



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-10

August 13, 2021¹

QUESTION PRESENTED²

Who is included in NMSA 1978, Section 10-16A-3(C)'s classification "state agency head" and, therefore, must file an annual financial disclosure statement?

ANSWER

Under Subsection 10-16A-3(C), a "state agency head" is the person or persons who are ultimately responsible for exercising the powers of a state agency's official acts or expending the agency's appropriated funds. Every state entity that receives an annual appropriation in section 4 of the General Appropriations Act or the feed bill is a "state agency" for the purposes of Subsection 10-16A-

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 June 22, 2021, the Commission received a request for a formal 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).

3(C), and their respective “heads” must file annual financial disclosure statements.

ANALYSIS

The Financial Disclosure Act, NMSA 1978, §§ 10-16A-1 to -8 (1993, as amended 2021), requires several categories of individuals to file annual financial disclosure statements with the Secretary of State: persons holding legislative or statewide office; candidates for legislative or statewide office; officials whose appointment to a board or commission is subject to senate confirmation; members of the insurance nominating committee; state ethics commissioners; and state agency heads. *See* NMSA 1978, § 10-16A-3(A)-(C) (1993, as amended 2019). For all but one of those categories, it is relatively clear whom the statutory language includes and excludes.

The category of “state agency head” differs: the New Mexico Statutes Annotated reference at least 241 separate state entities, from the Acequia Commission, NMSA 1978, § 73-2-65 (1993), to the Youth Conversation Corps Commission, NMSA 1978, § 9-5B-5 (1992). *See* App. Of these 241 separate entities, it is not obvious which are “state agencies” and, for the “state agencies” among the 241 entities, who are their respective “heads.” The Financial Disclosure Act defines neither “state agency” nor “state agency head.” *See* NMSA 1978, § 10-16A-2 (1993). And no New Mexico appellate court has interpreted the term.

We begin with the meaning of “state agency” in Subsection 10-16A-3(C). Both New Mexico and federal administrative procedures statutes and freedom of information statutes provide definitions of the term “agency.” *See, e.g.*, 5 U.S.C. § 551(1) (Administrative Procedures Act); 5 U.S.C. § 552(f) (Freedom of Information Act); NMSA 1978, § 12-8-2(A) (1969) (Administrative Procedures Act); *cf. also* NMSA 1978, § 14-2-6(F) (Inspection of Public Records Act) (defining “public body”). New Mexico’s Administrative Procedures Act defines an “agency,” in part, to mean “any state board, commission, department or officer authorized by law to make rules, conduct adjudicatory proceedings, make determinations, grant licenses, impose sanctions, grant or withhold relief or perform other actions or duties delegated by law” NMSA 1978, § 12-8-2(A) (1969). Any general definition of “agency,” however, is only of “limited utility . . . [when] confronted with one of the myriad organizational arrangements for getting the business of government done.” *Washington Rsch. Project, Inc. v. Dep’t of Health, Ed. & Welfare*, 504 F.2d 238, 246 (D.C. Cir. 1974) (citations

omitted). While useful, we hesitate to import to the Financial Disclosure Act part of the definition of “agency” provided by the Administrative Procedures Act.

Rather, when construing the term “state agency head,” we consider the objective and purpose of the Financial Disclosure Act—particularly in the light of the governmental ethics statutes enacted in the same session of the legislature. *See* NMSA 1978, § 12-2A-18(A)(1) (“A statute or rule is construed, if possible, to give effect to its objective and purpose . . .”). “[W]here a plain language analysis does not provide a clear interpretation, . . . ‘other statutes in pari materia [may be considered] in order to determine legislative intent.’” *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 22, 148 N.M. 426, 237 P.3d 728. “This approach ‘has the greatest probative force in the case of statutes relating to the same subject matter passed at the same session of the legislature.’” *Id.* (citation omitted).

The Financial Disclosure Act was enacted in 1993 as part of a broad set of statutory enactments and amendments related to governmental ethics. *See* Laws 1993, Chapter 46, §§ 39-45; *see also id.* §§ 1-60. These reforms responded to the January 20, 1993, recommendations of the Governmental Ethics Task Force, and included not only the Financial Disclosure Act but also campaign disclosure requirements, a prohibition on fundraising during the legislative session, lobbyist disclosure requirements, the enactment of the Governmental Conduct Act, and the creation of an interim legislative ethics committee. *See* Laws 1993, Chapter 46, §§ 1-60; *see also* Rep. H. John Underwood & James B. Mulcock, *Governmental Ethics Task Force, Final Report—Findings and Recommendations*, N.M. Legis. Council Service Info. Memo No. 202.90785 (Jan. 27, 1993). When considered alongside other contemporaneously enacted governmental ethics statutes, particularly the Governmental Conduct Act, the Financial Disclosure Act furthers two principles of public service. *See* NMSA 1978, § 10-16-3. First, financial disclosure requirements provide state officials and employees with a formal means of disclosing “real and potential conflicts of interest . . .” NMSA 1978, § 10-16-3(C) (1993). Second, financial disclosure requirements provide the public with a means to check that a legislator or public officer is using “the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.” NMSA 1978, § 10-16-3(A) (1993, as amended 2011).

Section 10-16A-4 further underscores these twin purposes. That statute provides that state officials and employees who are not otherwise required to file a financial disclosure statement under section 10-16A-3 nevertheless must disclose

their private financial interests if those interests might reasonably affect their “official acts” taken in the course of their public service. *See* NMSA 1978, § 10-16A-4 (1993). Section 10-16A-4’s concern with the “official acts” of certain state officers and employees supports a reading of the Financial Disclosure Act’s main governmental-ethics-related purposes. If public servants must disclose financial interests that reasonably could affect their “official acts” in public office, § 10-16A-4, then it is correspondingly easier to ascertain if their decisions regarding the “powers and resources” of their office benefits the public only, and not themselves, § 10-16-3(A).

In light of the Financial Disclosure Act’s governmental-ethics-related purpose, we conclude that a “state agency,” under the Act, is a state entity that has “powers and resources”—more specifically, the (i) legally authorized powers to alter the rights, duties, or privileges of others; and (ii) appropriated funds. This interpretation of “state agency” accords with other elements in definitions of state agencies or public bodies in New Mexico law. *Cf.* § 12-8-2(A) (Administrative Procedure Act) (defining “agency” to emphasize the legal power of the state to alter the rights and privileges of others);³ § 14-2-6(F) (Inspection of Public Records) (defining “public body” to include any branch of government that receives public funding). The “head” of such a “state agency” is the person or persons who are ultimately responsible for exercising the agency’s powers or expending the agency’s appropriated funds. To verify those persons are using the agency’s powers and funds “only for the public interest and not to obtain personal benefits,” § 10-16-3(A), the Act requires such individuals to disclose details about, *inter alia*, their employer, general sources of gross income, real estate holdings, business interests, memberships on for-profit businesses, professional licenses, and dealings with state agencies. *See generally* NMSA 1978, § 10-16A-3(D)(1)–(8).

This construction might not perfectly resolve all the ambiguities that may arise when considering, under section 10-16A-3(C), whether a particular individual at a particular state entity is a “state agency head” or not. *Cf. Washington Rsch. Project*, 504 F.2d at 246 (“The unavoidable fact is that each new arrangement must be examined anew and in its own context.”). But the construction supplies the two agencies who administer the Financial Disclosure Act—namely, the Secretary of State and the State Ethics Commission—with a definition that comports with the Act’s overall purpose. *See generally* NMSA 1978, §§ 10-16A-3 through 10-16A-

³*See generally, e.g.,* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions As Applied in Legal Reasoning*, 23 YALE LAW JOURNAL 16 (1913).

9. For example, state governmental entities that are purely advisory in their functions and which do not receive appropriations are not “state agencies” for the purpose of the Financial Disclosure Act. Those agencies neither exercise the legal powers of the state, nor expend appropriated state funds. Accordingly, the law does not require annual disclosure of the private finances of their members or employees (assuming there are any) because there is a lessened concern that these individuals could misuse state power or resources in the service of private ends.⁴

This construction also provides the State Ethics Commission and the Secretary of State with a reliable method to ascertain who must annually file financial disclosure statements. If a state entity annually receives an appropriation either through section 4 of the annual General Appropriations Act, *e.g.*, Laws 2021, Chapter 137, § 4, or the annual feed bill, *e.g.*, Laws 2021, Chapter 1, §§ 1–13, then that entity is a “state agency” for the purposes of the Financial Disclosure Act. Consequently, the head of that agency, who is ultimately responsible for expending the appropriated funds, must annually file a financial disclosure statement.

CONCLUSION

Under Subsection 10-16A-3(C), a “state agency head” is the person or persons who are ultimately responsible for exercising the powers of a state agency’s official acts or expending the agency’s appropriated funds. Every state entity that receives an annual appropriation in section 4 of the General Appropriations Act or the feed bill is a “state agency” for the purposes of Section 10-16A-3(C), and their respective “heads” must file annual financial disclosure statements.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

⁴ Individuals who remain uncertain whether or not they are a “state agency head” under Subsection 10-16A-3(C) may always submit a request to the Commission staff for an informal advisory letter. *See* 1.8.1.9(B) NMAC. Informal advisory letters are specific to the person who requests the advice and the facts presented in the request. *See* 1.8.1.9(B)(2) NMAC.

HON. CELIA FOY CASTILLO, Commissioner
RONALD SOLIMON, Commissioner
JUDY VILLANUEVA, Commissioner