



STATE ETHICS COMMISSION
MEETING

April 2, 2021

PUBLIC MEETING MATERIALS PACKET

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STATE ETHICS COMMISSION

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

Friday, April 2, 2021, 9:00 a.m. to 12:00 p.m (Mountain Time).

Zoom Meeting

Location: Virtual Meeting Via Zoom

Join Zoom meeting through internet browser:

<https://us02web.zoom.us/j/87348251731?pwd=aUIKQVZrUDNSSDdKbCtmRkVzb04xZz09>

Meeting ID: 873 4825 1731

Online Meeting Passcode: PGU4vG

Join Zoom meeting telephonically: (669) 900 9128

Telephone Passcode: 888272

COMMISSION MEETING

Chairman Lang Calls the Meeting to Order

1. Roll Call
2. Approval of Agenda
3. Approval of Minutes of February 5, 2021 Commission Meeting

Commission Meeting Items	Action Required
4. Outcomes from the 2021 legislative session (<i>Farris</i>)	No
5. Process for appointments to Citizens Redistricting Committee (<i>Farris</i>)	Yes
6. Timeline for rulemaking hearing on amendments to 1.8.3 NMAC (<i>Farris</i>)	No
7. Update on October 1, 2021 special report (<i>Farris & Kiley</i>)	No
8. Advisory Opinion 2021-06 (<i>Farris</i>)	Yes
9. Advisory Opinion 2021-07 (<i>Farris</i>)	Yes

Upon applicable motion, Commission goes into Executive Session under NMSA 1978, §§ 10-15-1(H)(2) (limited personnel matters), 10-15-1(H)(3) (administrative adjudicatory proceedings) & 10-15-1(H)(7) (attorney client privilege pertaining to litigation)

10. Discussions regarding administrative complaints
(*Farris & Boyd*)
 - a. Administrative Complaint No. 2020-07
 - b. Administrative Complaint No. 2020-31
 - c. Administrative Complaint No. 2020-40
 - d. Administrative Complaint No. 2021-04
 - e. Administrative Complaint No. 2021-05
 - f. Administrative Complaint No. 2021-06
 - g. Administrative Complaint No. 2020-08
11. Discussions regarding pending civil litigation
(*Farris & Boyd*)
12. Executive director annual performance evaluation
(*Lang*)

Upon applicable motion, Commission returns from Executive Session

- | | |
|---|-----|
| 13. Actions on Administrative Complaints
(<i>Farris</i>) | Yes |
|---|-----|

- a. Administrative Complaint No. 2020-07
- b. Administrative Complaint No. 2020-31
- c. Administrative Complaint No. 2020-40
- d. Administrative Complaint No. 2021-04
- e. Administrative Complaint No. 2021-05
- f. Administrative Complaint No. 2021-06
- g. Administrative Complaint No. 2020-08

No

14. Public Comment

No

15. Determination of next meeting
(Lang)

16. Adjournment

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

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



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

STATE ETHICS COMMISSION

Commission Meeting Minutes of February 5, 2021 | 9:00pm-12:00pm
Virtually Via Zoom
[View Recording Here](#)

[SUBJECT TO RATIFICATION BY COMMISSION]

1. CALL TO ORDER AND ROLL CALL:

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

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

2. APPROVAL OF AGENDA:

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

3. APPROVAL OF DECEMBER 4, 2020 COMMISSION MEETING MINUTES:

- Chair Lang sought a motion to approve the minutes of the December 4, 2020 Commission meeting. Commissioner Williams moved to approve the minutes; Commissioner Carruthers seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the minutes were approved unanimously.

4. ADVISORY OPINION 2021-01

- Director Farris provided an overview of Advisory opinion 2021-01.
- Chair Lang sought a motion to approve the advisory opinion. Commissioner Baker moved to approve advisory opinion 2021-01; Commissioner Villanueva seconded. After a discussion on the motion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and advisory opinion 2021-01 was approved unanimously.

5. ADVISORY OPINION 2021-02

- Deputy General Counsel, Rebecca Branch, provided an overview of Advisory opinion 2021-02.
- Chair Lang sought a motion to approve the advisory opinion. Commissioner Bluestone moved to approve advisory opinion 2021-02; Commissioner Williams seconded. After a discussion on the advisory opinion's content and structure, Commissioner Villanueva sought clarification on the answer provided to the second question. Director Farris recommended revising the opinion to move the original penultimate paragraph to the summary of the opinion in order to provide a clearer answer in the answer section of the opinion. With Commissioner Villanueva in agreement with the revision, and with Commissioners Bluestone and Williams' approval of the amendment to the motion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and advisory opinion 2021-02 (amended as stated above) was approved unanimously.

6. ADVISORY OPINION 2021-03

- General Counsel Boyd provided an overview of Advisory opinion 2021-03.
- Chair Lang sought a motion to approve the advisory opinion. Commissioner Bluestone moved to approve advisory opinion 2021-03; Commissioner Williams seconded. After a discussion of the advisory opinion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and advisory opinion 2021-03 was approved unanimously.

7. ADVISORY OPINION 2021-04

- Director Farris provided an overview of Advisory opinion 2021-04.
- Chair Lang sought a motion to approve the advisory opinion. Commissioner Baker moved to approve advisory opinion 2021-04; Commissioner Bluestone seconded. After a discussion of the advisory opinion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and advisory opinion 2021-04 was approved unanimously.

8. ADVISORY OPINION 2021-05

- General Counsel Boyd provided an overview of Advisory opinion 2021-05.
- Chair Lang sought a motion to approve the advisory opinion. Commissioner Carruthers moved to approve advisory opinion 2021-05; Commissioner Baker seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and advisory opinion 2021-05 was approved unanimously.

9. EXECUTIVE SESSION

Chair Lang sought a motion to enter executive session under NMSA 1978, §§ 10-15-1(H)(3) (administrative adjudicatory proceedings) & 10-15-1(H)(7) (attorney-client privilege pertaining to litigation). Commissioner Carruthers moved to enter executive session; Commissioner Villanueva seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and the Commissioners entered an executive session.

---BEGINNING OF EXECUTIVE SESSION---

- The following matters were discussed in executive session:
 - Administrative Case No. 2020-031
 - Administrative Case No. 2020-034 (consolidated with No. 2020-035)

- Administrative Case No. 2020-039
 - Administrative Case No. 2021-001
 - Pending civil litigated matters
- The matters discussed in the closed meeting were limited to those specified in the motion to enter executive session. After concluding its discussion of these matters, the Commission resumed public session upon an applicable motion.

---END OF EXECUTIVE SESSION---

10. ACTIONS ON ADMINISTRATIVE CASES

Administrative Case 2020-031:

- Director Farris asked the Commission for a motion to instruct staff to continue its investigation in administrative case No. 2020-031 under 10-16G-11(A) of the State Ethics Commission Act for another 90 days.
- Chair Lang sought a motion to authorize the staff to continue its investigation in case 2020-031 for another 90 days. Commissioner Carruthers moved to authorize the staff as stated above; Commissioner Bluestone seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and the motion was approved unanimously.

Administrative Case 2020-031:

- Director Farris asked the Commission for a motion to authorize the attorney staff to file a petition for subpoenas with the Commission's appointed district court judge.
- Chair Lang sought a authorize the staff as stated above. Commissioner Solimon moved to authorize the staff as stated above; Commissioner Williams seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and the motion was approved unanimously.

Administrative Case 2020-034 (Consolidated with Case 2020-035):

- Director Farris asked the Commission for a motion to instruct staff to continue its investigation in administrative case No. 2020-034 (consolidated with 2020-035) under 10-16G-11(A) of the State Ethics Commission Act for another 90 days.
- Chair Lang sought a motion to authorize the staff as stated above. Commissioner Villanueva moved to authorize the staff as stated above; Commissioner Baker seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and the motion was approved unanimously.

Administrative Case 2020-034 (Consolidated with Case 2020-035):

- Director Farris asked the Commission for a motion to authorize the attorney staff to file a petition for subpoenas with the Commission's appointed district court judge.
- Chair Lang sought a motion to authorize the staff as stated above. Commissioner Bluestone moved to authorize the staff as stated above; Commissioner Williams seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the motion was approved unanimously.

Administrative Case 2020-039:

- Director Farris asked the Commission for a motion to dismiss case No. 2020-039 for lack of jurisdiction.
- Chair Lang sought a motion to authorize the staff as stated above. Commissioner Solimon moved to dismiss case 2020-39 as stated above; Commissioner Villanueva seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the case was dismissed unanimously.

Administrative Case 2021-01:

- Director Farris asked the Commission for a motion to dismiss case No. 2020-01 for lack of jurisdiction.
- Chair Lang sought a motion to authorize the staff as stated above. Commissioner Williams moved to dismiss case 2021-01 as stated above; Commissioner Bluestone seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative, and the case was dismissed unanimously.

11. CONSIDERATION OF ENDORSEMENT OF LOBBYIST DISCLOSURE BILLS

- Commissioner Bluestone provided an overview of SB 314 (which would require lobbyists to disclose the bills they are lobbying on) and moved for the Commission to endorse SB 314 and also to allow for Director Farris to serve as an expert witness when the bill is reviewed by legislative committees. Commissioner Williams seconded the motion as stated above. Chair Lang invited Commissioners to provide comments.
 - o In addition to multiple comments and questions from Commissioners, one member of the public, Rikki-Lee Chavez (on behalf of herself and New Mexico Capitol Counsel and Consulting) provided a comment that if a bill such as this were to pass, it would be important for the legislature to provide a supplemental appropriation to account for the additional workload on the Secretary of State's office which Ms. Chavez alleged is overburdened in the administration of the current system for lobbyist reporting. Ms. Chavez also stated that the bill might hinder negotiations around legislation by causing parties to pre-register their stances on bills.
- After a discussion of the merits and demerits of the motion, Commissioner Bluestone amended his motion to be sectioned into two parts with the first, moving the Commission to endorse SB 314 and the second, to allow Director Farris to testify as an expert witness in favor of the bill.
- Chair Lang conducted a roll-call vote. The votes are as follows:
 - o Commissioner Baker, No
 - o Commissioner Bluestone, Yes
 - o Commissioner Carruthers, Yes
 - o Commissioner Solimon, No
 - o Commissioner Villanueva, Abstain
 - o Commissioner Williams, Yes
 - o Chair Lang, No
- The motion failed to pass because of the lack of the requisite number of affirmative votes as set forth in Section 10-16G-3(H) of the State Ethics Commission Act.

12. CONSIDERATION OF ENDORSEMENT OF OTHER BILLS AFFECTING THE COMMISSION

- Commissioner Bluestone provided an overview of SB 311, which would require disclosure of lobbyists compensation by lobbyists and their employers. Commissioner Bluestone motioned to have the Commission endorse SB 311.
- Chair Lang conducted a roll-call vote. The votes are as follows:
 - o Commissioner Baker, No
 - o Commissioner Bluestone, Yes
 - o Commissioner Carruthers, No
 - o Commissioner Solimon, No
 - o Commissioner Villanueva, No
 - o Commissioner Williams, Yes
 - o Chair Lang, No
- The motion failed to pass because of the lack of the requisite number of affirmative votes as set forth in Section 10-16G-3(H) of the State Ethics Commission Act.

13. COMMISSION STAFF PERFORMANCE EVALUATIONS

- Commissioner Williams inquired about job descriptions for the Executive Director and the agency staff and asked for documents regarding the organizational composition of the agency. Additionally, Commissioner Williams proposed conducting performance evaluations of the Director and staff.
- Director Farris provided an overview of past instances where agency organizational and personnel information has been shared as well as where that information can be found presently. Director Farris stated he would provide additional information sought in the next weekly update to Commissioners.

14. PUBLIC COMMENTS

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

- **Tony Ortiz**, from New Mexico Ethics Watch, provided a statement on NMEW's recent report on the oil industry's continuing influence on the legislature as well as associated recommendations for amendments to the Lobbyist Regulation Act. Additionally, Mr. Ortiz shared the perspective that if Director Farris had to serve as an expert witness, he could do so while remaining neutral if he provided a disclaimer beforehand that he was only testifying to provide technical information and not to support or oppose a given bill.
- **Rikki-Lee Chavez**, from New Mexico Capitol Counsel and Consulting, provided a statement encouraging regulators and compliance enforcement agencies like the SEC to consider the burden on the Secretary of State's Office that accompany changes to the compliance and enforcement regimes related to lobbyists and candidates. She concluded that the Secretary of State needs to receive additional funding and resources in order to contend with the kinds of additional requirements that would be imposed as a result of SB 311 and SB 314. Ms. Chavez stated that she was appearing on her own behalf and not representing any clients.
- **Dr. Bobbi Green**, Secretary of the Martin Luther King, Jr. Commission, stated that she was grateful for the Commission's recommendations to the MLK Commission and reiterated that the statements made against the MLK Commission were misleading distracted from the commission's work.

- No additional public comments were offered.

15. DETERMINATION OF NEXT MEETING

- The Commissioners agreed to meet next on Friday, April 2, 2021.

16. ADJOURNMENT

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

[SUBJECT TO RATIFICATION BY COMMISSION]



STATE ETHICS COMMISSION

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

Jeremy D. Farris, Executive Director

March 25, 2021

To: State Ethics Commissioners
 Re: Selection process for three appointees to Citizens Redistricting Committee

The Redistricting Act, Senate Bill 304 (55th Legis., 1st Sess. 2021), §§ 2–10, creates the Citizen Redistricting Committee, which will create and propose plans of single-member districts for New Mexico’s delegation to the United States House of Representatives, the New Mexico House of Representatives, the New Mexico Senate, and other state offices requiring redistricting (such as the Public Education Commission). Under the Redistricting Act, the State Ethics Commission must appoint three members to the Citizen Redistricting Committee: the chair, who must be a retired justice of the New Mexico Supreme Court or a retired judge of the New Mexico Court of Appeals; and two members who shall not be members of the largest or second largest political parties in New Mexico.

This is an important duty. Under Senate Bill 304 (attached to this memorandum) the Citizens Redistricting Committee is tasked with a large amount of work in a relatively short time, and the Legislature appropriated \$300,000 for the committee to do its work. The ability of the redistricting committee to recommend sets of fair district plans depends in large part on who the appointing authorities select to serve on the committee.

This memorandum outlines: (1) the timeline for these appointments; (2) the plan by which the State Ethics Commission will solicit and receive applications for these three appointments; and (3) a proposed selection process for the Commission to adopt at the April 2, 2021 meeting.

I. Timeline

Date	Event
April 2, 2021	Commission adopts selection process for appointments.
Date Governor signs SB 304 (no later than noon on April 9, 2021).	Application period opens.
May 21, 2021	Application period closes.
May 26, 2021	Executive Director provides shortlist of applicants to Commission for interviews; Commission staff contact interviewees to schedule interviews for June 4, 2021; Commission staff send a letter of appreciation to all applicants not selected for an interview.

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May 31, 2021	Commission agenda for June 4, 2021 meeting is posted, making interviewees publicly available.
June 4, 2021	Commission interviews applicants, selects three appointments, and issues appointment orders, effective on July 1, 2021, regarding appointments.
July 1, 2021	General Counsel administers oath to appointees. Executive Director forwards Commission's appointment orders to Legislative Council Service, the Secretary of State, or any other state agency that is administratively associated with the Citizen Redistricting Committee

II. Plan for soliciting and receiving applications

Commission staff have created an [online Google form](#) to receive applications.¹ Through this form, applicants for any of the three positions can submit their application and upload their resume. After the Governor signs SB 304, we will post the link to the Commission's website, circulate this online form widely (email, Twitter, etc.), and encourage interested parties and nonprofit groups (e.g. the League of Women Voters, New Mexico First, Common Cause, etc.) to do so. I will also ask the Administrative Office of the Courts for the contact information of the retired appellate judges and justices and send a letter to the retired appellate judges and justices, soliciting their applications.

III. Proposed selection process

I propose that, at the April 2, 2021 meeting, the Commission adopt a process to select applicants for the three appointments to the Citizens Redistricting Committee. The process I recommend is similar to the process that the four legislatively-appointed Commissioners used in 2019 when appointing Commissioners Solimon and Baker for their first terms. The selection process I recommend is as follows:

1. On May 26, 2021, I provide the Commissioners with two lists: (1) a short list (approximately six to eight) of the best-qualified applicants who have applied for the two non-major-party positions; and (2) a list of every retired judge and justice who has applied for the chairperson position. I will also provide the Commissioners the

¹ Individuals must have a Google account for the Google form, because the form asks that applicants upload their applications to the Commission's Google drive. We believe that, by this point, most New Mexicans using the internet have a Google account or, if they really want to apply for the redistricting committee, will establish a Google account. For example, I have had a Google account since 2004.

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applications and resumes of every person on the two lists. I will create the short list for the two non-major-party positions after reviewing all applications and conferring with all members of the State Ethics Commission staff.²

2. By May 31, 2021, Commission staff will have (i) contacted these applicants and set an interview schedule; and (ii) sent a letter of appreciation to all other applicants. On May 31, 2021, Commission staff will make the agenda for the June 4, 2021 meeting publicly available. The agenda will contain the names of the applicants receiving interviews.
3. On June 4, 2021, the Commission will conduct short interviews of every applicant receiving an interview. After conducting all interviews, each Commissioner will complete two preference rankings (on a form supplied by the staff) for each kind of appointment. So, for the eight interviewees for the two non-major-party positions, each Commissioner will assign a preference ranking to every interviewee (1 through 8, where 1 is the most preferred applicant). For the judicial applicants, each Commissioner will also assign a preference ranking to every interviewee. After the Commission has completed the final interview, and during a break in the meeting, each Commissioner will email me their completed form.
4. After receiving each Commissioner's completed form, I will aggregate the preference rankings that each Commissioner assigned to each applicant. For the two non-major-party positions, the two applicants with the two lowest overall aggregate rankings will be appointed. For the chairperson position, the applicant with the lowest overall aggregate ranking will be appointed.
5. In the event of a tie between the two most preferred applicants for the non-major-party appointments, both applicants will be selected. In the event of a tie between the second-most preferred applicants for the non-major-party position, and in the event of a tie between the most-preferred judicial applicants, the preferences of Commissioner Baker, the Commission's only party-independent member, will control. This is a fair and appropriate tie-breaker rule for the redistricting committee, given its emphasis on nonpoliticized decisions.
6. Here is an explanatory example for this selection process: a preference ranking about the Commission's selections of two deserts out of five possible options for the Commission's hypothetical 2022 banquet:

² When New Mexico First solicited applications for its task force to propose recommendations for redistricting, New Mexico First received 122 applications. That was a task force; this is an actual state agency, with a \$300,000 budget and for which the members are eligible for per diem and mileage. I expect the volume of applications could be very large and strongly recommend that the Commission allow the staff to make a shortlist instead of forwarding each of you every application received.

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Commissioner	Biscochitos	Natillas	Carrot Cake	Dried Fruit	Chocolate Cake
Baker	5	4	2	1	3
Bluestone	3	1	2	4	5
Carruthers	3	4	2	5	1
Lang	4	1	2	3	5
Solimon	2	1	4	5	3
Villanueva	5	3	2	4	1
Williams	4	5	1	2	4
Aggregate	26	19	15	24	21

Carrot Cake and Natillas have it!

But suppose that Commissioner Williams voted differently, such that, as a result, there is a tie for second place between Natillas and Chocolate Cake:

Commissioner	Biscochitos	Natillas	Carrot Cake	Dried Fruit	Chocolate Cake
Baker	5	4	2	1	3
Bluestone	3	1	2	4	5
Carruthers	3	4	2	5	1
Lang	4	1	2	3	5
Solimon	2	1	4	5	3
Villanueva	5	3	2	4	1
Williams(*)	4	5	2	3	1
Aggregate	26	19	16	25	19

So, here we are definitely having Carrot Cake at the hypothetical banquet, but there is a tie between Natillas and Chocolate Cake. How to decide? We apply the tie-breaker rule: Commissioner Baker's choice prevails. Between Natillas and Chocolate Cake, he prefers Chocolate Cake. So, we'll be having Chocolate Cake too.

Please do not hesitate to contact me with any questions.

Very truly yours,

/s/ Jeremy Farris

SENATE BILL 304

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

INTRODUCED BY

Brenda McKenna

This document may incorporate amendments proposed by a committee, but not yet adopted, as well as amendments that have been adopted during the current legislative session. The document is a tool to show amendments in context and cannot be used for the purpose of adding amendments to legislation.

AN ACT

RELATING TO ELECTIONS; DIRECTING THE SECRETARY OF STATE TO COLLECT AND MAKE PUBLICLY AVAILABLE THE GEOGRAPHIC INFORMATION SYSTEM DATA FOR EACH VOTING DISTRICT IN THE STATE Hf11→ENACTING THE REDISTRICTING ACT; CREATING THE CITIZEN REDISTRICTING COMMITTEE; DIRECTING THE COMMITTEE TO DEVELOP DISTRICT PLANS FOR APPROVAL BY THE LEGISLATURE AND GOVERNOR; PROVIDING DUTIES; ESTABLISHING REQUIREMENTS FOR CREATING DISTRICT PLANS AND PUBLIC PARTICIPATION IN THE PROCESS; AMENDING THE PRECINCT

.219413.1AIC March 20, 2021 (8:49am)

underscored material = new
 [bracketed material] = delete
 Amendments: new = →bold, blue, highlight↔
 delete = →bold, red, highlight, strikethrough↔

BOUNDARY ADJUSTMENT ACT ←Hf11 .

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

SECTION 1. A new section of Chapter 1, Article SRC→2←SRC SRC→3←SRC NMSA 1978 is enacted to read:

"[NEW MATERIAL] SECRETARY OF STATE--GEOGRAPHIC INFORMATION SYSTEM DATA.--

A. Hf11→SRC→No later than January 1, 2022, the←SRC SRC→The←SRC←Hf11 Hf11→ Hf11→No later than←Hf11 Hf11→Beginning←Hf11 January 1, 2022, the←Hf11 secretary of state shall collect and make publicly available on the secretary of state's website the geographic information system data for each voting district SRC→that is elected pursuant to the Election Code←SRC SRC→in the state←SRC .

B. The geographic information system data shall be accessible free of charge and provided in shapefile format or any comparable SRC→open source or convertible←SRC geographic information system file format.

C. In the event of a change in voting district boundaries or precinct boundary adjustments, the secretary of state shall promptly update the geographic information system data accordingly.

D. For the purposes of this section, "voting district" means a political subdivision or boundary located in a geographical area that is represented by SRC→an←SRC elected

.219413.1AIC March 20, 2021 (8:49am)

underscoring material = new
 [bracketed material] = delete
 Amendments: new = →bold, blue, highlight←
 delete = →bold, red, highlight, strikethrough←

office."

Hf11→SRC→SECTION 2. ~~APPLICABILITY.~~--The provisions of this act are applicable starting January 1, 2022.←SRC←Hf11

Hf11→SECTION 2. [NEW MATERIAL] SHORT TITLE.--Sections 2 through 10 of this act may be cited as the "Redistricting Act".

SECTION 3. [NEW MATERIAL] DEFINITIONS.--As used in the Redistricting Act:

A. "committee" means the citizen redistricting committee;

B. "community of interest" means a contiguous population that shares common economic, social or cultural interests;

C. "district plan" means an entire plan of single-member districts for electing members to the United States house of representatives, the state house of representatives, the state senate or other state offices requiring redistricting;

D. "lobbyist" means a person who is required to register as a lobbyist pursuant to the provisions of the Lobbyist Regulation Act;

E. "political party" means a political party that has been qualified in accordance with the provisions of the Election Code; and

F. "public official" means a person elected to an office of the executive or legislative branch of the state.

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SECTION 4. [NEW MATERIAL] CITIZEN REDISTRICTING COMMITTEE

CREATED--MEMBERSHIP--TERMS.--

A. The "citizen redistricting committee" is created.

B. The committee is composed of seven members, appointed, with due regard to the cultural and geographic diversity of the state, as follows:

(1) one member appointed by the speaker of the house of representatives;

(2) one member appointed by the minority floor leader of the house of representatives;

(3) one member appointed by the president pro tempore of the senate;

(4) one member appointed by the minority floor leader of the senate;

(5) two members appointed by the state ethics commission, who shall not be members of the largest or second largest political parties in the state; and

(6) one member appointed by the state ethics commission, who shall be a retired justice of the New Mexico supreme court or a retired judge of the New Mexico court of appeals, and who shall chair the committee.

C. No more than three members of the committee shall be members of the same political party. A member of the committee shall not have changed party registration in the two

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years preceding the member's appointment in such a manner that the member's prior party registration would cause one political party to have more than three members. A member of the committee shall not continue to serve on the committee if the member changes party registration after the date of appointment in such a manner as to cause one political party to have more than three members.

D. Members shall be appointed not later than July 1, 2021, and August 1 of each year ending in the number zero thereafter, and shall serve until a district plan for each of New Mexico's congressional districts, the state house of representatives, the state senate and other state offices requiring redistricting is submitted to the legislature.

E. When any member of the committee dies, resigns or no longer has the qualifications required for the member's original appointment, the member's position on the committee becomes vacant and the chair shall notify the original appointing authority of the vacant position. The vacancy shall be filled by appointment by the original appointing authority no later than fifteen days following notification of the vacancy.

F. The committee shall meet as necessary to carry out its duties pursuant to the Redistricting Act.

G. Members are entitled to receive per diem and mileage as provided in the Per Diem and Mileage Act and shall

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receive no other compensation, perquisite or allowance.

SECTION 5. [NEW MATERIAL] MEMBERS--QUALIFICATIONS--
LIMITATIONS.--

A. To qualify for appointment to the committee, a person shall:

(1) be a qualified elector of New Mexico and a voter; and

(2) not be, or in the two years prior to appointment have been, in New Mexico, any of the following:

- (a) a public official;
- (b) a candidate for public office;
- (c) a lobbyist;
- (d) an office holder in a political party at the state or federal level;
- (e) a relative in the first degree of consanguinity of a member of congress, the state house of representatives, the state senate or the public education commission;
- (f) an employee of congress, the legislative branch of government or other state office required to be redistricted by the committee; or
- (g) an employee of the executive branch of government.

B. Before entering upon the duties of the office of member, a member shall review the Redistricting Act and take

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the oath of office as provided by state law.

SECTION 6. [NEW MATERIAL] COMMITTEE--DUTIES.--

A. Beginning July 1, 2021, and every August 1 of each year ending in the number zero thereafter, the committee shall:

(1) no later than October 30, 2021, or as soon thereafter as practicable, and September 1 of each year ending in the number one thereafter, adopt three district plans each for:

(a) New Mexico's congressional districts;

(b) the state house of representatives;

(c) the state senate; and

(d) the other state offices required to be redistricted;

(2) hold no fewer than six public meetings that allow for virtual participation before publishing the district plans for public comment; provided that in-person meetings shall not be required if such meetings would violate a public health order;

(3) hold no fewer than six public meetings that allow for virtual participation for the purpose of adopting district plans; provided that in-person meetings shall not be required if such meetings would violate a public health order;

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(4) conduct all meetings pursuant to the requirements of the Open Meetings Act; and

(5) compile, index, maintain and provide public access to the committee's record for each district plan it adopts.

B. Beginning no later than July 1, 2021, and August 1 of each year ending in the number zero thereafter, the committee may:

(1) develop and adopt procedures for public hearings; and

(2) hire staff and enter into contracts and any interagency agreements, including agreements to provide for professional technical or legal services, as necessary to accomplish the duties set forth in this section.

SECTION 7. [NEW MATERIAL] COMMITTEE MEETINGS BEFORE PROPOSING DISTRICT PLANS.--

A. Before the committee issues proposed district plans for public comment, the committee shall hold no fewer than six public meetings at which the committee shall receive testimony, documents and information regarding the identification of communities of interest and other testimony, documents and information regarding the creation of district plans. The committee shall provide the public with notice not later than thirty days before these meetings and the notice shall include information about how the public may participate

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and submit testimony, documents and information. The committee shall hold meetings in various regions across the state, including in central New Mexico and in each of the four geographic quadrants of the state, with at least one meeting on tribal lands.

B. The committee shall compile, index, maintain and provide public access to all testimony, documents and information received in the meetings conducted before issuing proposed district plans for public comment.

C. The proposed district plans that the committee issues for public comment shall be based, in part, on the testimony, documents and information received.

SECTION 8. [NEW MATERIAL] DISTRICT PLANS--REQUIREMENTS AND PROHIBITIONS.--

A. The committee shall develop district plans in accordance with the following provisions:

(1) congressional districts shall be as equal in population as practicable;

(2) state districts shall be substantially equal in population; no plans for state office will be considered that have a total deviation of more than ten percent;

(3) the committee shall use the most recent federal decennial census data generated by the United States census bureau and may use other reliable sources of demographic

data as determined by majority vote of the committee;

(4) proposed redistricting plans to be considered by the legislature shall not be composed of districts that split precincts;

(5) plans must comport with the provisions of the federal Voting Rights Act of 1965, as amended, and federal constitutional standards; plans that dilute a protected minority's voting strength are unacceptable; race may be considered in developing redistricting plans but shall not be the predominant consideration; traditional race-neutral districting principles shall not be subordinated to racial considerations;

(6) all redistricting plans shall use only single-member districts;

(7) districts shall be drawn consistent with traditional districting principles;

(8) districts shall be composed of contiguous precincts and shall be reasonably compact;

(9) to the extent feasible, districts shall be drawn in an attempt to preserve communities of interest and shall take into consideration political and geographic boundaries, including the boundaries of Indian nations, tribes and pueblos; and

(10) in addition, and to the extent feasible, the committee may seek to preserve the core of existing

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districts.

B. The committee may incorporate suggested changes to its proposed district plans in accordance with public comments and testimony it receives, but shall not subordinate the requirements of Paragraphs (1) through (9) of Subsection A of this section in doing so.

C. When proposing or adopting district plans, the committee shall not:

(1) use, rely upon or reference partisan data, such as voting history or party registration data; provided that voting history in elections may be considered to ensure that the district plan complies with applicable federal law; or

(2) consider the voting address of candidates or incumbents, except to avoid the pairing of incumbents unless necessary to conform to other traditional districting principles.

SECTION 9. [NEW MATERIAL] COMMITTEE ADOPTION OF DISTRICT PLANS.--The committee shall adopt at a minimum three district plans for each of New Mexico's congressional districts, the state house of representatives, the state senate and other state offices required to be redistricted at an open meeting. After the committee adopts the district plans, the committee shall provide written evaluations of each district plan that address the satisfaction of the requirements set forth in the Redistricting Act, the ability of racial and language

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minorities to elect candidates of their choice, a measure of partisan fairness and the preservation of communities of interest.

SECTION 10. [NEW MATERIAL] LEGISLATIVE SELECTION OF DISTRICT PLANS.--

A. The committee shall deliver its adopted district plans and accompanying written evaluations and all accompanying concise explanatory statements to the legislature by October 30, 2021, or as soon thereafter as practicable, and September 1 of each year ending in the number one thereafter.

B. The legislature shall receive the adopted district plans for consideration in the same manner as for legislation recommended by interim legislative committees.

SECTION 11. Section 1-3-12 NMSA 1978 (being Laws 1984 (1st S.S.), Chapter 3, Section 4, as amended) is amended to read:

"1-3-12. ADJUSTING PRECINCT BOUNDARIES.--

A. Before each federal decennial census, every precinct shall comply with the requirements of Section 1-3-1 NMSA 1978, and if necessary its boundary shall be adjusted to coincide with a feature or a boundary that is:

(1) shown on the standard base maps developed pursuant to Subsection B of this section;

(2) a designated census block boundary on the proposed federal PL 94-171 [2020] census block maps; or

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(3) approved by the secretary of state and the United States bureau of the census.

B. Prior to commencement of the federal decennial census, the secretary of state shall have prepared and shall furnish to each county clerk standard base maps of the county. The standard base map for urban and nonurban areas of the county shall, as nearly as practical, show:

- (1) all state and federal highways;
- (2) all numbered and named county roads that have been certified to the department of transportation;
- (3) all military installation boundaries and federal and state prison boundaries;
- (4) all major railroad lines;
- (5) federal, state and county political boundaries, municipal boundaries and school district boundaries;
- (6) Indian nation, tribe and pueblo boundaries and subdivisions or chapter house boundaries;
- ~~(7)~~ (7) all streets within urban areas; and
- ~~(7)~~ (8) other major terrain features, such as flowing rivers and streams, arroyos, power lines, pipelines, roads, trails and ridgelines and other acceptable census block boundaries.

C. The board of county commissioners, upon receipt of the standard base maps from the secretary of state and upon

the recommendation of the county clerk, shall:

(1) adjust all precinct boundaries to coincide with numbered or named street boundaries or suitable visible terrain features shown on the standard base map; provided that the precincts shall be composed of contiguous and compact areas, and state, county, municipal, school district and other special district or political boundary lines shall serve as precinct boundaries whenever possible; and

(2) upon the completion of the precinct boundary adjustments as required in this section, indicate on the standard base maps the boundaries for both urban and nonurban precincts and, together with a written description of the precincts, shall send an electronic copy to the secretary of state for approval.

~~D. The precincts shown upon the standard base maps submitted pursuant to the provisions of this section and as revised and approved by the secretary of state pursuant to the Precinct Boundary Adjustment Act shall become the official precincts of each county for the 2021 redistricting. For the 2022 and subsequent statewide elections, changes in precincts shall be made in accordance with the provisions of Chapter 1, Article 3 NMSA 1978.~~

~~E. In the same calendar year in which the state receives the results of a federal decennial census, the state legislature shall redistrict federal representative districts,~~

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~~each chamber of the legislature, public regulation commission districts, public education commission districts and any other state districts requiring redistricting.~~

~~F. In the calendar year following the receipt of the results of a federal decennial census, each local public body subject to districting shall create or redraw districts for the local public body. A local public body, when creating or redrawing districts, shall not split a precinct into two or more districts for any elected office unless necessary to comply with federal law or to preserve communities of interest.]"~~

SECTION 12. Section 1-3-13 NMSA 1978 (being Laws 1983, Chapter 223, Section 4, as amended) is amended to read:

"1-3-13. [SECRETARY OF STATE POWERS AND DUTIES] ADJUSTING PRECINCT BOUNDARIES--TIME LINES FOR LEGISLATIVE AND LOCAL PUBLIC BODY REDISTRICTING--RELEASE OF NOMINATING PETITIONS.--

A. Prior to commencement of the federal decennial census, the secretary of state shall review all county precinct maps submitted pursuant to Section 1-3-12 NMSA 1978 for compliance with the provisions of the Precinct Boundary Adjustment Act and Section 1-3-1 NMSA 1978. Those county precinct maps determined not to be in compliance with the precinct boundary criteria set forth in Subsection A of Section 1-13-12 NMSA 1978 or Section 1-3-1 NMSA 1978 shall be rejected

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and returned to the appropriate county clerk with a written statement setting forth those instances in which the map does not comply. The county clerk and the board of county commissioners shall make the required adjustments within thirty days after receiving notice of noncompliance.

B. Following receipt of the results of a federal decennial census, the secretary of state shall again follow the procedures outlined in Subsection A of this section to allow the counties to make any necessary adjustments. For any county that does not make the required adjustments within thirty days after receiving notice of noncompliance following receipt of the results of a federal decennial census, the secretary of state shall send a second notice of noncompliance, and no later than ~~[June 30 of the same year]~~ ninety days following receipt of the results of the federal decennial census, if any precinct boundary adjustments are necessary to meet the legal requirements of redistricting, pursuant to Sections 1-3-1 and 1-3-12 NMSA 1978, the secretary of state shall adjust the boundaries of the precincts only to the extent necessary to achieve compliance with the requirements of those sections and notify the county of those boundary adjustments.

C. The precincts shown upon the standard base maps submitted pursuant to the provisions of this section and as revised and approved by the secretary of state pursuant to the Precinct Boundary Adjustment Act shall become the official

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precincts of each county for redistricting.

D. Following completion of the procedures outlined in Subsection B of this section and in the same calendar year in which the state receives the results of a federal decennial census:

(1) the legislature shall redistrict federal congressional districts, each house of the legislature and any other state districts requiring redistricting; and

(2) each local public body subject to districting and whose governing body members are not elected at the regular local election shall create or redraw districts for the local public body.

E. In the calendar year following the receipt of the results of a federal decennial census, each local public body subject to districting and whose governing body members are elected at the regular local election shall create or redraw districts for the local public body.

F. A local public body shall establish districts in which the number of persons in each district, as shown in the most recent federal decennial census, is as nearly equal in population as practical, but within five percent of the mean. A local public body subject to districting shall not split a precinct into two or more districts for any elected office unless necessary to comply with federal law or to preserve communities of interest. Each local public body subject to

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districting shall create or redraw districts pursuant to the time lines of this section.

G. During years in which districts are redrawn pursuant to the provisions of this section, nominating petitions shall not be made available for relevant offices until completion of the procedures specified in Subsection D or E of this section, as applicable.

H. As used in this section:

(1) "local public body subject to districting" means any political subdivision of the state with elected governing body members who:

(a) must reside in designated areas of the political subdivision to qualify for election; or

(b) are elected by a geographically defined subset of voters within the boundaries of the political subdivision; and

(2) "mean" means the total number of persons residing within a political subdivision of the state divided by the number of districts from which governing body members are elected."

SECTION 13. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2021.←Hf11

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underscored material = new

[bracketed material] = delete

Amendments: new = →bold, blue, highlight←

delete = →bold, red, highlight, strikethrough←



STATE ETHICS COMMISSION

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Jeremy D. Farris, Executive Director

March 25, 2021

To: State Ethics Commissioners
Re: Amendments to 1.8.3 NMAC

Dear State Ethics Commissioners,

In 2021, the Commission should amend its rules of procedure for administrative cases, 1.8.3 NMAC. Amendments are both necessary and advisable for four reasons:

1. Amendments are necessary to align 1.8.3 NMAC with HB 244, which removed the notarization requirement for administrative complaints and establishes statutory referral rules for certain administrative claims with the Secretary of State.
2. Having adjudicated cases for over a year with the initial rules of procedure, staff have noted several small gaps and ambiguities, the closure and elucidation of which will improve the efficient and fair administration of the Commission's administrative cases.
3. As the Commission launched its web-based case management and docketing system (the Proceedings Portal), the rules of procedure should be adjusted to align the rules and the docketing system.
4. Over the past few weeks, staff have held discussions with the directors of state ethics commissions of Nevada, Texas, Louisiana, Arkansas, Alabama, Georgia, South Carolina, West Virginia, Virginia and California. These discussions have elicited suggested amendments for the Commission's rules of procedure.

I recommend the following timeline for this rulemaking:

Timeline	Event
May 6, 2021 (4 weeks before SEC meeting)	(1.) Staff distributes to Commission draft of amendments to 1.8.1 and 1.8.3 NMAC
May 6, 2021 through May 31, 2021 (Commissioners should supply any additional amendment language by May 31, 2021. The Commission should avoid in-meeting line editing.)	(2.) Commissioners provide any commentary and recommendations regarding the staff draft of amendments to 1.8.3 NMAC
June 4, 2021 (Commission meeting)	(3.) Commission issues amendments to 1.8.3 NMAC for comment
June 10, 2021 (NM Reg. submittal deadline)	(4.) Submittal to SRAC for NM Register
June 22, 2021 (NM Reg. Publication Date)	(5.) Publish Notice of Proposed Rulemaking in NM Register
August 6, 2021 (Commission Meeting)	(6.) Public Rule Hearing and Rule Adoption (SEC Meeting) [At least 30 days after Notice]
August 12, 2021 (NM. Reg. submittal deadline)	(7.) Rule filing [Within 15 days after adoption]
August 24, 2021 (NM Reg. Publication Date)	(8.) Publication in NM Register [SRAC publishes ASAP]

State Ethics Commission
March 25, 2021
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If you have any suggestions for changes to the Commission's rules of procedure for administrative cases, please reach out. Thank you.

Very truly yours

/s/ Jeremy Farris



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-06

April 2, 2021¹

QUESTION PRESENTED²

At least thirty days before the state purchasing agent or a central purchasing office awards a sole source procurement contract, NMSA 1978, Section 13-1-126.1(A) (2013, as amended 2019) requires the state purchasing agent or central purchasing office to post notice of its intent to award the contract on their website, identifying the parties to the proposed contract; the nature and quantity of the service, construction, or item of tangible personal property being contracted for; and the contract amount. Similarly, under NMSA 1978, Section 13-1-128 (1984, as amended 2013), before awarding a sole source procurement contract, the state purchasing agent or central purchasing office must provide information about the contract to the Department of Information Technology (“DoIT”) for posting on the sunshine portal. Where the state purchasing agent or central purchasing office has

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

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)).). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On February 12, 2021, the Commission received a request for an informal advisory opinion that detailed the issues as presented herein. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1). The executive director provided an informal advisory opinion in response to the request on February 25, 2021. The Commission now issues that guidance as a formal advisory opinion. *See* 1.8.3.9(B)(3) NMAC.

allowed a state agency to enter a sole source procurement contract, the state agency has entered a sole source contract, and the state agency and the contractor subsequently seek to amend the terms of the sole source contract, do the notice provisions of sections 13-1-126.1 and 13-1-128 apply to the amended contract? In other words, when a sole source contract is amended, does notice of the amendment need to be posted on the state purchasing agent's or central purchasing office's website and the sunshine portal?

ANSWER

Yes.

ANALYSIS

The Procurement Code generally requires government entities to procure goods and services through a competitive, sealed process. *See* NMSA 1978, §§ 13-1-102 (1984, as amended 2007) & 13-1-111 (1984, as amended 2007). The Code allows an exception to this requirement for sole source procurement. § 13-1-102(C). If there is only one vendor capable of supplying needed construction, goods or services, then a government entity need not conduct a competitive, sealed process before contracting with that vendor. *See* NMSA 1978, § 13-1-126(A) (1984, as amended 2013). Because sole source procurement offers an alternative to the competitive sealed process, and because sole source procurement necessarily allows a government entity to select the vendor without using a competitive process, it is subject to the potential for abuse. With respect to some vendors, therefore, sole source procurement is not allowed. *See, e.g.*, NMSA 1978, § 10-16-9(A) (1967, as amended 2007) (prohibiting a sole source procurement contract between a state agency and “a legislator, the legislator’s family or with a business in which the legislator or the legislator’s family has a substantial interest”). Where sole source procurement is allowed, the Procurement Code imposes a system of checks to ensure that sole-source procurement is not abused and satisfies the Code’s purposes “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) (1984). Two of those checks are prominent:

First, the Procurement Code requires the state purchasing agent or a central purchasing office to play an independent role in sole source procurement. After “reviewing available sources and consulting with” the government entity seeking the

sole source procurement, either the state purchasing agent or a central purchasing office must make a written determination that a sole source procurement is necessary. *See* § 13-1-126(A).³ Specifically, the state purchasing agent or central purchasing office must decide:

- (1) there is only one source for the required service, construction or item of tangible personal property;
- (2) the service, construction or item of tangible personal property is unique and this uniqueness is substantially related to the intended purpose of the contract; and
- (3) other similar services, construction or items of tangible personal property cannot meet the intended purpose of the contract.

Id. When deciding whether or not “there is only one source” for the required service, construction, or good, § 13-1-126(A)(1), the state purchasing agent or central purchasing office may not “narrowly draft[] specifications so that only one predetermined source would satisfy those specifications,” § 13-1-126(E). In other words, the officials charged with independently overseeing procurement may not yield to a government agency’s desire to select a specific vendor, where other vendors could supply the goods or service on terms more favorable to the agency and, by extension, the public. *See id.* Moreover, those procurement officials may take over the contract negotiations with the sole-source vendor to ensure favorable terms. *See* § 13-1-126(C) (“The state purchasing agent or a central purchasing office

³For a state agency’s sole source procurement contracts, whether the state purchasing agent or the agency’s own central purchasing office makes this determination likely depends on the scope of the state purchasing authority over procurement under NMSA 1978, Section 13-1-99 (1984, as amended 2007). That provision “exclude[s] from the requirement of procurement through the state purchasing agent but not from the requirements of the Procurement Code” more than a dozen different categories of procurement, including, for example, the procurement of professional services, procurement by the board of regents of state educational institutions, and procurement by all local public bodies. *See* § 13-1-99(A), (G) & (J); *see also generally* NMSA 1978, § 13-1-97(A)–(B) (1984, as amended 2013) (regarding the division of authority between the state purchasing agent and central purchasing offices). So, for example, if a state agency seeks a sole source procurement of professional services, then that agency’s own central purchasing office likely makes the written determination under section 13-1-126(A) that a sole source procurement is necessary. *See also generally* NMSA 1978, § 13-1-37 (1984, as amended 2013) (defining “central purchasing office” as “that office within a state agency or a local public body responsible for the control of procurement of items of tangible personal property, services or construction”).

shall conduct negotiations, as appropriate, as to price, delivery and quantity in order to obtain the price most advantageous to the state agency or a local public body.”).

Second, before the state purchasing agent or a central purchasing office awards a sole source contract, it must notice the intent to award the sole source contract on their respective websites, providing basic information about the parties to the proposed contract; the nature and quantity of the service, construction or goods contracted for; and the contract amount. § 13-1-126.1(A). It also must provide this information, plus information concerning the contract term and the justification for the sole source contract to DoIT for posting on the sunshine portal, <http://sspn.nm.gov>. Public notice of this contract information enables other vendors to check (and contest) the accuracy of the state purchasing agent’s or central purchasing office’s determination that there is only a single source of the services, construction, or goods sought. *See* § 13-1-126.1(B). Indeed, “[a]ny qualified potential contractor that was not selected for a proposed sole source contract may protest the selection in writing, within fifteen calendar days after the notice of intent to award the contract was posted by the state purchasing agent or central purchasing office” *Id.*; *see also generally* NMSA 1978, §§ 13-1-172 to 13-1-176 (regarding protests). Upon receiving a timely submitted protest, the state purchasing agent or central purchasing office generally “shall not proceed further with the procurement” until they resolve the protest. § 13-1-173. Protest decisions are subject to judicial review. NMSA 1978, §§ 13-1-175(B) (1984) & 13-1-183 (1984, as amended 1999).

By requiring that sole source contracting be available to public scrutiny and contestation by qualified potential contractors not selected for a sole source contract, the Procurement Code imposes “safeguards for maintaining a procurement system of quality and integrity.” § 13-1-29(C); *see also* §§ 13-1-126.1(A) & 13-1-128. This safeguard is especially important where a state agency’s own central purchasing office makes the written determination that the agency’s desire for a sole source procurement is consistent with law, as for example when a state agency seeks a sole source procurement of professional services. *See* § 13-1-99(A). In that instance, because the state purchasing agent does not independently determine that a sole source procurement is justifiable, public notice and the right of protest are necessary to maintain “a procurement system of quality and integrity.” § 13-1-29(C).

The safeguards of public notice and the right to protest apply not only when a government entity enters a sole source contract but also when it amends a sole source contract. In the former case of a proposed sole source contract, a qualified contractor can protest the section 13-1-126(A) determination made by the state purchasing agent or central purchasing office. *See* § 13-1-126.1(B). In the latter case of an

amended contract, a potential contractor can protest that the state purchasing agent's or central purchasing office's section 13-1-126(A) determination does not apply to the amended contract. *See* NMSA 1978, § 13-1-172 (1984, as amended 1987); *see also* § 13-1-126.1(B). The state purchasing agent or central purchasing office has "the authority to take any action reasonably necessary to resolve a protest of an aggrieved bidder or offeror," including termination of the sole source contract. *See* NMSA 1978, § 13-1-174 (1984, as amended 1987); *see also* 1.4.1.88 NMAC.⁴

The notice (and availability of protest) provisions apply also when a state agency amends a sole source contract for two basic reasons. First, the contract amendment might affect the applicability of the state purchasing agent's or central purchasing office's previously-issued section 13-1-126(A) determination. In view of the amendment, it might no longer be true that "there is only one source," that the service, construction or good is "unique," or that other "similar . . . [services, construction or goods] cannot meet the intended purpose of the contract." § 13-1-126(A)(1)–(3). Accordingly, the Code requires public notice of the amended contract so that the public and the potential contractors can scrutinize whether the state purchasing agent's or central purchasing office's sole source determination for the original contract remains applicable as to the amended contract.⁵

Second, notice for amended contracts prevents unfair gamesmanship in sole source procurement. Because of the notice requirement, state agencies may *not* notice and receive approval for a sole source contract that has a comparatively insignificant compensation term and then, hidden from the scrutiny of the public and competing contractors, amend the contract to considerably increase the scope of work and compensation terms. This type of conduct is contrary to the Procurement Code's purposes "to provide for the fair and equitable treatment of all persons

⁴The authority of the state purchasing agent or a central purchasing office to resolve protests "shall be exercised in accordance with regulations promulgated by the secretary" of the General Services Department. § 13-1-174. Under regulation, after an award of a sole source procurement, if the state purchasing agent or central purchasing office makes a written determination that an award of a contract is in violation of law, then the contract may be revised or terminated, and, if terminated, "the business awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract plus reasonable profit prior to termination." 1.4.1.88 NMAC(B)(1)(b); *accord* NMSA 1978, § 13-1-182.

⁵Moreover, whenever a state agency amends a sole source contract, the state purchasing agent or the appropriate central purchasing office should also review whether its sole source determination for the original contract continues to apply to the amended contract. *See* § 13-1-126.

involved in public procurement . . . and to provide safeguards for maintaining a procurement system of quality and integrity.” § 13-1-29(C). Nor is public notice of an original sole source contract necessarily sufficient to provide notice of an amended contract, particularly where the amended contract contains a considerably larger compensation term. For example, where state agencies propose to enter sole source procurements, notice of a \$70,000 sole source contract reasonably would not generate the same scrutiny and potential protest of the state purchasing agent’s sole source determination as would notice of a \$7,000,000 contract. Accordingly, it is fair neither to the public, nor to the state purchasing agent or central purchasing office, for a state agency to receive approval for and notice a sole source contract at a lower compensation term, only then, having received the sole source determination, to turn around and amend the contract to increase the scope and compensation terms considerably. Because the Procurement Code’s purposes are inconsistent with that kind of gamesmanship, the notice provisions of sections 13-1-126.1 and 13-1-128 apply not only to proposed sole source contracts but also to amendments to sole source contracts.

The application of sections 13-1-126.1 and 13-1-128 to sole source contract amendments is supported not only by the Procurement Code’s purposes but also by its text. Section 13-1-126.1(A) requires notice of a sole source “contract.” The Procurement Code defines a “contract” as “any agreement for the procurement of items of tangible personal property, services or construction.” NMSA 1978, § 13-1-41 (1984). That definition of “contract” also encompasses amended contracts, which are also “agreement[s] for the procurement of items of tangible personal property, services or construction.” § 13-1-41.⁶

⁶The Procurement Code also defines “contract modification” as “any written alteration in the provisions of a contract accomplished by mutual action of the parties to the contract.” NMSA 1978, § 13-1-42 (1984). Section 13-1-126.1(A)’s lack of any reference to “contract modification” does not, however, entail that agencies may omit notice of sole source contract amendments. The Procurement Code uses the term “contract modification” only when referring to cost or pricing data. *See* NMSA 1978, §§ 141–143, 160 (1984). And cost or pricing data is not required for contracts based on competitive sealed bid or for professional services contracts. *See* NMSA 1978, § 139 (1984, as amended 1993). Accordingly, it is doubtful that the Procurement Code would make reference to “contract modification” whenever the Code’s provisions encompass both original and amended contracts. Section 13-1-126.1(A)’s omission of any reference to “contract modification” therefore likely does not support an inference that section 13-1-126.1(A)’s notice provisions reach sole source contracts but not sole source contract amendments.

CONCLUSION

For the foregoing reasons, the notice provisions of sections 13-1-126.1 and 13-1-128 apply to amendments to sole source contracts.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner

FRANCES F. WILLIAMS, Commissioner



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-07

April 2, 2021¹

QUESTION PRESENTED²

May legislators who are respondents to administrative complaints pending in the State Ethics Commission vote on proposed legislation that affects the State Ethics Commission?

ANSWER

Yes.

ANALYSIS

The Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019), does not require a legislator to recuse from a vote on legislation that implicates a conflict of interest. This is a function of not only the Act's definitions

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

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." *See* NMSA 1978, § 10-16G-8(A)(2) (2019). "When the Commission issues an advisory opinion, the opinion is tailored to the 'specific set' of factual circumstances that the request identifies." State Ethics Comm'n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)).). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On March 1, 2021, the Commission received a request for an informal advisory opinion that detailed the issues as presented herein. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1). The executive director provided an informal advisory opinion in response to the request on February 25, 2021. The Commission now issues that guidance as a formal advisory opinion. *See* 1.8.3.9(B)(3) NMAC.

and text but also the protection conferred on legislators by Article IV, Section 13 of the New Mexico Constitution. Two sections of the Governmental Conduct Act are relevant.

First, section 10-16-4(B) provides that “a public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer’s or employee’s financial interest . . . [that is not] proportionately less than the benefit to the general public.” § 10-16-4(B). Legislators, however, are expressly excluded from the definition of a “public officer or employee.” *See* § 10-16-2(I). Accordingly, the disqualification requirement in section 10-16-4(B) does not require a legislator to recuse from any vote.

Second, section 10-16-3(A) also bears on the question of recusal. Unlike section 10-16-4(B), section 10-16-3(A) applies to legislators. That section provides:

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.

§ 10-16-3(A). Under this provision, a legislator may not use the powers and resources of their legislative office “to obtain personal benefits or pursue private interests.” *Id.* In view of the New Mexico Court of Appeals’ recent opinion in *State v. Gutierrez, et al.*, this provision is not merely aspirational, but rather is enforceable through criminal (and civil) penalties. *See* 2020-NMCA-045, ¶¶ 9, 33–36, 472 P.3d 1260, *cert. granted* (Sept. 8, 2020). Whether a legislator uses the powers and resources of their office for the specific purpose “to obtain personal benefits or pursue private interests” is a question of fact. § 10-16-3(A); *see, e.g., State v. Muraida*, 2014-NMCA-060, ¶ 18, 326 P.3d 1113 (concluding that intent presents a question of fact and may be inferred from both direct and circumstantial evidence). Furthermore, whether a particular use of “the powers and resources” of a legislator’s office results in “personal benefits” to the legislator or advances their “private interests” is also a question of fact.

Like section 10-16-4(B), section 10-16-3(A) does not require recusal on any vote affecting a legislator’s interests, because a legislator may cast their vote “only to advance the public interest,” consistent with their duty to treat their position “as a public trust.” § 10-16-3(A). A legislator’s *voluntary* recusal on matters affecting their interest, however, is certainly an action available to legislators to demonstrate

that they are not using the powers of their legislative offices “to obtain personal benefits or pursue private interests.” § 10-16-3(A). Voluntary recusal from voting on matters affecting a legislator’s interest would likely defeat a section 10-16-3(A) claim that a legislator used the powers of their office to obtain personal gain.

Moreover, it is doubtful that the State Ethics Commission could adjudicate or pursue a section 10-16-3(A) claim against a legislator for casting a vote in either house. Article IV, Section 13 of the New Mexico Constitution provides:

Members of the legislature shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and on going to and returning from the same. And they shall not be questioned in any other place for any speech or debate or for any vote cast in either house.

N.M. Const. art. IV, § 13. This provision confers on Members of the New Mexico House and Senate an immunity similar to the immunity the Speech or Debate Clause provides to Members of Congress.³ Article IV, Section 13 formed part of the original 1911 New Mexico Constitution and follows the text of the federal Speech or Debate Clause. *Compare* U.S. Const., art. I, § 6, cl. 1, *with* N.M. Const. art. IV, § 13. In addition to the language it copies from the Speech or Debate Clause, Article IV, Section 13 also states that Members “shall not be questioned in any other place . . . *for any vote cast in either house.*” N.M. Const. art. IV, § 13 (emphasis added). This addition makes manifest in the New Mexico Constitution what, in 1881, the United States Supreme Court held to be encompassed by the Speech or Debate Clause—namely, that the constitutional protection extends to a legislator’s act of voting. *See Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). Because

³The Speech or Debate Clause provides members of Congress and their aides with immunity from civil and criminal actions, whether brought by private individuals or the executive branch, for legislative acts taken in the course of their official responsibilities. *See Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 502–03 (1975); *Gravel v. United States*, 408 U.S. 606, 615–17 (1972). Regarding the scope of immunity for legislative acts (and motives for legislative acts), *see, e.g., United States v. Helstoski*, 442 U.S. 477, 489 (1979); *Doe v. McMillan*, 412 U.S. 306, 313–18 (1973); *Gravel*, 408 U.S. at 613–29; *United States v. Brewster*, 408 U.S. 501, 507–29 (1972); *United States v. Johnson*, 383 U.S. 169, 174–85 (1966); *Kilbourn v. Thompson*, 103 U.S. 168, 201–205 (1881); *see also United States v. Menendez*, 831 F.3d 155, 166–67 (3d Cir. 2016). In light of the federal case law, the legislative acts for which Article IV, Section 13 confers immunity are not coextensive with all of the powers and resources of a legislator’s public office; accordingly, the immunity provided by Article IV, Section 13 does not completely eclipse the application of section 10-16-3(A) to legislators. Casting a vote on the floor of a legislative chamber, however, is the legislative act *par excellence*.

legislators are immune from any criminal or civil action “for any vote cast,” N.M. Const. art. IV, § 13, neither the State Ethics Commission nor a prosecutor could pursue an action against a legislator for not recusing on a vote. Nor could the Commission adjudicate an administrative claim based on the predicate that a legislator cast a vote. For this reason, the Governmental Conduct Act (or any other statute) does not require legislators to recuse from any vote affecting the State Ethics Commission or otherwise.

CONCLUSION

Legislators who are respondents to administrative complaints pending in the State Ethics Commission may vote on proposed legislation that affects the State Ethics Commission.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner

FRANCES F. WILLIAMS, Commissioner