



## STATE OF NEVADA

### BEFORE THE NEVADA COMMISSION ON ETHICS

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

Request for Opinion No. 20-006A

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Public Officer. /

### **ABSTRACT OPINION**

#### **I. STATEMENT OF THE CASE**

Public Officer ("Public Officer") employed by Public Entity ("Public Entity"), requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.675 regarding the propriety of Public Officer's conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in Chapter 281A of the Nevada Revised Statutes. Pursuant to NAC 281A.352, a quorum of the Commission considered this matter by submission, without holding an advisory-opinion hearing.<sup>1</sup> 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 sought an opinion from the Commission regarding the applicability of the Ethics Law to Public Officer's circumstances, including NRS 281A.420, NRS 281A.430 and various provisions of NRS 281A.400. Specifically, Public Officer requests guidance on Public Officer's disclosure and abstention obligations associated with Public Officer's private business ("Private Business"), which is jointly owned with a relative, and whether the circumstances implicate other provisions of the Ethics Law. Public Officer recognizes the conflict and has made disclosures to the supervisory head of the organization and prior legal counsel for Public Entity. Public Officer was advised by these officials on compliance obligations under the Ethics Law related to the circumstances. Public Officer now seeks confirmation that the prior advice and direction received has not changed by virtue of any amendments to the Ethics Law or the Commission's interpretive opinions.

After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented, the Commission deliberated and advised Public Officer that Public Officer has a pecuniary interest relating to Private Business and also has commitments in a private capacity under NRS 281A.065(1), (4) and (5) to the interests of Private Business, including its other owner who is related within the third-degree of consanguinity. Based upon these private interests and commitments, Public Officer is advised to continue disclosing and abstaining on all matters before the Public Entity affecting Public Officer's relative and/or Private Business. The Commission further advises Public Officer of the contract restrictions set forth in NRS 281A.430 and the implications under NRS 281A.400 to the circumstances.

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

The Commission now renders this final 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. For the purposes of the conclusions offered in this 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. Although the 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.<sup>2</sup>

## **II. QUESTION PRESENTED**

Public Officer questions whether provisions of the Ethics Law set forth in NRS 281A.400, NRS 281A.420 or NRS 281A.430 are implicated by Public Officer's private pecuniary interests and commitments in a private capacity associated with Private Business, which has a contract with Public Entity.

## **III. FINDINGS OF FACT**

1. Public Officer is employed by Public Entity.
2. Public Officer jointly owns Private Business with a relative related within the third-degree of consanguinity.
3. Public Entity and Private Business have entered into a contract to provide certain services to Public Entity, which contract has been renewed.
4. Public Officer made disclosures to the official legal counsel and organizational head of Public Entity relating to Private Business, the commitments in a private capacity to any relative related within the third-degree of consanguinity and has abstained on all related matters.
5. Public Officer was advised by Public Entity and official legal counsel to disclose and abstain on all matters pertaining to Private Business and interests of the relative related within the third-degree of consanguinity. Public Entity established certain protocols to separate Public Officer from all matters relating to the contract between Private Business and Public Entity.
6. Private Business continues to provide contract services to the Public Entity.

## **IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES**

### **A. OVERVIEW OF ISSUES**

Public Officer must commit to avoid conflicts between Public Officer's private interests and those of the general public served. Public Officer has a duty to avoid any actual or perceived conflicts of interest, and Public Officer may not use Public Officer's public position to seek or accept economic opportunities that would improperly influence

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<sup>2</sup> 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 first-party 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).

public duties or secure or grant unwarranted privileges, preferences, exemptions or advantages for Public Officer or for any person (or entity) to whom there is a commitment in a private capacity. See NRS 281A.020 and NRS 281A.400(1) and (2).

The Ethics Law further prohibits a public officer/employee from using an official position to seek or accept economic opportunities that affect public duties or to secure unwarranted benefits for themselves or a person or entity to whom there is a private commitment. NRS 281A.400(1) and (2). Further, the Ethics Law prohibits use of government time, property or resources to benefit a pecuniary interest or benefit a person or entity to whom public officer/employee has a private commitment. See NRS 281A.400(7). Public officers/employees are also prohibited 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 contracting process is governed 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. Moreover, a public officer/employee has a duty to disclose the conflict and abstain from acting on such matters 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:**

“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), (7) 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.

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7. Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit a significant personal or pecuniary interest of the public officer or employee. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer or employee who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of the public officer's or employee's public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

↳ If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

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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.

## **8. Other Implicated Laws**

### **NRS 281.230 provides in 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.

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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**

The circumstances establish that Public Officer has consistently been transparent with Public Entity and the legal counsel for Public Entity. Public Officer has disclosed and abstained on all matters affecting Public Officer's pecuniary interests and private commitments relating to Private Business, and Public Officer has followed the protocols established by Public Entity to abstain from acting on such matters. Public Officer is commended for seeking the advice of the legal counsel for Public Entity, which Public Officer relied upon, to guide him on Public Officer's compliance obligations under the Ethics Law. Good faith reliance on the advice of counsel retained by a public officer's/employee's public body can provide safe harbor protections from a willful violation pursuant to NRS 281A.790(5).

The Ethics Law requires Public Officer to separate public duties from Public Officer's personal pecuniary interests and private comments to preserve the public trust. NRS 281A.020. In this opinion, the Commission confirms Public Officer's conflicts associated with pecuniary interests in Private Business (NRS 281A.139) and Public Officer's private commitments to Private Business and relative related within the third-degree of consanguinity (NRS 281A.065). Based upon these private pecuniary interests and commitments, Public Officer is advised on the application of the disclosure and abstention requirements set forth in NRS 281A.420. Moreover, it appears that prior advice given to Public Officer overlooked the application of the contracting prohibitions set forth in NRS 281A.430 and certain provisions of NRS Chapter 281A.400. Therefore, Public Officer is advised to take corrective action relating thereto.

### **B. DISCLOSURE AND ABSTENTION REQUIREMENTS**

#### **1. Conflicts Requiring Disclosure**

NRS 281A.420(1) requires a proper disclosure when carrying out Public Officer's public duties to approve, disapprove, vote, abstain or otherwise act upon a matter: (a) regarding a gift or loan, (b) in which Public Officer has a significant pecuniary interest, (c) which would reasonably be affected by Public Officer's 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. In addition to Public Officer's ownership interests in Private Business, Public Officer is employed by the company. Therefore, Public Officer has a significant pecuniary interest in employment with the company Public Officer also owns. 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 (11<sup>th</sup> 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, Public Officer has a private commitment to Public Officer's relative and Private Business, as a co-owner and as the private employer of Public Officer. See also *In re Spiegel*, Comm'n Op. No. 15-25A (2015), at p. 7. The Commission has determined that in cases involving a commitment in a private capacity, the interests of the person to whom there is a commitment 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. *In re Public Officer*, Comm'n Op. No. 13-71A (2014).

This means that the interests of Private Business and Public Officer's relative are statutorily attributed to Public Officer. See *In re Public Officer*, Comm'n Op. No. 17-10A (2017), at 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.

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, including the fact that Public Officer has a private interest in maintaining employment and salary from 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.

## **2. Abstention Requirements**

NRS 281A.420(3) and (4) set forth 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 with respect 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 Public Officer 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 business license increase and Public Officer's business would be subject to the increase and pay the same amount as other businesses similarly situated, Public Officer may make a proper disclosure and explain to the public why the legal presumption permits Public Officer's 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.

Approval of the Private Business contract materially benefits Public Officer, Public Officer's Private Business and relative. Furthermore, the presumption does not apply to allow Public Officer to participate on any matter relating thereto. The Commission has determined that in cases involving substantial and continuous business relationships, the interests of a 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 a person with whom the public officer shares an important business relationship. *In re Public Officer*, Comm'n Op. No. 13-71A (2014). Thus, a public officer must abstain on all matters before Public Entity that materially affect the interests of Public Officer's business and any business affiliate or client. See *In re Derbidge*, Comm'n Op. No. 13-05C (2013).

The Commission is confident that Public Officer will comply with NRS 281A.420 because Public Officer recognizes these pecuniary interests and private commitments and has been transparent, has complied with legal advice, and has complied with all protocols established by Public Entity.

### **C. NRS 281A.430 – CONTRACTING PROHIBITION**

In establishing protocols based upon Public Officer's conflicts, it appears that provisions of NRS 281A.430 may not have been fully considered. 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 private 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 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, only the exception set forth in NRS 281A.430(4) could apply. NRS 281A.430(4) 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.

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 the public officer 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 Public Officer 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) Public Officer has not taken part in developing the contract plans or specifications; and (d) Public Officer 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.

Here, the circumstances demonstrate certain protocols have been instituted; however, the Private Business contract is not within the statutory exception. Significantly, the contracting process was not subject to an open, competitive process. The Commission recognizes that Public Officer was acting pursuant to direction provided by Public Entity's officials and legal counsel. Public Officer proactively sought direction on Public Officer's conflict and the appropriateness of safe harbor under NRS 281A.790 would be considered in the context of an ethics complaint case, if one were to be filed with the Commission.<sup>3</sup> Unfortunately, since the Private Business contract was approved some time ago, the Commission is not in a position to consider granting relief under NRS 281A.430(6).

Accordingly, 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 does not have jurisdiction to advise Private Business on how to conduct its private business operations. Instead, the Commission's jurisdiction is over Public Officer.

Therefore, Public Officer is advised to secure statutory compliance with the contracting provisions of the Ethics Law given the legal implications of Private Business's contract with the Public Entity. There are many ways to secure compliance, not all of which are referenced in this opinion. Public Officer can secure future compliance with the Ethics Law by not entering into or voiding the contract between Private Business and the Public Entity. Divesting oneself of a business interest also could present an alternative to secure future compliance with the contracting prohibitions. *See In re Schmidlein*, Comm'n Op. No. 13-66A (2014) (Prior to seeking an advisory opinion, Schmidlein fully divested his interests in a private business prior to the contracting process to permit a contract with the government).

Importantly, such divestment may not result in an elimination of associated pecuniary interests (i.e., community property interests) and does not change any statutory commitments in a private capacity. Therefore, Public Officer is reminded that, even if Public Officer pursues mitigation and secures future statutory compliance, Public Officer's private commitments will require proper disclosures and abstentions to inform Public Entity about such interests on any related matters considered by the Public Entity. Public Officer is further directed to the statutory provisions of NRS 281A.540 indicating that the resultant contract entered into in violation of NRS Chapter 281A or NRS 281.230 is void

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<sup>3</sup> In the context of an advisory opinion, even if past conduct is at issue, the Commission does not hold contested case proceedings under NRS Ch. 281A or make associated public findings of a violation or issue sanctions against requesters of advisory opinions. However, the public officer or employee is not protected from a public filing of an ethics complaint and possible sanction in accordance with the complaint procedures outlined in NRS Ch. 281A. *See In re Public Officer*, Comm'n Op. No. 12-46A (2013), pgs. 3-5. Further, Commission advice on past conduct does not afford the requester a right of judicial review.

or voidable by the State, county, city or political subdivision if the Ethics Law is violated. See references to NRS 281.230 below under other implicated laws.

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

The Commission also 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 position could provide opportunity to obtain an unwarranted benefit for Public Officer's private interests and commitments such as improperly using a public position to market a private business.
- NRS 281A.400(3) – participating as agent of government on private contract in which one holds a significant pecuniary interest.
- NRS 281A.400(7) – Public Officer must fully separate Public Officer's private work from Public Officer's public duties.
- NRS 281A.400(10) – seeking employment/contracts through use of public position. Public Officer is advised to refrain from referencing Public Officer's public position in promotional or marketing efforts related to Private Business.

The Ethics Law generally does not prohibit a public officer 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 maintains the appropriate separation between Public Officer's private matters and Public Officer's 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 Public Officer's position to either hire oneself 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 Public Employee*, Comm'n Op. No. 15-28A (2016) (concerns expressed regarding use of public position to seek post-separation consulting contract with the employing public entity because anticipated private services were similar to public employee's assigned public duties). Additionally, the Commission has confirmed that a public officer/employee may not use a public position as a "selling point" in marketing private services. 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 in disclosing and abstaining on the conflicts and in seeking legal advice from the official legal advisory for Public Entity. However, the protocols are not sufficient given the requirements of NRS 281A.430 (prohibited contracts) and NRS 281A.400 restricting Public Officer from using Public Officer's public position for a private interest or commitment. Therefore, Public Officer is advised to take additional affirmative steps to address these conflicts and bring the circumstances into compliance with the requirements of the Ethics Law.

#### **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 it 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 enforce 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. Further, Public Officer must complete due diligence on whether any other laws or policies outside the jurisdiction of the Commission apply to the circumstances.

#### **VI. CONCLUSIONS OF LAW**

1. Public Officer is a public officer as defined by NRS 281A.160.
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.665.
3. Pursuant to NRS 281A.400(2), Public Officer must commit to avoid using Public Officer's public position to obtain any unwarranted preferences or advantages for Public Officer or any private person or entity to whom there is a private commitment under NRS 281A.065, including Public Officer's relative and Private Business, which is co-owned by and employs Public Officer.

4. Pursuant to NRS 281A.400(1), (3), (7) and (10), Public Officer may not use Public Officer's public position to: (1) seek or acquire any economic opportunity or engagement; (2) negotiate/execute a contract between the government and oneself or any business entity with which Public Officer has a significant pecuniary interest or with anyone to whom Public Officer has a private commitment; (3) improperly use government resources; or (4) seek other employment or contracts for Public Officer or any person to whom there is a private commitment.
5. Pursuant to NRS 281A.420(1), prior to acting on a matter on behalf of Public Entity pertaining to Private Business or Public Officer's relative, Public Officer must make proper disclosures under NRS 281A.420(1), as instructed in the written opinion served on Public Officer.
6. Pursuant to NRS 281A.420(3) and (4), Public Officer must abstain on all matters pertaining to Public Officer's pecuniary interests and private commitments to Private Business and the relative related within the third-degree of consanguinity, and the presumption set forth in NRS 281A.420(4) does not apply under the circumstances presented.
7. Based upon the record presented, the contracting exceptions listed in NRS 281A.430 are not applicable. Consequently, the contracting prohibition set forth in NRS 281A.430 applies to the Private Business contract.
8. Given the affirmative requirements of NRS 281A.020 to avoid conflicts of interests, NRS 281A.430 regarding the Private Business contract 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 the written opinion served on Public Officer.

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

The following Commissioners participated and approved this opinion:

Dated this 18<sup>th</sup> day of June, 2020.

By: /s/ Cheryl A. Lau  
Cheryl A. Lau, Esq.  
Chair

By: /s/ Teresa Lowry  
Teresa Lowry, Esq.  
Commissioner

By: /s/ Kim Wallin  
Kim Wallin, CPA  
Vice-Chair

By: /s/ Philip K. O'Neill  
Philip K. O'Neill  
Commissioner

By: /s/ Brian Duffrin  
Brian Duffrin  
Commissioner

By: /s/ Damian R. Sheets  
Damian R. Sheets, Esq.  
Commissioner

By: /s/ Barbara Gruenewald  
Barbara Gruenewald, Esq.  
Commissioner

By: /s/ Amanda Yen  
Amanda Yen, Esq.  
Commissioner