility, legislators must inform themselves on the issues that affect their constituencies. This is no small feat, especially for New Mexico’s citizen legislators. Attending an educational program offered by a company that proposes to build a nuclear waste storage facility in New Mexico is one way that legislators can inform themselves on how the proposed storage facility would affect their constituents’ interests. The educational program that Holtec offers is directly related to legislators’ official duties.

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<sup>6</sup>Under the Gift Act, Holtec’s donations of flights, meals, and lodging must be “reasonable.” § 10-16B-2(B)(9). In other words, the donations should not be so lavish that an observer might question the tour’s essentially educational purpose. Further, in this instance, the Lobbyist Regulation Act supports the Gift Act’s “reasonableness” requirement with required disclosure. Legislators should be aware that, under NMSA 1978, Section 2-11-6(A), Holtec must file an expenditure report corresponding to the tour of the Callaway site with the Secretary of State. *See infra*, § 3.

The “educational program” exception therefore applies. Holtec’s payments for the flights, meals, refreshments, and lodging incidental to the tour of Holtec’s Callaway facility are not “gifts,” as the Gift Act defines that term. Consequently, the Gift Act’s \$250 single/\$1000 aggregate limitations do not apply to those donations.

2. The Campaign Reporting Act does not require the legislators who attend Holtec’s tour to report the costs of the trip as in-kind donations.

Under the Campaign Reporting Act, a “‘contribution’ means a gift, subscription, loan, advance or deposit of money or other thing of value, including the estimated value of an in-kind contribution, *that is made or received for a political purpose*, including payment of a debt incurred in an election campaign.” NMSA 1978, § 1-19-26(H)(1) (emphasis added). A “political purpose,” in turn, means “for the purpose of supporting or opposing a ballot question or the nomination or election of a candidate.” § 1-19-26(S); *but cf. N.M. Youth Organized v. Herrera*, 611 F.3d 669, 674 (10th Cir. 2010) (“[I]n order to be constitutional, the phrase ‘political purpose’ [in the Campaign Reporting Act] may be applied only to reach contributions or expenditures for communications that constitute express advocacy for the election or defeat of a clearly identified candidate, or its functional equivalent.”) (citations omitted).

The request indicates that Holtec’s payments of legislators’ tour-related expenses are “to inform legislators about Holtec’s operations, structure, environmental protections, safety precautions, and general business practices.” Request at 1. As described, the tour-related expenses are not made or received to advocate for the election or defeat of a candidate or ballot question. Accordingly, the flights, meals, refreshments, and lodging incidental to legislators’ tour of the Callaway station are not given for a “political purpose” and, hence, are not “contributions” under Section 1-19-26(H)(1). Section 1-19-27(A) does not require legislators to report the flights, meals, refreshments, and lodging incidental to the tour as contributions on their filings with the Secretary of State.<sup>7</sup>

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<sup>7</sup>If Holtec otherwise makes a “contribution” authorized by the Campaign Reporting Act to a legislator, *see* § 1-19-26(H) (defining “contribution”), then the legislator must report that contribution on their filing with the Secretary of State. Contributions authorized by the Campaign Reporting Act are not “gifts” under the Gift Act and, therefore, are also excepted from the Gift Act’s \$250 single/\$1000 aggregate limitations.

3. The Lobbyist Regulation Act would require Holtec to report Holtec's expenditures for the proposed educational tour to the Secretary of State.

Last, while New Mexico's campaign reporting statute does not require legislators to report Holtec's proposed donations as contributions, the Lobbyist Regulation Act, NMSA 1978, §§ 2-11-1 to -9, would require *Holtec* to report the same expenditures to the Secretary of State. *See* § 2-11-6(A); *see also* Att'y Gen. Adv. Ltr. to Representatives Gray and Tyler, N.M. House of Representatives, from Att'y Gen. Gary King and Asst. Att'y Gen. Zachary Shandler (Jun. 5, 2007), at 3 (noting § 2-11-6(A) in an advisory letter addressing a similar request). Under the Lobbyist Regulation Act,

Each . . . lobbyist's employer who makes or incurs expenditures . . . for the benefit of . . . a state legislator . . . who is involved in an official action affecting the lobbyist's employer or in support of or in opposition to . . . pending legislation or official action shall file an expenditure report with the secretary of state . . . .

§ 2-11-6(A).

The Lobbyist Regulation Act, therefore, requires more disclosure than the Campaign Reporting Act. In view of prevailing First Amendment jurisprudence, the difference is not accidental. The First Amendment limits state-mandated disclosure of payments made to influence *public opinion* to the disclosure of "contributions or expenditures for communications that constitute express advocacy for the election or defeat of a clearly identified candidate." *N.M. Youth Organized*, 611 F.3d at 674. By contrast, the First Amendment does not impose similar limitations on state-mandated disclosure of payments made to influence *legislators' opinions*. *See, e.g., United States v. Harriss*, 347 U.S. 612, 625 (1954) (rejecting a First Amendment challenge to disclosure requirements in the Federal Regulation of Lobbying Act and concluding "that Congress . . . is not constitutionally forbidden to require the disclosure of lobbying activities"); *see also Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 369 (2010) ("[T]he Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.") (citing *Harriss*, 347 U.S. at 625). In other words, under the First Amendment, states may demand more disclosure of lobbying-related expenditures

than of campaign-related expenditures. And, in the Lobbyist Regulation Act, the New Mexico Legislature required more disclosure. *See* § 2-11-6.

## **CONCLUSION**

The Gift Act's limitations do not apply to flights, meals, refreshments, and lodging incidental to an educational tour. Because these expenditures are for an educational purpose, and not a political purpose, legislators participating in the tour are not required to report the flights, meals, refreshments, and lodging as in-kind contributions.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**

**JEFF BAKER, Commissioner**

**STUART M. BLUESTONE, Commissioner**

**HON. GARREY CARRUTHERS, Commissioner**

**RONALD SOLIMON, Commissioner**

**JUDY VILLANUEVA, Commissioner**

**FRANCES F. WILLIAMS, Commissioner**



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2020-04**

June 5, 2020<sup>1</sup>

### **QUESTIONS PRESENTED**

1. Does the Procurement Code prohibit a person involved in a procurement award decision from discussing the contents of a proposal submitted in response to request for proposals prior to the award?
2. Does the Procurement Code prohibit a person involved in a procurement from applying a local vendor preference to a procurement over and above the resident business preference set forth in NMSA 1978, Section 13-1-21(D)?
3. Does the Procurement Code prohibit a person involved in a procurement from having *ex parte* communications with potential offerors outside the context of public notice, pre-proposal conferences, or written questions?

### **FACTS<sup>2</sup>**

A local school district's Chief Procurement Officer (CPO) issued a request for proposals for cleaning services. Two proposals were received. The CPO

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<sup>1</sup>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).

<sup>2</sup>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)). On April 7, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein. While the facts concern a local school district's officials and employees, for which the Commission lacks



disqualified one of the proposals as nonresponsive.<sup>3</sup> The CPO determined that the remaining proposal was responsive and that it was in the interests of the school district to contract with the offeror. Under the school district's procurement regulations, the school board must approve the CPO's recommended award; accordingly, the CPO asked the school district's board of directors to approve the CPO's recommendation.

The school district's finance committee, consisting of two members of the school district's board of directors, met to discuss the procurement. One member voiced opposition to the CPO's recommendation. The board member asked the CPO to provide copies of the request for proposals and the names of all vendors who received notice. After receiving this information, the board member contacted local vendors to discuss the cost of the cleaning services requested and asked whether they had received notice of the request for proposals.

The board of directors held a public meeting to discuss the CPO's recommended award. The board member already opposed to the contract identified the sole responsible offeror, stated that "he would have preferred a local vendor," and discussed the proposal that the CPO had disregarded as nonresponsive. The board tabled a vote on the CPO's recommendation and deferred further consideration of an award to its next meeting. Believing that the board member had violated the Procurement Code by discussing the contents of the offerors' proposals at a public meeting, the CPO canceled the procurement without award.

### ANSWERS

1. Yes.
2. Yes.
3. As a general matter, no; however, certain *ex parte* communications could violate the Procurement Code or other regulations issued under the Procurement Code.

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jurisdiction, 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).

<sup>3</sup>A responsive offer is "an offer which conforms in all material respects to the requirements set forth in the request for proposals." NMSA 1978, § 13-1-85.

## ANALYSIS

We begin with an overview of the Procurement Code. “The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.” NMSA 1978, § 13-1-29(C); *see also Morningstar Water Users Ass’n, Inc. v. Farmington Mun. Sch. Dist. No. 5*, 1995-NMSC-052, ¶ 41, 120 N.M. 307, 901 P.2d 725 (“The purpose of the Procurement Code is to insure [sic] fairness when a public entity makes a purchase from a private entity.”). It has also been said that the Procurement Code “protects against the evils of favoritism, nepotism, patronage, collusion, fraud, and corruption in the award of public contracts.” *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, ¶ 8, 118 N.M. 707, 885 P.2d 628 (citing *John J. Brennan Constr. Corp. v. City of Shelton*, 187 Conn. 695, 448 A.2d 180, 184 (1982)).

Subject to certain exceptions not relevant here, the Procurement Code applies “to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.” NMSA 1978, § 13-1-30(A). In general (and again, subject to certain exceptions not relevant here), a government body’s purchase of goods or services under the Procurement Code must proceed in one of two ways: (1) solicitation of competitive sealed bids, *see* NMSA 1978, § 13-1-102; or (2) an invitation for sealed proposals, *see* NMSA 1978, § 13-1-111. The default rule is that all procurements must take place through competitive sealed bids. *See* NMSA 1978, § 13-1-102 (providing both the default rule and the exceptions thereto). Procurement of services that are not deemed to be professional services may be accomplished through a request for proposals only when the agency finds “that the use of competitive sealed bidding for . . . [nonprofessional] services is either not practicable or not advantageous to the state agency or a local public body.” *See* NMSA 1978, § 13-1-111(A); *see also* NMSA 1978, § 13-1-76 (defining “professional services”).

An agency’s decision to procure by inviting bids or requesting proposals determines the amount of discretion the agency has over an award. When a procurement is accomplished through an invitation for bids, the procuring government agency is required to award a contract to the lowest responsible bidder. *See* NMSA 1978, § 13-1-108.<sup>4</sup> In other words, the agency may decline to award a

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<sup>4</sup>We are aware of a 1954 Attorney General Advisory Opinion that opined that a county board of education could award a contract to a higher bidder. *See* N.M. Att’y Gen. Op. 54-5959

contract to the lowest bidder only when the bidder is not “responsible.” *See also Planning and Design Solutions*, 1994-NMSC-112, ¶ 15 (“[a]n award to other than the lowest bidder is prima facie erroneous and illegal.”) (quoting 10A Eugene McQuillin, *The Law of Municipal Corporations* § 29.73, at 496-97 (3d ed. 1990)).

In contrast, a request for proposals permits the agency to accept the offer that is “most advantageous . . . [after] taking into consideration the evaluation factors set forth in the request for proposals.” NMSA 1978, § 13-1-117. An agency conducting a procurement through a request for proposals must “state the relative weight to be given to the factors in evaluating proposals” in the request. NMSA 1978, § 13-1-114. This requirement gives a measure of predictability to proposal-based procurements, ensuring that the agency does not introduce additional evaluation factors mid-procurement to tip the scales in favor of an offer that is otherwise less advantageous. *See Planning and Design Solutions*, 1994-NMSC-112, ¶ 14 (“The [Procurement] Code indicates that, in evaluating [responsive] proposals, [an agency is] required to apply the factors listed in the [r]equest [for proposals]—and no others.”); *cf. also* 10 U.S.C. § 2305(b)(1) (“The head of an agency shall evaluate . . . competitive proposals and make an award based solely on the factors specified in the solicitation.”).

The Procurement Code is based on the American Bar Association’s 1979 Model Procurement Code for State and Local Governments, and the commentary to the model code explains the distinction between bid- and proposal-based procurements in this way:

Under competitive sealed bidding, judgmental factors may be used only to determine if the supply, service, or construction item bid meets the purchase description. Under competitive sealed proposals, judgmental factors may be used to determine not only if the items being offered meet the purchase description but may also be used to evaluate competing proposals. The effect of this different use of judgmental evaluation is that under competitive sealed bidding, once the judgmental

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(1954) (“[I]t is our opinion that the board, if it has accurate figures at its disposal showing the lowest bid not to be the best bid because of such matters as operating expense, may award the contract to the highest bidder.”). We believe the Legislature’s 1984 enactment of Section 13-1-108 supplants the 1954 Attorney General opinion, such that the latter no longer carries any persuasive authority. *See* § 13-1-108 (“A contract solicited by competitive sealed bids shall be awarded with reasonable promptness by written notice to the lowest responsible bidder.”).

evaluation is completed, award is made on a purely objective basis to the lowest responsive and responsible bidder. Under competitive sealed proposals, the quality of competing products or services may be compared and trade-offs made between price and quality of the products or services offered (all as set forth in the solicitation), Award under competitive sealed proposals is then made to the responsible offeror whose proposal is most advantageous to the [State].

Model Procurement Code for State and Local Governments § 3-203 cmt. (3)(a) (1979) (bracketed material in original).

Relatedly, any agency’s choice to invite bids or request proposals also dictates the process the agency uses to reach its award decision. When a governmental entity procures through competitive sealed bidding, unless the lowest responsive bid contains a mistake, it must be “unconditionally accepted for consideration for award without alteration or correction.” NMSA 1978, § 13-1-105(A). As noted, the procuring agency is generally required to accept the lowest responsive bid; however, the lowest bidder and the procuring agency can engage in further negotiations over the price of the bid if the bidder is already otherwise qualified, there is no change in the original terms and conditions of the procurement, and negotiation is needed “in order to avoid rejection of all bids for the reason that the lowest bid was up to ten percent higher than budgeted project funds.” NMSA 1978, § 13-1-105(B).

In a procurement through request for proposals by contrast, a government agency’s award decision is based on application of factors set by the procuring agency—and not based on the cost alone. *See Planning and Design Solutions*, 1994-NMSC-112, ¶ 14; *cf. also PlanetSpace, Inc. v. United States*, 92 Fed. Cl. 520, 536 (Fed. Cl. 2010) (“It is beyond peradventure that the government may not rely upon undisclosed evaluation criteria in evaluating proposals. . . . Moreover, agencies must apply the stated evaluation factors in a fair and evenhanded manner across competing proposals. . . . Nevertheless, a solicitation need not identify criteria intrinsic to the stated evaluation factors, and agencies retain great discretion in determining the scope of a given evaluation factor.”) (internal quotations, citations and alterations omitted).

When using requests for proposals, the procuring agency and responsible offerors may engage in pre-award negotiations. *See* NMSA 1978, § 13-1-115. Thus, while an agency’s power to select a proposal is constrained in key respects (i.e., the agency must select proposals based only on the evaluation factors set forth in the request for proposals), the agency may negotiate with offerors “who submit

proposals found reasonably likely to be selected for award,” and the agency may permit revisions “for the purpose of obtaining best and final offers.” *Id.*<sup>5</sup>

In view of this background, the school district in this matter chose to procure cleaning services through a request for proposals. We turn to the questions presented.

1. The Procurement Code prohibits public discussion of proposals from the receipt of proposals until the award of the contract.

The request for an advisory opinion asks the Commission to determine if the local school board member violated the Procurement Code by discussing the contents of the CPO-recommended proposal at a public meeting. Specifically, the request inquires whether the local board member may have violated Section 116, which provides: “[t]he contents of any proposal shall not be disclosed so as to be available to competing offerors during the negotiation process.” NMSA 1978, § 13-1-116. We conclude that the facts presented in the request establish a violation of Section 116, because the board member disclosed the contents of proposals “during the negotiation process.” *Id.*

We read Section 116’s reference to “during the negotiation process” to refer to the period that extends from the submission of proposals until the award of the contract to the selected offeror. § 13-1-116. In this matter, “the negotiation process” began with the submission of proposals and would have concluded with the school board’s award of a contract to the selected offeror in an open meeting. Between those two points, a duty of confidentiality applies; consequently, public officials and employees involved in the procurement decision may not “disclose[] the contents of any proposal” such that competing offerors could learn of their competitors’ proposals. *Id.*

We find support for this reading of Section 116 in New Mexico’s statutes, the laws of other jurisdictions, and the purposes that confidentiality serves in public procurement conducted through requests for proposals.

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<sup>5</sup>Although the Procurement Code permits negotiation of best and final offers with offerors whose proposals are likely to be selected, the State Purchasing Division of the General Services Division “strongly discourage[s]” executive state agencies from seeking best and final offers, directing to state agencies that “[a]n offeror’s best offer should be included in that offeror’s original proposal.” 1.4.1.41 NMAC. The Procurement Code regulations contained in 1.4.1 NMAC apply to executive branch agencies of the State and only scattered sections of those regulations apply to local public bodies or school districts.

First, Section 115 of the Procurement Code supports our reading of the statutory phrase “during the negotiation process.” Section 115, entitled “Competitive sealed proposals; negotiations,” provides:

Offerors submitting proposals may be afforded an opportunity for discussion and revision of proposals. Revisions may be permitted *after submissions of proposals and prior to award* for the purpose of obtaining best and final offers. Negotiations may be conducted with responsible offerors who submit proposals found to be reasonably likely to be selected for award.

§ 13-1-115 (emphasis added). Under Section 115, procuring agencies may permit offerors to revise proposals and negotiate with offerors “after submissions of proposals and prior to award.” § 13-1-115. Given Section 115’s framework, Section 116’s duty of confidentiality attaches “during the negotiation process” that Section 115 permits. Looking to Section 115’s language, that period extends “after submissions of proposals and prior to the award.” Once the procuring agency awards a contract to a responsible offeror, the duty of confidentiality no longer applies.

Second, our understanding of when Section 116’s duty of confidentiality applies is supported by the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4. There, the statutory requirements of open meetings and public inspection of meeting minutes do not apply to “that portion of meetings at which the contents of competitive sealed proposals solicited pursuant to the Procurement Code are discussed during the contract negotiation process.” NMSA 1978, § 10-15-1(H)(6). But the “final action regarding the selection of a contractor [i.e., the award] shall be made in an open meeting.” *Id.* As such, the Open Meeting Act exempts its requirements for the discussion of proposals but applies those same requirements when the procuring entity takes final action on the selection of the contractor.<sup>6</sup> In parallel, Section 116’s duty of confidentiality applies from submission until the procuring entity awards a contract.

Third, our reading of Section 116’s duty of confidentiality is consistent with the procurement law of other jurisdictions. *See, e.g.*, 41 U.S.C. § 2102(a)(1) (“Except as provided by law, a person . . . shall not knowingly disclose contractor

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<sup>6</sup>The American Bar Association’s 1979 and 2000 Model Procurement Codes have a similar structure, providing that “[p]roposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation” and that “[a] Register of Proposals shall be . . . open for public inspection after contract award.” Model Procurement Code § 3-203(4) (1979); *see also* Model Procurement Code § 3-203(4) (2000).

bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.”); *see also Michaelis, Montanari & Johnson v. Superior Court, et al.*, 136 P.3d 194, 195 (Cal. 2006) (“[C]onsistent with analogous federal law and the majority of statutes and decisions in other states, we conclude that public disclosure of such proposals properly may await conclusion of the agency’s negotiation process, occurring before the agency’s recommendation is finally approved by the awarding authority.”); *cf. Shermco Indus. v. Secretary of Air Force* 613 F.2d 1314, 1317–1318 (5th Cir. 1980) (disclosure of bid competitor’s cost proposals exempt under federal Freedom of Information Act until final award of contract).

Last, Section 116’s confidentiality requirement best serves its purposes when that requirement extends from the submission of proposals to the award of a contract. So read, the confidentiality requirements protect the procuring agency’s interests. As the Supreme Court of California has noted, disclosure of an offeror’s terms jeopardizes a procuring agency’s ability to obtain the most favorable terms; once an offeror becomes aware of the content of competing proposals, the offeror would no longer be in doubt about its relative bargaining position. *See Michaelis, Montanari & Johnson*, 136 P.3d at 199. During negotiations, offerors may adjust their terms—presumably to the detriment of the procuring agency—if they have knowledge of other, competing offers. *See id.* Furthermore, disclosure of any significant gap between the terms of a finalist offeror and its competitors could induce that offeror “to resist the [procuring agency’s] requests for even more favorable terms, or lead to an amended proposal that offers less attractive terms.” *Id.* Finally, nondisclosure from the time of submission to the award “tends to reduce the possibility of collusion, price-fixing, or bid-rigging tactics.” *Id.*

The confidentiality requirement also protects the interests of competing offerors. The requirement ensures that “negotiations [are] conducted in accordance with ethical business standards” and that the procuring agency does not deploy “[a]uction techniques” to play offerors against one another in a deleterious race to the bottom. Model Procurement Code § 3-203(6) cmt. (1) (1979). Such “[a]uction techniques” could induce an offer that the offeror cannot, in the end, meet—leaving the state with incomplete work and the need for a subsequent procurement. *Id.* Furthermore, over time, such auction techniques might disincentivize firms from proposing to do business with the State or other public procuring agencies, thereby diminishing their business opportunities and the range of services available to the public.

We recognize that our reading of “during the negotiation process” to mean the period from the submission of proposals to the award of the contract is not the only

available reading of the statutory phrase. In the matter presented, the CPO received only two proposals. § 13-1-116. The CPO unsealed the proposals and determined whether each was “responsive”—i.e., whether the proposals “conform[ed] in all material respects to the requirements set forth in the request for proposals.” § 13-1-85. One proposal was disqualified because it was not responsive, leaving only one responsive proposal to be considered by the school district’s board of directors for award. As the only other competing offeror had been disqualified, at the board meeting, the relevant question was whether to adopt the CPO’s award recommendation. In these circumstances, it might be objected that Section 116’s confidentiality requirement did not apply because, at the time of the board member’s disclosure, there were no ongoing negotiations (and, thus, no “negotiation process”); moreover, the board member’s disclosure of proposal information could not have been “available to competing offerors,” because, at that moment, there were none. § 13-1-116.

We doubt this alternative reading is sound. Disclosure of proposals at any point from the time of submission to the selection of an award undermines the procuring agency’s ability to secure advantageous terms. *See Michaelis, Montanari & Johnson*, 136 P.3d at 199. So too in this matter: If, after the board member’s disclosure, the school board did not approve the CPO’s recommendation and instead directed the CPO to renegotiate the terms, the offeror might reasonably stand firm, knowing that it submitted the only responsive proposal. Alternatively, if the school board directed the CPO to reissue a new request for proposals, competing offerors could participate in the procurement with access to the details of competitors’ proposals. But Section 116’s confidentiality requirement exists to prevent offerors from submitting, revising, or standing firm on proposals in light of their competitors’ proposals—whether on the first or subsequent rounds of negotiation or procurement. *See Michaelis, Montanari & Johnson*, 136 P.3d at 199 (observing that disclosure of proposals particularly jeopardizes a procuring agency’s ability to negotiated favorable terms in “second-round situations”) (internal quotation marks omitted). Section 116’s confidentiality requirement, therefore, does not apply only when the procuring agency is, as a matter of contingent fact, engaged in negotiations with an offeror; rather, it applies from submission of proposals right through to the final action awarding a contract.

For the foregoing reasons, we conclude the confidentiality requirement applies “during the negotiation process—i.e., from the time of submission of proposals to the award of a contract. Disclosure of a proposal’s contents during this period would violate Section 116.



2. The Procurement Code prohibits a person involved in a procurement from stating a preference that a local vendor receive a contract.

As noted above, “[t]he [Procurement] Code indicates that, in evaluating [responsive] proposals, [an agency is] required to apply the factors listed in the [r]equest [for proposals]—and no others.” *Planning and Design Solutions*, 1994-NMSC-112, ¶ 14 (citation omitted).

In evaluating a request for proposals, the Procurement Code requires a government agency to give a preference to a resident business. *See* NMSA 1978, § 13-1-21(D). When evaluating proposals with a factor-based process, the agency is required to give “five percent of the total weight of all the factors used in evaluating the proposals to a resident business[.]” NMSA 1978, § 13-1-21(D)(1). When evaluating proposals with a point-based system, the agency is required to award “five percent of the total possible points to a resident business[.]” NMSA 1978, § 13-1-21(E)(1). To obtain resident business treatment, a prospective offeror must submit a valid resident business certificate issued by the New Mexico Taxation & Revenue Department and an affidavit from a certified public accountant establishing the business’s bona fides as a resident. *See* NMSA 1978, §§ 13-1-22(A), (B).<sup>7</sup>

The facts and the Supreme Court’s holding in *Planning and Design Solutions v. City of Santa Fe* are instructive. In that case, the city of Santa Fe issued a request for proposals for professional services to develop a mixed-use community. 1994-NMSC-112, ¶ 2. The request for proposals listed four weighted factors that the city would use to evaluate proposals. *Id.* The city’s selection committee determined that *Planning and Design Solutions*’ proposal was the most advantageous to the city based on the four factors set out in the request for proposals. *Id.* ¶ 3. But the city elected to award a contract to the fourth-placed offeror, who was “the highest local firm on the list.” *Id.* The Supreme Court held that this was an improper because the locality factor was not disclosed in the request for proposals; in effect, the city had “changed the rules in the middle of the game.” *Id.* ¶¶ 15-17.

The request for an advisory opinion presents a similar set of facts. The CPO applied the evaluation factors to the only responsive bid received by the school district and recommended that the offeror receive a contract. If the CPO had received another responsive proposal from a local vendor who qualified as a resident

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<sup>7</sup>We understand that, because the New Mexico Taxation & Revenue Department requires the vendor to submit an affidavit to receive the resident business certificate, the State Purchasing Division of the General Services Department requires the certificate only.

business, the CPO would have been required to apply Section 13-1-21's resident business preference to enhance the offeror's score. But if an out-of-state offeror nevertheless received a greater score under the school district's evaluation factors, the Procurement Code would have required the district to award a contract to the out-of-state offeror. If the school board rejected the contract with this offeror or awarded a contract to a lower-ranked vendor based on an otherwise undisclosed local vendor preference, the decision would result from an application of a factor not contained in the request for proposals and, therefore, would violate the Procurement Code.

3. The Procurement Code does not prohibit a person involved in a procurement from having an *ex parte* communication with potential offerors.

Under the Procurement Code, public notice of a request for proposals must be provided to potential offerors pursuant to the requirements set forth by NMSA 1978, Section 13-1-104. *See* NMSA 1978, § 13-1-113. The purpose of the public notice requirements is to give potential offerors enough time to prepare and submit offers in a timely manner. *See* Model Procurement Code § 3-202(3) cmt. (1979). Many procurement managers require potential offerors to submit questions in writing to avoid any contention that the manager provided some potential offerors with insider information. *See, e.g.*, New Mexico Human Services Department, Request for Proposals for the Provision of HHS 2020 Medicaid Enterprise Financial Services, RFP # 20-630-8000-0001, at 26, available at <https://tinyurl.com/ybjb3fkh> (setting forth process for submission of written questions by potential offerors). But the Procurement Code does not specifically prohibit oral communications between a purchasing office and prospective offerors outside the context of public notice, written questions, or negotiations. Indeed, the only specific prohibition related to *ex parte* communications is found in procurement regulations issued by the State Purchasing Division of the General Services Department, which prohibit “[submission], *ex parte*, any material, evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in a protest.” *See* 1.4.1.92(B) NMAC. This regulation does not apply because this matter does not involve a protest.

In the absence of facts showing that the contents of the school board member's communications were otherwise in violation of the Procurement Code (for example, facts showing that the board member was telling potential offerors of the contents of other proposals or that their proposals would be improperly favored), the

Commission concludes that *ex parte* communications with potential offerors alone do not violate the Procurement Code.<sup>8</sup>

#### 4. Other laws

The Commission was also asked whether the facts presented by the request establish a violation of any other laws in addition to the Procurement Code. But the facts presented are not detailed enough for the Commission to provide an answer. The request does not identify who the school board member discussed the CPO-recommended proposal with or identify the “local vendor” the board member stated he would have preferred the cleaning services contract be awarded to. That said, the Governmental Conduct Act (GCA) specifically prohibits taking an official act “for the primary purpose of directly enhancing the public officer’s or employee’s financial interest or financial position.” NMSA 1978, § 10-16-4(A). The GCA further provides:

Unless a public officer or employee has disclosed the public officer’s or employee’s substantial interest through public notice and unless a contract is awarded pursuant to a competitive process, a local government agency shall not enter into a contract with a public officer or employee of that local government agency, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest.

NMSA 1978, § 10-16-7(B). These provisions would likely be violated if the local school board member holds, or is a close family member of someone with, an interest in an entity seeking to sell goods or services to the school district. The facts presented in the request for an advisory opinion, however, do not suggest any such relationship.

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<sup>8</sup>Such communications might violate other applicable regulations that a local entity issues under the Procurement Code. The Procurement Code authorizes local public body to adopt specific regulations governing procurement. *See, e.g.*, NMSA 1978, §§ 13-1-80 (defining “regulation”); 13-1-117.1(A) (authorizing local public bodies to issue regulations for the selection and award of professional service contracts). The Commission does not address the applicability of local purchasing regulations to *ex parte* communications. We note, however, that regulations that bar *ex parte* communications align with the express “purposes of the Procurement Code”—namely, the purposes “to provide for the fair and equitable treatment of all persons involved in public procurement . . . and to provide safeguards for maintaining a procurement system of quality and integrity.” § 13-1-29(C).

Furthermore, the GCA prohibits public officers and employees from “disclos[ing] confidential information acquired by virtue of . . . [their] position with . . . [a] local government agency for the . . . public officer’s or employee’s or another’s private gain.” NMSA 1978, § 10-16-6. The facts presented in the request do not establish a violation of this GCA provision.

### **CONCLUSION**

The Procurement Code prohibits disclosure of the contents of a sealed proposal during the negotiation process—i.e., from the time the proposals are submitted to the award of the contract. The Procurement Code does not allow a procuring agency to apply an undisclosed local business preference over and above the application of the resident business preference. The Procurement Code does not prohibit *ex parte* communications with potential offerors about a procurement where the procurement is not the subject of a protest.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**

**JEFF BAKER, Commissioner**

**STUART M. BLUESTONE, Commissioner**

**HON. GARREY CARRUTHERS, Commissioner**

**RONALD SOLIMON, Commissioner**

**JUDY VILLANUEVA, Commissioner**

**FRANCES F. WILLIAMS, Commissioner**

**TITLE 1            GENERAL GOVERNMENT ADMINISTRATION**  
**CHAPTER 8        STATE ETHICS COMMISSION**  
**PART I            GENERAL PROVISIONS**

**1.8.1.1            ISSUING AGENCY:** State ethics commission (the commission), 800 Bradbury Dr. SE, Ste. 217, Albuquerque, NM 87106.  
[1.8.1.1 NMAC-N, 1-1-2020]

**1.8.1.2            SCOPE:** The rules of Chapter 8 provide for and govern the organization and administration of the state ethics commission.  
[1.8.1.2 NMAC-N, 1-1-2020]

**1.8.1.3            STATUTORY AUTHORITY:** Paragraph 2 of Subsection A of Section 10-16G-5, State Ethics Commission Act, Section 10-16G-1 NMSA 1978; **Subsection (C) of Section 10-15-1, Open Meetings Act, Section 10-15-1 NMSA 1978.**  
[1.8.1.3 NMAC-N, 1-1-2020]

**1.8.1.4            DURATION:** Permanent.  
[1.8.1.4 NMAC-N, 1-1-2020]

**1.8.1.5            EFFECTIVE DATE:** January 1, 2020, unless a later date is cited at the end of a section, in which case the later date is the effective date.  
[1.8.1.5 NMAC-N, 1-1-2020]

**1.8.1.6            OBJECTIVE:** The rules of Chapter 8 are promulgated to ensure that the state ethics commission is administered so that it works effectively, efficiently and fairly to achieve its constitutional and statutory mission. That mission is to ensure compliance with all applicable public ethics laws by all public officials, employees, candidates, contractors, lobbyists and others subject to the commission’s jurisdiction throughout their employment or dealings with New Mexico state government; and to ensure that the public ethics laws are clear, comprehensive and effective. The rules adopted in Chapter 8 shall be interpreted and applied to achieve the purposes and objectives for which the commission has been established.  
[1.8.1.6 NMAC-N, 1-1-2020]

**1.8.1.7            DEFINITIONS:**

**A.            “Advisory opinions”** are opinions written by the commission responding to questions presented by persons authorized under Paragraph 1 of Subsection A of Section 10-16G-8 NMSA 1978 about how ethics laws apply to specific fact situations.

**B.            “Interagency agreement”** means an agreement between the commission and another state or federal agency, including memoranda of understanding, joint powers agreements, and services agreements.

**C.            “Joint powers agreement”** as used in this part, has the same meaning as it does in the Joint Powers Agreements Act, Section 1-11-1 NMSA 1978.

**D.            Other words and phrases used in this part have the same meaning as found in 1.8.3.7 NMAC.**  
[1.8.1.7 NMAC-N, 1-1-2020]

**1.8.1.8            DUTIES AND POWERS OF THE DIRECTOR:** Without limiting the duties and powers conferred by statute, the director shall have the power to:

**A.            review complaints filed with the commission for jurisdiction;**

**B.            refer complaints over which the commission has jurisdiction to the general counsel for investigation and possible filing of a complaint;**

**C.            refer complaints, or parts thereof, to other state or federal agencies with jurisdiction over such complaints, pursuant to the terms of any joint powers agreements or other interagency agreements with any such agency;**

**D.            enter into contracts on behalf of the commission, including, with the commission’s approval, joint powers agreements;**

**E.            with the approval of the commission and at the direction of the commission’s chair, petition courts for the issuance and enforcement of subpoenas in relation to:**

- (1) the general counsel's investigations to determine probable cause in connection with a complaint filed with the commission;
- (2) the adjudication of complaints filed with the commission; and
- (3) an investigation related to the commission's determination whether to file a civil court action to enforce any available civil remedy corresponding to any statute or constitutional amendment over which the commission has jurisdiction;
- F. with the approval of the commission, file a civil court action to enforce any available civil remedy corresponding to any statute or constitutional amendment over which the commission has jurisdiction;
- G. select and hire staff, including a general counsel;
- H. select and contract with hearing officers and other contractors;
- I. recommend to the commission adoption of draft rules, forms or legislative changes;
- J. prepare annual budgets and appropriation requests for commission approval;
- K. authorize the general counsel to administer oaths and take depositions;
- L. during a period of vacancy or extended absence in the office of the general counsel, assign any duties assigned to the general counsel by statute or rule to a qualified attorney who is either on the commission's staff or on contract with the commission;
- M. draft advisory opinions for the commission's approval;
- N. notify parties and the public of commission actions, including dismissals or referrals of complaints;
- O. provide for the confidentiality of all records designated as confidential by law;
- P. with commission approval, delay notification of a complaint to protect the integrity of a criminal investigation;
- Q. perform such other duties as may be assigned from time to time by the commission;
- R. issue standing orders to the extent authorized by the commission; and
- S. delegate the responsibilities as set forth in this section to appropriate commission staff members.

[1.8.1.8 NMAC-N, 1-1-2020]

**1.8.1.9 ADVISORY OPINIONS:**

- A. The commission may issue advisory opinions on matters related to ethics. Advisory opinions shall:
  - (1) be requested in writing by a public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist or lobbyist's employer;
  - (2) identify a specific set of circumstances involving an ethics issue;
  - (3) be issued within sixty days of receipt of the request unless the commission notifies the requester of a delay in issuance and continues to notify the requester every thirty days until the advisory opinion is issued; and
  - (4) be published after omitting the requester's name and identifying information.
- B. A request for an advisory opinion shall be confidential and not subject to the provisions of the Inspection of Public Records Act.
- C. 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.

[1.8.1.9 NMAC-N, 1-1-2020]

**1.8.1.10 INFORMAL ADVISORY OPINIONS:**

- A. A person authorized to request an advisory opinion who desires a response in fewer than 60 days for the purpose of deliberation and decision making may submit the request for an informal advisory opinion to the director or general counsel, who may answer the request. An informal advisory opinion is specific to the person who requests the advice and the facts presented in the request. The commission shall treat as confidential the request and the informal advisory opinion issued in response.
- B. Any informal advisory opinion issued pursuant to this rule is not binding on the commission unless and until the commission votes to adopt the informal advisory opinion as an advisory opinion. 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.

**C.** Before each regular meeting of the commission, the director shall review any informal advisory opinions issued since the last meeting. 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.

[1.8.1.10 NMAC-N, 1-1-2020]

**1.8.1.11 REFERENCE TO OTHER DOCUMENTS:** When a rule issued by the commission refers to another rule, regulation or statute, or other document, the reference, unless stated specifically to the contrary, is continuous and intended to refer to all amendments of the rule, regulation, statute or document.

[1.8.1.11 NMAC-N, 1-1-2020]

**1.8.1.12 INTERPRETATION OF TERMS:** Unless the context otherwise requires:

**A.** Singular/plural. Words used in the singular include the plural; words used in the plural include the singular.

**B.** Gender. Words used in the neuter gender include the masculine and feminine. The personal pronoun in either gender may be used in these rules to refer to any person, firm or corporation.

**C.** Permissive/mandatory. May is permissive; shall and must are mandatory.

[1.8.1.12 NMAC-N, 1-1-2020]

**1.8.1.13 USE OF PRESCRIBED FORMS:** The director may prescribe forms to carry out specified requirements of these rules or the state ethics commission act. Prescribed forms, or their substantial equivalent, must be used when available, unless these rules state otherwise or the director waives this requirement in writing. The director shall accept filings made on legible copies of prescribed forms.

[1.8.1.13 NMAC-N, 1-1-2020]

**1.8.1.14 ADDRESS FOR FILING DOCUMENTS:**

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

**B.** In person: State Ethics Commission, 800 Bradbury Dr. SE, Ste. 217, Albuquerque, NM 87106.

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

[1.8.1.14 NMAC-N, 1-1-2020]

**1.8.1.15 COMPUTATION OF TIME:** In computing any period of time prescribed or allowed by these rules, the day from which the period of time begins to run shall not be included. The last calendar day of the time period shall be included in the computation, unless it is a Saturday, Sunday or a day on which the state observes a legal holiday or emergency closure. In case of any such closure, the period of time runs to the close of business on the next regular workday. If the period is less than 11 days, a Saturday, Sunday, legal holiday or emergency closure day is excluded from the computation.

[1.8.1.15 NMAC-N, 1-1-2020]

**1.8.1.16 COMMISSION MEETINGS:** The commission chair, in consultation with the director, shall determine the time, place, and duration of commission meetings necessary to conduct the commission's business.

**A. Executive Session.** Upon motion and vote of a quorum, the commission may enter into a closed, executive session to discuss matters that are confidential under the State Ethics Commission Act, Section 10-16G-1 NMSA 1978, and as otherwise permitted by the Open Meetings Act, Section 10-15-1 NMSA 1978.

**B. Virtual meetings.** With the consent of the commission chair, the commission may meet virtually via web or teleconference. In the event the commission meets virtually, commission staff shall ensure that the meeting occurs on a platform that allows members of the public to observe and participate. At a virtual or telephonic meeting, each commissioner participating must be identified when speaking and all meeting participants and members of the public attending must be able to hear every person who speaks during the meeting. The commission staff shall record virtual meetings and make the recordings (except for recordings of closed executive sessions) available for public inspection.

**C. Virtual attendance by individual commissioners.** An individual commissioner may attend a physical commission meeting virtually, through telephone phone or web conference, when it is difficult or impossible for the commissioner to attend the meeting in person, provided that each commissioner participating by

conference telephone can be identified when speaking, and all meeting participants and members of the public attending can hear every person who speaks during the meeting.

**D. Maintaining order.** The commission chair may take reasonable steps to ensure the commission is able to fairly and efficiently conduct its business, including adopting parliamentary procedure, imposing reasonable limitations on public comment, and excluding members of the public who disrupt commission meetings.

[1.8.1.16 NMAC-N, 1-1-2020]

**1.8.1.17 SEVERABILITY:** If any provision of Chapter 8 of these rules, or the application or enforcement thereof, is held invalid, such invalidity shall not affect other provisions or applications of Chapter 8 of these rules which can be given effect without the invalidated provisions or applications, and to this end the several provisions of Chapter 8 of these rules are hereby declared severable.

[1.8.1.17 NMAC-N, 1-1-2020]

**History of 1.8.1 NMAC: [RESERVED]**



**TITLE 1            GENERAL GOVERNMENT ADMINISTRATION**  
**CHAPTER 8        STATE ETHICS COMMISSION**  
**PART 4            CODE OF ETHICS**

**1.8.4.1            ISSUING AGENCY:** State Ethics Commission, 800 Bradbury Dr. SE, Ste. 215, Albuquerque, New Mexico 87106.  
[1.8.4.1 NMAC-N, [insert date]]

**1.8.4.2            SCOPE:** This part contains a proposed code of ethics for officers and employees of executive and legislative state agencies and other institutions and instrumentalities of the state. Elected statewide executive branch officers and other state agencies must consider this proposed code when adopting either a code of conduct under Subsection C of Section 11 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978, or a code of ethics under Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978, for employees subject to the adopting agencies' control. If adopted, this code will apply to all officers and employees of the adopting agency, as well as other persons working for the agency, such as contractors.  
[1.8.4.2 NMAC-N, [insert date]]

**1.8.4.3            STATUTORY AUTHORITY:** Sections 11 and 11.1 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978; and Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978.  
[1.8.4.3 NMAC-N, [insert date]]

**1.8.4.4            DURATION:** Permanent.  
[1.8.4.4 NMAC-N, [insert date]]

**1.8.4.5            EFFECTIVE DATE:** January 1, 2021, unless a later date is cited at the end of a section, in which case the later date is the effective date.  
[1.8.4.5 NMAC-N, [insert date]]

**1.8.4.6            OBJECTIVE:** The objective of this part is to provide the executive and legislative branch agencies of state government and other institutions and instrumentalities of the state with a proposed code of ethics to consider when agencies adopt either a code of ethics under Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978, or a code of conduct under Sections 11 and 11.1 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978.  
[1.8.4.6 NMAC-N, [insert date]]

**1.8.4.7            DEFINITIONS:** The following terms apply to this part unless their context clearly indicates otherwise:

- A.            "Agency" or "this Agency"** means the agency that has adopted this proposed code of ethics.
- B.            "Business"** means an entity other than this agency.
- C.            "Code"** means this proposed code of ethics.
- D.            "Commission"** means the State Ethics Commission.
- E.            "Financial interest"** means an interest held by an individual or the individual's family that is an ownership interest in a business or property; or employment or prospective employment for which negotiations have already begun.
- F.            "Gift"** has the same meaning as defined by Subsection B of Section 2 of the Gift Act, Section 10-16B-1 NMSA 1978, namely, any donation or transfer without commensurate consideration of money, property, service, loan, promise or any other thing of value, including food, lodging, transportation and tickets for entertainment or sporting events, but does not include:
  - (1)** any activity, including but not limited to the acceptance of a donation, transfer or contribution, or the making of an expenditure or reimbursement, that is authorized by the Campaign Reporting Act or the Federal Election Campaign Act of 1971, as amended;
  - (2)** a gift given under circumstances that make it clear that the gift is motivated by a family relationship or close personal relationship rather than the recipient's position as a state officer or employee or candidate for state office;
  - (3)** compensation for services rendered or capital invested that is:

- (a) normal and reasonable in amount;
- (b) commensurate with the value of the service rendered or the magnitude of the risk taken on the investment;
- (c) in no way increased or enhanced by reason of the recipient's position as a state officer or employee or candidate for state office; and
- (d) not otherwise prohibited by law;
- (4) payment for a sale or lease of tangible or intangible property that is commensurate with the value of the services rendered and is in no way increased or enhanced by reason of the recipient's position as a state officer or employee or candidate for state office;
- (5) a commercially reasonable loan made in the ordinary course of the lender's business on terms that are available to all similarly qualified borrowers;
- (6) reimbursement for out-of-pocket expenses actually incurred in the course of performing a service for the person making the reimbursement;
- (7) any gift accepted on behalf of and to be used by the state or a political subdivision of the state, including travel, subsistence and related expenses accepted by a state agency in connection with a state officer's or employee's official duties that take place away from the state official's or employee's station of duty;
- (8) anything for which fair market value is paid or reimbursed by the state officer or employee or candidate for state office;
- (9) reasonable expenses for a bona fide educational program that is directly related to the state officer's or employee's official duties; or
- (10) a retirement gift.

**G. “Indirectly”** means with and on account of the subject’s knowledge, acquiescence, or recommendation.

**H. “Market value”** means the amount for which a good or service can be sold on the relevant market.

**I. “Restricted donor”** has the same meaning as defined by Subsection D of Section 2 of the Gift Act, Section 10-16B-1 NMSA 1978, namely, a person who:

- (1) is or is seeking to be a party to any one or any combination of sales, purchases, leases or contracts to, from or with the agency in which the donee holds office or is employed;
- (2) will personally be, or is the agent of a person who will be, directly and substantially affected financially by the performance or nonperformance of the donee’s official duty in a way that is greater than the effect on the public generally or on a substantial class of persons to which the person belongs as a member of a profession, occupation, industry or region;
- (3) is personally, or is the agent of a person who is, the subject of or party to a matter that is pending before a regulatory agency and over which the donee has discretionary authority as part of the donee’s official duties or employment within the regulatory agency; or
- (4) is a lobbyist or a client of a lobbyist with respect to matters within the donee’s jurisdiction.

**J. “Official act”** means any act or omission to act that would not be possible but for the actor’s official position or state employment.

**K. “Shall”** means must, and **“must”** means shall.

**L.** Any other terms shall be defined for purposes of this rule as they are defined in Section 2 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978.

[1.8.4.7 NMAC-N, [insert date]]

#### **1.8.4.8 STRUCTURE OF THIS CODE AND CORRESPONDING COMMENTARY:**

**A.** This Code is organized by subject area rather than by the statutes that concern the various subject matters of this code.

**B.** The Commission publishes and updates extensive commentary and examples corresponding to this Code on the Commission’s website. An official or employee of this agency dealing with an ethical issue should identify and consult the relevant sections of this Code. If this Code does not resolve the issue, further guidance might be found in the Commission’s separately published commentary.

[1.8.4.8 NMAC-N, [insert date]]

**1.8.4.9 PRINCIPLES OF PUBLIC ETHICS:** This Code is based on, and should be interpreted to advance, the following principles of public ethics:

**A. Honest services.** An officer or employee shall conduct government business in accordance with the law and free from conflicts of interest. Public office is a public trust; as such, an official or employee must take care to ensure that every official act and decision affecting the rights or interests of individuals is based in law and the public interest.

**B. Proportionality.** When committing an official act or making a decision, an officer or employee shall ensure that the action taken is proportional to the goal being pursued. The officer or employee shall avoid restricting the rights of New Mexicans or imposing burdens on them, when those restrictions or burdens are not justified by a public interest.

**C. Impartiality and fairness.** The conduct of an officer or employee shall never be guided by:

- (1) personal, family or financial interests;
- (2) a motivation to benefit or empower an elected official, a candidate for office, or a political party or its members; or
- (3) a motivation to disadvantage or disempower an elected official, a candidate for office, or a political party or its members.

**D. Consistency.** Like cases shall be treated alike. An officer or employee shall behave consistently with the agency's normal practices, unless there is a legitimate basis for departing from those practices in an individual case and that basis is documented in writing. An officer or employee shall respect the reasonable expectations of the public that the agency will continue to act as it has acted in similar circumstances unless there is an articulable reason for change.

**E. Diligence.** An officer or employee shall ensure that every decision on a matter is made with care and adequate understanding of the issue, within a reasonable time, and without unnecessary delay.

**F. Respect.** An officer or employee shall be courteous and accessible to the public and their colleagues.

**G. Transparency.** An officer or employee's official acts and decisions shall be made openly and with adequate opportunity for public review and comment.

**H. Fallibility and reversibility.** Individuals not only err in judgment but also act in ways that unconsciously benefit some and burden others; accordingly, an officer or employee shall endeavor to take official acts and make decisions in ways that are deliberative, open to review and, where appropriate, reversible.  
[1.8.4.9 NMAC-N, [insert date]]

### Commission Commentary to 1.8.4.9 NMAC

[1] This section describes the core principles of ethical public service. Public officers and employees are entrusted by the People of New Mexico to manage and spend their tax dollars efficiently and with integrity. The public expects government services to be delivered fairly, promptly and respectfully. The public wants public servants to know their jobs, to do them diligently, and to be held accountable whenever they fail to live up to the core standards of public service.

The legislature has embedded these expectations into Section 3 A of the Governmental Conduct Act, §10-16-1 NMSA 1978:

A legislator or public officer or employee shall treat the legislator's or public officer's or employee's government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

The principles set out in this section do not create enforceable standards of conduct. Rather, they are designed to serve as a guide to help public officers and employees understand and apply the specific sections of this code of ethics. For example, a reader might ask what legitimate business an agency of the state has in investigating and potentially disciplining an officer or employee for failing to disclose the financial interest of a close family member in an official decision (Section 1.8.4.10(C)). The principles above furnish an answer: every official action must advance the public interest, be impartial and independent, and be consistent with previous actions taken under similar circumstances.

A code of ethics cannot anticipate every issue that may arise, and there may be reasonable disagreement over what the principles above require in each situation. Public officers and employees should use their own judgment to consider how these principles apply to various situations. Public officers and employees who keep these principles in mind are more likely to succeed in meeting the public's high expectations.

[2] Subsection A: **Honest services.** The public has a right to public servants who are free of undue influence. This code of ethics and the Commission's accompanying commentary is designed to help public officers and employees from performing their duties improperly because of inappropriate pressure or temptation.

[3] Subsection B: **Proportionality.** The law gives public officers and employees discretion in exercising their authority, and this discretion must be exercised wisely. Officers and employees often have discretion over how the power of government should be used to pursue a goal. For example, an officer or employee may be asked to decide whether to use the power of eminent domain to force someone to sell private land for public use. A public officer and employee should only use this and other discretionary powers to the extent needed to serve the public interest, and no more.

[4] Subsection C: **Impartiality and fairness.** All the actions of government officers and employees in the award of benefits, contracts, and other expenditures, personnel decisions and other actions should be made with due consideration of the interests and wishes of all constituents, to the extent allowed by law. Even decisions that are impartially made may leave an appearance of impropriety, if they are not adequately justified and explained. The rules on conflicts of interest and procurement emphasize this principle.

[5] Subsections D & E: **Consistency and diligence.** Professional public servants seek out training opportunities so that they will excel in their job performance. They meet or exceed reasonable deadlines for tasks and perform them efficiently, thoroughly and conscientiously. The public relies on government to continue its past policies and practices; if changes are needed, the agency should alert the public to the change promptly to allow time to adapt.

[6] Subsection F: **Respect.** Ethical public officers and employees treat clients, co-workers, supervisors, contractors, and all other people with respect. Their respect is reflected in their use of language, their behavior while on the job, acceptance of supervision, and particularly in how constructively they manage conflict. Above all, public officers and employees must never engage in sexual or any other type of harassment toward anyone they work with or encounter. They respect public property and the property of their coworkers.

[7] Subsection G: **Transparency.** Government actions can and often do have major impacts on the public. Members of the public are entitled to know what decisions are being made, the processes that will be used to make them, and the reasons for each action taken.

#### 1.8.4.10 HONEST SERVICES; AVOIDING CONFLICTS OF INTEREST

##### A. Outside employment.

(1) **Duty to avoid conflicts from outside employment.** An officer or employee of this agency engaged in paid employment for a business shall ensure that the employment does not conflict with the duties of state employment.

(2) **Disclosure of outside employment.** An officer or employee having permissible outside employment shall:

(a) file with the employee's supervisor, or other officer or employee that this agency designates, a signed statement explaining the outside employment and why it does not create a conflict;

(b) the disclosure statement shall include the name of the officer or employee, the name and general nature of the business, the hours that the officer or employee will work, and the reasons why the work does not create a conflict of interest with the officer or employee's public duties;

(c) in the disclosure statement, the officer or employee shall additionally commit to disclose any potential conflict of interest that may arise during the officer or employee's work with the business.

##### B. Disclosure of potential conflicts of interest and disqualification.

**(1) Disclosure of financial interests.**

**(a) Mandatory financial disclosure by officers and agency heads.** An officer or head of this agency must disclose financial interests to the Secretary of State on the form provided by the Secretary of State.

**(b) Disclosure of financial interests: contents; when filed.** The disclosure required by 1.8.4.10.B(1)(a) NMAC shall be filed within thirty days of taking office and each January thereafter and shall disclose the following financial interests of the filing individual and the filing individual's spouse, for the prior calendar year:

- (i)** current employer and the nature of the business or occupation;
- (ii)** all sources of gross income over \$5,000, identified by category;
- (iii)** real estate owned in the state other than the personal residence;
- (iv)** other business interests of \$10,000 or greater value;
- (v)** memberships on for-profit boards;
- (vi)** New Mexico professional licenses held;
- (vii)** sales to state agencies exceeding \$5000 for the prior year; and
- (viii)** state agencies before which clients were represented or assisted during

the prior year.

**(c) Officers and employees required to disclose potentially conflicting financial interests; when filed.** An officer or employee of this agency must file a disclosure of financial interests when the officer or employee believes, or has reason to believe, that their financial interest may be affected by their official acts or actions of the state agency that employs them. The disclosure must be filed before entering state employment or within ten days of the date when the officer or employee knows, or should know, that a potential conflict has arisen and each subsequent January, so long as the conflict or potential conflict continues to exist.

**(d) Financial disclosure statements are public records.** All disclosures required under this subsection are public records.

**(2) Disqualification from acts affecting financial interests.**

**(a)** An officer or employee of this agency may not take official acts for the purpose of enhancing their financial interests. An officer or employee must be disqualified from any matters that could directly enhance or diminish the officer's or employee's financial interest. If disqualified, then the officer or employee shall refrain from acting on a matter involving the disqualifying financial interest.

**(b)** An officer or employee of this agency is not disqualified from taking an official action under 1.8.4.10(B)(2)(a) NMAC if the benefit of the official act to the officer's or employee's financial interest is proportionately equal to or less than the benefit to the general public.

**C. Business with regulated entities.**

**(1) Sales to regulated persons.** An officer or employee of this agency may not directly or indirectly sell goods or services to, or profit from a transaction with, a business or individual over whom this agency has regulatory authority.

**(2) No acceptance of job or contract offers from regulated entities.** An officer or employee of this agency may not accept an offer of employment from, or a contract to provide goods or services to any entity that this agency regulates. An officer or employee shall disqualify themselves from any official act or decision affecting a business in which an immediate family member is employed or in which the officer or employee seeks employment.

**(3) Ordinary transactions at market rates allowed.** Nothing in this rule prevents an officer or employee from purchasing or contracting for services or goods from a regulated entity on the same basis available to any other member of the public.

**D. Accepting or Giving Gifts.**

**(1) Gifts from restricted donors.** An officer or employee of this agency may not, directly or indirectly, solicit a gift from, and shall decline any gift offered by, a restricted donor or by any person who gives a gift because of the donee's status as an official or employee of this agency.

**(2) Gifts and business from subordinates.** An officer or employee of this agency may not, directly or indirectly:

**(a)** accept a gift from an employee having a lower grade or receiving less pay, unless the donor and donee are not in a subordinate-superior relationship and there is a personal relationship between the donor and recipient that would justify the gift.

**(b)** solicit business from a supervised employee where the business redounds to the financial interest of the officer or employee or an immediate family member.

(3) **Soliciting gifts for charities.** An officer or employee of this agency may not solicit or require a charitable donation from any business, or an agent of any business, regulated by or contracting with this agency; nor from any employees that the officer or employee supervises.

(4) **Declining permissible gifts.** An officer or employee of this agency shall consider declining an otherwise permissible gift, if they believe that a reasonable person with knowledge of the relevant facts would question the officer or employee's integrity or impartiality as a result of accepting the gift. Among other relevant factors, the officer or employee shall take into account whether:

- (a) The gift has a high market value;
- (b) The timing of the gift creates the appearance that the donor is seeking to influence an official action;
- (c) The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the officer or employee's duties; and
- (d) Acceptance of the gift would provide the donor with significantly disproportionate access.

(5) **Disclosure of offers of gifts from restricted donors.** If a restricted donor offers a gift of any value to an officer or employee of this agency, or if an officer or employee of this agency unintentionally receives a gift from a restricted donor, the officer or employee should report to their supervisor: the date the offer was made or the gift was received, the name of the donor and the donor's relationship to the agency, the nature and value of the gift, and whether the officer or employee accepted or refused the gift.

(6) **Certain donations of private funds prohibited.** No officer or employee of this agency may give:

- (a) a gift from their own funds to any person with whom their agency is doing business, or considering doing business, under circumstances which may appear to favor the recipient over other similarly situated persons; or
- (b) a gift to any other state officer or employee when the gift may be, or may appear to be, intended to influence any official decision by the recipient.

(7) **Certain donations of public funds prohibited.** No officer or employee of this agency may give to any person any gift from public funds, unless the gift:

- (a) is a service appreciation award of de minimis value; or
- (b) does not violate the Anti-Donation Clause, N.M. Const., Art. IX, § 14.

**E. Honoraria; no solicitation or acceptance of honoraria permitted for speaking or writing.**

(1) An officer or employee of this agency may not request or receive honoraria for a speech or service that relates to the performance of public duties; provided that an officer or employee of this agency may accept reasonable reimbursement for meals, lodging or actual travel expenses incurred in making the speech or rendering the service.

(2) An officer or employee of this agency may accept payment for services rendered in the normal course of a private business pursuit.

**F. Timekeeping, reimbursement, and use of state property.**

(1) An officer or employee of this agency must work during the hours required and report time accurately.

(2) An officer or employee of this agency shall not claim reimbursement in excess of what is necessary and incidental to an official duty or action.

(3) An officer or employee of this agency shall limit personal use of state office supplies and assigned equipment, such as computers and telephones, and otherwise shall not use state property or expend state funds for private purposes.

**G. Procurement.**

(1) **Fair and equitable treatment of persons involved in public procurement.** An officer or employee of this agency shall treat persons involved in public procurement fairly and equitably.

(2) **Maximize the value of public funds.** An officer or employee of this agency involved in procurement shall endeavor to maximize the purchasing value of public funds.

(3) **Conflicts of interest prohibited; agency waiver.**

(a) An officer or employee of this agency shall not participate directly or indirectly in a procurement when the officer or employee, or their immediate family member, has a financial interest in a business participating in the procurement.

(b) An officer or employee of this agency who is participating directly or indirectly in procuring goods or services for this agency shall not be simultaneously employed by any person or business contracting with this agency.

(c) A conflict of interest under subparagraphs (a) or (b) this Paragraph may be waived by this agency, if the contemporaneous employment or financial interest has been publicly disclosed, the officer or employee is able to perform procurement functions without actual or apparent bias or favoritism, and the officer or employee's participation is in the best interests of this agency.

**(4) Due diligence by agency.**

(a) **Participation by person submitting bid or proposal.** An officer or employee of this agency assessing a bid or proposal shall exercise due diligence to ensure that the person submitting the bid or proposal did not participate in the preparation or receive any advance notice of specifications, qualifications or evaluation criteria on which the specific bid or proposal was based.

(b) **Campaign contribution disclosure and prohibition.** An officer or employee of this agency who is participating directly or indirectly in procuring goods or services for this agency shall exercise due diligence to ensure that the prospective contractor:

(i) does not give a campaign contribution or other thing of value to a person elected to an office or a person appointed to complete a term of elected office who has the authority to award or influence the award of a contract into which the prospective contractor seeks to enter; and

(ii) disclose all campaign contributions, where such contributions in the aggregate exceed over \$250 in the two years before the beginning of the procurement process, given by the prospective contractor or a family member or representative of the prospective contractor to a person elected to an office or a person appointed to complete a term of elected office who has the authority to award or influence the award of a contract into which the prospective contractor seeks to enter.

**H. Former officers and employees.**

(1) **Contracting.** This agency may not contract with or take any other favorable action toward a person or business that is:

(a) represented by a person who was an officer or employee of this agency within the preceding year, if the contract or action has a value of \$1,000 or more and is the direct result of the officer or employee's official act; or

(b) assisted by a former officer or employee of this agency whose official act while in state employment directly resulted in the contract or action. This subparagraph applies regardless of the value of the contract or action, or the length of time since the officer or employee left the agency.

(2) **Restrictions on former officers or employees representing a person in the person's dealings with this agency.**

(a) A former officer or employee of this agency is prohibited from representing anyone in dealings with this agency on any matter in which the officer or employee participated personally and substantially during their employment with this agency.

(b) A former officer or employee of this agency may not, for one year after the termination of their employment with this agency, represent for pay a person on any matter before this agency, regardless of whether they were involved in that matter personally.

[1.8.4.10 NMAC-N, [insert date]]

**Commission Commentary to 1.8.4.10 NMAC**

**Subsection A**

[1] Subsection A is intended to ensure that any private jobs held by officers and employees of state government do not create conflicts with their state jobs.

[2] Subsection A (2) requires an officer or employee to disclose outside employment to a supervisor or other designated agency representative. This disclosure is required by the Governmental Conduct Act. *See* NMSA 1978, § 10-16-4.2.

[3] Subsection A requires the officer or employee who is working at an outside job to disclose any conflict of interest that may arise, *before* undertaking the potentially conflicting private work. The Financial Disclosure Act is less stringent, requiring disclosure prior to entering state employment and every January thereafter. *See* NMSA 1978, §§ 10-16A-3(A)-(C), -4(A). The Commission believes that disclosure of potentially conflicting outside employment should be prompt and has therefore adopted a more stringent rule than the one set forth in the Financial Disclosure Act.

*Additional restrictions on employees involved in the contracting process.*

[4] Subsection B(2) establishes an additional requirement for an officer or employee involved in the agency's contracting for goods or services. Under the Governmental Conduct Act, an officer or employee of a state agency involved in the agency's contracting process may not become employed by any business contracting with the agency. *See* NMSA 1978, § 10-16-4.3. This restriction applies even if the agency employee is not involved in any contract between that business and the agency.

*Required statutory disclosures of outside employment.*

[5] The Financial Disclosure Act, NMSA 1978, Sections §§ 10-16A-1 to -8, requires legislators and statewide elected officers to file financial disclosures with the Secretary of State within 30 days of their taking office and each subsequent January. *See* NMSA 1978, § 10-16A-3. Candidates for those offices must file their disclosure statements with their declaration of candidacy. Certain designated appointed officers have similar disclosure requirements in that rule. These appointed officers include: any state agency head, or any officer whose appointment to a board or commission is subject to confirmation by the New Mexico State Senate. *Id.*

[6] The Financial Disclosure Act requires disclosure of: employment by the public officer and that officer's spouse, both during the time of reporting and the year prior to taking office; a description of each spouse's job; each broad category of work resulting in gross income over \$5000 in the reporting year; employment for state agencies that paid \$5000 or more; and any state agency before which the public officer or spouse represented or assisted clients. *See* NMSA 1978, § 10-16A-3(D). Public officers may update their report at any time but are required to file at least once annually. *See* NMSA 1978, § 10-16A-3(D).

[7] Under the Financial Disclosure Act, an employee not otherwise required to make a financial disclosure must do so if the employee holds a financial interest that may be affected by the employee's official acts "or [the] actions of the state agency by which he is employed." *See* NMSA 1978, § 10-16A-4.

[8] The Governmental Conduct Act requires all state officers and employees to disclose outside employment to their office or supervisor. *See* NMSA 1978, § 10-16-4.2. The Governmental Conduct Act and Procurement Code also prohibit officers and employees involved in contracting from working for any contractor to the agency, irrespective of whether the state officer's or employee's work involves that contractor. While the Procurement Code includes a provision allowing waivers from this prohibition (NMSA 1978, § 13-1-194), the Governmental Conduct Act does not permit waivers under any circumstances.

**Subsection A - Examples**

[a] **Disclosure of an outside job.** A state correctional facility cook moonlighting as a chef in a restaurant has a duty to report her outside job to her state Corrections Department supervisor on a signed conflict disclosure form. *See* 1.8.4.10(A)(1), (A)(2)(a) NMAC. The supervisor confirms that the hours for her outside job do not conflict with her state job. The cook agrees to disclose to the supervisor if she is asked to work any hours that conflict, before agreeing to new hours. *See* 1.8.4.10(A)(2)(c) NMAC; *see also* NMSA 1978, § 10-16-4.2 ("A public officer or employee shall disclose in writing to the officer's or employee's respective office or employer all employment engaged in by the officer or employee other than the employment with or service to a state agency or local government agency.").

[b] **Factors to consider involving an outside job.** A hydrologist for the Environment Department is offered a part-time contract with an oil company to analyze impacts of its drilling operations on aquifers. The hydrologist reports the offer to his supervisor, committing to work for the oil company only on his days off, and pointing out that oil



drilling is regulated by a different state agency, the Oil Conservation Division of the state Energy, Minerals and Natural Resources Department. *See* 1.8.4.10(A)(1), (A)(2)(b) NMAC. He and his supervisor must consider the time this job would require, the possibility that the hydrologist might be asked to challenge findings by the staff of the Oil Conservation Division, and similar factors to determine whether this employment would create significant conflict with the hydrologist's public responsibilities *See* 1.8.4.10(A)(1),(2)(b) NMAC; NMSA 1978, § 10-16-1-4.3.

[c] **Disclosure of an unpaid job.** A specialist for the state Department of Information Technology is asked to provide volunteer services to a non-profit organization. Since the outside employment is unpaid, disclosure is not required by the rule. *See* 1.8.4.10(A)(1) NMAC. The specialist may nonetheless wish to disclose the outside work so that his supervisor can point out any issues that may be created and how to avoid them. *See* 1.8.4.10(A)(2)(c) NMAC. Such a conflict might arise, for example, if the non-profit group were to use the specialist's services to develop evidence in litigation against the state. *Id.*

[d] **Employment with a prospective contractor prohibited for employee involvement with RFP.** Joanne, an employee of the state Department of Health (DOH), is asked by her supervisor to participate in drafting a Request for Proposals (RFP) for public relations services, after which she will help to oversee the work of the selected contractor. She is an expert in messaging to the public how to avoid infection during an epidemic. DOH contracts with a public relations firm that then offers a part-time, temporary job to Joanne to draw upon her expertise to craft and disseminate effective messages. Joanne is prohibited from accepting the offer because she was involved in the RFP. *See* 1.8.4.10(B)(2) NMAC.

[e] **Employment with prospective contractor barred prohibited for employee involved in unrelated contracting.** Same facts as in example #[d], except that Joanne is involved only in preparing an RFP for health inspections at restaurants, not the public health messaging campaign. She discloses to her supervisor the job offer from the public relations firm. Even though her involvement in the contracting process for the agency is unrelated to the proposed outside employment, she still is prohibited from accepting the offer. *See* 1.8.4.10(B)(2) NMAC. The statute and rule prohibit any employee involved in the agency's contracting process from working for any contractor with that agency, regardless of whether the employee was involved in that particular contract. *Id.*; *see also* Comment [8].

[f] **Outside work by employee not involved in contracting processes.** Fred works for the State Parks Division (Division) of the Energy Department. The Minerals and Natural Resources Department does not involve him in any contracting. He is recruited by a non-profit conservation group which has contracts with the Division to provide paid tourist guide services on his days off. Fred is not prohibited from working for a group that contracts with his Division because he is not involved in contracting for his agency. He must, however, still disclose the outside work to his supervisor before beginning it. *See* 1.8.4.10(B)(2) NMAC.

[g] **Disclosure of outside employment by commissioner.** Henry is appointed to the Construction Industries Commission, receiving the required state Senate confirmation. He files his financial disclosure form with the Secretary of State immediately after taking office in January. Six months later, in June, he accepts a job as a manager for a corporation that builds large construction projects. He discloses that employment on his financial disclosure statement filed the following January, which he simultaneously files with the Superintendent of the Regulation and Licensing Department. *See* 1.8.4.10(B)(1)(b) NMAC. While Henry has complied with the disclosure requirements of the Financial Disclosure Act, he has violated 1.8.4.10(B)(1)(c). The rule requires him to file the disclosure *before* undertaking the outside employment, which is not required by the statute. *See* NMSA 1978, § 10-16A-3.

## Subsection B

[1] State law also includes disclosure and reporting requirements for candidates for elective office, which are beyond the scope of this rule. *See, e.g.*, NMSA 1978, § 10-16A-3 (Financial Disclosure Act); NMSA 1978, § 1-19-25 (Campaign Reporting Act); NMSA 1978, § 1-19A-9 (Voter Action Act). For more information on filing requirements, candidates should contact the Office of the Secretary of State. For rules relating to the impact on procurement from financial interests of public officers and employees, refer to the section on Procurement, 1.8.4.10(H) NMAC.

[2] 1.8.4.10(B)(1)(c) NMAC sets out a disclosure requirement for newly-arising financial interests: when an officer or employee discovers a new personal financial interest that may be affected by their official acts or actions of the state agencies that employ them, 1.8.4.10(B)(1)(c) requires the public officer or employee to disclose that interest within ten days of the date when the officer or employee knew, or should have known of it. The disclosure must be filed both with the Secretary of State and with the employee's supervisor. The Commission finds it important that public disclosure of the potential conflict occur soon after it develops. It is also important that the employee's supervisor know promptly of the potential conflict, enabling the supervisor to discuss the implications with the employee and adjust work assignments if necessary. This will help prevent real or apparent conflicts of interest from arising during the months after the interest has been acquired but before the Financial Disclosure Act requires the filing of a disclosure.

[3] Among the most serious violations of public trust that a public officer or employee can commit is the use of their power to advance the personal finances of themselves, their family, their friends or business associates. This causes public distrust in government to fester, is unfair to the many dedicated state employees who commit themselves to honest public service and discourages capable candidates from pursuing careers in public service.

[4] Section 1.8.4.10(B)(1)(b) NMAC is based on the Governmental Conduct Act, NMSA 1978, § 10-16-4. It requires public officers and employees to know what their own and their spouses' financial interests are, to disclose any interests that may create a conflict for them, and to either disqualify themselves from taking official action on any matters that may increase their assets or income, or dispose of those assets so any conflict is removed. Investments may also be placed in a blind trust, managed by an outside broker, so that neither the employee nor their spouse know what their interests are. The rule does not, however, disqualify public officers or employees from acts that might benefit them less than it would anyone else in the general public.

#### **Subsection B - Examples**

[a] **Financial interests shared with the public need not be disclosed.** A policy analyst with the Taxation and Revenue Department is asked to analyze a legislative proposal to increase the state tax on gasoline. Even though the analyst may benefit personally by paying less for gasoline, he does not benefit any more than any other member of the public who owns a car that runs on gas, and the aggregate benefit to the public (whether from higher tax revenues or lower gas prices) is greater than any personal benefit. His work in preparing the analysis therefore does not violate this rule and he does not need to make any disclosure. *See* 1.8.4.10(B)(2)(b) NMAC.

[b] **Disqualifying financial interest in land.** An employee of the Oil Conservation Division of the Energy, Minerals, and Natural Resources Department is asked to consider an energy company's application for a permit to drill for oil and natural gas. The application seeks permission to conduct drilling operations on land near the employee's ranch and, if approved, would diminish the value of the ranch and other property in the vicinity. *See* 1.8.4.10(B)(2)(a) NMAC. Other landowners in the area have spoken in opposition to the application, arguing that it is not in the public interest to permit additional drilling in the area. The applicant and some local elected officials have spoken in favor of the application, arguing that it will bring needed jobs and tax revenues to the area. The employee should disclose his conflict and disqualify himself from considering the application. *Id.* His financial interest in the ranch will increase by denying the application, more so than any arguable benefit to any other member of the general public. *Id.*

[c] **Disqualifying financial interest held by a family member.** A food inspector for the Environment Department marries a woman who owns a restaurant in a community where the inspector is assigned to conduct restaurant inspections. The food inspector does not file a disclosure of financial interests with the Secretary of State or her supervisor. *See* 1.8.4.10(B)(1)(b) NMAC. The inspector is assigned to inspect her spouse's restaurant one day and does so. Her supervisor then learns from other sources that it is her spouse's business. The inspection was improper in that it involved her oversight of a business in which her spouse has a financial interest, and she failed to file a disclosure of this conflict within ten days of her marriage. The inspection should be conducted again by another inspector and the inspector's conduct should be considered for possible disciplinary action. *See* 1.8.4.10(C)(2) NMAC.

[d] **Timely disclosure meets the requirements of this Code.** An employee of the Economic Development Department purchased stock in a large corporation for her retirement account. *See* 1.8.4.10(B)(1)(b) NMAC. She later discovers that the same corporation took over a computer firm that she advised on getting a small business

loan. She files a disclosure statement within a week with the Secretary of State and with her supervisor. Because she disclosed the financial interest within ten days of learning of her interest, the employee and supervisor were able to discuss whether this creates a conflict for her and necessitates any change of assignment. *See* 1.8.4.10(B)(1)(c) NMAC. They also discussed whether the employee should sell the investment to avoid the conflict. *Id.*

### Subsection C

[1] The state regulates public utilities, transportation services, the practice of medicine, plumbers, and driving schools—to name just a few examples of the wide swaths of the economy the state controls through regulation. Because regulators determine whether someone they regulate will receive or lose a license to practice their profession, or the level of profit that they can receive, there is an obvious potential for a regulated entity to seek favorable treatment by offering business or employment opportunities to the government officer or employee regulating their business. To preserve the actual fairness and impartiality of the regulators in exercising their responsibilities, and public confidence in their impartiality, this Code prohibits regulators from entering into financial transactions with the businesses they regulate. That means the public officers and employees involved in regulation may not accept any job offer from such a business, nor have any contracts with them. Regulators can purchase the services provided by the regulated entities, provided they do so on the same terms as are available to any other member of the public.

[2] Subsection C prohibits public officers or employees who have regulatory authority from selling directly to regulated businesses from selling indirectly through any members of their immediate family (their spouse, parents, children or siblings, by blood or through marriage), or from selling through any business in which they have a substantial (20% or greater) interest.

[3] Subsection C does not prohibit a family member from being employed by a business under the jurisdiction of the regulator. The regulator should, nonetheless, disqualify himself from any matters involving the business in which a close family member is employed. Regulatory actions may affect the profitability of the business, which may in turn impact the family member's earnings.

[4] Questions may arise over which public officers and employees within an agency have the authority that requires them to comply with this rule. A commissioner who votes on a license or rate request is clearly covered, but her administrative assistant probably is not. Questions like this can only be dealt with on a case-by-case basis. Public officers or employees considering any sale to or employment with a regulated entity, by themselves or through their family or a business in which they have a substantial interest, should disclose this to their supervisor, who should determine whether their role requires them not to do so.

[5] Because of its regulatory role over so much of New Mexico's commerce, the Public Regulation Commission, including its commissioners, candidates and employees, is subject to a special and much more detailed set of rules at Sections 17 through 19 of the Public Regulation Commission Act, NMSA 1978, §§ 8-8-1 through -20.

### Subsection C - Examples

[a] **Sales by a family member prohibited.** An officer who has regulatory power over insurance companies suggests to a representative of one company that if she buys office supplies from a store run by the officer's wife, she will give the representative a good discount. The representative buys office supplies from the officer's wife at a discounted price. The officer's wife does not know that she is selling to a representative of a company regulated by her husband. The officer's suggestion and the sale violate Subsection (C)(1).

[b] **Employment of a family member by a regulated business.** An employee of the State Department of Transportation oversees licensing and investigating complaints against ignition interlock installers. His daughter-in-law receives a job offer with an ignition interlock installation company. The daughter-in-law may take the job, but the state employee should recuse himself from any matter involving that company. *See* 10.8.4.10(C)(2) NMAC.

[c] **Regulator may not contract with a regulated business.** The state Medical Board receives a complaint alleging that a doctor committed malpractice. While the matter is pending, one of the members of the board agrees to

examine the patient. The doctor pays the board member a consulting fee. The payment violates the prohibition against contracting to supply services to a regulated person. *See* 10.8.4.10(C)(2) NMCA.

#### **Subsection D**

[1] This Code imposes conditions on the giving and receipt of gifts by public officers and employees and requires careful thought before a gift of any kind is accepted. When someone gives a significant gift to a public officer for the purpose of gaining a contract or favorable official decision, that constitutes an illegal bribe that can be prosecuted as a crime. But a smaller gift – even if perfectly legal – may create an undesirable appearance of undue influence. This erodes citizens’ confidence in the integrity of state government.

[2] Subsection D prohibits public officers and employees from accepting any gifts from restricted donors. In this respect, the rule is stricter than the Gift Act, NMSA 1978, Sections §§10-16B-1 to -5, which permits gifts from restricted donors of up to \$250. *See* NMSA 1978, § 10-16B-3(A). The Code prohibits gifts of any value from restricted donors because any gratuity given to a public officer or employee can suggest an attempt by the donor to gain undue influence over the officer or employee’s actions.

[3] This Code should not (and does not) prevent employees from showing their appreciation for their colleagues and superiors on special occasions (such as retirement, anniversary or transfer). Likewise, the State has no legitimate interest in prohibiting gifts that are given by people solely because a personal or familial relationship. But when a friend, business colleague, or relative becomes a restricted donor, such as during a procurement process in which the donor has a financial interest, the rule prohibiting gifts from restricted donors would preclude otherwise-permissible gifts.

[4] Reimbursement of expenses for travel, accommodations or related costs are permitted from any source. Public officers may attend a meeting or conference at the invitation of business or non-profit groups and may accept free rooms and meals as well. This is because public officers and employees are not expected to pay for their expenses in fulfilling their public responsibilities out of their own pockets. Since they could obtain reimbursement for these expenses from their own agencies, being paid instead by outside businesses or organizations is essentially a gift to the agency rather than its individual personnel. But public officers and employees, and their agencies, must exercise discretion in such matters. Accommodations should not be so luxurious as to raise public suspicion that the travel is an attempted bribe in disguise, such as at pricey resorts or on cruise ships. And the agency should keep records proving that legitimate public business took place at the event, justifying the attendance of the state personnel.

[5] Provisions relating to gifts to public officers and employees are contained in the Constitution and New Mexico statutes. *See, e.g.,* N.M. Const. Art. IV, § 27 (extra-compensation clause); N.M. Const. Art. XX, § 9 (emoluments clause); the Gift Act, NMSA 1978, §§ 10-16B-1 to -4; NMSA 1978, § 10-16-13.3 (Governmental Conduct Act); NMSA 1978, §§ 13-1-191, -191.1, and 198 (Procurement Code); NMSA 1978, §§ 30-23-1, 30-23-6, 30-24-2 (Criminal Code).

#### **Subsection D - Examples**

[a] **Modest meal from restricted donor not allowed.** A state employee drafts specifications for a Request for Proposals (RFP) pursuant to one of the competitive processes in the Procurement Code. The president of a company who wishes to respond to the RFP offers to take the employee to lunch in a modestly priced restaurant. The state employee must decline the offer. *See* 1.8.4.10(D)(4)(c) NMAC. The company president is a restricted donor because he is seeking to contract with the agency which employs the donee.

[b] **Indirect solicitation of charitable donation prohibited.** The state superintendent of insurance meets with an insurance company general counsel. The superintendent’s office annually approves the company’s premium rates and policy terms. In the meeting, the superintendent complains of the inadequate legislative appropriation given to a non-profit organization his office established to offer insurance coverage to low-income residents with pre-existing conditions. The superintendent mentions that insurers would benefit if they help increase the funding for the non-profit. The superintendent’s suggestion violates the prohibition against solicitation of charitable gifts. *See* 1.8.4.10(D)(3) NMAC.

[c] **Solicitation of charitable donation prohibited.** A workers' compensation administrative hearing officer sees multiple claims for lung damage. She orders the employer, a painting contractor, to compensate the victims, and to donate \$1000 to the New Mexico Lung Association. While her intentions may be good, ordering a charitable donation is outside her jurisdiction as a hearing officer. Workers' compensation cases are between injured workers and their employers. Ordering a donation to an outside group constitutes an improper mandatory donation. The contractor may volunteer to make a donation as part of a settlement of a legal proceeding, but the state officer may not request or demand a donation. *See* 1.8.4.10(D)(3) NMAC.

[d] **Undisclosed offer of official help in exchange for a personal gift prohibited.** An aide to the governor accepts a no-interest personal loan from a friend who is a government contractor and not in the business of giving loans. When an emergency construction project becomes available, the aide, who has made no repayment on the loan, asks the governor to direct the cabinet secretary in charge of the project to award the contract to his friend. The aide does not disclose that he received a loan from this government contractor. The favorable terms of the loan, *see* 1.8.4.10(C)(3) NMAC, and the fact that the loan was not disclosed, make this an unlawful gift from a restricted donor. *See* 1.8.4.10(D)(5) NMAC; NMSA 1978, § 30-23-6 (Criminal Code).

[e] **Personal gift by public officer to a friend in a regulated business permitted, but disqualifies officer.** An employee of a commission that issues occupational licenses goes on vacation to celebrate the anniversary of an old friend. The friend is also an applicant for a license from the agency. The state employee uses his own funds to treat the applicant and his spouse to their room as an anniversary gift. The commission employee should recuse from any decisions involving the friend's application, or complaints about his business, to avoid an appearance that the friend is receiving favorable treatment. *See* 1.8.4.10(D)(6)(a) NMAC.

[f] **Gift by one public officer to another to obtain favorable action not allowed.** A department head requests the State Personnel Office (SPO) to reclassify the position of a valuable employee who has received another job offer. The department head invites the SPO director to a basketball game, to try to convince her to authorize the reclassification. The SPO director should reject the offer. *See* 1.8.4.10(D)(5) NMAC. The department head, even as a state employee, falls within the definition of a restricted donor in this example. Other agencies could see the SPO director's acceptance of the free ticket as undue influence.

[g] **Employee recognition award allowed.** An office decides to throw a farewell party for a retiring employee. The organizers ask the officer in charge if they can use office funds to purchase an award recognizing the retiree's service. The model rule allows purchase of employee service awards. *See* 1.8.4.10(D)(7)(a) NMAC; NMSA 1978, § 10-16B-2(B)(10). However, the purchase must comply with the Department of Finance and Administration Manual of Model Accounting Practices FIN 5.6, which governs purchases of employee service recognition awards by state agencies.

[h] **Free services at state expense not allowed.** An inspector for the state construction industries division agrees to inspect a home for free for a friend who is considering buying it. The inspector conducts the inspection during paid working hours for his state job. The inspector is violating the model rule and the anti-donation clause of the New Mexico Constitution by giving his paid time to an individual who is not eligible for it. *See* 1.8.4.10(D)(7)(b) NMAC; N.M. Const., Art IX, § 14.

[i] **Business transaction at market rates allowed.** An officer of the state Financial Institutions Division, which regulates state banks, applies for a home mortgage from a bank regulated by her agency. The bank offers her standard rates and terms for a buyer with her credit history. The transaction is not a "gift" for purposes of this rule, because the public officer pays market rates for the mortgage. *See* 1.8.4.10(C)(3) NMAC.

[j] **Unsolicited good will gift not allowed.** An oil producer requests a meeting with the new director of a field office that regulates oil drilling, just to "get acquainted." The producer has no open matters being considered by the office. As he leaves, the producer silently places a wrapped case on the director's desk. The director sees the package after his visitor leaves. The director opens the package and finds two pearl-handled pistols within. He immediately calls his supervisor to report the gift. *See* 1.8.4.10(D)(5) NMAC. Even though the oil executive did not make any specific requests of the director, regulatory issues routinely come up. The gift appears to have been given to the director to create good will and affect the directors' official acts. The gift was therefore given to the director because of his

official position; the director correctly reported the gift to his supervisor, and it must be returned. *See* 1.8.4.10(D)(1) NMAC.

[k] **Indirect gifts.** A public officer or employee may not indirectly solicit a gift for a third party if the gift would otherwise be prohibited when given directly to the public officer or employee. *See* 1.8.4.10(D)(1) NMAC.

### Subsection E

[1] Honoraria provide a way for non-governmental entities to give valuable payments to public officers and employees. Like gifts, such payments may be, or appear to be, opportunities for these outside entities to influence the recipient's decisions.

[2] Since honoraria are given in payment for services, usually in the form of speaking or writing, they are not outright gifts. Different people may appraise the value of the same speech very differently. Very large honoraria, which may even include free trips to expensive resorts, may be given to a well-known speaker because of her reputation, influence or status, not necessarily because she is the best informed or most articulate speaker on the subject. Because there is no certain way to measure how much the speech is worth, the only way to prevent a non-governmental entity from padding the honorarium to gain influence is to prohibit it.

[3] Subsection E prohibits honoraria from any source, provided that the service "relates to the performance of public duties." The prohibition extends to any entity paying the honorarium, whether or not it is regulated by the public officer's or employee's agency. Nor does the entity paying the honorarium have to have any matters pending in front of the agency. Consequently, even an honorarium from a public or private university or other governmental office is prohibited. If the officer is asked to speak or write about subjects within his area of public service, honoraria are barred.

[4] The Governmental Conduct Act permits payment of an honorarium of up to \$100 in addition to reimbursement of travel expenses. *See* NMSA 1978, § 10-16-4.1. Subsection E prohibits honoraria in any amount, for two reasons. First, even a payment as modest as \$100 may undermine public confidence in the public officer's or employee's fairness. Ordinary citizens are suspicious of the advantage that well-funded interest groups can gain by wining and dining those officers, regardless of the price paid. Second, and more importantly, New Mexico adopted at statehood a constitutional provision, Section 9 of Article XX of the state Constitution (*the Emoluments Clause*). This clause limits public officers to their salaries and prohibits them from taking any other payment in relation to the performance of their public duties. The Commission notes the tension between the limits contained in the Constitutional Emoluments Clause and the allowance of honoraria of up to \$100 in the Governmental Conduct Act. Rule 1.8.4.10(E) attempts to faithfully follow the Constitutional Emoluments Clause, and therefore prohibits all honoraria for state officers or employees.

[5] Reimbursement of expenses for travel, accommodations or related costs are permitted from any source. Public officers and employees may attend a meeting or conference at the invitation of business or non-profit groups and may accept free rooms and meals as well. This is because public officers and employees are not expected to pay out of their own pockets for their expenses fulfilling their public responsibilities. Since they could obtain reimbursement for these expenses from their own agencies, being paid instead by outside businesses or organizations is essentially a gift to the agency rather than its individual personnel. But public officers and employees, and their agencies, must exercise discretion in such matters. Accommodations should not be so luxurious as to raise public suspicion that the travel is an attempted bribe in disguise, such as at pricey resorts or on cruises. And the agency should keep records proving that legitimate public business actually took place at the event, in which the state officer or employee participated.

[6] **Applicable law:** N.M. Const. Art. XX, § 9; NMSA 1978, § 10-16-4.1; NMSA 1978, § 30-23-1.

### Subsection E - Examples

[a] **No honorarium for speech within scope of official duties.** A curator for the Department of Cultural Affairs is offered an honorarium to give a lecture to a social club on the art collection of a state museum. One of the curator's

job duties is to describe the state's art collection. The curator may not accept the honorarium. *See* 1.8.4.10(E)(1) NMAC.

[b] **Honorarium for service outside of scope of official duties allowed.** The museum curator, whose hobby is chess, is offered an honorarium to mentor a student chess team. Since this service is unrelated to the curator's public duties, the honorarium is allowed. *See* 1.8.4.10(E)(2) NMAC.

[c] **Expense reimbursement allowed.** The curator drives his personal car 100 miles from his office to give an evening lecture to a social club on the museum art collection. He may accept reasonable reimbursement from the social club for the cost of driving, his overnight accommodations and meals. *See* 1.8.4.10(E)(1) NMAC. The social club reimbursements reduce department costs, since the state agency would otherwise reimburse the curator for these expenses.

[d] **Reasonable travel expense reimbursement allowed.** The head of a division that oversees mining operations is asked to speak to a regional mining association meeting held in Hawaii. The Association offers to cover his travel and accommodations. He receives a first-class ticket for a flight and finds himself in a luxury suite in a 5-star resort hotel. Although the division head may accept reasonable travel expenses for a presentation, he should have determined the travel arrangements and accommodations before accepting the invitation. *See* 1.8.4.10(E)(1) NMAC. While he could still participate in the meeting, accepting luxurious arrangements looks very suspect to members of the public, and goes beyond "reasonable reimbursement" for travel expenses.

[e] **Compensation for permitted outside work not honoraria.** A part-time accountant for a state agency discloses to her supervisor that she is performing accounting services for a private business. *See* 1.8.4.10(A)(2) NMAC. She does this outside her state office, during her off-hours, and her client does not do business with her agency. The accountant's fees are allowed as services rendered in the normal course of a private business pursuit. *See* 1.8.4.10(E)(2) NMAC.

## Subsection F

[1] People who arrive late, leave early, or handle personal business when they are "on the clock" are stealing money from the state. Moreover, absenteeism creates resentment among their colleagues and undermine public confidence in the integrity of state government.

[2] Public officers or employees must be careful not to view their state office as a personal business office given to them by the public. Doing so violates Section 3 A of the Governmental Conduct Act, NMSA 1978, § 10-16-1. Any significant use of stationery, postage, faxing services or even email or telephone service for personal business amounts to use of public resources "to pursue private interests." These abuses also involve taking time for which one is paid by taxpayer dollars to do the public's work. While rare, trivial uses of office supplies may be overlooked, personal use of state vehicles is a much more serious violation. This not only burdens the state with the costs of driving for personal reasons, but also imposes the danger of state liability for accidents or breakdowns during unauthorized uses.

[3] **Reimbursement.** Problems with claims for reimbursement arise most often with respect to expenses incurred in connection with official travel. These expenses are often reimbursed as a flat per diem instead of reimbursement for specific expenses actually incurred. These problems sometimes take the form of per diem claims for more time than actually was spent traveling. A more serious problem is "double-dipping," when a public officer or employee seeks reimbursement from two different sources for the same expense, such as mileage. A responsible public officer or employee will also consider the extra step of keeping track of meals provided by another source and deducting those meals from his per diem claim from his state office.

[4] Governor's contingency fund. State law has established a special fund for use by the governor "to pay for expenses directly connected with obligations of the elected office of governor," but not to supplement the salaries of the governor or her staff. This fund recognizes that the governor should be able to cover expenses for such amenities as entertaining visiting dignitaries. But even this discretionary fund available to the state's chief executive is subject to the laws and rules controlling state expenditures, including the Procurement Code and Inspection of Public

Records Act. The governor must also report expenditures monthly to the legislature, holding the governor to much the same standards of accountability as any other state officer or employee using public funds.

[5] **Applicable law:** Sections 3A and 4 of the Governmental Conduct Act, NMSA 1978, §10-16-1; NMSA 1978, § 30-24-1 (bribery); NMSA 1978, § 30-41-1 (kickbacks); NMSA 1978, § 30-16-8 (embezzlement); NMSA 1978, § 30-16-9 (extortion); NMSA 1978, § 30-23-1 (demanding illegal fees); and NMSA 1978, § 10-17-12 (neglect of duty). All except neglect of duty are felonies.

### **Subsection F - Examples**

[a] **Reimbursement from a regulated entity.** A state business group invites a division director to speak at an in-state, but out-of-town conference. The division director regulates the state business group. The director drives her own vehicle and the trade group reimburses her for her mileage, pays her hotel bill and provides several of her meals. *See* 1.8.4.10(E)(1) NMAC. After her return, the director's administrative assistant prepares a routine travel claim with her office. The director carelessly signs the travel claim that includes a reimbursement request for mileage and per diem for meals that were provided by the group. The claim for mileage is illegal "double-dipping," since the business group already paid her mileage for the same trip. As for meals, she may have a valid claim for per diem under NMSA 1978, § 10-8-4, even though her meals were provided by the group.

[b] **Missed work caring for children.** A full-time staff member, a hard-working single father and a capable employee, is having trouble finding affordable after-school childcare. His supervisor notes that he is taking off daily to pick up his child at school, missing as much as an hour from each day. The supervisor talks with the employee to review his hours and work out an accommodation. The staff member may need to work some time at home to address his child-care responsibilities while meeting his obligation to work full-time. *See* 1.8.4.10(F)(1) NMAC.

### **Subsection G**

[1] Procurement ethics must be based on fairness, honesty and transparency. All public officers and employees must conduct themselves in a manner to maintain trust and confidence in the integrity of the procurement process. While model Codes of Ethics for procurement may be written in broad conceptual terms, public officers and employees engaged in the procurement process must understand what the Procurement Code, its various rules promulgated through the State Rules Act, and relevant New Mexico caselaw, intend to accomplish.

[2] Procurement processes must comply not only with the Procurement Code, but also with procurement-related provisions of the Governmental Conduct Act and applicable criminal laws.

[3] An agency employee may not participate in the agency's procurement process where the employee or a family member has a financial interest in a business that is involved. The Governmental Conduct Act (GCA) defines "family" and "financial interest" in NMSA 1978, §§ 10-16-2(E), (F). Basically, "family" includes one's spouse, parents, children or siblings, either by blood or marriage. "Financial interest" in a business is defined by the GCA to include any ownership interest or current or prospective employment with the business.

[4] Paragraph 3(b) of this Subsection, prohibiting an agency employee involved in procurement from being an employee of a contractor to the agency, extends to employment with *any* contractor of the agency—whether or not the employee has been involved with that contract.

[5] As seen in paragraph 3 (c) and (d) of this section, the two main procurement statutes conflict on whether an agency can waive the prohibition against contemporaneous employment by an agency employee involved in contracting. Both statutes prohibit an agency officer or employee from participating in procurement while serving as an employee of a business that is contracting with that employee's agency. The Commission believes that this prohibition may *not* be waived by the agency, even though the Procurement Code permits it under certain conditions. The Commission recommends following the virtually identical provision in the Governmental Conduct Act, which has no waiver provision. The Commission believes that this conflict of interest is too serious to be waived, and that legal proceedings could be conducted under the GCA regardless of whether an agency grants a waiver under the Procurement Code. But the decision on how to proceed is up to the discretion of the agency.



[6] The Governmental Conduct Act *does* have a provision allowing an agency to waive the prohibition against allowing its public officers or employees to contract with the agency, either directly, or through a business in which the officer or employee or his family holds a substantial (20% or greater) financial interest. (Note that this involves situations where the agency employee is himself a contractor or significant financial interest holder in the prospective contractor, but not merely an *employee* of the contractor.) NMSA 1978, § 10-16-7 allows the public officer or employee to contract with the agency if he has disclosed the substantial interest he holds in the business, and if the contract is awarded through a competitive process. The agency staff is required to exercise due diligence to ensure that these requirements are met. The public officer or employee is prevented from participating in the contracting process on behalf of the agency in such cases by NMSA 1978, § 10-16-4(B).

[7] Procurement processes demand due diligence by the responsible public officers and employees to protect the integrity of the contracting process. This means that all steps of the process are to be carefully monitored to ensure accuracy and compliance with procedures, and to prevent improper influences. Two important examples requiring due diligence are noted in 1.8.4.10 H (4) NMAC. The first example lies in the agency's responsibility to ensure that no one making a bid or proposal was involved in any way in developing or conducting the agency's contracting process. The Governmental Conduct Act prohibits accepting such a bid or proposal at NMSA 1978, § 10-16-13. The second example is from the Procurement Code, NMSA 1978, § 13-1-191.1. This law prohibits prospective contractors, their family members or other representatives from making contributions to state officers who serve in elected positions during the procurement process. Contributions are permitted by the Procurement Code prior to the beginning of the procurement process. But if the total of such contributions made within the two years before the start of the procurement process exceeds \$250, agency procurement staff must do due diligence to ensure these contributions are disclosed. While these two examples are salient for the protection of public funds and the fairness of contracting processes, there are many other situations where agency due diligence is needed.

[8] The New Mexico Legislative Finance Committee estimated in the Fall of 2016 that "up to \$13 billion of the \$18 billion State Budget is spent on the procurement of goods and services" (LFC Program Evaluation Unit Report #16-09, October 27, 2016).

[9] Since January 1, 2015, Chief Procurement Officers in all state agencies are required to be trained and certified to make determinations, including determinations regarding exemptions, initiate small purchases and approve procurements pursuant to the Procurement Code. (*See* NMSA 1978, § 13-1-95.2). This legal requirement to professionalize procurement in state government is consistent with the concepts of loyalty and respect for the State's statutory laws and regulations, impartiality and fairness, confidentiality, avoidance of the appearance of impropriety and due diligence.

### **Subsection G - Examples**

[a] **Kickbacks prohibited.** The Legislature appropriates capital outlay money to build a new courthouse. As part of the construction process, the judicial district awards a "sole source" contract to a security firm to install necessary security systems throughout the new building. The contractor then "kicks back" part of the proceeds from the contract to the district project construction manager in return for the non-competitive award of the contract. Pursuant to Section 126 of the Procurement Code, NMSA 1978, § 13-1-28, the project construction manager must show that there is only "one source for the required service," that the service is "unique and this uniqueness is substantially related to the purpose of the contract," and that other similar services cannot meet the intended purpose of the contract. The sole source award violates the Procurement Code. More seriously, civil and criminal penalties may be imposed on the sole source contractor and the project construction manager for the illegal kickbacks, under NMSA 1978, §§ 13-1-196-199, and the NM Criminal Code's prohibition on kickbacks at NMSA 1978, § 30-41-2. *See* 1.8.4.10(G)(3)(b) NMAC.

[b] **Benefits to family members.** The state Department of Health awards a small purchase contract to the son of a state legislator to provide needed language interpretation services in a Department-operated health facility. The agency does not know of the contractor's family relationship to the state legislator. The contract with the legislator's son violates the Governmental Conduct Act, as the contract was not awarded through a competitive process required by the Procurement Code. *See* NMSA 1978, § 10-16-9(A); *see also* 1.8.4.10(G)(1) NMAC.

[c] **Procurement.** The state fire marshal's office puts out an RFP to contract for certain specialized forest fire equipment. The deputy chief fire marshal is a partner in a family business which owns the needed equipment. The agency may contract with the deputy's family business, but *only* if the deputy publicly discloses her ownership interest and the agency goes through a full procurement process, without using sole source or small purchase exceptions. *See* 1.8.4.10(G)(3)(c) NMAC; 1.8.4.10(G)(4)(a) NMAC. The law leaves to the discretion of the agency what kind of public notice would be sufficient.

[d] **Small purchases and campaign donations.** The State Treasurer's office executes a small purchase contract with an auditing firm to review the financial records of a single state commission. The son of the audit firm's president made a \$300 contribution to the state treasurer's election campaign a month before the contract was signed by both parties. Because this contract is a small purchase, the contribution is not prohibited. *See* 1.8.4.10(G)(4)(b)(ii) NMAC. But the contribution must be disclosed on the Department of Finance and Administration form, on the date when the contractor signs the contract, and it becomes a public record.

[e] Same example as in [d], but no campaign contribution had been made to the Treasurer. The disclosure form must still be completed and filed, indicating that no contributions were made. *See* 1.8.4.10(G)(4)(c) NMAC.

## Subsection H

[1] Many professionals are drawn to state government because of the experience and insights it offers them toward building professional expertise. By working for state government, these employees can better understand how they can go on to represent private sector clients who interact with public agencies. With their greater understanding of government, these professionals can help their clients adapt to the expectations of government agencies and work more efficiently with them to conform to, or improve on, the law. The public may view this differently, however, seeing the professionals' government service as a "revolving door" to advance their careers. Of particular concern is the perception, true or not, that public officials or employees could use their authority to favor some businesses or non-profits to improve their chances of gaining employment with them. The Governmental Conduct Act attempts to resolve this tension by placing limits on what former public officials and employees can do for private and non-profit clients, in certain sensitive situations.

[2] Subsection H tracks the corresponding language in the Governmental Conduct Act. *Compare* NMSA 1978, § 10-16-8. Subpart 1 of this section applies to the situation when businesses, including non-profit organizations, are represented or assisted by former officers or employees of state agencies. This rule prevents state agencies from contracting with or taking any favorable action towards such persons or businesses, if the contract or action resulted directly from the actions of the former agency employees. This prevents the officer or employee from using their public authority to set up an opportunity for people outside government to benefit, and then quitting their state job to support a business doing just that. Members of the public would justifiably see that as an abuse of their public trust.

[3] Subsection H(2) prohibits former public officers and employees from performing certain work for businesses. Subparagraph (2) (a) imposes a permanent, lifetime ban on any former state officer or employee from representing anyone before *any* agency of state government on a matter in which the former officer or employee participated personally and substantially. This prohibition applies most readily to former government attorneys, but would also apply to other former employees lobbying or negotiating on behalf of their private sector employer. This rule prevents a textbook revolving door situation, where a former state employee uses insider knowledge of a particular issue for the benefit of a private party. But the rule is limited to those matters that the former employee was personally and substantially involved in, an acknowledgment that too sweeping a prohibition would deter qualified persons from pursuing government service out of fear that their service would prevent them from ever returning to the private sector.

[4] Subsection H(2)(b) imposes a more sweeping, but temporary, ban on representing people or businesses in proceedings in front of the agency they worked in, on *any* matter, if done for pay. This ban only lasts for a year after the officer or employee leaves state government. The ban is not limited to matters in which the former officer or employee was personally involved during their state employment, or even matters in which they were involved at all. The rule is an effort to balance two competing goals. On the one hand, the one-year ban on representing clients on any matter before their former agency can dispel the public perception that the agency's former personnel are using their contacts and experience to offer their clients an unfair advantage. On the other hand, a permanent

prohibition against former employees' working on matters before their agency would impose punitive limitations on their careers, discouraging them from entering public service at all.

### **Subsection H - Examples**

**[a] State agency may not contract with business assisted by former agency employee who developed RFP.**

Tom, a telecommunications specialist for the Corrections Department, assists in writing a Request for Proposals (RFP) to install and operate a telecommunications system in the state prisons. He accepts a job offer from a telecommunications company and helps to prepare their response to the RFP. While he may accept the job, Tom's participation in writing the RFP prevents the Corrections Department from awarding the contract to his private employer. *See* 1.8.4.10(H)(1)(a) NMAC. This ban on contracting with this company lasts as long as Tom works there. *Id.*

**[b] Attorney's representation of business in litigation relating closely to work for former state employer is prohibited.**

An attorney for the Environment Department leaves his job and goes to work for a public interest law firm advocating for environmental policy. During his employment with the department, the attorney had worked extensively on a lawsuit and settlement to control radioactive emissions from a national laboratory, including proceedings to enforce consent orders. The public interest law firm where he now works wants him to represent a client in litigation against the laboratory, in which his former department is a party. The Commission addressed this issue in Advisory Opinion 2020-02 (April 3, 2020). In its opinion, the Commission compared the attorney's former work on this issue with the current case, deciding that the legal matters were close enough to establish that the attorney had been personally and substantially involved in the issue. The Commission advised that the attorney was therefore permanently barred from working on this matter under NMSA 1978, § 10-16-8.

**[c] Former employee not barred from contracting directly with former state employer.** Jack retires from his job as an accountant for a state agency. His former director asks Jack to come back to continue his work on a contractual basis, until a permanent replacement can be found. Jack is not ethically prevented from doing contract work for his former agency, so long as he is not representing or assisting another business. *See* 1.8.4.10(H)(1) NMAC. (He needs to confirm that there is no impact on his retirement benefits, however, from violating PERA "return to work" rules.)

**[d] Former employee may assist business in fulfilling contract on matters in which she was not personally involved.**

Jean, an architect for General Services Department, leaves her state job to work for a private firm that was hired to design a state building. Jean was not involved in the planning of the building or the procurement process that resulted in the contract with her new company. Since Jean was not personally and substantially involved in this project, she is able to work on it for the private firm. *See* 1.8.4.10(H)(2)(a) NMAC. However, she may not represent her new employer in front of her former state agency on this or any other project for a year. *See* 1.8.4.10(H)(2)(b) NMAC.

### **1.8.4.11 OPEN GOVERNMENT AND FREEDOM OF INFORMATION**

**A.** An officer or employee of this agency should welcome and encourage the public to attend and participate in public meetings.

**B.** An officer or employee of this agency must permit members of the public to inspect this agency's records, unless the records are confidential under the law.

[1.8.4.11 NMAC-N, [insert date]]

**[1] The importance of transparent state government.**

Rules for ensuring honesty in government can only be effective when the workings of that government are transparent. Transparency in government means that public agencies allow interested persons the opportunity to find out what their public officers and employees do, how they do it and the reasons for their decisions. This enables citizens to hold their public servants accountable through elections or have the opportunity for free expression of their opinions. At the same time, openness reduces the likelihood of public misinterpretation of government actions, including false rumors about the motives of public officers that sometimes circulate after they announce their decisions.

The law protects transparency of public decisions in several ways. First, the law gives members of the public the right to attend to all meetings of a quorum of a government decision-making body. Second, the Inspection of Public Records Act, NMSA 1978, § 14-2-1 gives the public the right to see and copy public records within a reasonable time after their request. Third, statutes prohibiting public officers and employees from using confidential information for the private gain of themselves or others protect information that is entrusted to government agencies. *See* NMSA 1978, § 10-16-6. Fourth, it is a felony to knowingly alter, create or destroy a public record without legal authority. *See* NMSA 1978, § 30-26-1.

**[2] Subsection A.** The Open Meetings Act (“OMA”), NMSA 1978, §§ 10-15-1 to -4, declares that it is the public policy of the state to require open meetings of decision-making bodies:

all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. The formation of public policy or the conduct of business by vote shall not be conducted in closed meeting. All meetings of any public body except the legislature and the courts shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.

*See* NMSA 1978, § 10-15-1(A). OMA requires open meetings for quorums of state decision-making bodies, other than the courts and the legislature. *See* NMSA 1978, § 10-15-1(B). OMA requires any meeting where public business is discussed by a quorum of a public body to be open. Limited exceptions are provided by law to protect confidentiality. Although the public must be able to attend and listen, their opportunity to provide input is determined by the rules of each public body.

Notice of a public meeting must be timely, clear, and adequately distributed. *See* NMSA 1978, §§ 10-15-1(D)-(F). A vital part of each notice is the agenda for the meeting; the body is only allowed to discuss or make decisions on issues listed as agenda topics. Each agency must annually adopt its own policy for giving notice, including the appropriate time for publishing notice and the way it will be publicized.

Public officers and employees should go beyond mere compliance with the law on open meetings and take steps to actively encourage public attendance. Such steps include choice of convenient time and location of meetings; the variety of written languages used in the public notices and the method for distributing them; and the offer of interpretative services at open meetings for non-English speakers or for the hearing impaired. Public bodies should also consider whether a rule allowing members of the public to express their views on issues, even briefly, may increase the likelihood of their attending.

**[3]** Under OMA, a public body is permitted to exclude the public from meetings where a deliberative body discusses certain discrete subjects. *See* NMSA 1978, § 10-15-1(H). In order to close a meeting:

- a. the deliberative body must, by a majority roll call vote, move into executive session;
- b. the topics under discussion in the executive session must be disclosed in general terms, both in the agenda and before the vote to go into executive session;
- c. no undisclosed topic may be discussed during the executive session;
- d. a vote may be taken on the action under discussion only after the open meeting reconvenes; and
- e. the public body must approve minutes of the closed meeting confirming that the only issues discussed there were those listed on the agenda for the executive session.

[4] Meetings should be scheduled at times and locations convenient for public attendance. Agencies should try to hold at least some open meetings in underserved communities, especially when considering issues that particularly impact their interests. Public notice should be distributed as widely as practicable. The notice should also commit that interpretation of the meeting will be provided if requested in advance by people with different native languages or hearing impairments. And the notice itself should be written in languages spoken by significant numbers of affected people. Section 3 of Article VII of the New Mexico State Constitution specifically protects public participation in state government for speakers of the Spanish language.

[5] **Subsection B.** Under the Inspection of Public Records Act (“IPRA”), NMSA 1978, § 14-2-4, the public has the right to inspect public records, except for records exempted from disclosure by law. IPRA spells out what documents must be disclosed, how members of the public can make their requests, the time limits for agencies to respond, and the other responsibilities of the agency whenever a request is received.

Under IPRA, the public generally has the right to inspect documents in the possession, custody, or control of public agencies. A state agency must respond to a request to inspect public records in 15 days or fewer, and any failure to deny the requester access must be explained within that time. Agencies are frequently sued and fined for failing to respond, or for providing unreasonable justifications for refusing to permit inspection of requested records.

Under IPRA, a state agency must have a staff member trained and responsible for receiving, processing and responding to requests to inspect records. In addition, the custodian is responsible for providing opportunities for inspection and for furnishing copies of records. The custodian also is required to post notices of the rights of the public to inspect the records of the agency, and the procedures for doing so.

While IPRA includes a list of documents and records that are exempt from disclosure, numerous state statutes and court rules contain additional exemptions not listed in IPRA. The best compilation available of the documents and records exempted by other laws and court rules is the Attorney General’s Compliance Guide to the Inspection of Public Records Act, available at [nmag.gov/resources/publications](http://nmag.gov/resources/publications).

## Examples

[a] A state board comprised of seven members decides to meet in subcommittees of two or three to work out several issues holding up a new regulation they plan to issue. The board convenes with all members present, then immediately breaks up into three subgroups. The subgroup meetings violate NMSA 1978, § 10-15-1(B) because a quorum of the board met before breaking into closed subgroups. *See* 1.8.4.11(A) NMAC.

[b] A commission established by statute holds an open meeting to decide on a research contract proposal. A member of the audience demands to be heard on the question, but the commission chair denies that request, saying he can submit his comment in writing. The commission goes on to approve a proposal that evening, and the audience member threatens to sue because the commission chair denied his right to be heard. The commission chair had no legal obligation to let an audience member speak during the meeting, so there is no valid claim for a lawsuit. But the chair should have considered allowing a short public comment period. *See* 1.8.4.11(A) NMAC.

[c] An agency records custodian receives a request for inspection of a public document that she quickly locates in the agency’s files. She notices that someone used the document to write a few notes, including information about a secret date with the spouse of another public officer. The custodian cuts the note off, considering the information embarrassing and outside the disclosure requirements for the agency. However, IPRA requires that the entire document be disclosed. The fact that the agency possesses the note guarantees public inspection.

[d] A freelance reporter walks into an agency and asks the receptionist to see “the files on the agency head.” The reporter does not specify which files she means. The receptionist correctly reports this verbal exchange to the public records custodian, who decides not to respond. There is no penalty for not responding to an oral request. *See* NMSA 1978, § 14-2-8(A). The custodian may choose to respond within 15 days, denying the request on the grounds that it was too vague. The records custodian cannot know if the requested files included confidential personnel files that are not subject to public inspection. Nothing prevents the reporter from following up with a well-defined written request. *See* 1.8.4.11(B) NMAC.

#### **1.8.4.12 POLITICAL ACTIVITY**

- A.** An officer or employee of this agency may not use their official position to pressure others to participate in political activities.
- B.** An officer or employee of this agency may not use their official position to influence an election or nomination, or otherwise engage in any partisan political activity while on duty.
- C.** An officer or employee of this agency may not serve as an officer of a political organization.
- D.** An officer or employee of this agency may not use or allow others to use state money or property to promote a political campaign, candidate for elected office, political party, or other partisan political organization.
- E.** An officer or employee of this agency who becomes a candidate in a partisan election must take a leave of absence upon filing for or accepting the candidacy.
- F.** An officer or employee of this agency may participate in political activities while off duty, including:
  - (1)** donating to political candidates;
  - (2)** volunteering or working for a political campaign or political organization, so long as the officer's or employee's work does not violate any applicable conflict-of-interest provision of this rule or statute; and
  - (3)** holding non-partisan political office, such as non-partisan county or municipal office or a seat on a local school board.

[1.8.4.12 NMAC-N, [insert date]]

#### **Commission Commentary to 1.8.4.12 NMAC**

##### **General Principles**

[1] Under the Governmental Conduct Act, a state officer or employee is prohibited from coercing other state officers and employees to contribute funds, their time, their endorsement, or their vote to any political candidate or organization. *See* NMSA 1978, § 10-16-3.1. Moreover, a state officer or employee may use their office “only to advance the public interest and not to obtain personal benefits or pursue private interests.” NMSA 1978, § 10-16-3(A). Subsection A synthesizes these provisions to bar a public officer or employee from using their official position to coerce others into participating in political activities. *See also* NMSA 1978, § 10-9-21 (State Personnel Act).

[2] Subsection B of this section protects the integrity of the electoral process and the personnel who administer it from interference or manipulation by any state officer or employee. State law prohibits state employees from engaging in partisan political activity while on duty. *See* NMSA 1978, 10-9-21(F).

[3] Subsection C of this section makes it improper to use any office supplies, facilities, equipment, or staff time to promote a political campaign, party other organization, or to authorize anyone else to do so.

[4] Public servants may, if they wish, participate in politics, on their own time and using their own resources. Subsection D of this section explicitly sets forth permitted political activities.

[5] As explained below, federal and state law impose additional restrictions on an employee's ability to run for public office. The existence and scope of the restriction turns on whether the employee's salary is funded with federal grant money or whether the employee is a member of the classified service. The Commission's proposed rule refers state officers and employees wishing to run for public office to these state laws.

##### **[6] History**

During most of the nineteenth century, much of American government was staffed by political appointees of each new president. This was known as the “spoils system,” taken from the expression, “to the victor belong the spoils.” This meant that the opportunity for a new president to appoint his supporters to virtually any government job was a reward for being elected. But it also meant that government agencies could see massive staff turnover after each election, with experienced public servants being replaced with the winning candidate’s supporters.

With the passage of the Pendleton Act of 1883, the federal government began a transition to civil service. Merit selection, based on testing and proof of qualifications, began to replace the spoils system. The numbers of federal government appointees chosen by merit increased over time, until only top policy positions were appointed at each president’s discretion. With merit selection came job security, protecting appointees from removal except for cause. In 1939, Congress passed the Hatch Act, which prohibited—and thereby protected—many employees of federal government from engaging in certain political activities.

**Federal law applies to political activity of some state employees.** The federal Hatch Act primarily controls political activity by federal officers and employees. But it also has limited application to State and local government employees whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency. *See* 5 U.S.C. §§ 1501(4), 1502. (Employees who work for educational or research institutions that are supported in whole or in part by a state or its political subdivision are not covered by the Hatch Act, even if they are also financed by the federal government. *See* 5 U.S.C. § 1501(4)(B).)

Under the Federal Hatch Act, State officers or employees whose principle jobs are funded with federal grants may not: (a) use their official authority or influence to affect the result of an election; or (b) seek political contributions from other public employees. State officers or employees whose jobs are completely funded by federal money may not run for office in any partisan election, but may run in non-partisan elections; *provided* that officers who already hold their office through a partisan election are allowed to run for that or other partisan offices.

If an employee subject to the Hatch Act violates these provisions, the employee must be dismissed or the state agency risks losing its federal funds. *See* 5 U.S.C. § 1506.

On the other hand, affected employees may, on their personal time:

1. run for public office in nonpartisan elections,
2. campaign for and hold office in political clubs and organizations,
3. actively campaign for candidates for public office in partisan and nonpartisan elections, and
4. contribute money to political organizations and attend political fundraising functions.

The United States Supreme Court, in upholding the constitutionality of the Hatch Act, found that “the end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for public needs to abstain from active political partisanship,” *Oklahoma v. US Civil Service Comm’n.*, 330 U.S. 127, 143 (1947). The Court has also found that the act furthers Congress’ goal that employment and advancement in government service not depend on political performance and that governmental employees be free from political pressure. *See United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

## Examples

[a] **Using special access to benefit a campaign.** The cousin of a special assistant at the Department of Finance and Administration is a candidate for County Sheriff in an upcoming election. The special assistant distributes campaign literature to her coworkers inside the Department of Finance and Administration’s office building. The special assistant has violated 1.8.4.12(C) NMCA because she used state property to promote a political campaign.

[b] **Encouraging employees to vote permitted.** A cabinet secretary sends a memo to her entire department, encouraging them to vote, explaining the agency’s leave policy for voting, and offering information on getting free rides to the polls. So long as the memo does not encourage the staff to vote for any particular candidate, party or ballot proposition, or otherwise suggest that employees must vote, this support for the department’s employees to exercise their right to vote is permitted. *See* 1.8.4.12 NMCA.

[c] **Solicitation of campaign contributions at the workplace prohibited.** At a staff meeting, a bureau chief tells the staff that they should all vote, and that if anyone wants to make a donation for a candidate who belongs his political party, he can deliver it. *See* 1.8.4.12(D) NMAC. While his appeal for political donations may be indirect, employees could reasonably be concerned that those who donate will be favored by the director. It therefore violates the Governmental Conduct Act and the State Personnel Act.

[d] **No campaign advertising at state offices.** A citizen walks into the County Clerk's office to file a deed, and sees a stack of campaign flyers on the counter, advocating the reelection of the County Clerk. This is improper use of government facilities for a political purpose. *See* 1.8.4.12(D) NMAC.

[e] **Nonpartisan political office.** Margaret decides that her children need a better education, so she decides to run for her district school board. She works for a federally funded program within the state Department of Transportation. Margaret can run for school board, because it is a non-partisan office. *See* 1.8.4.12(F)(3) NMAC;

[f] **Fundraising off the clock permitted.** A state employee is asked to raise money and serve as ward chair of her political party. She may raise the money on her own time and outside of her office, but the State Personnel Act prohibits her serving as a party ward chair. *See* 1.8.4.12(F)(2) NMAC. She would also be prohibited from serving as a board member for a political action committee, even as a volunteer.

#### **1.8.4.13 ETHICAL CONDUCT IN THE WORKPLACE**

- A.** An officer or employee of this agency with supervisory responsibility shall:
- (1) manage the hiring of new employees fairly and equitably;
  - (2) diligently investigate allegations of misconduct;
  - (3) refrain from unsolicited private business dealings with supervised employees, either directly or indirectly; and
  - (4) ensure all visitors and staff can access this agency's services.
- B.** An officer or employee of this agency shall:
- (1) treat colleagues with respect;
  - (2) learn about what behavior constitutes harassment, and make efforts to remove it from the workplace;
  - (3) report violations of this code of ethics or other laws to responsible authorities within this agency or to the Commission; and
  - (4) learn how to recognize and prevent substance abuse among this agency's personnel.
- [1.8.4.13 NMAC-N, [insert date]]

#### **Commission Commentary to 1.8.4.13 NMAC**

[1] Hiring and promotion decisions must be unbiased and merit-based. Policies and procedures of the State Personnel Office or those of higher education institutions are carefully structured toward that end. But hiring or promotion process always relies heavily on the judgment of managers, who must determine from interviews and experience the applicants who provide the best fit for the open position. Staff and job applicants understand that such discretion exists, and that it is subject to the value judgments and perceptions of the hiring officers. To ensure that this discretion is exercised fairly, officers and employees in managerial roles must take great care to advertise positions widely; schedule interviews for a diverse array of candidates; convene hiring committees trusted for their fairness and understanding of the qualifications for the position; establish uniform hiring procedures for all interviewed candidates; and emphasize to staff the suitability of those hired or promoted.

State law prohibits nepotism. NMSA 1978, § 10-1-10; *see also* 1.7.6.8 NMAC (State Personnel Office rule). A state officer or employee may neither hire nor supervise in violation of this law. Nepotism exists when a manager



hires or supervises someone within the third degree of consanguinity (blood) or affinity (marriage). This translates into anyone falling into one of the following relationships: spouse, children, parents, children-in-law, parents-in-law, siblings and siblings-in-law, grandparents and grandparents-in-law, grandchildren and grandchildren-in-law, great grandparents and great-grandchildren, aunts and uncles, nieces and nephews. Step relationships are the same as blood, but not in-law, relationships.

[2] The most effective managers show interest in the work of their staff and recognize their skills and successes. They encourage staff to take training in the skills and knowledge they need to accomplish their work, especially challenging new assignments. When unintentional mistakes are made, they are treated as learning experiences rather than cause for reprimand. People who show initiative will sometimes fail, but discouraging their innovation by demanding conformity stifles progress. But if a supervisor becomes aware of deliberate misconduct, especially if it is harmful to co-workers or detrimental to the mission of the agency, she must start disciplinary action promptly. Disciplinary procedures consistent with agency policy should be invoked to prevent damage from escalating, to intervene while modest measures are sufficient, and to prevent repetition of the offending conduct by that employee or any other.

[3] The influence entrusted to a supervisor over his subordinates should never be exploited for his personal gain. One way in which the Governmental Conduct Act protects employees from this ethical violation is the rule prohibiting supervisors from selling anything to employees they supervise, unless the employee initiates the request. NMSA 1978, § 10-16-13.2(A). No unsolicited sale can be made directly by the supervisor, through a family business, or through a business in which the supervisor holds a substantial interest (at least 20% ownership, or employment or prospective employment with the business). The supervisor is also prohibited from receiving a commission or any other kind of profit from a sale to the employee. But if the supervisor or business making the sale did not know the buyer was under his supervision, there is no violation of this law. For the same reasons, supervisors should not use their authority to pressure the staff that they supervise to make charitable donations.

[4] Managers have a duty to make sure that all who do business with their agency, whenever possible, have positive experiences. Staff who deal with the public should be trained and encouraged to be polite, patient, and informative to all who come for assistance. Training in how to calm agitated people will inevitably prove useful. Members of the public seeking information from agency staff should receive it promptly or be informed when it will be available. When visitors cannot get what they need from an agency, the staff should know or find out where to refer the visitor for the information; calling ahead on the visitor's behalf draws special appreciation. Staff should also be prepared for reporters to drop in unexpectedly. News reporters may quite accurately point out that the public is entitled to know what the agencies of government are doing, but that doesn't mean every staff member at the agency must open up with their perspectives. Management should designate a limited number of informed officers who can talk to the media on behalf of the agency and advise all other staff to refer inquiries to them.

[5] The Americans with Disabilities Act requires state agencies to make reasonable accommodations for the needs of people with disabilities. 42 U.S.C. §§ 12131-12133. This requirement extends not only to physical accommodations, such as wheelchair ramps and automatic door openers, but to services as well. For example, hearing impaired people may need to have information communicated in American Sign Language. Agencies should consider and prepare for the kinds of disabilities that their clients might have. Apart from disabilities, clients whose first language is not English may require interpretative services. While agencies may not have interpreters on staff to meet the communications needs of unexpected visitors, there should be professionals on call by appointment. The New Mexico Constitution, at Section 3 of Article VII, specifically extends rights to vote, hold public office and serve on juries to people who require interpretation to understand English. This right was confirmed by the New Mexico Supreme Court in *State v. Rico*, 2002-NMSC-022. Agencies should view this constitutional right as applicable to all their important duties and services.

[6] Differences of opinion among staff are inevitable but should be managed as opportunities to consider different perspectives and be discussed until resolved. Disagreement should be channeled away from destructive conflict before it begins. Once insults fly, threats are exchanged or "flaming" emails sent to a large office distribution list, the damage will take far longer to repair. This is not only a responsibility of managers, but of all staff. Mediation services should be drawn upon where internal efforts fail to resolve problems. When office disputes become ongoing harassment, including bullying, the situation can be so deep seated as to cause mass departures. Office personnel

should support management in identifying and controlling such behavior, and management must take rapid and decisive action, drawing upon available human resources experts.

[7] Sexual harassment has no place in workplaces. It is prohibited by Title VII of the federal Civil Rights Act of 1964 and can be reported to the Equal Employment Opportunity Commission for action. It may also be reported to the New Mexico Human Rights Commission under Subsection 7 of the Human Rights Act, NMSA 1978, § 28-8-1. Victims of sexual harassment are entitled to file suits for damages against agencies that tolerate sexual harassment and do not make adequate efforts to prevent or respond to it. All public officers and staff of state government shall be thoroughly trained in conduct that constitutes sexual harassment, and management shall establish and enforce mechanisms to discipline those who commit it.

[8] The Whistleblower Protection Act, NMSA 1978, § 10-16C-1, protects public officers and employees from retaliation for reporting or refusing to engage in misconduct. Specifically, an employee is protected when:

- (a) communicating to the public employer or a third-party information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act;
- (b) providing information to, or testifying before, a public body as part of an investigation, hearing or inquiry into an unlawful or improper act; or
- (c) objecting to or refusing to participate in an activity, policy or practice that constitutes an unlawful or improper act.

For example, an employee who complains to his supervisor or to the Attorney General about misuse of funds within his agency is protected against being fired or demoted for uncovering the improper acts. Whistleblowing can be a difficult thing to do to one's colleagues, both because of the harm it can do to them and because of the retaliation that may come to the complaining employee. It usually takes time for whistleblowing employees to be vindicated by the Whistleblower Protection Act. An employee who sees misconduct should nonetheless consider whether it is his public duty to report it to his supervisor or other authority. If doing so results in retaliation to the employee, consultation with legal counsel is advised.

[9] Substance abuse can inflict horrific consequences on abusers and their families. Employers also suffer from loss of productive work, conflicts, mistakes on the job, accidents that may inflict injuries and even deaths. Colleagues may be forced to compensate for abusers' neglect of duties. Agencies may be sued over accidents or mistakes of judgment by personnel who are under the influence. All staff should therefore be trained in the signs of substance abuse and should know the resources available locally to help abusers. The Americans with Disabilities Act, 42 U.S.C. §§ 12131-12133, considers substance abuse a disability, for which employers must attempt to make reasonable accommodation, which may include directing abusers to treatment resources. Management should seek guidance from its human resources officers and legal counsel before disciplining or terminating the employment of a substance abuser.

[10] The State Ethics Commission hears and decides complaints alleging unethical conduct in state government. Complaints that fall within the jurisdiction of the Commission may be investigated and brought before hearing officers for action to correct or punish the misconduct. Some complaints will be referred to other agencies that have authority to handle them. Complaints of criminal misconduct may be referred to prosecutors to file charges. The State Ethics Commission Act protects a person who files a complaint with the Commission from retaliation. For more information, go to the State Ethics Commission's website: [www.sec.state.nm.us](http://www.sec.state.nm.us).

### **Examples**

[1] Fred decides to surprise his boss with a new approach to notices of public meetings. He carefully reviews the requirements of the law and the agency's rules regarding public notice. Starting from that required content, he adds information that he thinks will assist the public in understanding the agenda. His boss calls him in and criticizes him, explaining that the notice must strictly adhere to the format the agency uses and that the attorney has previously approved. The boss should have considered his response should have been more considered. The attorney could have been consulted again to approve the new version of the notice. The boss discouraged Fred from trying new ideas, and the department lost an opportunity to increase public participation. *See* 1.8.4.13(A)(4) NMAC.

[2] A new employee initially impresses his supervisor with his hard work and skill. But he soon starts challenging the way things are done, questioning the wisdom and the intentions of the middle management on many issues. He begins to demand repeated staff meetings devoted to changing the office's procedures and dominates those meetings with lengthy criticisms and personal attacks on those with whom he disagrees. His immediate supervisor, who appreciates the skills that he brings, does not wish to control the employee. But the demands and attacks keep growing, with increasingly unfounded accusations flying. Several other staff start taking his side against management and the people he attacks. An office should encourage constructive criticism so that it can improve its services. But when battle lines are drawn, alliances built, and criticisms become personal and of questionable validity, constructive criticism can turn into a power grab. The management needs to use discipline to protect the office and bring the bully under control. *See* 1.8.4.13(B)(1)-(2) NMAC.

[3] Jacquelyn, who reviews and approves timesheets for her unit. She notes that John, a part-time co-worker paid by the hour, has been at his desk less and less often. Yet the timesheets he submits appear to be unchanged from week to week, claiming the same amount of time spent at work. *See* 1.8.4.10(F)(1) NMAC. She asks him about this, and he responds that he's getting the same work done faster so he should be paid the same amount regardless of the hours he spends. Jacquelyn hesitates to say anything about John's false time reports and possibly get him because she knows he could get fired from a job she knows he needs. Nonetheless, she must report John's misconduct to her supervisor John's misconduct and his false claims to be compensated for time not spent on the job. *See* 1.8.4.13(A)(2), (B)(3) NMAC.

[4] An elderly Navajo woman arrives at a Department of Workforce Solutions field office with her 10-year old grandson to apply for her unemployment benefits. It is immediately clear that the woman has a very limited 's understanding of English, and she has brought her grandson to interpret. A Department employee tries to explain the application process to the boy, but he clearly struggles to translate the information into Navajo. The department employee offers to schedule an appointment with a trained Navajo interpreter, at the agency's expense. *See* 1.8.4.13(A)(4) NMAC.

[5] Jan, a member of a racial minority, is getting tired of hearing the daily bigoted remarks of one of her co-workers, Sam. He makes no effort to hide his ethnic prejudices. He uses racially charged language loudly enough for minority members of the staff to hear, always following the offensive remarks by claiming that he is just telling harmless jokes. *See* 1.8.4.13(B)(1) NMAC. Jan complains privately to their supervisor, who expresses his sympathy and advises her to ask Sam directly to watch his language. The supervisor should not pass this responsibility back to Jan. *See* 1.8.4.13(B)(2) NMAC. But because the supervisor has authority to hold employees accountable for his unacceptable conduct, it is the supervisor who must talk with Sam. *See* 1.8.4.13(A)(2) NMAC.

**TITLE 1           GENERAL GOVERNMENT ADMINISTRATION**  
**CHAPTER 8       STATE ETHICS COMMISSION**  
**PART 4           CODE OF ETHICS**

**1.8.4.1           ISSUING AGENCY:** State Ethics Commission, 800 Bradbury Dr. SE, Ste. 215, Albuquerque, New Mexico 87106.

[1.8.4.1 NMAC-N, [insert date]]

**1.8.4.2           SCOPE:** This part contains a proposed code of ethics for officers and employees of executive and legislative state agencies and other institutions and instrumentalities of the state. Elected statewide executive branch officers and other state agencies must consider this proposed code when adopting either a code of conduct under Subsection C of Section 11 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978, or a code of ethics under Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978, for employees subject to the adopting agencies' control. If adopted, this code will apply to all officers and employees of the adopting agency, as well as other persons working for the agency, such as contractors.

[1.8.4.2 NMAC-N, [insert date]]

**1.8.4.3           STATUTORY AUTHORITY:** Sections 11 and 11.1 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978; and Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978.

[1.8.4.3 NMAC-N, [insert date]]

**1.8.4.4           DURATION:** Permanent.

[1.8.4.4 NMAC-N, [insert date]]

**1.8.4.5           EFFECTIVE DATE:** January 1, 2021, unless a later date is cited at the end of a section, in which case the later date is the effective date.

[1.8.4.5 NMAC-N, [insert date]]

**1.8.4.6           OBJECTIVE:** The objective of this part is to provide the executive and legislative branch agencies of state government and other institutions and instrumentalities of the state with a proposed code of ethics to consider when agencies adopt either a code of ethics under Paragraph 4 of Subsection B of Section 5 of the State Ethics Commission Act, Section 10-16G-1 NMSA 1978, or a code of conduct under Sections 11 and 11.1 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978.

[1.8.4.6 NMAC-N, [insert date]]

**1.8.4.7           DEFINITIONS:** The following terms apply to this part unless their context clearly indicates otherwise:

**A.           “Agency” or “this Agency”** means the agency that has adopted this proposed code of ethics.

**B.           “Business”** means an entity other than this agency.

**C.           “Code”** means this proposed code of ethics.

**D.           “Commission”** means the State Ethics Commission.

**E.           “Financial interest”** means an interest held by an individual or the individual's family that is an ownership interest in a business or property; or employment or prospective employment for which negotiations have already begun.

**F.           “Gift”** has the same meaning as defined by Subsection B of Section 2 of the Gift Act, Section 10-16B-1 NMSA 1978, namely, any donation or transfer without commensurate consideration of money, property, service, loan, promise or any other thing of value, including food, lodging, transportation and tickets for entertainment or sporting events, but does not include:

**(1)** any activity, including but not limited to the acceptance of a donation, transfer or contribution, or the making of an expenditure or reimbursement, that is authorized by the Campaign Reporting Act or the Federal Election Campaign Act of 1971, as amended;

**(2)** a gift given under circumstances that make it clear that the gift is motivated by a family relationship or close personal relationship rather than the recipient's position as a state officer or employee or candidate for state office;

**(3)** compensation for services rendered or capital invested that is:

- (a) normal and reasonable in amount;
- (b) commensurate with the value of the service rendered or the magnitude of the risk taken on the investment;
- (c) in no way increased or enhanced by reason of the recipient's position as a state officer or employee or candidate for state office; and
- (d) not otherwise prohibited by law;
- (4) payment for a sale or lease of tangible or intangible property that is commensurate with the value of the services rendered and is in no way increased or enhanced by reason of the recipient's position as a state officer or employee or candidate for state office;
- (5) a commercially reasonable loan made in the ordinary course of the lender's business on terms that are available to all similarly qualified borrowers;
- (6) reimbursement for out-of-pocket expenses actually incurred in the course of performing a service for the person making the reimbursement;
- (7) any gift accepted on behalf of and to be used by the state or a political subdivision of the state, including travel, subsistence and related expenses accepted by a state agency in connection with a state officer's or employee's official duties that take place away from the state official's or employee's station of duty;
- (8) anything for which fair market value is paid or reimbursed by the state officer or employee or candidate for state office;
- (9) reasonable expenses for a bona fide educational program that is directly related to the state officer's or employee's official duties; or
- (10) a retirement gift.

**G. “Indirectly”** means with and on account of the subject’s knowledge, acquiescence, or recommendation.

**H. “Market value”** means the amount for which a good or service can be sold on the relevant market.

**I. “Restricted donor”** has the same meaning as defined by Subsection D of Section 2 of the Gift Act, Section 10-16B-1 NMSA 1978, namely, a person who:

- (1) is or is seeking to be a party to any one or any combination of sales, purchases, leases or contracts to, from or with the agency in which the donee holds office or is employed;
- (2) will personally be, or is the agent of a person who will be, directly and substantially affected financially by the performance or nonperformance of the donee’s official duty in a way that is greater than the effect on the public generally or on a substantial class of persons to which the person belongs as a member of a profession, occupation, industry or region;
- (3) is personally, or is the agent of a person who is, the subject of or party to a matter that is pending before a regulatory agency and over which the donee has discretionary authority as part of the donee’s official duties or employment within the regulatory agency; or
- (4) is a lobbyist or a client of a lobbyist with respect to matters within the donee’s jurisdiction.

**J. “Official act”** means any act or omission to act that would not be possible but for the actor’s official position or state employment.

**K. “Shall”** means must, and **“must”** means shall.

**L.** Any other terms shall be defined for purposes of this rule as they are defined in Section 2 of the Governmental Conduct Act, Section 10-16-1 NMSA 1978.

[1.8.4.7 NMAC-N, [insert date]]

**1.8.4.8 STRUCTURE OF THIS CODE AND CORRESPONDING COMMENTARY:**

**A.** This Code is organized by subject area rather than by the statutes that concern the various subject matters of this code.

**B.** The Commission publishes and updates extensive commentary and examples corresponding to this Code on the Commission’s website. An official or employee of this agency dealing with an ethical issue should identify and consult the relevant sections of this Code. If this Code does not resolve the issue, further guidance might be found in the Commission’s separately published commentary.

[1.8.4.8 NMAC-N, [insert date]]

**1.8.4.9 PRINCIPLES OF PUBLIC ETHICS:** This Code is based on, and should be interpreted to advance, the following principles of public ethics:

**A. Honest services.** An officer or employee shall conduct government business in accordance with the law and free from conflicts of interest. Public office is a public trust; as such, an official or employee must take care to ensure that every official act and decision affecting the rights or interests of individuals is based in law and the public interest.

**B. Proportionality.** When committing an official act or making a decision, an officer or employee shall ensure that the action taken is proportional to the goal being pursued. The officer or employee shall avoid restricting the rights of New Mexicans or imposing burdens on them, when those restrictions or burdens are not justified by a public interest.

**C. Impartiality and fairness.** The conduct of an officer or employee shall never be guided by:

- (1) personal, family or financial interests;
- (2) a motivation to benefit or empower an elected official, a candidate for office, or a political party or its members; or
- (3) a motivation to disadvantage or disempower an elected official, a candidate for office, or a political party or its members.

**D. Consistency.** Like cases shall be treated alike. An officer or employee shall behave consistently with the agency's normal practices, unless there is a legitimate basis for departing from those practices in an individual case and that basis is documented in writing. An officer or employee shall respect the reasonable expectations of the public that the agency will continue to act as it has acted in similar circumstances unless there is an articulable reason for change.

**E. Diligence.** An officer or employee shall ensure that every decision on a matter is made with care and adequate understanding of the issue, within a reasonable time, and without unnecessary delay.

**F. Respect.** An officer or employee shall be courteous and accessible to the public and their colleagues.

**G. Transparency.** An officer or employee's official acts and decisions shall be made openly and with adequate opportunity for public review and comment.

**H. Fallibility and reversibility.** Individuals not only err in judgment but also act in ways that unconsciously benefit some and burden others; accordingly, an officer or employee shall endeavor to take official acts and make decisions in ways that are deliberative, open to review and, where appropriate, reversible.  
[1.8.4.9 NMAC-N, [insert date]]

#### **1.8.4.10 HONEST SERVICES; AVOIDING CONFLICTS OF INTEREST**

##### **A. Outside employment.**

(1) **Duty to avoid conflicts from outside employment.** An officer or employee of this agency engaged in paid employment for a business shall ensure that the employment does not conflict with the duties of state employment.

(2) **Disclosure of outside employment.** An officer or employee having permissible outside employment shall:

- (a) file with the employee's supervisor, or other officer or employee that this agency designates, a signed statement explaining the outside employment and why it does not create a conflict;
- (b) the disclosure statement shall include the name of the officer or employee, the name and general nature of the business, the hours that the officer or employee will work, and the reasons why the work does not create a conflict of interest with the officer or employee's public duties;
- (c) in the disclosure statement, the officer or employee shall additionally commit to disclose any potential conflict of interest that may arise during the officer or employee's work with the business.

##### **B. Disclosure of potential conflicts of interest and disqualification.**

###### **(1) Disclosure of financial interests.**

(a) **Mandatory financial disclosure by officers and agency heads.** An officer or head of this agency must disclose financial interests to the Secretary of State on the form provided by the Secretary of State.

(b) **Disclosure of financial interests: contents; when filed.** The disclosure required by 1.8.4.10.B(1)(a) NMAC shall be filed within thirty days of taking office and each January thereafter and shall disclose the following financial interests of the filing individual and the filing individual's spouse, for the prior calendar year:

- (i) current employer and the nature of the business or occupation;
- (ii) all sources of gross income over \$5,000, identified by category;
- (iii) real estate owned in the state other than the personal residence;

- (iv) other business interests of \$10,000 or greater value;
- (v) memberships on for-profit boards;
- (vi) New Mexico professional licenses held;
- (vii) sales to state agencies exceeding \$5000 for the prior year; and
- (viii) state agencies before which clients were represented or assisted during

the prior year.

**(c) Officers and employees required to disclose potentially conflicting financial interests; when filed.** An officer or employee of this agency must file a disclosure of financial interests when the officer or employee believes, or has reason to believe, that their financial interest may be affected by their official acts or actions of the state agency that employs them. The disclosure must be filed before entering state employment or within ten days of the date when the officer or employee knows, or should know, that a potential conflict has arisen and each subsequent January, so long as the conflict or potential conflict continues to exist.

**(d) Financial disclosure statements are public records.** All disclosures required under this subsection are public records.

**(2) Disqualification from acts affecting financial interests.**

**(a)** An officer or employee of this agency may not take official acts for the purpose of enhancing their financial interests. An officer or employee must be disqualified from any matters that could directly enhance or diminish the officer's or employee's financial interest. If disqualified, then the officer or employee shall refrain from acting on a matter involving the disqualifying financial interest.

**(b)** An officer or employee of this agency is not disqualified from taking an official action under 1.8.4.10(B)(2)(a) NMAC if the benefit of the official act to the officer's or employee's financial interest is proportionately equal to or less than the benefit to the general public.

**C. Business with regulated entities.**

**(1) Sales to regulated persons.** An officer or employee of this agency may not directly or indirectly sell goods or services to, or profit from a transaction with, a business or individual over whom this agency has regulatory authority.

**(2) No acceptance of job or contract offers from regulated entities.** An officer or employee of this agency may not accept an offer of employment from, or a contract to provide goods or services to any entity that this agency regulates. An officer or employee shall disqualify themselves from any official act or decision affecting a business in which an immediate family member is employed or in which the officer or employee seeks employment.

**(3) Ordinary transactions at market rates allowed.** Nothing in this rule prevents an officer or employee from purchasing or contracting for services or goods from a regulated entity on the same basis available to any other member of the public.

**D. Accepting or Giving Gifts.**

**(1) Gifts from restricted donors.** An officer or employee of this agency may not, directly or indirectly, solicit a gift from, and shall decline any gift offered by, a restricted donor or by any person who gives a gift because of the donee's status as an official or employee of this agency.

**(2) Gifts and business from subordinates.** An officer or employee of this agency may not, directly or indirectly:

**(a)** accept a gift from an employee having a lower grade or receiving less pay, unless the donor and donee are not in a subordinate-superior relationship and there is a personal relationship between the donor and recipient that would justify the gift.

**(b)** solicit business from a supervised employee where the business redounds to the financial interest of the officer or employee or an immediate family member.

**(3) Soliciting gifts for charities.** An officer or employee of this agency may not solicit or require a charitable donation from any business, or an agent of any business, regulated by or contracting with this agency; nor from any employees that the officer or employee supervises.

**(4) Declining permissible gifts.** An officer or employee of this agency shall consider declining an otherwise permissible gift, if they believe that a reasonable person with knowledge of the relevant facts would question the officer or employee's integrity or impartiality as a result of accepting the gift. Among other relevant factors, the officer or employee shall take into account whether:

**(a)** The gift has a high market value;

**(b)** The timing of the gift creates the appearance that the donor is seeking to influence an official action;

(c) The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the officer or employee's duties; and

(d) Acceptance of the gift would provide the donor with significantly disproportionate access.

(5) **Disclosure of offers of gifts from restricted donors.** If a restricted donor offers a gift of any value to an officer or employee of this agency, or if an officer or employee of this agency unintentionally receives a gift from a restricted donor, the officer or employee should report to their supervisor: the date the offer was made or the gift was received, the name of the donor and the donor's relationship to the agency, the nature and value of the gift, and whether the officer or employee accepted or refused the gift.

(6) **Certain donations of private funds prohibited.** No officer or employee of this agency may give:

(a) a gift from their own funds to any person with whom their agency is doing business, or considering doing business, under circumstances which may appear to favor the recipient over other similarly situated persons; or

(b) a gift to any other state officer or employee when the gift may be, or may appear to be, intended to influence any official decision by the recipient.

(7) **Certain donations of public funds prohibited.** No officer or employee of this agency may give to any person any gift from public funds, unless the gift:

(a) is a service appreciation award of de minimis value; or

(b) does not violate the Anti-Donation Clause, N.M. Const., Art. IX, § 14.

**E. Honoraria; no solicitation or acceptance of honoraria permitted for speaking or writing.**

(1) An officer or employee of this agency may not request or receive honoraria for a speech or service that relates to the performance of public duties; provided that an officer or employee of this agency may accept reasonable reimbursement for meals, lodging or actual travel expenses incurred in making the speech or rendering the service.

(2) An officer or employee of this agency may accept payment for services rendered in the normal course of a private business pursuit.

**F. Timekeeping, reimbursement, and use of state property.**

(1) An officer or employee of this agency must work during the hours required and report time accurately.

(2) An officer or employee of this agency shall not claim reimbursement in excess of what is necessary and incidental to an official duty or action.

(3) An officer or employee of this agency shall limit personal use of state office supplies and assigned equipment, such as computers and telephones, and otherwise shall not use state property or expend state funds for private purposes.

**G. Procurement.**

(1) **Fair and equitable treatment of persons involved in public procurement.** An officer or employee of this agency shall treat persons involved in public procurement fairly and equitably.

(2) **Maximize the value of public funds.** An officer or employee of this agency involved in procurement shall endeavor to maximize the purchasing value of public funds.

(3) **Conflicts of interest prohibited; agency waiver.**

(a) An officer or employee of this agency shall not participate directly or indirectly in a procurement when the officer or employee, or their immediate family member, has a financial interest in a business participating in the procurement.

(b) An officer or employee of this agency who is participating directly or indirectly in procuring goods or services for this agency shall not be simultaneously employed by any person or business contracting with this agency.

(c) A conflict of interest under subparagraphs (a) or (b) this Paragraph may be waived by this agency, if the contemporaneous employment or financial interest has been publicly disclosed, the officer or employee is able to perform procurement functions without actual or apparent bias or favoritism, and the officer or employee's participation is in the best interests of this agency.

(4) **Due diligence by agency.**

(a) **Participation by person submitting bid or proposal.** An officer or employee of this agency assessing a bid or proposal shall exercise due diligence to ensure that the person submitting the bid or proposal did not participate in the preparation or receive any advance notice of specifications, qualifications or evaluation criteria on which the specific bid or proposal was based.