



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

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

Advisory Opinion No. 20-036A

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer ("Public Officer"), 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 Public Officer's anticipated future conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in Chapter 281A of the Nevada Revised Statutes ("NRS"). 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, information provided by Public Officer that was affirmed as true and publicly available information.

Public Officer sought an opinion from the Commission regarding Public Officer's responsibilities under the Ethics Law related to private interests in a business in which Public Officer owns a majority share of the stock ("Private Business"). Private Business has contracts with certain public agencies including Public Entity, Public Officer's employer.

After fully considering Public Officer's request and analyzing the facts, circumstances and information presented, the Commission deliberated and advises Public Officer that, in performing Public Officer's public duties, Public Officer must properly separate private interests and commitments from public duties and comply with the disclosure and abstention requirements of NRS 281A.420, as more particularly advised in this opinion. Further, Public Officer must be vigilant not to use Public Officer's public position to seek or acquire unwarranted private benefits for Public Officer or any person or entity to whom Public Officer has a private commitment under NRS 281A.065.

The Commission now renders this abstract opinion stating its 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 this opinion, the Commission's findings of fact set forth below are accepted as true. 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

¹ The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Wallin, and Commissioners Duffrin, Gruenewald and O'Neill. Commissioner Yen disclosed and abstained from any participation on this matter to avoid any appearance of impropriety or bias in compliance with NRS 281A.065(5), NRS 281A.420 and Rule 2.11 of the Code of Judicial Conduct. The details of the private commitment are not provided in this Abstract Opinion in order to protect the identity of the requester.

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.

II. QUESTION PRESENTED

Public Officer seeks guidance on Public Officer's duties under the Ethics Law when Public Officer's public duties intersect with private interests and commitments related to Private Business, including direction on the application of the disclosure and abstention requirements established in NRS 281A.420.

III. FINDINGS OF FACT

1. Public Officer is employed by Public Entity.
2. In Public Officer's private capacity, Public Officer owns a majority share of stock in Private Business that sells certain products to government agencies, including Public Entity.
3. Although Public Officer is a majority stockholder in Private Business, Public Officer does not oversee the day-to-day business operations of the company.
4. Public Officer's stock ownership in Private Business constitutes a significant pecuniary interest in the business and its associated contracts.
5. Public Officer indicates that Public Officer has not used Public Officer's public position to seek any contracts benefiting Private Business or any governmental agency.
6. For purposes of this Abstract Opinion, Public Officer identifies two Private Business contracts, one with a government agency that does not employ Public Officer ("Contract A") and one with Public Entity, Public Officer's employer ("Contract B").
7. Public Officer did not negotiate or execute Contract A and Public Officer does not participate in Private Business's associated contract performance obligations.
8. Public Officer did not negotiate or execute Contract B. Only with regard to creation of the product sold did Public Officer assist Private Business with the contract deliverables under Contract B.
9. Public Entity received competitive grant funds to enable it to pay Private Business for the deliverables set forth in Contract B. Because the grant was competitive, Public Officer believes that Contract B would be within the contracting exception set forth in NRS 281A.430(4).
10. Other government agencies are interested in purchasing Private Business' products.

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 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).

11. Public Entity has adopted a policy that has a conflict of interest section (“Conflict of Interest Policy”), which recognizes that outside activities or interests may adversely affect, compromise or be incompatible with the public obligations of its employees and requires all employees to disclose financial interests and business relationships that may involve a conflict of interest.
12. The Conflict of Interest Policy confirms that all persons employed by Public Entity must also comply with the Code of Ethical Standards of the State of Nevada (Ethics Law).
13. The Conflict of Interest Policy also has a contracting prohibition restricting any Public Entity employee from being interested, directly or indirectly, or through any business entity in which the employee has a financial interest, in any kind of contract or purchase order and sets forth certain exceptions that are similar to those listed in NRS 281A.430.
14. In compliance with the Conflict of Interest Policy, Public Officer has filed forms disclosing Public Officer’s interest in Private Business including the associated contracts with other government agencies. Public Entity desires to continue purchasing products from Private Business and has guided Public Officer to seek this opinion to assist in the application of the Ethics Law to the situation.
15. Because Public Officer believes that this situation is the first of its kind to be addressed by Public Entity, Public Officer is unsure about whether exemptions set forth in the NRS 281A.430 are required, who should request them and who has authority to grant them.
16. Public Officer hopes that Private Business will be allowed to sell its products to Public Entity and other public agencies and Public Officer is prepared to follow the Commission’s guidance and all laws, regulations and policies regarding such matters.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

The citizens of Nevada have a right to be assured to the fullest possible extent that the private financial dealings of their governmental representatives present no conflict of interest between public trust and private gain. The Ethics Law promotes the appropriate separation between public duties and private interests. The Commission has long maintained the intent of the Ethics Law, currently set forth in NRS Chapter 281A, as follows:

The apparent intent of the provisions of NRS Chapter 281 [now NRS Chapter 281A]...is to prevent public officers and employees from becoming involved in situations generating conflicts between private and public interests so as to preserve and enhance impartiality of public office and faith in the integrity of government. Policy objectives for ethics in government laws in general include:

- Impartiality, fairness and equality of treatment toward those dealing with government.

- Assurance that decisions of public importance will not be influenced by private considerations.
- Maintenance of public confidence in government (wherein enters the matters of appearances).
- Prevention of use of public office for private gain.

A conflict of interest (either actual or potential) is a situation requiring a public officer to serve two masters, presenting a potential; rather than an actuality, of wrongdoing. The wrongdoing does not have to actually occur in order for a prohibited conflict to exist. A public official may have done no wrong in the ordinary sense of the word, but a conflict of interest may put him in danger of doing wrong. It is avoiding even the potential of doing wrong which is the focus of ethics in government laws.

For this purpose, ethics in government laws identify certain types of conflicts of interest and prohibit conduct by public officials that would allow these conflicts to affect decisions of the public official...

In re Public Officer, Comm'n Op. No. 99-57 (2000), at p. 3, cited by *In re Dressler*, Comm'n Op. No. 00-12 (2000), *In re Public Officer*, Comm'n Op. No. 01-14 (2001) and *In re Public Officer*, Comm'n Op. No. 02-01 (2002).

In this opinion, the Commission advises Public Officer of the conflicts of interests associated with Public Officer's Private Business and the required disclosure and abstention and contracting requirements established in the Ethics Law, to ensure that Public Officer maintains proper separation between Public Officer's public duties and Public Officer's private interests and commitments.

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. “Compensation” Defined - NRS 281A.070 provides:

“Compensation” means any money, thing of value or economic benefit conferred on or received by any person in return for services rendered, personally or by another.

4. 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.

5. Code of Ethical Standards - NRS 281A.400(1), (2) 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.

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.

6. 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.

7. 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.

8. 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 Public Officer's 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.

9. Other Implicated Laws

a. 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.

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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 particular, 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 commit himself to avoid conflicts between Public Officer's private interests or commitments and those of the general public whom Public Officer serves. In furtherance thereof, Public Officer has a duty to avoid actual and perceived conflicts of interest, and Public Officer may not use Public Officer's position in government to seek or accept improper economic opportunities or secure or grant unwarranted privileges, preferences, exemptions or advantages for himself or for any person to whom Public Officer has a commitment in a private capacity. NRS 281A.020, NRS 281A.065 and NRS 281A.400. Further, NRS 281A.430 identifies the type of contracts between public officers/employees and the government that are prohibited, and which contracts are exempted. Separately, Public Officer must comply with all Public Entity policies, which may compliment the Ethics Law, but are not directly enforced by the Commission. Therefore, Public Officer is referred to Public Entity for guidance relating to compliance with its established policy directives.

B. PECUNIARY INTERESTS AND PRIVATE COMMITMENTS

Application of the Ethics Law starts with an analysis of whether there is a conflict implicating the compliance requirements of the Ethics Law, which exists when a public officer or employee has an associated significant pecuniary interest or private commitment. A pecuniary interest is anything of economic value that is measurable in money or related to money. See NRS 281A.139. 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*.

Public Officer has a controlling ownership interest in Private Business that is measured in the value and marketability of the company's stock. Even though Public Officer confirms that Public Officer is not an employee of Private Business, the stock ownership is measurable in money and is marketable. The value associated with Public

Officer's ownership interest in Private Business is by no means *de minimis*. Accordingly, the Commission finds that Public Officer's interest in Private Business is a significant pecuniary interest for purposes of application of the Ethics Law.

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(5) and (6), Public Officer has private commitments to Private Business and to its clients or persons/entities to whom Private Business has a substantial and continuing business relationship based on Public Officer's ownership interest. The interests of a person/entity to whom a public officer has a commitment in a private capacity are statutorily attributed to the public officer or employee based on the presumption that a reasonable person with the same conflict lacks independent judgment toward the interests of those persons to whom there are private commitments. See *In re Public Officer*, Comm'n Op. No. 13-71A (2014).

Given Public Officer's significant pecuniary interest in Private Business and Public Officer's associated private commitments, Public Officer must take steps to avoid conflicts of interest and comply with the Ethics Law. In doing so, Public Officer must recognize that the interests of Private Business and its clients and business associates are statutorily attributed to Public Officer. See *In re Public Officer*, Comm'n Op. No. 17-10A (2017), at p. 6.

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

The Commission highlights the Code of Ethical Standards, set forth in NRS 281A.400, which restrict use of a public position to obtain a private contract 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 that improperly influences public duties.
- NRS 281A.400(2) – using public position to secure unwarranted privilege/advantage. Public Officer's public duties could place Public Officer in a position to create an unwarranted benefit for Public Officer's private interests if Public Officer's public position is used to bolster business opportunities or market Public Officer's private business services or products. Public Officer also must not use Public Officer's public position as a selling point for purposes of advertising Public Officer's business products and promotional materials.
- NRS 281A.400(10) – seeking employment/contracts through use of public position. Public Officer is advised of the requirements of this statute so that Public Officer does not use Public Officer's public position to obtain contracts related to Private Business.

Unlike NRS 281A.430, which is addressed below, 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 a public officer's/employee's private interests 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 hire himself or ask 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 or contract opportunity or influence 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).

Public Officer confirms that Public Officer has endeavored to separate the pecuniary interests and private commitments relating to Private Business from Public Officer's public duties. The Commission recommends that Public Officer review the Code of Ethical Standards so Public Officer may proactively comply with these provisions in the future when Public Officer's public duties implicate Public Officer's private interests and commitments including, without limitation, refraining from using Public Officer's public position to sell or advertise Private Business and its products.

D. NRS 281A.420 - DISCLOSURE AND ABSTENTION REQUIREMENTS

NRS 281A.420(1) requires a proper disclosure when the public officer or employee is 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 significant pecuniary interests and commitments in a private capacity as disclosable conflicts. As a public officer, Public Officer must disclose any significant pecuniary interests and private commitments to the supervisory head of the organization, including the nature of the relationship and the full effect of the matter on Public Officer's pecuniary interests and the interests of those to whom Public Officer has a private commitment. It makes no difference whether the effect constitutes a benefit

or a detriment because the requirement established in NRS 281A.420(1) is one of proper disclosure.

In addition to making a proper disclosure to the supervisory head of the organization, Public Officer is advised of the requirement in NRS 281A.420 to make a public disclosure in certain circumstances should Public Officer be involved in a matter considered in a public meeting. See *In re Murnane*, Comm'n Op. No. 15-45A (2016) (requiring City Manager Murnane, as an appointed public officer, to make a written disclosure to the Henderson City Council to be included in the agenda packet available to the public, when certain matters affecting his private commitments were considered in a public meeting before the City Council). The requirement to inform the public applies to all public officers and employees irrespective of the varied statutory requirements identifying to whom the disclosure is required to be made based upon type of positions held (public officer vs. public employee) if the public officer/employee is appearing, presenting or representing matters at the public meeting. Whether a public disclosure is required for the public employee depends on whether there is an associated appearance during the public meeting in a representative capacity on the matter. *Id.*

Public Officer is advised 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 Private Business and the effect of the matter on Public Officer's private interests.

In summation, the Commission is confident that Public Officer will comply with the disclosure requirements of NRS 281A.420 because Public Officer has already complied with the conflict reporting requirements established by Public Entity. In addition to compliance with Public Entity's established policies, Public Officer is advised that a proper disclosure is required under the Ethics Law each time Public Officer's private interests and commitments connect with Public Officer's public duties.

Public Officer has detailed facts to confirm Public Officer has a significant private pecuniary interest in Private Business and holds associated private commitments. Therefore, the Commission also advises Public Officer that the abstention requirements under NRS 281A.420(3) would generally prohibit Public Officer from participating on such matters in Public Officer's public capacity. If Public Officer has a question about a particular matter, Public Officer may seek an advisory opinion from the Commission or consult with the official legal advisor for Public Entity to complete due diligence on the matter.³ NRS 281A.790(5) could provide Subject "safe harbor" from a willful violation if advice is sought from official legal counsel and received, preferably in writing, prior to participation on the matter.

³ A contemporaneous review must be conducted to ascertain whether a particular item also implicates the provisions of NRS 281A.400.

E. 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 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 any exemption set forth in NRS 281A.430 applies.

In particular, NRS 281A.430(4) establishes another contracting exception that bears review to determine whether it is applicable to Public Officer's circumstances, which states:

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 he served, thereby securing or granting to

him/herself and a limited liability company in which Public Officer 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 was utilized for its “as needed” services, which services were obtained pursuant to rules of an open, competitive process. *Id.*, at 8.

Although Public Officer was involved in the creation of the product for Private Business, Public Officer confirms that Public Officer did not use Public Officer’s position to benefit Private Business in obtaining the contracts with Public Entity or other government agency and Public Officer did not negotiate or sign the contracts. However, all requirements of NRS 281A.430(4) must be present for the application of the exception. At issue is whether the subject contracts were processed by an open and competitive bid.

Although requested, no facts are provided to establish that Contract A was competitively bid. With regard to Contract B, Public Officer submits it meets the requirements of a competitively bid contract because it was funded by a competitive grant. However, a competitive grant received by a public agency to fund a contract does not satisfy the competitive bid requirements of NRS 281A.430(4). The statute requires that the contract itself be competitively bid and contains no language verifying that receipt of grant funds that can be used to purchase a product constitutes a competitive bid situation. The Commission has interpreted competitive bidding to include those contracts where there are indicia that the contract was awarded through an open and competitive process, and the subject contract must meet all other requirements of NRS 281A.430(4).

Contract funding sources including grants are usually a separate and distinct process from the subject contract’s advertisement and competitive award process. Neither NRS 281A.430 or its referenced purchasing provisions (NRS 332.112 or 332.148), reference a grant funding source as a specific exception. Certainly, securing grant funds can be competitive. In general, grant funds may be provided to the public agency and may be used for a designated purpose as set forth in the grant in compliance

with applicable purchasing laws. If the grant is awarded to a private business, it could fund business operations or other matters as set forth in the grant. A grant funding source could be used to pay for various forms of contracts including those that are and those that are not competitively advertised or bid. Here, the Commission is without facts to determine whether the contracts themselves were also competitive based solely upon the indication that grant funds were involved with one of the contracts.

F. DIRECTION TO TAKE CORRECTIVE ACTION

The Commission is not able to find that the circumstances associated with Contract A or Contract B are within a contracting exception set forth in NRS 2181A.430. Nevertheless, the Commission recognizes that Public Officer properly complied with Public Entity's Conflict of Interest Policy. Unfortunately, because the subject contracts have already been approved, the Commission is not in a position to consider granting relief under NRS 281A.430(6), even though there are certain facts that might support such relief.

The Commission is precluded from issuing particular direction to Private Business on its business operations but advises Public Officer to correct the appearance of impropriety and possible violation of NRS 281A.430 presented by Public Officer's circumstances.⁴ One example of corrective action is for Private Business to refrain from seeking a contract renewal unless the contract 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 Public Entity to obtain other possible corrective measures. However, in doing so, Public Officer must disclose and abstain as directed in this opinion. Public Officer is further directed to the statutory provisions of NRS 281A.540, which state 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. See references to NRS 281.230 below under other implicated laws.

G. 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 is 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.

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⁴ 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 NRS Ch. 281A. See *In re Public Officer*, Comm'n Op. No. 12-46A (2013), pgs. 3-5. Further, the Commission's advice on past conduct does not afford requester a right of judicial review.

VI. CONCLUSIONS OF LAW

The public judges its government by the way public officials and employees conduct themselves in the posts to which they are elected or appointed. The people have a right to expect that every public official and employee will conduct themselves in a manner that will tend to preserve public confidence in and respect for the government Public Officer served. Such confidence and respect can best be promoted if every public official 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 under the Ethics Law.
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. Public Officer has a significant pecuniary interest in Public Officer's majority ownership interest of Private Business' stock.
4. Pursuant to NRS 281A.065(5) and (6), Public Officer has private commitments to Private Business and to its clients or persons/entities to whom Private Business has substantial and continuing business relationships.
5. Pursuant to NRS 281A.420(1) Public Officer must make a proper public disclosure on all matters detailing sufficient information concerning Public Officer's private interests and commitments and their potential effect on Public Officer's participation on any matter associated with Private Business and public duties for Public Entity, as instructed in this opinion.
6. Abstention on all matters captured by NRS 281A.420 that are associated with Public Officer's private interests and commitments, as identified in this opinion, are required pursuant to NRS 281A.420(3) because the impartiality of a reasonable person under the same circumstances would be materially affected.
7. Given the affirmative requirements of NRS 281A.020 to avoid conflicts of interests, NRS 281A.430 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.
8. Public Officer should confer with the Public Entity's official legal counsel on any other questions related to legal implications of Public Officer's actions including policies established by Public Entity.

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 25th day of June, 2020.

NEVADA COMMISSION ON ETHICS

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Chair

By: ABSENT
Teresa Lowry
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By: /s/ Kim Wallin
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