STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2023-02

February 3, 2023[1]

QUESTION PRESENTED[2]

> A legislator's children own and operate a company that has contracts with state agencies to provide those state agencies with services. The contracts are awarded through a competitive process, i.e., by submitting bids or proposals in response to an invitation to bid (ITB) or request for proposals (RFP). The company rents storage space from the legislator, and the legislator has no other financial interest in the corporation. The legislator asks what conduct and disclosure requirements apply to him because of his relationship with his children's business.

ANSWER

I. Section 10-16-9 of the Governmental Conduct Act

Section 10-16-9 of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019), is the main statutory provision that governs a legislator's conduct with respect to a business in which the legislator's family has a substantial interest. Subsection A provides the conditions under which a state agency may contract with such a business, and Subsection B provides rules

[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).

regarding the legislator's representation of or assistance with the business before a state agency.

A. 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's business or a business owned by a legislator's family, so long as: (1) the legislator has disclosed his or her substantial interest, if the legislator has any substantial interest; (2) the state agency awards the contract in 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 corporation may bid on (and be awarded) a state agency contract.[3]

Section 10-16-9(A) applies to contracts between state agencies and the company owned by the legislator's children. *See* NMSA 1978, § 10-16-2 (2011) (defining "family" as "an individual's spouse, parents, children or siblings, by consanguinity or affinity"). Accordingly, Subsection A of Section 10-16-9 requires the legislator to disclose any substantial interest the legislator has in the

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[3] 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 proposal 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.

company. Considering the facts that the request provides, the legislator's only interest in their children's company is a rental agreement for storage space. This is not a "substantial interest" of which the Governmental Conduct Act requires disclosure before a state agency could enter a contract with the company. *See* NMSA 1978, § 10-16-2(L) (2011) (defining "substantial interest" to mean "an ownership interest that is greater than twenty percent").

Section 10-16-9(A) also operates to prohibit a state agency from entering into a contract with the corporation unless 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. According to the facts in the request, however, the contracts between the corporation and state agencies were entered into pursuant to a competitive process and consistent with the Procurement Code's requirements. Accordingly, under Section 10-16-9(A), a state agency may award contracts to the company owned and operated by the legislator's children.

B. 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 benefit of a constituent; or (3) the legislator is an attorney or another professional person engaged in the conduct of his or her profession.

According to the facts presented in the request, the legislator is in no way involved in the state agency procurement process on behalf of the corporation. Because there is no suggestion in the request that the requester is appearing for,

representing, or assisting the corporation in a matter before a state agency, there is no basis to conclude that Section 10-16-9(B) applies.

II. Section 10-16-3 of the Governmental Conduct Act

A. Subsection A of Section 10-16-3

Like Section 10-16-9, Section 10-16-3 of the Governmental Conduct Act also applies to legislators. Section 10-16-3(A) 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 presented in the request, the legislator holds an indirect financial interest in the corporation in the form of a rental contract between the company and the legislator. While the storage-rental contract does not constitute a "financial interest" as defined by the Governmental Conduct Act, *see* § 10-16-2(F), Section 10-16-3(A) likely prohibits the legislator from using the powers of their legislative office (such as designating an appropriation) for the purpose of benefiting their children's company. Beyond that general guideline, 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).

If, during the course of their legislative service, the legislator confronts a bill that implicates the company owned by the legislator's children, the Governmental Conduct Act does not require the legislator to recuse from a vote on such

legislation.[4] The legislator, however, may *voluntarily* recuse from participation in a legislative matter that affects (or has the appearance of affecting) their interest and the interest of their children's company. 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.[5]

B. Subsection C of Section 10-16-3

Section 10-16-3(C) of the Governmental Conduct Act requires the legislator to disclose real or potential conflicts of interest, and disclosure of the legislator's interests in the storage-rental contract on their 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 the sources of gross income above $5,000 in the previous calendar year. *See* NMSA 1978, § 10-16A-3(D)(2) (2021). The required disclosure of gross income must state "the nature of the income source" in "broad categories." *Id.* To the extent the requester receives more than $5,000 in rental income from their children's company, a statement that the legislator had made

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[4] 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.

[5] Note also that the Speech or Debate Clause of the New Mexico Constitution, N.M. Const., art. IV, § 13, likely prevents the Commission from adjudicating an administrative claim based on a legislative act. *See* 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).

more than $5,000 in rental income 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 might be prudent to include in a Financial Disclosure Statement information about the company's contracts with state agencies, which, in any event, might also be available on the Sunshine Portal.

III. Article IV, Section 28 of the State Constitution

Finally, we observe that the Emoluments Clause of Article IV, Section 28 of the New Mexico Constitution imposes requirements on the legislator because of their indirect financial interest in their children's business. 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.

A contract violates 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. However, a contract is not "authorized by any law" simply because it is funded by an appropriations bill. *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)).

The Emoluments Clause applies to prohibit contracts in which a legislator holds a direct interest (e.g., a contract between a state agency and the legislator) as well as contracts in which the legislator holds an "indirect[]" interest, such as a contract between a state agency and a business that is owned or partly owned by a legislator. Although it is unclear how attenuated a legislator's relationship with a contract must be before the contract is not prohibited by the Emoluments Clause, prior legal opinions have concluded that a legislator holds an "indirect" interest in a contract when the legislator is able to and will likely realize a benefit from the contract's execution. For example, in one advisory opinion, the Attorney General concluded that a legislator held an indirect interest in a contract between a political subdivision and a company where the legislator had an "ongoing contractual relationship" with the company "to perform work attributable specifically to the project that the legislature funded." N.M. Att'y Gen. Op. 91-11 (Oct. 17, 1991). Other opinions have held that the mere fact that a legislator has a relationship with a business that may hold contracts with a state agency does not imply that any contract between the business and a state agency authorized during the legislator's current term of office is prohibited. *See* N.M. Att'y Gen. Op. 03-01 (Jan. 15, 2003) (opining that contracts between a state agency and a nonprofit corporation that employs a legislator did not violate the Emoluments Clause).

Assuming that the legislator has an "indirect interest" in any contracts between their children's company and state agencies (in view of the rental-storage agreement), the facts presented in the request do not allow an analysis of how the Emoluments Clause applies to the contracts. If the legislation authorizing the state agencies to enter the contracts were enacted during the legislator's term, then the Emoluments Clause would prohibit the legislator from having an indirect financial interest in the contracts. From the facts presented and considering that, under *State ex rel. Baca v. Otero*, 1928-NMSC-021 and its progeny, such legislation would not include any appropriations bills funding the contracts, we are unable to form a view when such legislation was enacted. Going forward, however, if new legislation is passed during the requester's current or future terms of office authorize one or more state agencies to enter into contracts, the Emoluments Clause may operate to bar the legislator's director or indirect interest in such contract. In that circumstance, if the company secures a state-agency contract authorized by new legislation, then the company might have to secure a lease for storage from another vendor.

SO ISSUED.

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