



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-08

June 4, 2021¹

QUESTIONS PRESENTED²

1. (a) May a legislator or a legislator's family apply for or receive state funds following passage of legislation making such funds available?

(b) If a legislator or their family members may not apply for or receive state funds made available by a statute, does a member who recuses from the vote on that legislation obviate the prohibition?
2. May a legislator or a legislator's family apply for a small business loan made available by the Small Business Recovery Act of 2020, Laws 2020 (1st S.S.), ch. 6, §§ 1–7?

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

² The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." *See* NMSA 1978, § 10-16G-8(A)(2) (2019). "When the Commission issues an advisory opinion, the opinion is tailored to the 'specific set' of factual circumstances that the request identifies." State Ethics Comm'n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On 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 18, 2021. The Commission now issues that guidance as a formal advisory opinion. *See* 1.8.3.9(B)(3) NMAC.

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

ANSWERS AND ANALYSIS

1. **(a) Whether a legislator or their family members may benefit from state funds made available by statute depends on how the state agencies, to whom the funds are appropriated, make those funds available.**

(b) Recusal does not obviate any constitutional or statutory limitations on a legislator’s interest in a contract with a state agency.

- a. Contracts

If a statute authorizes state agencies to make appropriated funds available to private individuals and businesses by contract, then two laws specifically constrain the ability of legislators and their families to benefit from the appropriated funds:

First, Article IV, Section 28 of the New Mexico Constitution constrains a legislator’s ability to contract with a state agency or political subdivision. It provides, in pertinent part, that no member of the legislature “during the term for which he [or she] was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.” N.M. Const. art. IV, § 28 (alteration added).³ So, for example, if the Fifty-Fourth Legislature enacted a law that authorized a particular kind of state contract, a member of the Fifty-Fourth Legislature could not have a financial interest in that kind of contract during their

³ The State Ethics Commission does not have the authority to investigate or adjudicate alleged violations of Article IV, Section 28. *See* NMSA 1978, § 10-16G-9(A) (2019). However, the Commission has the power to issue advisory opinions “on matters related to ethics.” *See* NMSA 1978, § 10-16G-8(A) (2019). Although the Commission lacks authority to enforce Article IV, Section 28, the constitutional provision bears directly on the answer to the question presented in your request for an advisory opinion. *See also* State Ethics Comm’n Advisory Op. 2021-02 (Feb. 5, 2021) (interpreting and applying Article IV, Section 28 to a legislator’s indirect interest in a nonprofit group that holds contracts with state agencies).

term, which concluded with the end of the Fifty-Fourth Legislature, and for one year thereafter—roughly, until the end of 2021.⁴

Second, section 10-16-9(A) of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019), imposes additional prohibitions that apply to contracts involving legislators, their immediate family members, and their businesses. Section 10-16-9(A) provides in pertinent part:

A state agency shall not enter into a contract for services, construction or items of tangible personal property with a legislator, the legislator's family or with a business in which the legislator or the legislator's family has a substantial interest unless the legislator has disclosed the legislator's substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code, except the potential contractor shall not be eligible for a sole source or small purchase contract.

§ 10-16-9(A); *see also* NMSA 1978, § 10-16-2(L) (defining “substantial interest” to mean an ownership interest that is greater than twenty percent). Section 10-16-9(A) requires disclosure of a legislator's substantial interest in a business that contracts with state agencies. The statutory provision also requires that any contract with the legislator-affiliated business be awarded consistent with the Procurement Code and not through a sole source or small purchase exception to a competitive procurement process. § 10-16-9(A).

b. Grants

If, on the other hand, a statute authorizes state agencies to make appropriated funds available to private individuals and businesses by grants, then the limitations on legislators' interest in contracts imposed by Article IV, Section 28 and NMSA 1978, Section 10-16-9(A) do not apply. Those provisions specifically address “contract[s],” and the judicial opinions interpreting Article IV, Section 28 also

⁴ For purposes of Article IV, Section 28, appropriations to a state agency made through the General Appropriations Act do not “authorize” a contract. *See State ex rel. Baca v. Otero*, 1928-NMSC-021, ¶ 11, 33 N.M. 310 (concluding that, under Article IV, Section 28, a legislator could receive compensation on a contract of employment as rural school supervisor because the contract was authorized by a 1923 statute empowering the superintendent of public instruction to enter contracts and not by the appropriations bill of the 1927 Legislature, of which the legislator was a member); *see also State ex rel. Stratton v. Roswell Independent Schools*, 1991-NMSC-013, ¶ 37, 111 N.M. 495.

concerned contracts with the state or its political subdivisions. *E.g.*, *State ex rel. Maryland Casualty Co. v. State Highway Commission*, 1934-NMSC-062, 38 N.M. 482 (insurance contract); *State ex rel. Baca v. Otero*, 1928-NMSC-021, 33 N.M. 310 (employment contract); *State ex rel. Stratton v. Roswell Independent Schools*, 1991-NMSC-013, 111 N.M. 495 (employment contract). And a state agency’s grant of appropriated funds is not a contract with a state agency that is supported by consideration. *See generally Grant*, *Black’s Law Dictionary* (11th ed. 2019) (defining “grant” as a “subsidy”); *see also, e.g.*, New Mexico Finance Authority, Small Business CARES Relief Grants, <https://www.nmfinance.com/cares-continuity-grants/> (last accessed Feb. 17, 2021) (“What is a grant? A grant is money given for a specific purpose without any obligation to repay the funding. In this case, grants will be given to help New Mexico businesses weather the economic hardship due to the pandemic. This grant does not need to be paid back.”).⁵

While the limitations imposed by Article IV, Section 28 and Section 10-16-9(A) do not apply to grants, other laws constrain the Legislature’s ability to authorize grant funding and, by extension, a legislator’s ability to receive a grant. For example, Article IX, Section 14 of the New Mexico Constitution (“the Anti-Donation Clause”) prohibits the state from “mak[ing] any donation to or in aid of any person, association or public or private corporation . . . ,” unless the donation is allowed under one of the enumerated exceptions to the Anti-Donation Clause. The most common exception to the Anti-Donation Clause’s proscription is located at subsection (D), which provides that the state may create job opportunities “by providing land, buildings or infrastructure for facilities to support new or

⁵ Article IV, Section 28 of the state Constitution addresses the potential for self-dealing and conflicts of interest by members of the Legislature who either aspire to other civil office or to enter into state contracts that the Legislature authorized. *See* N.M. Const., art. IV, § 28. The constitutional purpose to preclude self-dealing seems to arise irrespective of whether funds that the Legislature authorizes are made available through contract or grant; however, the constitutional text and the line of New Mexico appellate cases applying Article IV, Section 28 focuses exclusively on contracts. Furthermore, a separate provision of the Constitution, Article IX, Section 14 (the Anti-Donation Clause), constrains the Legislature’s authority to grant state funds to private persons and businesses. Both Article IV, Section 28 and Article IX, Section 14 formed part of the original state constitution, adopted by the constitutional convention held in Santa Fe from October 3 to November 21, 1910, and as amended on November 6, 1911 and November 5, 1912. *See Constitution of the State of New Mexico* (La Voz Del Pueblo, 1914), <https://tinyurl.com/7qy0hvwp> (last accessed May 19, 2021). As such, the original constitutional structure separated the provisions controlling state contracts and grants. Accordingly, acknowledging that there might be reasonable disagreement regarding the scope of Article IV, Section 28’s application, the Commission reads that specific constitutional provision not to limit a legislator’s interest in grants.

expanding businesses” N.M. Const., art. IX, § 14(D); *see also* NMSA 1978, § 5-10-2(B) (“The purpose of the Local Economic Development Act is to implement the provisions of the 1994 constitutional amendment to Article 9, Section 14 of the constitution of New Mexico to allow public support of economic development to foster, promote and enhance local economic development efforts while continuing to protect against the unauthorized use of public money and other public resources.”).

c. On recusal and disclosure of conflicts of interest

The Governmental Conduct Act does not require a legislator to recuse from a vote on legislation that affects their financial interests or otherwise implicates a conflict of interest. This conclusion might be surprising and, in part, is a function of the Act’s definitions. While section 10-16-4(B) of the Governmental Conduct Act 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 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.

Section 10-16-3(A) of the Governmental Conduct Act 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.* Under 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, 472 P.3d 1260, *cert. granted* (Sept. 8, 2020). Whether a legislator introduces or votes on a specific bill or amendment for the specific purpose “to obtain personal benefits or pursue private interests” is a question of fact. *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 bill, if enacted, would result in “personal benefits” to a legislator or advance 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 financial interest, 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 a financial 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). And, moreover, broad and voluntary recusal on matters affecting their financial interests would likely defeat a section 10-16-3(A) claim that a legislator used the powers of their office to obtain personal gain. Even so, a legislator’s voluntary recusal from a vote on legislation authorizing a state agency to make state funds available through contract, however, does *not* obviate the limitations on a legislator’s ability to benefit from a state contract. Neither Article IV, Section 28 nor section 10-16-9 of the Governmental Conduct Act suggests as much. *See* N.M. Const., art. IV, § 28; § 10-16-9.

Finally, although the Governmental Conduct Act does not require that legislators recuse when faced with conflicts of interest, it does require that legislators disclose any conflicts of interest. *See* NMSA 1978, § 10-16-3(C); *accord* House Rule 26–1(A). Section 10-16-3(C) of the Governmental Conduct Act provides that “[f]ull disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct.” § 10-16-3(C).⁶ If legislation would authorize state agencies to make available funds either through contracts or grants and, at the time of voting on the legislation, the legislator anticipates that a business in which they or their immediate family members are significantly interested will apply for such contracts or grants, then the legislator should disclose both their expectation that the business will apply for such contracts or grants and their financial interest in the business.

2. No. If a legislator was a member of the Fifty-Fourth Legislature, then the legislator (and the legislator’s business or nonprofit corporation) may not receive a small business loan made available

⁶ As with section 10-16-3(A), the enforceability of section 10-16-3(C) is currently pending review in the New Mexico Supreme Court. *See Gutierrez, 2020-NMCA-045, cert. granted* (Sept. 8, 2020).

by the Small Business Recovery Act of 2020. Further, the legislator’s immediate family members may not receive a small business loan where the legislator has an interest in the family business.

The Small Business Recovery Act of 2020 (“Act”), Laws 2020 (1st S.S.), ch. 6, §§ 1–7, creates a small business recovery loan fund and authorizes the New Mexico Finance Authority (“NMFA”) to issue loans of no greater than \$75,000.00 to qualifying small businesses. *See* Laws 2020 (1st S.S.), ch. 6, §§ 3(A), 4(A) & 4(D)(1). The loans that NMFA issues under the Act are contracts, requiring the debtor qualifying business to repay the loan “with interest under the terms of the loan agreement.” *See id.* ch. 6, § 4(D)(2)(b)(1); *see also id.* ch. 6, § 5 (setting the annual interest at one-half of the Wall Street Journal prime rate on the date the loan is issued and requiring payment terms for loans issued under the legislation). The Act therefore “authorized” these loan contracts within the meaning of Article IV, Section 28. *See State ex rel. Baca*, 1928-NMSC-021, ¶ 11.

Under Article IV, Section 28, any legislator who was a member of the Fifty-Fourth Legislature (and thus whose term included the June 2020 special session) cannot have a direct or indirect interest in the small business recovery loans during that term and for one year thereafter. The Constitution’s prohibition on a legislator’s direct and indirect interests in a contract has several ramifications: First, if a legislator has an ownership interest in an otherwise qualifying business, then Article IV, Section 28 disqualifies the business from receiving a recovery loan authorized by the Act. *See Att’y Gen. Op. 91-11* (1991) (concluding that a water users association could not contract with a firm in which Senator Christine Donisthorpe was a president and stockholder for a project funded through a contract authorized by the Legislature during Senator Donisthorpe’s term in office). Second, if the legislator sits on the board of an otherwise qualifying business or nonprofit corporation, then the legislator’s board membership also likely would disqualify the business or nonprofit from receiving a recovery loan. *See Att’y Gen. Op. 90-17* (1990) (concluding that a legislator’s service on the board of directors of a nonprofit organization disqualifies the organization from obtaining any contracts with state agencies where the contract was authorized by a law passed during the legislator’s term). Last, if the legislator’s immediate family members own a small business, then the legislator likely would have an indirect interest in the loan contract between that business and NMFA that would prevent the business from receiving the loan.

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

a. Laws 2021, Chapter 3, Sections 10 through 13⁷

Laws 2021, Chapter 3, Section 10 adds a new section to the Local Economic Development Act (“LEDA”), NMSA 1978, §§ 5-10-1 to 5-10-15 (1993, as amended 2020), authorizing recovery grants to qualifying entities. Laws 2021, Chapter 3, Section 11 appropriates \$200,000,000 from the general fund to the Economic Development Department (“EDD”) for expenditure in fiscal years 2021 through 2023 to provide grants pursuant to section 10 of the same act. Laws 2021, Chapter 3, Sections 12 and 13 enact the effective date and emergency clause for sections 10 and 11, among other amendments to LEDA.

Section 10 authorizes EDD to transfer the appropriated funds to the New Mexico Finance Authority (NMFA”) and for NMFA to provide recovery grants to qualifying entities. *Id.* § 10(A). Up to \$100,000 in a recovery grant may be provided to each qualifying entity in quarterly payments. *Id.* § 10(D). EDD shall promulgate rules to determine the amount of the recovery grants, provided that the grants shall not exceed \$25,000 per quarter. *Id.*

To receive a grant, an entity must agree, *inter alia*, (i) to use the proceeds of the grant for the reimbursement of rent, lease, or mortgage obligations of the entity for its business locations within the state of New Mexico; (ii) to certify that the grant shall be accompanied by new job creation, that the entity does not expect to permanently cease business operations or file for bankruptcy, and that the entity is current on several specified tax and unemployment compensation obligations; (iii) to demonstrate a decline in business revenues between taxable years 2019 and 2020; and (iv) to submit an application to NMFA for a grant no later than June 30, 2022. *Id.* § 10(C). To remain eligible for additional quarterly payments, an entity must demonstrate (i) activity and a net increase in the number of full-time-equivalent employees (“FTEs”) relative to the immediately preceding quarter; (ii) that it is current on state and local tax obligations; and (iii) that it has paid more in rent, lease or mortgage obligations within the state of New Mexico from the date of application to the request for a subsequent quarterly payment than it received in recovery grant payments. *See id.* § 11(D)(1)–(3).

⁷ This statute was approved on February 26, 2021 as House Tax and Revenue Committee Substitute for House 11, as twice amended, with an emergency clause.

- b. The limitations regarding a legislator’s interest in contracts with state agencies do not apply to the recovery grants.

The limitations that Article IV, Section 28 and section 10-16-9(A) impose on legislators’ interests in contracts do *not* apply to the recovery grants authorized by Laws 2021, Chapter 3, Sections 10 through 13. Recovery grants under section 10 are not loan contracts; nor are they contracts for services, construction, items of tangible personal property. Rather, they are grant payments by a state agency of an allocation of an appropriation of general fund dollars to private businesses. The State does not receive any services, construction, property, or obligation of repayment of the grant amount or interest thereon in exchange for the payments authorized by section 10. Therefore, because section 10 does not authorize contracts, neither Article IV, Section 28 of the New Mexico Constitution nor Section 10-16-9(A) of the Governmental Conduct Act prevent businesses that are owned by a legislator or a legislator’s family member from applying for or receiving a recovery grant.⁸ *See* State Ethics Comm’n Advisory Op. 2021-03, at 4 (Feb. 5, 2021) (concluding that section 10-16-9(A) does not constrain a business significantly owned by a legislator from applying for Coronavirus Aid, Relief, and Economic Security (“CARES”) Act relief grants funds because the CARES relief grants were not contracts).

While the limitations on legislators’ interests in state contracts do not apply, legislators who anticipate that their businesses will seek recovery grant funds should disclose the potential conflict of interest. *See* § 10-16-3(C). Ideally, this disclosure should occur before the legislator votes on the legislation. Section 10-16-3(C) of the Governmental Conduct Act does not specify how legislators, public officials and employees should disclose conflicts of interests. Accordingly, the Commission encourages each legislative chamber to adopt additional rules regarding the timing and content of disclosures of conflicts of interest. The

⁸ Like section 10-16-9(A), section 10-16-9(B) of the Governmental Conduct Act does not prohibit a business in which a legislator has an interest from applying for a relief grant; however, the latter statutory provision still prohibits a legislator from appearing on behalf of the business or otherwise assisting the business in applying for and receiving the relief grant. Under section 10-16-9(B), the legislator’s business is a “person.” § 10-16-9(B); *see also* § 12-2A-3(E) (Uniform Statutory and Rules Construction Act) (defining “person” as “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or any legal or commercial entity”). And the application to NMFA for the relief grant is “a matter before a state agency.” § 10-16-9(B). Accordingly, like with the small business recovery loans discussed *supra*, the application for the relief grant and other related matters should be accomplished by someone *other* than the legislator who has the interest.

Commission also encourages each chamber to adopt rules relating to the filing of statements of interests with the respective clerk of each legislative chamber.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY L. BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner

FRANCES F. WILLIAMS, Commissioner