



SEC COMMISSION MEETING

JUNE 4, 2021

PUBLIC MEETING MATERIALS PACKET

AFTERNOON SESSION

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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, June 4, 2021, 8:00 a.m. to 3:00 p.m. (Mountain Time).

Zoom Meeting

Location: Virtual Meeting Via Zoom

Join Zoom webinar through internet browser:

<https://us02web.zoom.us/j/89002346632?pwd=N0ZNa09yYU9mL2dHT09McIVCMU9CZz09>

Online Meeting Passcode: 82ACvK

Join Zoom meeting telephonically: 1 669 900 9128

Webinar ID: 890 0234 6632

Telephone Passcode: 77691

COMMISSION MEETING (Morning)

Chairman Lang Calls the Meeting to Order

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

Commission Meeting Items

Action Required

- | | |
|--|-----|
| 4. Selection of Citizen Redistricting Commission members:
overview of process and applications received
(Farris) | No |
| 5. Interviews and selection of Citizen Redistricting Commission Chair
<i>Applicants selected for interview:</i> | Yes |

- Hon. Edward L. Chávez
- Hon. Barbara J. Vigil

6. Interviews and selection of two Citizen Redistricting Commission Non-major party members Yes
- Applicants selected for interview:*
- Lisa Abeyta (Albuquerque)
 - Jarratt Applewhite (Lamy)
 - Vicki Ballinger (Elephant Butte)
 - Treciafaye Blancett (Eagle Nest)
 - William Jason Fisher (Albuquerque)
 - Robert Rhatigan (Albuquerque)
 - Joaquin Sanchez (Albuquerque)

**Break for lunch: 12:00 to 1:00pm.
Commission reconvenes at 1:00pm**

Join Zoom meeting through internet browser:

<https://us02web.zoom.us/j/82739821480?pwd=MVJFd1RxSIVHUFoxTys3RHJ2Vm5JUT09>

Meeting ID: 827 3982 1480

Online Meeting Passcode: NNanL0

Join Zoom meeting telephonically: 1 669 900 9128

Telephone Passcode: 472141

COMMISSION MEETING (Afternoon)

1. Roll Call
2. Advisory Opinion 2021-08 Yes
(*Farris*)
3. Advisory Opinion 2021-09 Yes
(*Branch*)
4. Issuance of amendments to 1.8.1 and 1.8.3 NMAC Yes
for public comment
(*Farris*)

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

5. Discussions regarding administrative complaints

(Farris & Boyd)

- a. Administrative Complaint No. 2020-007
- b. Administrative Complaint No. 2020-031
- c. Administrative Complaint Nos. 2020-034 & 2020-035
- d. Administrative Complaint No. 2021-004

- 6. Discussions regarding pending civil litigation
(Farris & Boyd)

Upon applicable motion, Commission returns from executive session

- 7. Actions on Administrative Complaints Yes
(Farris)
 - a. Administrative Complaint No. 2020-007
 - b. Administrative Complaint No. 2020-031
 - c. Administrative Complaint Nos. 2020-034 & 2020-035
 - d. Administrative Complaint No. 2021-004
- 8. FY22 outlook and possible interagency agreement No
(Farris)
- 9. Discussion of return to in-person meetings No
and discussion of next meeting
(Lang)
- 10. Public Comment No
- 11. Adjournment

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



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

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.

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 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

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.

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 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

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).

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 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 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,

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.

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).

- 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).

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.

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 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



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-09

June 4, 2021¹

QUESTION PRESENTED²

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

ANSWER

No. The 2020 Act and 2021 Act authorize small business loans, which are contracts. As a result, Article IV,

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 May 5, 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). Commission staff provided an informal advisory opinion in response to the request on May 12, 2021. The Commission now issues that guidance as a formal advisory opinion. *See* 1.8.3.9(B)(3) NMAC.

Section 28 of the New Mexico Constitution prohibits a legislator from being directly or indirectly interested in any small business loan authorized by the 2020 Act or the 2021 Act for the duration of the legislator’s term and for one year after their term expires.

ANALYSIS

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).

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, and 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).

The 2020 Act created a small business recovery loan fund and authorized the New Mexico Finance Authority (“NMFA”) to issue loans of up to \$75,000.00 to qualifying small businesses. See Laws 2020 (1st S.S.), ch. 6, §§ 3(A), 4(A) & 4(D)(1). The small business loans are distinguishable from other forms of coronavirus economic aid, such as CARES relief grants, because those forms of aid are unconditional grants of money. See Advisory Opinion No. 2021-03 (Feb. 5, 2021) (concluding that a legislator or the legislator’s business may apply for and receive a CARES relief grant authorized by Laws 2020 (2nd S.S.), ch. 1, § 2). The loans that NMFA may issue under the 2020 Act have several conditions: for example, a qualifying business must agree to repay the loan “with interest under the terms of the loan agreement.” See Laws 2020 (1st S.S.), ch. 6, § 4(D)(2)(b)(1); see also *id.* § 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). In view of the consideration required the legislation, the small business recovery loans are contracts with the New Mexico Finance Authority.

The 2021 Act made several changes to the small business recovery loan program, including liberalizing qualifications and extending the application deadline. See Laws 2021, ch. 5, § 2(E) (changing the definition of “qualifying small business” so as not to require proof of more than 30% revenue loss and to instead only require a showing that the business had “a substantial decline in gross revenue”), § 4(C)(4) (extending the application deadline to May 31, 2022). See *also* Legislative Finance Committee, Fiscal Impact Report on Senate Bill 3 (Feb. 10, 2021), <https://www.nmlegis.gov/Sessions/21%20Regular/firs/SB0003.PDF> (describing the 2021 Act’s changes to the small business recovery loan program to expand eligibility).

Because the 2020 Act “authorizes” the small business loan contracts within the meaning of Article IV, Section 28 of the New Mexico Constitution, any legislator who was a member of the Fifty-Fourth Legislature cannot have a direct or indirect interest in a small business recovery loan during their term of office 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 likely 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 disqualifies 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. *Cf.* NMSA 1978, § 10-16-2(F) (defining "financial interest" as an ownership interest in a business held by an individual or the individual's family).

The 2020 Act was passed by the Fifty-Fourth Legislature. Because the 2020 Act clearly "authorize[s]" the small business loans, Article IV, Section 28 prohibits any legislator that was a member of the Fifty-Fourth Legislature and any business a legislator that was a member of the Fifty-Fourth Legislature owns from applying for a small business loan until at least December 31, 2021. Whether the prohibition extends past December 31, 2021 turns on whether the 2021 Act also "authorizes" the small business loans.

The 2021 Act passed by the Fifty-Fifth Legislature also authorizes small business loans under Article IV, Section 28. The 2021 Act removes conditions on small business qualifying for small business loans, Laws 2021, ch. 5, § 2(E); authorizes the New Mexico Finance Authority to issue rules to permits businesses that do not have a record of actual losses to apply for small business recovery loans, *id.*, § 4(A); authorizes the New Mexico Finance Authority to issue small business loans in amounts greater than the authorization contained in the 2020 Act, *see id.*, § 4(C)(1); authorizes the New Mexico Finance Authority to require collateral or personal guarantees to secure loan amounts in excess of \$75,000, *id.*, § 4(C)(3); extends the deadline for loan applications from December 30, 2020 to May 31, 2022, *id.*, § 4(C)(4); and authorizes recipients receiving loans under the 2020 Act to refinance their loans subject to the terms and conditions of the 2021 act, *id.*, § 8. In view of those statutory provisions, like the 2020 Act, the 2021 Act

“authorizes” small business loans for the purposes of Article IV, Section 28.³ Therefore, Article IV, Section 28 also prohibits a legislator and any business a legislator owns from being “interested directly or indirectly in any” small business loan contract with the New Mexico Finance Authority authorized by either the 2020 Act or the 2021 Act.

CONCLUSION

For the reasons above, Article IV, Section 28 prohibits a legislator and a business a legislator owns from receiving a small business recovery loan until one year after the end of the legislator’s current term of office.

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

³ New Mexico case law distinguishes between, on the one hand, legislation that appropriates funds for payments on contracts and, on the other hand, legislation that authorizes contracts for the purposes of Article IV, Section 28. *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). In view of that distinction, the 2021 Act, like the 2020 Act, authorizes the small business loan contracts.

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

1.8.1.1 ISSUING AGENCY: State ethics commission (the commission), 800 Bradbury Dr. SE, Ste. 215, Albuquerque, NM 87106.
[1.8.1.1 NMAC-N, 1/1/2020; A, 10/15/2020]

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

1.8.1.3 STATUTORY AUTHORITY: Paragraph 2 of Subsection A of Section 10-16G-5, State Ethics Commission Act, Section 10-16G-1 NMSA 1978; Section 10-16-13.1, Governmental Conduct Act, Section 10-16-1 NMSA 1978, Subsection (C) of Section 10-15-1, Open Meetings Act, Section 10-15-1 NMSA 1978.
[1.8.1.3 NMAC-N, 1/1/2020; A, 10/15/2020]

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

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

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

1.8.1.7 DEFINITIONS:

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

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

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

D. Other words and phrases used in this part have the same meaning as found in 1.8.3.7 NMAC or the State Ethics Commission Act, NMSA 1978, § 10-16G-1 to -16. [1.8.1.7 NMAC-N, 1/1/2020; A, 10/15/2020]

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

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

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

1.8.1.9 ADVISORY OPINIONS AND INFORMAL ADVISORY OPINIONS

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

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

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

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

- (a) issue an advisory opinion;
- (b) inform the requester that the commission will not be issuing an advisory opinion and provide an explanation for the commission's decision; or
- (c) inform the requester that the commission requires more than sixty days to issue an advisory opinion, and notifies the requester about the status of the request every thirty days thereafter.

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

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

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

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

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

(3) An informal advisory opinion is not binding on the commission unless and until the commission votes to adopt the informal advisory opinion as an advisory opinion. The director, based on any informal advisory opinion issued, may draft an advisory opinion for the commission to consider for issuance as an advisory opinion.

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

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

[1.8.1.9 NMAC-N, 10/15/2020]

1.8.1.10 REFERENCE TO OTHER DOCUMENTS: When a rule issued by the commission refers to another rule, regulation or statute, or other document, the reference, unless stated specifically to the contrary, is continuous and intended to refer to all amendments of the rule, regulation, statute or document.
[1.8.1.9 NMAC-N, 1/1/2020, Rn, 10/15/2020]

1.8.1.11 INTERPRETATION OF TERMS: Unless the context otherwise requires:

- A.** Singular/plural. Words used in the singular include the plural; words used in the plural include the singular.
- B.** Gender. Words used in the neuter gender include the masculine and feminine. The personal pronoun in either gender may be used in these rules to refer to any person, firm or corporation.
- C.** Permissive/mandatory. May is permissive; shall and must are mandatory.

[1.8.1.10 NMAC-N, 1/1/2020, Rn, 10/15/2020]

1.8.1.12 USE OF PRESCRIBED FORMS: The director may prescribe forms to carry out specified requirements of these rules or the state ethics commission act. Prescribed forms, or their substantial equivalent, must be used when available, unless these rules state otherwise or the director waives this requirement in writing. The director shall accept filings made on legible copies of prescribed forms.
[1.8.1.11 NMAC-N, 1/1/2020, Rn, 10/15/2020]

1.8.1.13 ADDRESS:

- A.** By mail: Director, State Ethics Commission, 800 Bradbury Dr. SE, Ste. 215, Albuquerque, NM 87106.
- B.** In person: State Ethics Commission, 800 Bradbury Dr. SE, Ste. 215, Albuquerque, NM 87106.
- C.** By email: ethics.commission@state.nm.us.

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

1.8.1.14 COMMISSION MEETINGS: The time, location, and format of commission meetings is determined in accordance with this section.

- A. Time, place, and duration.** The commission chair, in consultation with the director, shall determine the time, place, format, and duration of commission meetings necessary to conduct the commission's business.
- B. Executive Session.** Upon motion and vote of a quorum, the commission may enter into a closed, executive session to discuss matters that are confidential under the State Ethics Commission Act, Section 10-16G-1 NMSA 1978, and as otherwise permitted by the Open Meetings Act, Section 10-15-1 NMSA 1978.
- C. Virtual meetings.** With the consent of the commission chair, the commission may meet virtually via web or teleconference. In the event the commission meets virtually, the meeting should occur on a platform that allows members of the public to observe and participate. At a virtual or telephonic meeting, each commissioner participating shall be identified when speaking and all meeting participants and members of the public attending must be able to hear

every person who speaks during the meeting. The commission staff shall record virtual meetings and make the recordings (except for recordings of closed executive sessions) available for public inspection.

D. Attendance by individual commissioners. An individual commissioner may attend a physical commission meeting virtually, through telephone phone or web conference provided that each commissioner participating by conference telephone can be identified when speaking, and those attending may hear every person who speaks during the meeting.

[1.8.1.14 NMAC-N, 10/15/2020]

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

1.8.3.1 ISSUING AGENCY: State ethics commission (the commission), 800 Bradbury Dr. SE, Ste. 2157, Albuquerque, New Mexico 87106.
[1.8.3.1 NMAC-N, 1/1/2020]

1.8.3.2 SCOPE: This part applies to all proceedings, cases, and hearings before the commission and all parties that appear before the commission.
[1.8.3.2 NMAC-N, 1/1/2020]

1.8.3.3 STATUTORY AUTHORITY: Paragraphs 2 and 3 of Subsection A of Section 10-16G-5 NMSA 1978; Paragraph 5 of Subsection B of Section 10-16G-6 NMSA 1978; Subsection H of Section 10-16G-7 NMSA 1978; Subsection C of Section 10-16G-12 NMSA 1978; Section 1-19-34.8 of the Campaign Reporting Act, Section 1-19-1 NMSA 1978; Section 2-11-8.3 of the Lobbyist Regulation Act, Section 2-11-1 NMSA 1978; Section 2-15-8 NMSA 1978; Sections 10-16-11, 10-16-13, 10-16-14 and 10-16-18 of the Governmental Conduct Act, 10-16-1 NMSA 1978; Sections 10-16A-5, 10-16A-6, and 10-16A-8 of the Financial Disclosure Act, 10-16A-1 NMSA 1978; Section 10-16B-5 of the Gift Act, Section 10-16B-1 NMSA 1978; and Section 13-1-196.1 of the Procurement Code, Section 13-1-28 NMSA 1978.
[1.8.3.3 NMAC-N, 1/1/2020]

1.8.3.4 DURATION: Permanent.
[1.8.3.4 NMAC-N, 1/1/2020]

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

1.8.3.6 OBJECTIVE: The objective of this part is to provide general procedural rules for proceedings before the state ethics commission.
[1.8.3.6 NMAC-N, 1/1/2020]

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

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

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

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

D. “Brief” is a document summarizing the facts and points of law of a party’s case. It may be offered to or requested by a hearing officer or filed in an appeal to the commission. For

example, a “brief in chief” is filed with the commission by the appellant. An “answer brief” is filed by the appellee in response to the brief-in-chief.

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

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

GE. “**Claim**” is a complainant’s allegation that a respondent violated a particular provision of law.

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

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

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

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

LJ. “**Party**” and “**Parties**” means the named persons in a proceeding before the commission or a hearing officer.

MK. “**Person**” means any individual or entity.

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

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

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

[1.8.3.7 NMAC-N, 1/1/2020]

1.8.3.8 STANDING ORDERS: The director may issue, or withdraw, standing orders addressing general practice issues and filing protocols for the handling of cases before the commission or its hearing officers. Such standing orders will be displayed publicly at commission facilities, any commission website, and in any applicable information provided with a notice of hearing. The parties appearing before the commission or its hearing officers are expected to comply with standing orders.

[1.8.3.8 NMAC-N, 1/1/2020]

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) A complaint filed pursuant to Subparagraph (a) of Paragraph (1) of Subsection A of 1.8.3.9 NMAC may be amended once. An amended complaint must be filed within seven days of the director's determination under Paragraph (3) of Subsection A of 1.8.3.10 NMAC that the commission has jurisdiction over the complaint.

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

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

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

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

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

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

(ii) a duty under Section 10-16A-3 NMSA 1978 to submit a financial disclosure statement as a condition of candidacy or holding office;

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

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

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

(a) on which the alleged conduct occurred; or

(b) the alleged conduct could reasonably have been discovered.

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

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

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

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

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

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

(a) of the provisions of this section regarding the blackout period;

(b) that the complainant may refer allegations of criminal conduct to the attorney general or appropriate district attorney at any time; and

(c) of the deferral of commission action on the complaint for the duration of the blackout period.

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

(a) the filing of the complaint;

(b) the specific allegations and violations charged in the complaint;

and

(c) the deferral of commission action on the complaint for the duration of the blackout period.

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

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

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

(1) any commissioner or the director presents to the commission information or documents showing a violation of any statute or constitutional provision over which the commission has jurisdiction;

(2) the director determines that the complaint would be within the commission's jurisdiction; and

(3) five commissioners vote to initiate the complaint and sign under oath and subject to penalty of perjury that the information in the complaint, and any attachments provided with the complaint, are true and accurate.

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

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

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

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

H. Except as provided in subsection (E) of 1.8.3.9 NMAC, Subsections (I) & (J) of Section 10-16G-10(I) NMSA 1978, Section (A) of Section 10-16G-11 NMSA 1978, Subsection A of 1.8.3.12 NMAC, or Subsection (J) of 1.8.3.14 NMAC, the commission shall not receive any information related to a complaint filed pursuant to Paragraph (1) of Subsection (C) of Section 10-16G-5 NMSA 1978 and Section (E) of 1.8.3.9 NMAC until an appeal is made pursuant to Section 1.8.3.15 NMAC.

[1.8.3.9 NMAC-N, 1/1/2020]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HG. The director shall consult with the attorney general, an appropriate district attorney or the United States attorney if:

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

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

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

[1.8.3.10 NMAC-N, 1/1/2020]

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

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

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

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

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

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

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

~~(2) Interview a witness under oath and outside the presence of the parties; and~~
~~(a) The general counsel shall serve a copy of the request for production of books, records, documents and other evidence and interrogatories on the respondent.~~

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

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

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

(b) Any objection during a deposition shall be stated concisely in a non-argumentative and non-suggestive manner. Objections to form or foundation may only be made by stating "objection—form" or "objection—foundation". ~~It is not grounds for objection~~

~~that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.~~ When a question is pending, or a document has been presented to the witness, no one may interrupt the deposition until the answer is given, except when necessary to preserve a privilege.

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

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

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

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

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

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

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

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

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

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

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

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

~~F. If, after completing the investigation, the general counsel determines that a complaint is not supported by probable cause, a hearing officer must dismiss the complaint. In that event, the complainant and the respondent shall be notified in writing of the decision and the~~

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

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

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

[1.8.3.11 NMAC-N, 1/1/2020]

1.8.3.12 SUBPOENAS; ENFORCEMENT:

~~**A.** **(3)** If the general counsel determines it is necessary, the director shall request the commission's authority to file a petition with the designated district court judge or other judge pro tempore as designated pursuant to order of the chief judge of the supreme court district court:~~

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

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

~~**(e3)** to resolve any assertion of privilege.~~

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

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

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

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

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

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

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

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

[1.8.13.12 NMAC-NM, date]

1.8.3.13~~2~~ GENERAL COUNSEL'S PROBABLE CAUSE DETERMINATIONS AND CONSEQUENCES; INVESTIGATION REPORTS AND RECOMMENDATIONS TO COMMISSION; DISPOSITION BY AGREEMENT; NOTICE TO PARTIES:

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

(1) promptly notify both the complainant and the respondent:
(1a) of the specific claims and allegations in the complaint that were the subject of the general counsel's investigation;
(2b) of the finding of probable cause as to specific claims; and
(3c) that a public hearing before a hearing officer will be set, provided that the notification has not been delayed by order of the commission pursuant to Subsection H of Section 10-16G-10 NMSA 1978; and

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

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

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

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

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

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

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

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

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

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

[1.8.3.1~~32~~ NMAC-N, 1/1/2020]

1.8.3.1~~43~~ HEARING OFFICERS; SUMMARY DISPOSITION; HEARINGS; INTERPRETERS; EVIDENCE:

A. The commission shall authorize the director to contract, for reasonable hourly compensation, with qualified persons to act as hearing officers. Hearing officers shall be assigned to act on or preside over hearings on complaints. Hearing officers must be currently licensed attorneys, or retired judges of the appellate, district, or metropolitan courts of New

Mexico or any federal court, who are familiar with the ethics and election laws enforced by the commission. A hearing officer shall conduct a hearing fairly and impartially.

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

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

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

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

F. The parties may be represented by counsel, who shall enter an appearance at the earliest opportunity, pursuant to Paragraph (73) of Subsection A of 1.8.3.9 NMAC.

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

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

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

that interferes with the conduct of a fair and orderly hearing or development of a complete record.

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

J. Parties who appear at the hearing may:

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

(2) present evidence and testimony;

(3) examine and cross-examine witnesses; and

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

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

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

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

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

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

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

NM. After the termination of the hearing, or in lieu of a hearing if, upon a motion by a party or the general counsel, the hearing officer concludes there is no genuine dispute as to any

~~material facts, if~~ the hearing officer shall issue written findings and conclusions on whether~~finds~~
~~by a preponderance of~~ the evidence establishes that the respondent's conduct as alleged in the
complaint constitutes ~~s~~ a violation of any law within the jurisdiction of the commission, the
hearing officer. The hearing officer's, in a written decision:

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

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

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

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

Q. ~~Either A~~ party may request copies of ~~exhibits, documents, records in the administrative file~~evidence considered by the hearing officer, or a copy of the audio recording of the ~~proceeding~~hearing by submitting a written request to the director. The director may charge a reasonable fee for copies made, consistent with its fee schedule under the Inspection of Public Records Act. The director may also require the requesting party to submit a new, sealed computer storage device, such as a compact disc, dvd disc, or usb drive, or other tangible device for copying of any audio or video recording that is part of the administrative record. Every party is responsible for paying the cost of any transcription of the audio recording.
[1.8.3.143 NMAC-N, 1/1/2020]

1.8.3.154 APPEALS:

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

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

(5) If the hearing officer issued a final decision on a complaint that was initiated by the commission under Paragraph (1) of Subsection (C) of Section 10-16G-5 NMSA

1978 and Section (E) of 1.8.3.9 NMAC, or where the general counsel has intervened under Section (G) of 1.8.3.14 NMAC, then the general counsel may appeal the hearing officer's decision within 30 days of the issuance by filing a notice stating the information required in subsections (1) through (4) above.

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

(1) The appellant shall file and serve a brief in chief within 15 days;

(2) The appellee shall file and serve an answer brief within 15 days after service of the brief of the appellant; and

(3) Neither the brief in chief nor the answer brief shall exceed 10 pages.

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

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

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

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

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

GH. A party may seek review of the commission's final decision by filing for a petition of writ of certiorari pursuant to Rule 1-075 NMRA.
[1.8.3.1~~54~~ NMAC-N, 1/1/2020]

1.8.3.1~~65~~ OPEN RECORDS AND CONFIDENTIALITY:

A. Thirty days after the director provides notice pursuant to Subsection ~~FA~~ of 1.8.3.13~~H~~ NMAC to the respondent of the allegations of a complaint, the general counsel's finding of probable cause, and the setting of the public hearing:

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

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

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

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

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

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

(3) The commission shall document in writing with reasonable specificity its decision on whether to confirm the director's decision, the reasons for its decision, and the time after which the release of documents must occur.

D. Except as otherwise provided by Section 10-16G-13 NMSA 1978, or these rules, all complaints, pleadings, evidence, findings of ethical violations, terms of settlements approved by the commission and other documents within the custody and control of the commission shall be public records subject to public inspection pursuant to the Inspection of Public Records Act, Section 14-2-1 NMSA 1978.

E. Notwithstanding the previous subsection, the commission, its staff and contractors shall not reveal any information that is:

(1) protected pursuant to any privilege in law or judicial rule, or

(2) otherwise made confidential by law.

[1.8.3.1~~65~~ NMAC-N, 1/1/2020]

History of 1.8.3 NMAC: [RESERVED]