

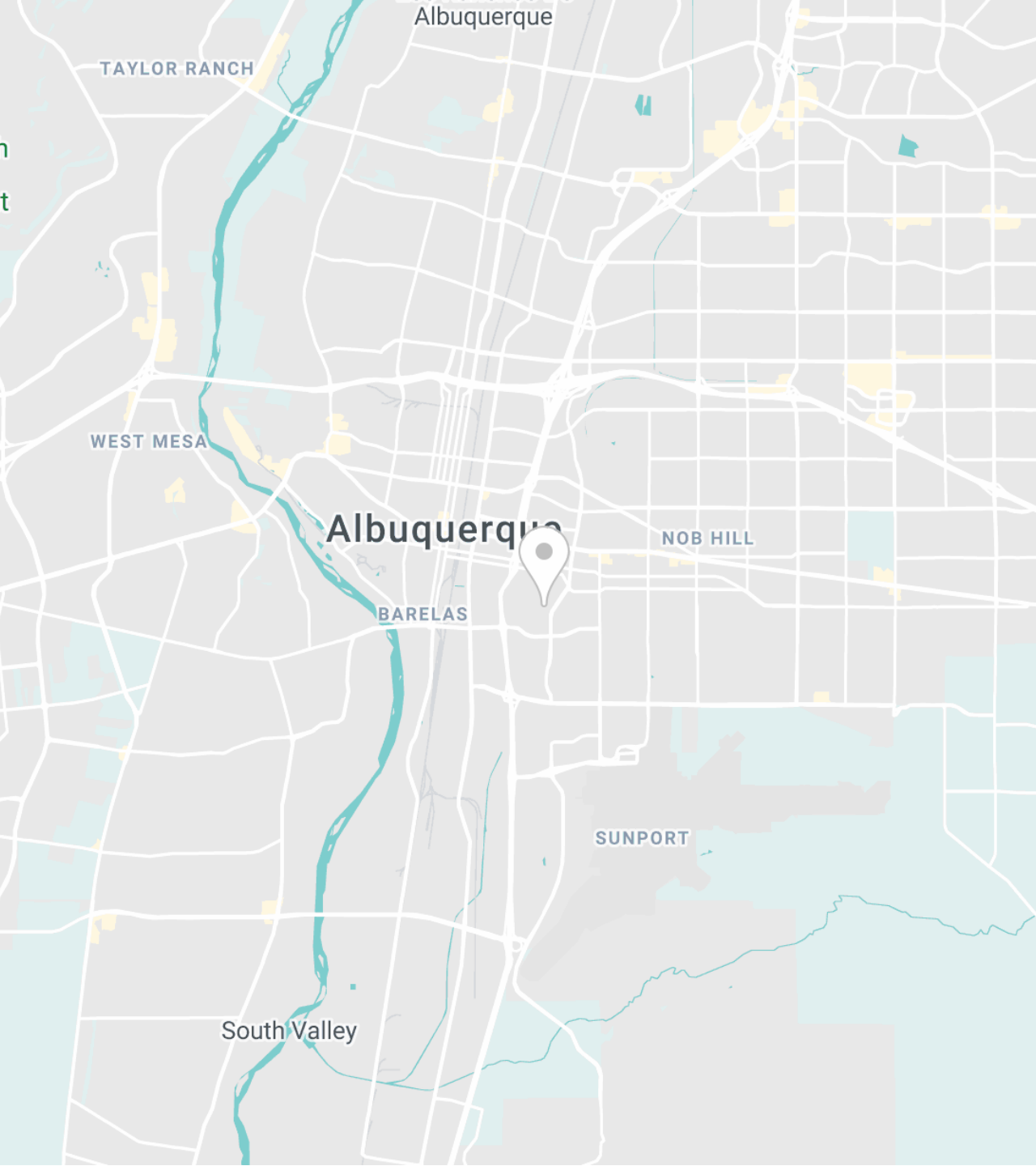
ETHICS LAW FOR MUNICIPAL OFFICIALS

New Mexico Municipal League | Municipal Officials Leadership Institute | Sept. 16, 2021

Jeremy Farris, Executive Director, State Ethics Commission



STATE ETHICS COMMISSION



STATE ETHICS COMMISSION

7 COMMISSIONERS

- Hon. William Lang (ABQ)
- Hon. Garrey Carruthers (LC)
- Jeffrey Baker (ABQ)
- Hon. Celia Foy Castillo (SF)
- Stuart Bluestone (ABQ)
- Dr. Judy Villanueva (Carlsbad)
- Ronald Solimon (ABQ)

POWERS AND RESPONSIBILITIES SPECIFIC TO LOCAL GOVERNMENT:

- PROVIDE TRAINING ON ETHICS LAWS
- PROVIDE ADVICE TO LOCAL OFFICIALS/EMPLOYEES
- ENFORCE APPLICABLE ETHICS LAWS

COMMISSION POWERS & DUTIES (1/2)

Quasi-Judicial Functions:

Adjudicate administrative complaints and issue advisory opinions

Adjudicate administrative complaints alleging violations of the laws under the SEC's jurisdiction. *Complainant v. Respondent* (State Ethics Comm'n)

Issue formal and informal (letter) advisory opinions on laws that Commission oversees.

Executive Functions: Civil enforcement actions, recommendations to Legislature and Governor, and trainings

Investigate alleged violations and initiate civil litigation in state courts to enforce selected provisions of ethics statutes. *State Ethics Comm'n v. Defendant* (2nd Jud. Dist. Ct.)

Provide recommendations on amendments to New Mexico's ethics laws.

Offer ethics trainings and guides, and "other duties as assigned" (e.g., redistricting committee appointments)

Legislative Functions: Delegated rulemaking powers (NMAC)

Promulgate rules of procedure for administrative adjudication. (1.8.3 NMAC)

Promulgate proposed code of ethics (1.8.4 NMAC)

COMMISSION POWERS & DUTIES (2/2)

Personal Jurisdiction (as an adjudicatory body)

- All Executive Officials and Legislators
- All Executive and Legislative Employees
(~17,000 in filled positions)
- Lobbyists and lobbyists' employers
(725)
- Candidates and entities subject to Campaign Reporting Act
(700)
- State government contractors and seekers of state government contracts
(~40,000 active outside suppliers)

Subject-Matter Jurisdiction and Civil Enforcement Authority

- Campaign Reporting Act
- Financial Disclosure Act
- Gift Act
- Lobbyist Regulation Act[†]
- Voter Action Act
- Governmental Conduct Act*
- Procurement Code[†]
- State Ethics Commission Act
- Article 9, Section 14 of the Constitution (Anti-Donation Clause)*
- Revised Uniform Law on Notarial Acts (2022)

TWO ORGANIZING IDEAS

1 Government belongs to the public

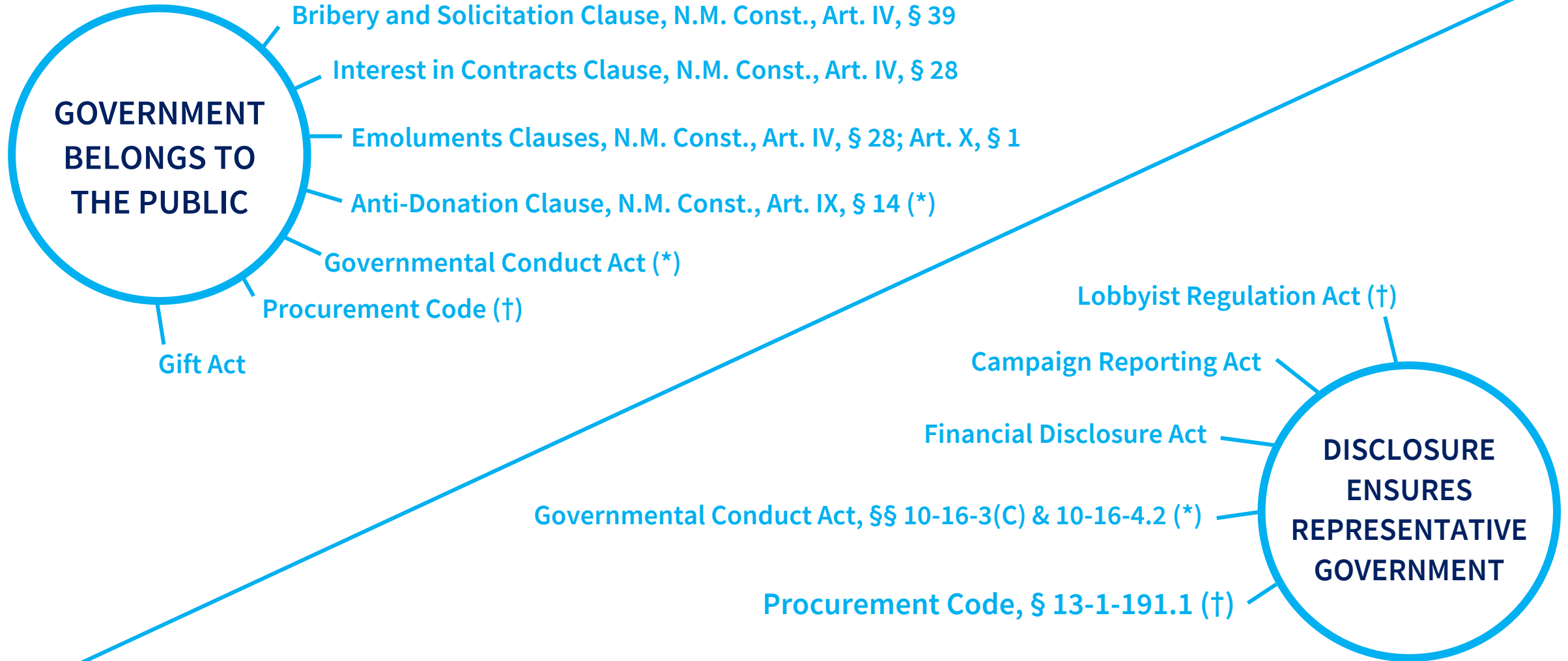
The property, powers, and prerogatives of government office *belong to and are for* the benefit of the public only, not the officials. See NMSA 1978, § 10-16-3(A).

TWO ORGANIZING IDEAS

2 Disclosure ensures representative government

- (a) Disclosure of who and what might influence an elected official allows constituents to check that the uses of government office are for the benefit of the public and not the official.
- (b) Disclosure helps to justify commonplace departures from the ideal theory of representation that representatives reflect the voices of the constituent members of their districts.

THESE TWO IDEAS ORGANIZE NM'S ETHICS LAWS



GOVERNMENTAL CONDUCT RULES

**Selected provisions of the Governmental Conduct Act relevant to
municipal government**

Prohibited Political Activities

Coercing others to make contributions (§ 10-16-3.1(A) & (B)):

Municipal official or employee cannot

- (a) coerce another public officer or employee to make a contribution to a candidate, committee, or other person for a political purpose;
- (b) threaten to deny a pay increase to employee depending on how they vote;
- (c) require an employee to contribute percentage of their pay to a political fund; or
- (d) influence a subordinate employee to purchase a ticket to a political fundraising dinner.

Using municipal property for political purpose (§ 10-16-3.1(C)):

Municipal official or employee cannot use municipal property, or allow its use, “for other than authorized purposes” – i.e., as an in-kind contribution to a candidate or political campaign.

*This provision also prohibits more mundane unauthorized uses of municipal property for a personal benefit. (e.g., using a municipal truck for a personal vacation)

Note: These provisions prevent public officials from using the public powers and resources at their disposal to finance their own campaigns or to support their political party. The statutory provisions also protect core First Amendment rights of public employees with respect to their decisions about voting and political contributions. As such, these laws keep separate the government, as an entity, and the political parties that vie for leadership positions in government.

Prohibited Sales

Sales to employees (§ 10-16-13.2(A)):

Municipal official or employee cannot sell goods, services, or construction to an employee, unless the employee initiates the sale.

Sales to persons under regulatory authority (§ 10-16-13.2(B)-(C)):

Municipal official or employee cannot sell goods, services, or construction to a person over whom they have regulatory authority.

Governmental Conduct Act & Procurement

Contracts involving public officials or employees (§ 10-16-7(B))

No contract between municipality and a public officer or employee, their family, or a business in which they have > 20% ownership interest, unless:

- (a) The public officer or employee disclosed their interest; and
- (b) The contract is awarded pursuant to a competitive process (RFP or ITB)

*Does not apply to employment contracts with municipality

Prohibited bidding (§ 10-16-13):

Municipality cannot accept a bid or proposal from a person who participated in the preparation of the specifications, qualifications or evaluation criteria on which the bid or proposal was based.

Note: These GCA provisions apply even where the Procurement Code does not -- i.e., to home rule municipalities with their own procurement ordinances. These rules, and rules about contemporaneous outside employment, severely constrain the ability of a municipal official or employee to be on both sides of a transaction involving municipal funds.

Revolving Door

Permanent ban on representation (§ 10-16-8(B))

A former official or employee cannot represent a person with the person's dealings with "the government" on a matter in which the former official or employee "participated personally and substantially" while a public official or employee

Ban on revolving door contracts (§ 10-16-8(C))

Municipality cannot enter contract with a business who is represented by a person who, within the preceding year, was a municipal official or employee if:

- (a) The contract is for more than \$1000; and
- (b) The contract is a "direct result of an official act" of the former municipal official or employee

Cooling-off period (§ 10-16-8(D))

For a period of one year after leaving government service or employment, a former public official or employee shall not represent "for pay" a person before the local government agency at which the former public official or employee worked

Note: the purpose of "revolving-door" rules is to prevent private businesses from "capturing" government by incentivizing government employees to make biased decisions in their favor.

Contemporaneous Outside Employment

Disclosure of outside employment (§ 10-16-4.2):

Municipal officer or employee can accept outside employment that does not relate to the performance of their official duties, but they must “disclose in writing” the outside employment to their respective municipal office.

Honoraria prohibited (§ 10-16-4.1):

Municipal officer or employee cannot request or receive an honorarium for a speech or a service rendered that relates to the performance of their public duties. An honorarium is cash or any thing of value greater than \$100, but excludes reimbursement for personal costs incurred in making the speech or rendering the service.

Also about prohibited employment: the old nepotism statute, § 10-1-10 (1925), prevents a municipal official or employee from employing a deputy, clerk or assistant who is a relative within the third degree (i.e., first cousins or closer), unless first approved by a higher officer, board, or council.

Prohibited employment with contracting businesses (§ 10-16-4.3):

Municipal officer or employee who is participating in municipal contracting process with a business cannot, while a municipal employee, accept outside employment with the business contracting with the municipality.

See also Procurement Code, § 13-1-193.

Prohibited employment with regulated businesses (§ 10-16-13.2(D)):

Municipal officer or employee cannot, while a municipal officer employee, accept an offer of employment or independent contract from a business over whom the municipal officer or employee has regulatory authority.

Duties at a High Level of Generality

Prohibited use of public powers (§ 10-16-3(A)):

Municipal 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”

**State v. Gutierrez, 2020-NMCA-045 (holding that this provision survived constitutional challenge)*

Disqualification for conflicts of interest (§ 10-16-4(B)):

Municipal official or employee is disqualified and must recuse from taking any official act directly benefiting their financial interest, where the benefit to their financial interest is proportionately greater than the benefit to the general public.

No official acts to enhance financial interest (§ 10-16-4(A)):

Municipal officer or employee shall not take an official act for the primary purpose of directly enhancing their financial interest or financial position

**The knowing and willful violation of this section is a fourth degree felony.*

Note: the Governmental Conduct Act advances the main principle that the powers, prerogatives, and property of public office be exercised only for the public benefit by imposing duties both (1) at a high specificity (like prohibiting certain sales) and (2) at a high level of generality (like prohibiting any official act taken to promote one’s own financial interest).

PROCUREMENT

Sources of rules, overview and scope of Procurement Code requirements, and selected ethics provisions

PROCUREMENT CODE: OVERVIEW AND SCOPE

- § 13-1-29(C)

“The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.”

- § 13-1-30(A)

The procurement code applies “to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.”

WHO HOLDS THE CHECKBOOK?

Chief procurement officers. Only certified chief procurement officers may do the following:

- **make determinations, including determinations regarding exemptions, pursuant to the Procurement Code;**
- **issue purchase orders and authorize small purchases pursuant to the Procurement Code; and**
- **approve procurement pursuant to the Procurement Code. *See* § 13-1-95.2(E)**

THE PROCUREMENT CODE IN ONE SLIDE

(1) *The main rule:* All procurement is achieved through competitive sealed bids or proposals. (§ 13-1-102). **(2) But there are *many exemptions and exceptions.***

Purchases of tangible items from other government agencies (state and local)

Procurements under existing contracts (e.g., GSA or statewide price agreements)

Travel, meals and lodging

Public school transportation services

Prepayment for conferences, magazine subscriptions, etc.

Jail and hospital operation contracts

Advertising

Purchases of services provided by disabled workers (State Use Act)

Small purchases (\$60,000 for professional services; \$20,000 for other services and goods)

EXCEPTION FOR SMALL PURCHASES

§ 13-1-125

- A) A central purchasing office shall procure services, construction or items of tangible personal property having a value not exceeding sixty thousand dollars (\$60,000), excluding applicable state and local gross receipts taxes, in accordance with the applicable small purchase rules adopted by the secretary, a local public body or a central purchasing office that has the authority to issue rules.**
- B) Notwithstanding the requirements of Subsection A of this section, a central purchasing office may procure professional services having a value not exceeding sixty thousand dollars (\$60,000), excluding applicable state and local gross receipts taxes, except for the services of landscape architects or surveyors for state public works projects or local public works projects, in accordance with professional services procurement rules promulgated by the general services department or a central purchasing office with the authority to issue rules.**
- C) Notwithstanding the requirements of Subsection A of this section, a state agency or a local public body may procure services, construction or items of tangible personal property having a value not exceeding twenty thousand dollars (\$20,000), excluding applicable state and local gross receipts taxes, by issuing a direct purchase order to a contractor based upon the best obtainable price.**
- D) Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section.**

ADVISORY OPINIONS

- **Advisory Opinions**

Formal advisory opinions may only be requested by a public official, public employee, candidate, person subject to the Campaign Reporting Act, government contractor, lobbyist or lobbyist's employer. Because county officials and employees are not subject to State Ethics Commission complaint jurisdiction, they cannot request formal advisory opinions.

Available on www.NMOneSource.com

- **Advisory Letters**

Informal advisory letters can be requested by municipal officials and employees, since they are subject to the Governmental Conduct Act. See also 1.8.1.9 NMAC

Must be requested in writing.

Requests for advisory opinions are confidential by law.

For more information and to request an opinion, email: ethics.commission@state.nm.us

QUESTIONS AND COMMENTS

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