



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2023-01

February 3, 2023¹

QUESTIONS PRESENTED²

A legislator owns and was, until elected to the legislature, the chief executive officer (CEO) of a corporation that provides services to the state pursuant to contracts and grant agreements. The legislator has resigned as CEO but continues to hold an ownership interest in the corporation. The legislator asks what the law requires with respect to any legislative matters or duties that may affect the legislator's interest in the corporation or otherwise present a conflict of interest.

ANSWER

Several laws apply when a legislator owns a corporation having business relationships with the State of New Mexico:

Article IV, Section 28 of the New Mexico Constitution, known as the "Emoluments Clause," generally prohibits a legislator from having a direct or indirect interest in a contract authorized by legislation passed during the term of the legislator's office and for one year thereafter. Although the Emoluments

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) (2019).

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." NMSA 1978, § 10-16G-8(A)(2) (2019).

Clause would not apply to existing contracts with state agencies, the Emoluments Clause would bar any new contract that is authorized by legislation passed during the requester's current term of office and for one year thereafter.

Subsection A of Section 10-16-3 of the Governmental Conduct Act imposes an obligation on legislators to refrain from taking official acts for the purpose of benefitting a personal interest. While this provision might apply to legislative acts on legislation that may directly or indirectly benefit the corporation, the Commission lacks jurisdiction to adjudicate a claim alleging a violation based on legislative actions (such as a committee or floor vote).

Subsection C of Section 10-16-3 of the Governmental Conduct Act requires a legislator to disclose real or potential conflicts of interest. Disclosure of the requester's ownership of and employment by the corporation on the legislator's annual Financial Disclosure Statement is likely sufficient to discharge the disclosure obligation under Subsection C of Section 10-16-3.

Section 10-16-9 of the Governmental Conduct Act prohibits a state agency from entering into a contract with a business substantially owned by a member of the legislature, unless the contract is awarded in accordance with the Procurement Code and is not a small purchase or sole source contract. Section 10-16-9 also prohibits a legislator from appearing for, representing, or assisting another person before a state agency unless certain exceptions apply. Because the requester is the owner of the corporation, a state agency must award any contract with the corporation in accordance with the Procurement Code. Likewise, the requester is prohibited from appearing for, representing, or assisting the corporation in a matter before a state agency.

ANALYSIS

I. Article IV, Section 28 of the State Constitution

Article IV, Section 28 of the New Mexico Constitution, known as the "Emoluments Clause," provides:

No member of the legislature shall, . . . 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.

Because the requester owns (and was previously employed by) the corporation, the requester holds an interest (whether direct or indirect) in contracts between state agencies and the corporation. A contract only runs afoul of the Emoluments Clause if it is entered into under authority granted to a state agency during the legislator's term of office and for one year after. And "authorized by any law" does not extend to appropriations bills. *See State ex rel. Baca v. Otero*, 1928-NMSC-021, ¶ 11, 33 N.M. 310 (stating that an appropriation for a contract does not "authorize" the contract for purposes of determining whether the contract is a prohibited emolument; instead, whether the contract is "authorized" by a law passed during a legislator's term is based on the law authorizing the specific contract); *see also State ex rel. Stratton v. Roswell Indep. Schs.*, 1991-NMCA-013, ¶ 37, 111 N.M. 495 ("*Otero* held that an appropriations bill does not 'authorize' a contract of employment with the state within the meaning of this provision." (citing *Otero*, 1928-NMSC-021)); State Ethics Comm'n Adv. Op. 2021-02, at *4 (Feb. 5, 2021) (Emoluments Clause does not automatically prohibit contract between state agency and nonprofit corporation that has a legislator on its board of directors); N.M. Att'y Gen. Op. 88-20 (Mar. 7, 1988) ("The test [for an Emoluments Clause violation] would be whether the contract could have been entered into by the state if the act in question had not been passed. If the answer is "yes," the act had no bearing on the contract and did not authorize it. If the answer is "no," the act made the formation of the contract possible. It permitted and therefore authorized the contract within the meaning of the provision.") (citing Note, *Legislative bodies-conflict of interest*, 7 N.M. L. Rev. 296 (1967)).

Applying this rule to the facts presented in the request, the contracts made between the corporation and state agencies before the requester assumed legislative office do not violate the Emoluments Clause because they are authorized by laws that were passed before the legislative term. The fact that a contract between a state agency and the corporation is funded by an appropriation approved during the requester's term of office does not bar that contract. However, if new legislation is passed during the requester's upcoming term that authorizes one or more state agencies to enter into other contracts, the Emoluments Clause would operate to bar the corporation owned by the requester from being a party to such a contract by virtue of the requester's ownership interest in the corporation.

II. Governmental Conduct Act

A. Section 10-16-3(A) of the Governmental Conduct Act does not require a legislator to recuse from a vote affecting a financial interest, although it might prohibit a vote that is for the purpose of benefitting a financial interest.

The Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019), does not require a legislator to recuse from a vote on legislation that implicates a conflict of interest. This is a function of not only the Act's definitions and text but also the protection conferred on Members by Article IV, Section 13 of the New Mexico Constitution. Two sections of the Governmental Conduct Act are relevant.

First, Section 10-16-4(B) provides that “a public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer's or employee's financial interest . . . [that is not] proportionately less than the benefit to the general public.” § 10-16-4(B). Under the Governmental Conduct Act, a “financial interest” means “(1) an ownership interest in business or property; or (2) any employment or prospective employment for which negotiations have already begun.” NMSA 1978, § 10-16-2(F) (2011). Legislators, however, are expressly excluded from the definition of a “public officer or employee.” § 10-16-2(I). Accordingly, the disqualification requirement in section 10-16-4(B) does not require a legislator to recuse from any vote.

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

A legislator or public officer or employee shall treat the legislator's or public officer's or employee's government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

§ 10-16-3(A). Under this provision, a legislator may not use the powers and resources of their legislative office “to obtain personal benefits or pursue private interests.” *Id.*

Whether a legislator uses the powers and resources of their office for the specific purpose “to obtain personal benefits or pursue private interests” is a

question of fact. § 10-16-3(A); *see, e.g., State v. Muraida*, 2014-NMCA-060, ¶ 18, 326 P.3d 1113 (concluding that intent presents a question of fact and may be inferred from both direct and circumstantial evidence). Furthermore, whether a particular use of “the powers and resources” of a legislator’s office results in “personal benefits” to the legislator or advances their “private interests” is also a question of fact.

According to the facts in the request, the requester holds two financial interests in the corporation: employment and ownership. *See* § 10-16-2(F). Accordingly, the Governmental Conduct Act prohibits the requester from taking any official act for the purpose of benefitting either the requester’s ownership or employment interests in the corporation. However, the facts in the request do not provide sufficient additional information to opine as to whether the requester’s participation in a particular legislative matter would violate section 10-16-3(A).

Although the facts presented in the request do not suggest a violation of Section 10-16-3(A) of the Governmental Conduct Act, a legislator may *voluntarily* recuse from participation in a matter that affects (or has the appearance of affecting) their interest. A decision to recuse on this basis, although not required by law, would demonstrate that a legislator is not using the powers of his or her legislative office “to obtain personal benefits or pursue private interests.” § 10-16-3(A). Voluntary recusal from voting on matters affecting a legislator’s interest would likely defeat a section 10-16-3(A) claim that a legislator used the powers of their office to obtain personal gain.

B. Section 10-16-3(C) of the Governmental Conduct Act requires a legislator to disclose real or potential conflicts of interest, and disclosure of the requester’s ownership of and employment by the corporation on an annual financial disclosure statement is sufficient to meet this requirement.

Section 10-16-3(C) of the Governmental Conduct Act imposes two duties: (i) a duty of “full disclosure of real or potential conflicts of interest,” and (ii) a duty to “avoid undue influence and abuse of office in public service.”

The Financial Disclosure Act, NMSA 1978, §§ 10-16A-1 to -8 (1993, as amended through 2021) imposes a duty on legislators to disclose in writing their employment. *See* NMSA 1978, § 10-16A-3(D)(1) (2021). If the requester has disclosed ownership of and employment by the corporation on an annual Financial Disclosure Statement, that statement would be sufficient to meet the disclosure required by Subsection 10-16-3(C). Of course, the minimum disclosure required

by the Financial Disclosure Act is just that—a minimum. The Secretary of State permits Financial Disclosure Statement filers to supplement their disclosures with additional information, and it may be prudent to include in a Financial Disclosure Statement information about the corporation’s contracts with state agencies.³

C. Section 10-16-9 of the Governmental Conduct Act prohibits a legislator from appearing for, representing, or assisting the corporation before a state agency.

1. Subsection A of Section 10-16-9

Subsection A of Section 10-16-9 provides:

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. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this subsection.

Under Section 10-16-9(A), a state agency can enter into a contract with a legislator or a business owned by a legislator, so long as: (1) the legislator has disclosed his or her substantial interest; (2) the state agency awards the contract in

³ It could be argued that Section 10-16-3(C) imposes an additional duty on a legislator to orally disclose outside employment at or before the time of a vote affecting their employer, and such an oral disclosure may be prudent. But because a legislator’s speech (or failure to speak) in committee or floor debates is immune from investigation or prosecution under the Speech or Debate Clause, neither the State Ethics Commission nor a prosecutor could pursue an action against a legislator for failing to disclose a potential conflict of interest during a committee or floor debate. *See also* State Ethics Comm’n Adv. Op. 2021-07 (Apr. 2, 2021) (providing a detailed overview of the Speech or Debate Clause’s application to legislative acts), *available at* https://nmonesource.com/nmos/secap/en/nav_date.do (last accessed Feb. 2, 2023). Note, however, that a legislator’s duty to disclose a conflict of interest outside the context of legislative proceedings is not subject to Speech or Debate Clause immunity. *See State v. Gregorio*, 451 A.2d 980, 982 (N.J. Super. Ct. Law Div. 1982)).

accordance with the provisions of the Procurement Code; and (3) the state agency does not award the contract as either a sole source or a small purchase contract. If those conditions are met, the legislator may bid on (and be awarded) a state agency contract.⁴

The requester has a “substantial interest” in the corporation because the requester is its owner. *See* NMSA 1978, § 10-16-2 (2011) (defining “substantial interest” as “an ownership interest that is greater than twenty percent”). Accordingly, Subsection A of Section 10-16-9 operates to prohibit a state agency from entering into a contract with the corporation *unless* the requester’s ownership interest is disclosed, the contract is awarded in accordance with the provisions of the Procurement Code, and the contract is not a sole source or small purchase contract.

2. Subsection B of Section 10-16-9

Subsection B of Section 10-16-9 provides:

A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall refrain from references to the legislator’s legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.

This provision prohibits a legislator from “appear[ing] for, represent[ing] or assist[ing] another person in a matter before a state agency,” unless an exception applies. The provision recognizes several exceptions to this broad prohibition: (1) the legislator is not receiving compensation; (2) the legislator is acting for the

⁴ To be sure, other statutory provisions apply to bids on state-agency contracts. For example, under NMSA 1978, Section 10-16-13 (2011), “[n]o state agency or local government agency shall accept a bid or purpose from a person who directly participated in the preparation of specifications, qualifications or evaluation criteria on which the specific competitive bid or proposal was based.” § 10-16-13. The facts presented in the request, however, do not suggest that Section 10-16-13—or other provisions that apply to conflicts of interest in procurement, *e.g.*, NMSA 1978, §§ 13-1-190 through -195 (1984, as amended 2009)—are relevant to this advisory opinion.

benefit of a constituent; or (3) the legislator is an attorney or another professional person engaged in the conduct of his or her profession. If an exception applies and operates to permit a legislator to “appear for, represent or assist another person in a matter before a state agency,” the legislator is nonetheless prohibited from making “references to the legislator’s legislative capacity except as to matters of scheduling,” from “communicat[ing] on legislative stationery,” and “[making] threats or implications relating to legislative actions.”

That a legislator’s actions benefit (or are intended to benefit) a group of persons does not make out a violation of Subsection 10-16-9(B). Instead, a legislator must have been acting as an agent or otherwise assisting “another person”—i.e., one or more identified legal persons, to come within the scope of the prohibition set out in Subsection 10-16-9(B). The corporation is another “person”; accordingly, the requester is prohibited from appearing for, representing, or assisting the corporation in a matter before a state agency unless an exception applies. Based on the facts presented in the request, it does not appear that an exception applies.

The first exception set out in section 10-16-9(B) permits a legislator to represent another person in a matter before a state agency if the representation is unpaid. But it does not appear that the requester is unpaid; instead, according to the request, the requester is both an owner and employee of the corporation, suggesting that any assistance to the corporation would be compensated, whether in the form of profits or wages. Accordingly, any representation or assistance on behalf of the corporation is not “unpaid” so as to be permitted by Section 10-16-9(A).

The next exception set out in Section 10-16-9(B) permits a legislator to represent another person in a matter before a state agency if the representation is for the benefit of a constituent. But the corporation is not a constituent. The Governmental Conduct Act does not define “constituent.” Dictionaries define “constituent” as a person who votes for an elected official in government. *See* Constituent, Merriam-Webster (“any one of the people who live and vote in an area: a member of a constituency”) (last accessed Feb. 2, 2023); Constituent, Black’s Law Dictionary (11th ed. 2019) (“Someone who is represented by a legislator or other elected official.”). Although corporations enjoy the right to freedom of speech under the First Amendment,⁵ the First Amendment right is not

⁵ *See Citizens United v. Federal Election Com’n*, 558 U.S. 310, 347 (2010).

the same as the right to vote in an election.⁶ Accordingly, the corporation is not a “constituent” so as to permit the requester to appear for, represent, or assist it before a state agency.

The final exception set out in section 10-16-9(B) permits a legislator to represent another person in a matter before a state agency if the legislator is an attorney or other professional person engaged in the conduct of their profession. This provision only applies to legislators who are licensed professionals, such as attorneys. As the 1993 Ethics Task Force Report (which contains the original proposed Subsection 10-16-9(B)) explains, “[d]isclosure of lawyer-legislators’ interests under the Campaign Reporting Act and the proposed Financial Disclosure Act, when coupled with the provisions of the house and senate rules, as well as the rules of professional responsibility governing lawyers . . . strikes the appropriate balance” between an outright ban on representation and no restrictions at all. Rep. H. John Underwood & James B. Mulcock, *Governmental Ethics Task Force, Final Report—Findings and Recommendations* 20, N.M. Legislative Council Service Info. Memo. No. 202.90785 (Jan. 27, 1993). The text of Subsection 10-16-9(B), its relationship with other ethics statutes, and legislative history establish that a legislator must be licensed and regulated by the state to qualify for Subsection 10-16-9(B)’s narrow “professional persons” exception. The facts set out in the request indicate that the requester is not a licensed attorney or other licensed professional. Accordingly, an appearance on behalf of the corporation in a matter before a state agency is not likely the capacity of a professional person engaged in the conduct of a profession, and is therefore not permitted under Section 10-16-9(B).

Because an exception does not apply, Section 10-16-9(B) likely prohibits the requester from appearing for, representing, or assisting the corporation before a state agency.

CONCLUSION

The Emoluments Clause does not prohibit a legislator from having direct and indirect interests in contracts between a corporation owned by the legislator and a state agency, so long as the legislation authorizing the contract became law before the requester’s current term of office. The Governmental Conduct Act does not require the legislator to recuse from matters affecting the corporation, and the

⁶ See NMSA 1978, § 1-1-4(A) (2019) (defining “qualified elector” to mean “any resident of this state who is qualified to vote under the provisions of the constitution of New Mexico and the constitution of the United States”); U.S. Const. Amend. XXVI (extending franchise to all citizens over the age of eighteen).

disclosure of the requester's employment and ownership of the corporation on the requester's annual Financial Disclosure Statement is sufficient to fulfill the disclosure obligations for potential conflicts of interest under the Governmental Conduct Act. Section 10-16-9 of the Governmental Conduct Act operates to prohibit a state agency from entering into a contract with the corporation unless the contract is made in accordance with the Procurement Code and is not a small purchase or sole source contract. Section 10-16-9 of the Governmental Conduct Act also likely prohibits the requester from appearing for, representing, or assisting the corporation in a matter before a state agency.

SO ISSUED.

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