



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In re **Public Officer**, Public Entity,
State of Nevada,

Advisory Opinion No. 20-003A

_____ Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer ("Public Officer"), a member of the Board of Public Entity, State of Nevada requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.675, regarding the propriety of anticipated future conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in NRS Chapter 281A. Pursuant to NAC 281A.352, a quorum of the Commission considered this matter by submission, without holding an advisory-opinion hearing.¹ The Commission considered the request for an advisory opinion, a list of proposed facts that were affirmed as true by Public Officer and publicly available information.

Public Officer contemporaneously serves as a public employee for another public agency and sought this opinion from the Commission regarding any disclosure and abstention responsibilities under the Ethics Law in the capacity of both a public officer and a public employee for the two governmental agencies. In addition, Public Officer owns a private business that provides contract services to private and public entities, including those that employ Public Officer. The Commission deliberated and advises Public Officer about these responsibilities. In addition, Public Officer is directed to comply with the Code of Ethical Standards set forth in NRS 281A.400 and contract restrictions set forth in NRS 281A.430.

The Commission now renders this Abstract Opinion stating its formal findings of fact and conclusions of law. The facts in this matter were obtained from documentary evidence provided by Public Officer and public records. For the purposes of the conclusions offered in the original written opinion, the Commission's findings of fact set forth below accept as true those facts Public Officer presented. Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those expressed in this opinion.² Although a full written opinion was served on Public Officer, for confidentiality reasons, this Abstract Opinion redacts certain Findings of Fact, provides a summary of issues and removes other identifying information to protect the confidentiality of the requester.

¹ The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Wallin and Commissioners Duffrin, Gruenewald, Lowry, O'Neill, Sheets and Yen.

² The Commission reserves its statutory authority should an ethics complaint be filed presenting contrary circumstances. See *In re Howard*, Comm'n Op. No. 01-36 (2002) (notwithstanding the advisory opinion, public is not precluded from bringing ethics complaint) and *In re Rock*, Comm'n Op. No. 94-53 (1995) (reservation of right to review until time issue is raised).

II. QUESTION PRESENTED

Public Officer seeks guidance on compliance with the Ethics Law when a matter is considered by either public agency that pertains to Public Officer's significant pecuniary interests in a private business.

III. FINDINGS OF FACT

1. Public Officer is a member of Board of Public Entity and, in this capacity, is a public officer as that term is defined by NRS 281A.160.
2. Public Officer is also a public employee of another governmental agency ("Other Agency"), and in this capacity, is a public employee as that term is defined by NRS 281A.150.
3. Board of Public Entity has authority and oversight on certain projects and contracts pertaining to Other Agency that contemporaneously employs Public Officer.
4. In a private capacity, Public Officer owns a business that provides contract services to both private and public clients.
5. Several years ago, Public Officer's private business bid on and was awarded a public contract for services provided to Other Agency, which contract was advertised and processed as an open and competitive bid ("Competitive Contract").
6. Thereafter, an extension of the Competitive Contract was awarded by Other Agency; however, the extension was not competitively bid and does not have any indicia of an open and competitive review or award process.
7. At the time of the Competitive Contract, Public Officer was not a member of the Board of Public Entity.
8. One of the contract services in furtherance of the Competitive Contract provided to Other Agency by Public Officer's private business is under the authority of the Board of Public Entity.
9. Previously, when a matter associated with the Competitive Contract was considered by the Board of Public Entity, Public Officer sought legal advice from the Board's legal advisor and disclosed and abstained from acting on the matter.
10. The Board of Public Entity may be considering other matters relating to the Competitive Contract in the future.
11. The Board of Public Entity has a policy prohibiting any of its members from having any interest, directly or indirectly, in any contract entered into with Public Entity unless certain exceptions are present.

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IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

As a public officer serving in two public positions, Public Officer must avoid conflicts between private interests and those of the general public served. Public Officer has a duty to avoid any actual or perceived conflicts of interest, and may not use either public positions in government to seek or accept economic opportunities that would improperly influence public duties or secure or grant unwarranted privileges, preferences, exemptions or advantages for Public Officer or for any person to whom there is a commitment in a private capacity. See NRS 281A.020, NRS 281A.065 and NRS 281A.400(1) and (2).

In addition to policies established by government entities, Public officers/employees are prohibited by the Nevada Revised Statutes from seeking or negotiating private contracts with governmental agencies, especially their own agency, or entering into contracts with a governmental entity for which they have a significant pecuniary interest, unless the contract is within a statutory exception. One exception pertains to contracts processed by open, competitive bidding, and the public officer or employee has not participated in the contracting process. See NRS 281A.400(3) and (10) and NRS 281A.430. In addition, to the extent private contracts, pecuniary interests or commitments in a private capacity are affected by public duties, a public officer/employee has a duty to disclose the conflict and abstain from acting on the matter pursuant to NRS 281A.420(1) and (3).

B. RELEVANT STATUTES

1. Public Trust and Duty to Avoid Conflicts of Interest - NRS 281A.020 provides:

1. It is hereby declared to be the public policy of this State that:
 - (a) A public office is a public trust and shall be held for the sole benefit of the people.
 - (b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.
2. The Legislature finds and declares that:
 - (a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests.
 - (b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.
 - (c) In interpreting and applying the provisions of this chapter that are applicable to State Legislators, the Commission must give appropriate weight and proper deference to the public policy of this State under which State Legislators serve as "citizen Legislators" who have other occupations and business interests, who are expected to have particular philosophies and perspectives that are necessarily influenced by the life experiences of the Legislator, including, without limitation, professional, family and business experiences, and who are expected to contribute those philosophies and perspectives to the debate over issues with which the Legislature is confronted.

(d) The provisions of this chapter do not, under any circumstances, allow the Commission to exercise jurisdiction or authority over or inquire into, intrude upon or interfere with the functions of a State Legislator that are protected by legislative privilege and immunity pursuant to the Constitution of the State of Nevada or NRS 41.071.

2. “Commitment in a Private Capacity” Defined - NRS 281A.065 provides:

“Commitment in a private capacity,” with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

1. Who is the spouse or domestic partner of the public officer or employee;
2. Who is a member of the household of the public officer or employee;
3. Who is related to the public officer or employee, or to the spouse or domestic partner of the public officer or employee, by blood, adoption or marriage or domestic partnership within the third degree of consanguinity or affinity;
4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee;
5. With whom the public officer or employee has a substantial and continuing business relationship; or
6. With whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to a commitment, interest or relationship described in subparagraphs 1 to 5, inclusive.

3. Pecuniary Interest - NRS 281A.139 provides:

NRS 281A.139 “Pecuniary interest” defined. “Pecuniary interest” means any beneficial or detrimental interest in a matter that consists of or is measured in money or is otherwise related to money, including, without limitation:

1. Anything of economic value; and
2. Payments or other money which a person is owed or otherwise entitled to by virtue of any statute, regulation, code, ordinance or contract or other agreement.

4. Code of Ethical Standards - NRS 281A.400(1), (2), (3), and (10) provides:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity, for the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity, which would tend improperly to influence a reasonable person in the public officer’s or employee’s position to depart from the faithful and impartial discharge of the public officer’s or employee’s public duties.

2. A public officer or employee shall not use the public officer’s or employee’s position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest or any person to whom the public officer or

employee has a commitment in a private capacity. As used in this subsection, “unwarranted” means without justification or adequate reason.

3. A public officer or employee shall not participate as an agent of government in the negotiation or execution of a contract between the government and the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest or any person to whom the public officer or employee has a commitment in a private capacity.

10. A public officer or employee shall not seek other employment or contracts for the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity through the use of the public officer’s or employee’s official position.

5. Disclosure - NRS 281A.420(1) provides:

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a significant pecuniary interest;

(c) Which would reasonably be affected by the public officer’s or employee’s commitment in a private capacity to the interests of another person; or

(d) Which would reasonably be related to the nature of any representation or counseling that the public officer or employee provided to a private person for compensation before another agency within the immediately preceding year, provided such representation or counseling is permitted by NRS 281A.410,

↳ without disclosing information concerning the gift or loan, the significant pecuniary interest, the commitment in a private capacity to the interests of the other person or the nature of the representation or counseling of the private person that is sufficient to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer’s or employee’s significant pecuniary interest, upon the person to whom the public officer or employee has a commitment in a private capacity or upon the private person who was represented or counseled by the public officer or employee. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer’s or employee’s organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

6. Abstention - NRS 281A.420(3) and (4) provide:

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or

advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

- (a) The public officer's acceptance of a gift or loan;
- (b) The public officer's significant pecuniary interest; or
- (c) The public officer's commitment in a private capacity to the interests of another person.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of another person, accruing to the other person, is not greater than that accruing to any other member of any general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the duty of the public officer to make a proper disclosure at the time the matter is considered and in the manner required by subsection 1.

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer makes a proper disclosure at the time the matter is considered and in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

7. Prohibited Contracts - NRS 281A.430 provides:

1. Except as otherwise provided in this section and NRS 218A.970 and 332.800, a public officer or employee shall not bid on or enter into a contract between an agency and any business entity in which the public officer or employee has a significant pecuniary interest.

2. A member of any board, commission or similar body who is engaged in the profession, occupation or business regulated by such board, commission or body may, in the ordinary course of his or her business, bid on or enter into a contract with an agency, except the board, commission or body on which he or she is a member, if the member has not taken part in developing the contract plans or specifications and the member will not be personally involved in opening, considering or accepting offers.

3. A full- or part-time faculty member or employee of the Nevada System of Higher Education may bid on or enter into a contract with an agency, or may benefit financially or otherwise from a contract between an agency and

a private entity, if the contract complies with the policies established by the Board of Regents of the University of Nevada pursuant to NRS 396.255.

4. Except as otherwise provided in subsection 2, 3 or 5, a public officer or employee may bid on or enter into a contract with an agency if:

(a) The contracting process is controlled by the rules of open competitive bidding or the rules of open competitive bidding or for a solicitation are not employed as a result of the applicability of NRS 332.112 or 332.148;

(b) The sources of supply are limited;

(c) The public officer or employee has not taken part in developing the contract plans or specifications; and

(d) The public officer or employee will not be personally involved in opening, considering or accepting offers.

↳ If a public officer who is authorized to bid on or enter into a contract with an agency pursuant to this subsection is a member of the governing body of the agency, the public officer, pursuant to the requirements of NRS 281A.420, shall disclose the public officer's interest in the contract and shall not vote on or advocate the approval of the contract.

5. A member of a local legislative body shall not, either individually or through any business entity in which the member has a significant pecuniary interest, sell goods or services to the local agency governed by his or her local legislative body unless:

(a) The member, or the business entity in which the member has a significant pecuniary interest, offers the sole source of supply of the goods or services within the territorial jurisdiction of the local agency governed by his or her local legislative body;

(b) The local legislative body includes in the public notice and agenda for the meeting at which it will consider the purchase of such goods or services a clear and conspicuous statement that it is considering purchasing such goods or services from one of its members, or from a business entity in which the member has a significant pecuniary interest;

(c) At the meeting, the member discloses his or her significant pecuniary interest in the purchase of such goods or services and does not vote upon or advocate the approval of the matter pursuant to the requirements of NRS 281A.420; and

(d) The local legislative body approves the purchase of such goods or services in accordance with all other applicable provisions of law.

6. The Commission may relieve a public officer or employee from the strict application of the provisions of this section if:

(a) The public officer or employee files a request for an advisory opinion from the Commission pursuant to NRS 281A.675; and

(b) The Commission determines that such relief is not contrary to:

(1) The best interests of the public;

(2) The continued ethical integrity of each agency affected by the matter; and

(3) The provisions of this chapter.

7. For the purposes of subsection 6, the request for an advisory opinion, the advisory opinion and all meetings, hearings and proceedings of the Commission in such a matter are governed by the provisions of NRS 281A.670 to 281A.690, inclusive.

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8. Other Implicated Laws - NRS 281.230 provides in relevant part:

1. Except as otherwise provided in this section and NRS 218A.970, 281A.530 and 332.800, the following persons shall not, in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind resulting from any contract or other significant transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way directly interested or affected:

(a) State, county, municipal, district and township officers of the State of Nevada;

(b) Deputies and employees of state, county, municipal, district and township officers; and

(c) Officers and employees of quasi-municipal corporations. . . .

4. A public officer or employee . . . may bid on or enter into a contract with a governmental agency if the contracting process is controlled by rules of open competitive bidding, the sources of supply are limited, the public officer or employee has not taken part in developing the contract plans or specifications and the public officer or employee will not be personally involved in opening, considering or accepting offers. . . .

5. A person who violates any of the provisions of this section shall be punished as provided in NRS 197.230 and:

(a) Where the commission, personal profit or compensation is \$650 or more, for a category D felony as provided in NRS 193.130.

(b) Where the commission, personal profit or compensation is less than \$650, for a misdemeanor.

6. A person who violates the provisions of this section shall pay any commission, personal profit or compensation resulting from the contract or transaction to the employing state, county, municipality, township, district or quasi-municipal corporation as restitution.

V. COMMISSION DECISION

A. INTRODUCTION

Nevada's Ethics Law mandates that public officers and employees hold public office for the public benefit and avoid conflicts of interest. NRS 281A.020. The Code of Ethical Standards set forth in NRS 281A.400 and other requirements of the Ethics Law are applicable to public officers and employees and serve to assist in determining the boundaries of prohibited conduct where conflicts of interest are presented between public duties and personal interests. In addition to the requirements of NRS 281A.400, the Ethics Law has disclosure and abstention obligations applicable to public officers and public employees that must be complied with when a public matter affects the public officer's or employee's pecuniary interests or commitments in a private capacity under NRS 281A.420.

Public Officer must avoid conflicts relating to Public Officer's private pecuniary interests (NRS 281A.139) and commitments in a private capacity, including the commitment to an employer (NRS 281A.065(4)) and the interests of the general public served. In furtherance of both public positions and associated duties to comply with the Ethics Law, Public Officer must avoid actual and perceived conflicts of interest, and may not use either public position to seek or accept improper economic opportunities or secure

or grant unwarranted privileges, preferences, exemptions or advantages for himself/herself, a private business, or any person to whom there is a commitment in a private capacity. NRS 281A.020, NRS 281A.065 and NRS 281A.400. Based upon these private pecuniary interests and commitments, Public Officer is advised on the application of the disclosure and abstention requirements of NRS 281A.420 and prohibited contracts requirements set forth in NRS 281A.430.

B. DISCLOSURE AND ABSTENTION REQUIREMENTS

1. Conflicts Requiring Disclosure

NRS 281A.420(1) requires a proper disclosure when the public officer or employee is carrying out his public duties to approve, disapprove, vote, abstain or otherwise act upon a matter: (a) regarding a gift or loan, (b) in which he has a significant pecuniary interest, (c) which would reasonably be affected by his commitment in a private capacity to the interests of another person, or (d) which would be related to any representation or counseling of a private person for compensation before another agency within the preceding year.

NRS 281A.420 references a significant pecuniary interest and commitments in a private capacity as disclosable conflicts. Public Officer has an ownership interest in the private company and has a significant pecuniary interest in employment with this company including receiving payment for contract services provided the other governmental entity. See NRS 281A.139. Under the Ethics Law a “pecuniary interest” is defined under NRS 281A.139 as “any beneficial or detrimental interest in a matter that consists of or is measured in money or is otherwise related to money, including without limitation:

1. Anything of economic value; and
2. Payments or other money which a person is owed or otherwise entitled to by virtue of any statute, regulation, code, ordinance or contract or other agreement.”

The Merriam-Webster Dictionary defines “significant” as having or likely to have influence or effect, important or probably caused by something other than mere chance. *Merriam-Webster’s Collegiate Dictionary* 1159 (11th ed. 2003). Similarly, *The American Heritage College Dictionary* 1268 (3rd ed. 1997) defines “significant” as “meaningful” or “important.” The statute, as originally enacted, did not contain the word “significant.” The term was added by the Nevada Legislature in 2013 with the enactment of Senate Bill (“SB”) 228. The Commission’s Executive Director at the time testified that “significant” was being added to several subsections of the Ethics Law, to eliminate a *de minimis* interest from being seen as a true conflict. See Exhibit C submitted at Hearing on SB 228 before the Assembly Legislative Operations & Elections Comm., 77th Leg. (Nev. May 14, 2013). Therefore, a significant pecuniary interest means that the associated benefits or detriments are important and not incidental, trivial or *de minimis*.

NRS 281A.065 establishes certain relationships constituting commitments in a private capacity, which relationships are used to identify conflicts of interest. Pursuant to NRS 281A.065(4), (5) and (6), Public Officer has a private commitment to Public Officer’s private business and to Other Agency, as its public employee. The Commission has confirmed in a recent opinion the “[p]ursuant to NRS 281A.065, [a] Public Officer has both significant pecuniary interest in maintaining private employment and a commitment in a private capacity to the interests of the employer, including associated clients and business interests.” *In re Public Officer*, Comm’n Op. No. 15-74A (2018), at p. 8.

The Commission has instructed in cases involving a statutory private commitment under NRS 281A.065, such as an employer, substantial and continuous business relationships or substantially similar relationships, that the interests of the person to whom there is a private commitment such as an employer, business affiliate or client, are statutorily attributed to the public officer based on the presumption that a person lacks independent judgment toward the interests of those persons to whom the public officer has such commitments. See *Id.*; *In re Public Officer*, Comm'n Op. No. 13-71A (2014).

This means that the interests of Public Officer's employers, private business and government entity, are statutorily attributed to Public Officer. See also *In re Public Officer*, Comm'n Op. No. 17-10A (2017), at p. 6. "Employers of public officers and employees are included among the statutorily recognized relationships regarding which the Ethics Law establishes per se conflicts because of the obvious and tangible interests in maintaining employment for professional and pecuniary reasons." *In re Public Officer*, Comm'n Op. No. 13-77A (2014), at p. 5.

In addition, public officers who are members of a public body that makes decisions must complete the disclosure to the public prior to participating on the matter. Public officers who are not members of a body that makes decisions shall make the required disclosure to the supervisory head of the organization under NRS 281A.420(1).³ In addition, should the public officer who is not a member of the body making decisions be participating in a public meeting that implicates a disclosable conflict, the Commission recommends the conflict also be disclosed to the public given the requirements of NRS 281A.420(1) to properly inform the public. See *In re Murnane*, Comm'n Op. No. 15-45A (2016), at p. 13. Public Officer is advised to properly complete disclosures to either the organizational head of the other employing government agency or in public meetings of the Board of Public Entity, as required by NRS 281A.420.

Public Officer is reminded that the Ethics Law does not recognize a continuing disclosure or a disclosure by reference. The purpose of disclosure is to provide sufficient information regarding the conflict of interest to inform the public of the nature and extent of the conflict and the potential effect of the action or abstention on the public officer's private interests. Silence based upon a prior disclosure at a prior meeting fails to inform the public of the nature and extent of the conflict at the meeting where no actual disclosure occurred. See *In re Buck*, Comm'n Op. No. 11-63C (2011) (holding that incorporation by reference of her prior disclosure, even though based upon the advice of counsel, did not satisfy the disclosure requirements of NRS 281A.420(1)). At a minimum, a disclosure should identify Public Officer's personal interests and private commitments to the private business and the other employing governmental entity, including the fact that Public Officer has a private interest in maintaining the associated employment and salary and contract payments to the private business. The public should be informed whether an official matter has potential to be materially affected by Public Officer's private financial interests and commitments.

In summation, the Commission is confident that Public Officer will comply with the disclosure requirements of NRS 281A.420 in serving Other Agency and Board of Public Entity because of the prior recognition of these statutory requirements and the disclosures already made by Public Officer when a matter relates to Public Officer's pecuniary interest

³ An ancillary purpose of a proper disclosure is to provide the supervisory head of the organization the ability to determine whether the subject public officer/employee should be directed to recuse themselves from participation on matters pertaining to the disclosable conflict based upon agency policy, operational or other business reasons.

or private commitments. The Commission advises that such disclosures will continue as long as Public Officer serves as a public employee or a public officer with authority over such matters.

2. Abstention Requirements

NRS 281A.420(3) and (4) detail the abstention requirements to be considered after a proper disclosure has been made by the public officer. NRS 281A.420(3) mandates that a public officer shall not vote upon or advocate the passage or failure of a matter to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the disclosed conflict. NRS 281A.420(4) creates a presumption against abstention in certain limited circumstances. After a proper disclosure is placed in the public record, the presumption permits the public officer to participate if the matter would not result in any form of benefit or detriment accruing to the public officer (or persons/entities to whom he has a private commitment) that is greater or less than that accruing to any other member of the general business profession, occupation or group that is affected by the matter. For example, if the public officer is voting upon a general business license increase and the business would be subject to the increase and pay the same amount as other businesses similarly situated, the public officer may make a proper disclosure and explain to the public why the legal presumption permits participation. As the Commission explained:

...[W]ithout a public disclosure, the Commission is hindered from application of the presumption, and the Public Officer is left without the benefit of the public policy presumption set forth in NRS 281A.420(3) and (4). A proper disclosure acts as a condition precedent to recognition of the public policy attributes of NRS 281A.420(3) and (4), which instruct that appropriate weight and proper deference be given to the public policy of this State, which favors the right of a public officer to perform the duties for which the public officer was appointed and to otherwise act upon a matter, provided the public officer has properly disclosed the public officer's commitment in a private capacity to the interests of another person in the manner required, and the independence of judgment of a reasonable person would not be clearly and materially affected by the private interests.

In re Public Officer, Comm'n Op. No. 15-74A (2018), at pgs. 9-10.

With regard to the Competitive Contract and related services, Public Officer is advised that the presumption does not apply to these types of matters and would not permit participation thereon. Consequently, Public Officer must abstain on all matters before either public agency which materially affect the interests of Public Officer's private business and its business affiliates and clients including services rendered under the Competitive Contract. *In re Derbidge*, Comm'n Op. No. 13-05C (2013).

C. NRS 281A.430 – CONTRACTING PROHIBITION

NRS 281A.430(1) establishes a broad restriction prohibiting contracts between public officers or employees including associated business entities and any agency. Agency is defined in NRS 281A.035 to mean any state agency or local agency. The requirements of NRS 281A.430 are separately enforceable from the public purchasing laws established in other chapters of the Nevada Revised Statutes. In *In re Public Employee*, Comm'n Op. No. 13-78A (2014), the Commission found that "NRS 281A.430 generally prohibits a public officer or employee from engaging in government contracts in

which the public officer or employee has a significant pecuniary interest,” unless the contract is exempted by the statute.

The statute has important public policy considerations given the perception, if not the reality, of tax-payer money expended on contracts between government agencies and entities owned or operated by the public officers/employees that work for governmental agencies. Such contracts do not appear to be transparent or fair to the public unless certain circumstances are present. Therefore, the Commission considers whether the circumstances presented by Public Officer fall within any of the contracting exceptions set forth in NRS 281A.430.

NRS 281A.430(2), (3), (4) and (5) provide various circumstances by which certain government contracts may be appropriate. Based upon the circumstances herein, the commission considers whether NRS 281A.430(2) and (4) apply. NRS 281A.430(2) permits a member of any board, commission or similar body who is engaged in the profession, occupation or business regulated by such a body, to bid on or enter into a contract with the agency, except the board, commission or body on which he or she is a member, if the member has not taken part in the development of contract plans or specifications and the member will not personally involved in opening, considering or accepting offers. Based upon the circumstances, NRS 281A.430(2) does not exempt the subject contract because Board of Public Entity does not regulate Public Officer or Public Officer’s private business.

NRS 281A.430(4) establishes another contracting exception that could apply to Public Officer’s circumstances, and provides:

Except as otherwise provided in subsection 2, 3 or 5, a public officer or employee may bid on or enter into a contract with an agency if:

- (a) The contracting process is controlled by the rules of open competitive bidding or the rules of open competitive bidding are not employed as a result of the applicability of NRS 332.112 or 332.148;
- (b) The sources of supply are limited;
- (c) The public officer or employee has not taken part in developing the contract plans or specifications; and
- (d) The public officer or employee will not be personally involved in opening, considering or accepting offers.

All of the requirements are in the conjunctive and must be present for the exception to apply. Central to the exception set forth in NRS 281A.430(4) is the requirement that the proposed contract is either subject to public bidding or an open, competitive process in which any other interested person/business was authorized to provide the services or products. In addition, the public officer or employee must not have a role in developing the contract specifications or considering the offers. See *In re Johnson*, Comm’n Op. No. 12-68A (2013) (“*Johnson*”); *In re Harris*, Comm’n Op. No. 02-08 (2002); *In re Public Officer*, Comm’n Op. No. 12-13A (2012); *In re Blackburn*, Comm’n Op. No. 09-90A (2009) and *Bid opinions: In re Public Officers*, Comm’n Op. Nos. 99-34 and 99-35 (2000).

In *In re Public Officer*, Comm’n Op. No. 01-16 (2001), the Commission determined that a violation of former NRS 281.505 (currently NRS 281A.430), or at least an appearance of impropriety, was implicated when the public officer, while serving as a public officer, used information and his position as a public officer to negotiate or execute a contract with the public agency he served, thereby securing or granting to himself and a limited liability company in which he had a “significant pecuniary interest” an unwarranted privilege, preference, exemption or advantage. The Commission confirmed

that a 50% equity interest in a limited liability company was a “significant pecuniary interest”. *Id.* The Commission recognized that the Ethics Law prohibits a public officer from bidding on or entering into a contract between a governmental agency and any private business in which he has a significant pecuniary interest, unless all of the following are met: (a) the contracting process is controlled by rules of open competitive bidding; (b) the sources of supply are limited; (c) he has not taken part in developing the contract plans or specifications; and (d) he will not be personally involved in opening, considering or accepting offers. *Id.*; See also *In re Public Employee*, Comm’n Op. No. 15-28A (2016).

In another prior opinion, the Commission reviewed the contract exception under circumstances where the Mayor of Elko provided plumbing and heating repair services on an “as needed” basis to the Elko Convention and Visitors Authority. See *Johnson*. The Commission discussed that the City of Elko has control over its visitor’s authority and considered, in the context of a contract issue implicating NRS 281A.430, whether an appearance of impropriety was created solely by virtue of the authority to appoint a board member. The visitor’s authority had purchased the repair services in an open and competitive process and there was not an exclusive contract for services. Importantly, the Mayor did not develop or specify the terms of the plumbing requirements and he did not influence the open and transparent contracting process. Under these specific circumstances, the Commission determined that the appointment of a single member of the visitor’s authority may have created some influence over its operations, but without other evidence, the appointment alone did not impact the determination about which plumbing contractor to utilize for its “as needed” services, which services were obtained pursuant to rules of an open, competitive process. *Id.*, at 8.

The Competitive Contract when originally awarded met the exception set forth in NRS 281A.430(4). However, successive contract renewals have occurred without an open competitive process. It appears that given the history of the contract, no one caught the associated implications to NRS 281A.430 to a contract renewal, which was approved without an open and competitive contracting process.

Each contract renewal is legally a separate contract for application of the statute. Black’s Law Dictionary defines “contract” to be “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.” *Black’s Law Dictionary* (10th ed. 2004), at p. 389. Therefore, any amendments or renewals, which are more than slight wording changes to a contract, qualify as separate contracts for application of NRS 281A.430. See *In re Public Officer*, Comm’n Op. No. 19-051A (2019), at p. 7. Each subject renewal added compensation and extended the term of the contract and are determined to be separate contracts for application of the Ethics Law.

The approval of the contract renewal in a public meeting does not equate to an open and competitive contracting process. The Commission recognizes that Public Officer has acted with transparency and proactively sought this opinion. Nevertheless, since the renewal was processed without an open and competitive process, the Commission directs Public Officer to take sufficient affirmative steps to secure statutory compliance and to mitigate any associated appearance of impropriety.

Affirmative steps to mitigate a potential violation of the Ethics Law have been considered by the Commission in determining whether there is a willful violation in the context of a complaint case. NRS 281A.775(1)(d) (standards for determination of a willful violation include consideration of mitigating facts); See also *In re Sweeney*, Comm’n Op. No. 15-70C (2016) (willful violation not found based in part on the screening and abstention procedures instituted by Sweeney’s private employer on matters that she was prohibited from acting upon pursuant to NRS 281A.410). The Commission is precluded

from issuing particular direction to a private business but advises Public Officer to correct the appearance of impropriety and possible violation of NRS 281A.430 presented by these circumstances. One example of corrective action is to refrain from seeking any contract or renewal unless it is properly processed to meet one of the exceptions set forth in NRS 281A.430. Public Officer also could seek direction from official legal counsel for the public agency served to obtain other possible corrective measures. Public Officer is further directed to the statutory provisions of NRS 281A.540, which indicate that the resultant contract entered into in violation of NRS Chapter 281A or NRS 281.230 is void or voidable by the State, county, city or political subdivision if the Ethics Law is violated.

D. CODE OF ETHICAL STANDARDS – NRS 281A.400

The Commission takes this opportunity to highlight sections of the Code of Ethical Standards set forth in NRS 281A.400, which apply to or limit private contracts between a public officer/employee and a public entity including, without limitation, the following:

- NRS 281A.400(1) – seeking or accepting engagement or economic opportunity which improperly influences public duties.
- NRS 281A.400(2) – using public position to secure unwarranted privilege/advantage. Public Officer’s role as a member of the Board places Public Officer in a position to create an unwarranted benefit for private interests if a public position is used to market private business services or products. Public Officer also must not use a public position as a selling point for purposes of advertising Public Officer’s private business services or products.
- NRS 281A.400(3) – participating as agent of government on private contract in which one holds a significant pecuniary interest.
- NRS 281A.400(10) – seeking employment/contracts through use of public position. Public Officer is advised of the requirements of this statute so that the public positions held are not used to seek employment or contracts.

Unlike NRS 281A.430, the Code of Ethical Standards set forth in NRS 281A.400 generally does not prohibit a public officer/employee from pursuing private interests and engagements; however, it does set limitations on the nature and extent of such private endeavors to ensure the public officer/employee maintains the appropriate separation between his private matters and his official position and public duties. Central to each of these provisions is the improper use of a public position to acquire a private or personal gain. These statutory provisions are analyzed based upon the facts presented and are not subject to relief or waiver by the Commission. So, care must be taken by public officers/employees to comply with these provisions and maintain the integrity of public service by avoiding actual conflicts or even an appearance of impropriety by properly separating private interests from public duties. NRS 281A.020.

In prior Commission opinions applying the provisions of NRS 281A.400, the Commission has reviewed the circumstances on a case-by-case basis to determine whether there has been a use of a public position to seek or gain a business opportunity or private employment. In *In re Public Employee*, Comm’n Op. No. 18-080A (2019), the Commission found that a public employee’s conduct in using a public position and associated relationships with vendors implicated the improper use of a public position under the Ethics Law. The Commission also has found violations when a public

officer/employee used his position to either hire himself or asked a subordinate to assist with obtaining private employment for the public officer. See *In re McNair*, Comm'n Op. Nos. 10-105C, 10-106C, 10-108C, 10-109C, and 10-0115C (2011); *In re Maurizio*, Comm'n Op. No. 09-40C (2010).

Even when the public officer or public employee does not use a public position to seek the employment opportunity or influence the assistance of a subordinate in the endeavor, other circumstances may be present warranting consideration under the Ethics Law. See *In re Hales*, Comm'n Op. No. 07-13A (2008). In *Hales*, the Commission considered Hales' conduct and expressly qualified its guidance to her private marketing endeavors that intricately used her public office as a selling point to promote private services and applied opinion precedent issued by the Commission, some of which are cited in this opinion. Guidance against using a public position for private marketing endeavors was reaffirmed in *In re Public Employee*, Comm'n Op. No. 16-72A (2017).

Here, the Commission reemphasizes its acknowledgement of Public Officer's transparency and actions in seeking preventative legal advice from official legal counsel to make appropriate disclosures and abstentions and by seeking this advisory opinion. Further, the facts provided do not implicate a past compliance concern with NRS 281A.400. Nevertheless, the Commission recommends that Public Officer continue to proactively comply with these provisions in the future when public duties implicate private interests and commitments.

E. OTHER IMPLICATED LAWS

Outside the scope and jurisdiction of the Ethics Law is a substantially similar prohibition against public officers and employees entering into contracts with governmental entities. Specifically, NRS 281.230 contains a similar prohibition as that imposed by NRS 281A.430 but imposes a criminal rather than an administrative sanction. In *In re Cunningham*, Comm'n Op. No. 10-52A (2010), the Commission confirmed that the Commission interprets the two similar provisions in NRS Chapters 281 and 281A to be intended to encompass those situations in which a public officer/employee improperly uses a public position to benefit himself in a private capacity. While the Commission cannot and does not interpret NRS 281.230, it does not intend to infer that an activity permissible under the Ethics Law would otherwise be permissible under other laws. *Id.*, at p. 5.

Public Officer references a policy of Public Entity as applicable to contracts, which statute could permit certain contracts. The Commission is not provided authority to interpret and enforce policy of another public agency. However, the Commission has interpreted the plain language of NRS 281A.430 to require compliance when other contracting statutes establish separate requirements for the contract to be permitted. See *In re Durski*, Comm'n Op. No. 18-118A (2019), at p. 8. *Durski* involved the application of NRS 333.705(1) which requires approval of a contract with a former employee to be obtained from the Board of Examiners in certain circumstances. The Commission determined that since NRS 281A.430 does not provide for an exception when contract approval is sought and received by the applicable agency from the State Board of Examiners, the requirements of NRS 281A.430 are separately enforceable. As stated in *Durski*:

It is a cardinal principle of statutory construction that the Legislature enacts law with the full knowledge of existing statutes. *Destefano v. Berkus*, 121 Nev. 627, 629, 119 P.3d 1238, 1240 (2005). If the Legislature intended to provide an exception in the Ethics Law where BOE approval is granted

under NRS 333.705, it could have easily done so in the adopted statutory language of the relevant statutes. See *Washoe Medical Ctr. v. Second Judicial Dist. Ct.*, 122 Nev. 1298, 1308, 148 P.3d 790, 797 (2006) (Maupin, J., dissenting) (“If the Legislature wanted to make such filing void, or provide that such filing would not toll the applicable statute of limitations, it could have done so.”). However, the Legislature did not do so, and the Commission declines to create an ad hoc exception when it has no legal authority to do so.

Id.

VI. CONCLUSIONS OF LAW

The public judges its government by the way public officers and employees conduct themselves in the posts to which they are elected or appointed. The people have a right to expect that every public officer and employee will conduct himself in a manner that will tend to preserve public confidence in and respect for the government he represents. Such confidence and respect can best be promoted if every public officer and employee uniformly avoids both actual and potential conflicts between their private interests and the interests of the public. Helping public officials and employees achieve these goals is one of the objectives of the Ethics Law and therefore the Commission concludes:

1. Public Officer is a public officer as defined by NRS 281A.160 and also a public employee under NRS 281A.150 based upon contemporaneous service to two public agencies.
2. Pursuant to NRS 281A.675, the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include guidance from the Commission to Public Officer under NRS 281A.460.
3. Public Officer has a significant pecuniary interest in ownership and private employment with a private company and employment with the government agencies.
4. Pursuant to NRS 281A.065(4), (5) and (6), Public Officer has a commitment in a private capacity to an employer, including the other government agency and the private business.
5. Pursuant to NRS 281A.400(2), Public Officer must commit to avoid using a public position to obtain any unwarranted preferences or advantages for Public Officer or any private person or entity to whom Public Officer has a private commitment under NRS 281A.065.
6. Pursuant to NRS 281A.400(1), (3) and (10), Public Officer may not use a public position to: (1) seek or acquire any economic opportunity or engagement; (2) negotiate/execute a contract between the government and Public Officer or any business entity with which Public Officer has a significant pecuniary interest or with anyone to whom there is a private commitment; or (3) seek other employment or contracts for Public Officer or any person to whom there is a private commitment.
7. Pursuant to NRS 281A.420(1) Public Officer must make a proper public disclosure on all matters associated with Public Officer’s private interests or private commitments, including any matters pertaining to the Competitive

Contract or extension, detailing sufficient information concerning the private interests and commitments and their potential effect on Public Officer's participation on the matter.

8. Public Officer is required by statute to abstain on all matters captured by NRS 281A.420 that are associated with Public Officer's private interests and commitments, as identified in this opinion, because the impartiality of a reasonable person under the same circumstances would be materially affected by such matters. In reaching this conclusion, the Commission confirms that Public Officer has not presented a given set of facts or circumstances that would warrant the application of the presumption set forth in NRS 281A.420(3) and (4).
9. Public Officer should confer with official legal counsel for the respective public agencies served on any other questions related to the legal implications of future actions on the pecuniary interests or private commitments held by Public Officer.
10. Based upon the record presented, the contracting exceptions listed in NRS 281A.430 are not applicable to the extension of the Competitive Contract. Consequently, the contracting prohibition set forth in NRS 281A.430(1) applies to such extension.
11. Given the affirmative requirements of NRS 281A.020 to avoid conflicts of interests and the requirements of NRS 281A.430 associated with government contracts and other provisions of the Ethics Law, the Commission further advises Public Officer to take affirmative steps to comply with these statutes, as indicated in this opinion.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

Dated this 8th day of June, 2020.

NEVADA COMMISSION ON ETHICS

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