



STATE OF NEVADA
BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct
of **Public Officer**, Member,
Local Governing Body, State of Nevada,

Request for Opinion No. 12-46A

Public Officer. /

ABSTRACT OF OPINION

I. STATEMENT OF THE CASE

Local Governing Body Member, Public Officer, requested this confidential advisory opinion from the Nevada Commission on Ethics (“Commission”) pursuant to NRS 281A.440(1) regarding the propriety of his past conduct as it relates to the Ethics in Government Law (Ethics Law) set forth in Chapter 281A of the Nevada Revised Statutes (“NRS”). A quorum¹ of the Commission heard this matter and Public Officer appeared at the hearing and provided sworn testimony.

Public Officer sought an opinion from the Commission regarding whether he was required to disclose his relationship with a nonprofit organization and/or abstain from voting concerning a matter in which the local governing body considered and approved certain grant funding to the organization.

After fully considering Public Officer’s request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and orally advised Public Officer of its decision that he should have disclosed his commitment to the nonprofit organization and abstained from voting. The Commission now renders this final written Opinion stating its findings of fact and conclusions of law.

Public Officer elected to retain confidentiality with respect to this proceeding. Therefore, the Commission publishes this Abstract in lieu of the full opinion.

¹ The following Commissioners participated in this opinion: Chairman Erik Beyer, Vice Chairman Paul Lambolely and Commissioners John Carpenter, Timothy Cory, Gregory Gale and James Shaw.

The facts in this matter were obtained from documentary and testimonial 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.

II. QUESTION PRESENTED

Public Officer serves as a member of the Local Governing Body and questions whether his former service on the Board of Directors of a nonprofit organization and present service as a member of the organization's fiscal subcommittee required his disclosure and/or abstention on a matter before the Local Governing Body which involved the local government's consideration and award of grant funding to the organization.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

As a public officer, the conflicts of interest provisions of the Ethics Law apply to Public Officer's conduct. Specifically, Public Officer is required to publicly disclose sufficient information concerning any private relationships and interests which would reasonably affect matters before the Local Governing Body. He is also required to abstain from voting or otherwise acting on matters in which such commitments would clearly and materially affect the independence of judgment of a reasonable person in his position. See NRS 281A.420(1), (3) and (8).

Public Officer serves as a volunteer member of the finance subcommittee of Nonprofit Organization, an organization focused on providing certain economic development to the local community. Prior to his public service and membership on the finance subcommittee, Public Officer served as a member of the Board of Directors of Nonprofit Organization for nearly a decade. Nonprofit Organization requested grant funding from the Local Government via a grant application. Based on the facts and circumstances presented, Public Officer has a commitment in a private capacity to the interests of Nonprofit Organization that he should have disclosed before voting on the grant application. Furthermore, he would have been required to abstain from participating and voting based on the nature of this relationship.

Under NRS 281A.420(8), the Legislature deemed certain relationships to establish the type of private commitments that implicate certain conflicts of interest. As we have stated in previous opinions, a public officer's volunteer service on the Board of Directors of a nonprofit organization constitutes a commitment in a private capacity to the interests of that organization. See *In re Public Employee*, Comm'n Opinion No. 10-66A (2012), *In re Public Officer*, Comm'n Opinion No. 11-84A (2012),

In re Public Officer, Comm'n Opinion No. 12-04A (2012) and *In re Public Officer*, Comm'n Opinion No. 12-15A (2012). In this case, the Commission concludes that such a commitment extends to a nonprofit organization when the public officer had a long-standing relationship with the Board of Directors of the organization and now serves on its finance subcommittee, which is responsible for financial decisions of the organization. This Opinion also analyzes whether the nature and extent of that commitment requires disclosure and abstention under the circumstances identified herein.

B. RELEVANT STATUTES

1. Standing Regarding Past Conduct

NRS 281A.440(1) and (7) provide:

1. The Commission shall render an opinion interpreting the statutory ethical standards and apply the standards to a given set of facts and circumstances within 45 days after receiving a request, on a form prescribed by the Commission, from a public officer or employee who is seeking guidance on questions which directly relate to the propriety of the requester's own past, present or future conduct as an officer or employee, unless the public officer or employee waives the time limit. The public officer or employee may also request the Commission to hold a public hearing regarding the requested opinion. If a requested opinion relates to the propriety of the requester's own present or future conduct, the opinion of the Commission is:

- (a) Binding upon the requester as to the requester's future conduct; and
- (b) Final and subject to judicial review pursuant to NRS 233B.130, except that a proceeding regarding this review must be held in closed court without admittance of persons other than those necessary to the proceeding, unless this right to confidential proceedings is waived by the requester.

7. Each request for an opinion that a public officer or employee submits to the Commission pursuant to subsection 1, each opinion rendered by the Commission in response to such a request and any motion, determination, evidence or record of a hearing relating to such a request are confidential unless the public officer or employee who requested the opinion:

- (a) Acts in contravention of the opinion, in which case the Commission may disclose the request for the opinion, the contents of the opinion and any motion, evidence or record of a hearing related thereto;
- (b) Discloses the request for the opinion, the contents of the opinion, or any motion, evidence or record of a hearing related thereto; or
- (c) Requests the Commission to disclose the request for the opinion, the contents of the opinion, or any motion, evidence or record of a hearing related thereto.

(Emphasis added).

Public Officer's request concerns questions regarding only the propriety of his **past** conduct. Pursuant to NRS 281A.440(1), Public Officer does not have a right to

judicial review of the Commission's opinion concerning his past conduct and the Opinion offered by the Commission pursuant to this RFO does not protect him from public findings and conclusions pursuant to a Third-Party Request for Opinion submitted pursuant to NRS 281A.440(2) regarding the same past conduct. The Commission provides confidential "advice" regarding past conduct to serve as guidance for potential future actions.

Advice concerning past conduct is counterintuitive. A Commission opinion about past conduct essentially results in a conclusion about whether the public officer violated the Ethics Law. However, a conclusion about past conduct constitutes the basis for advice or guidance concerning future conduct: a conclusion that the public officer has been complying with the Ethics Law prompts advice that he should continue the same course of conduct and a conclusion that the public officer has strayed from the requirements of the Ethics Law triggers advice that he should change his future conduct in similar circumstances.

In the context of a confidential request for opinion regarding past conduct, the Commission does not make public findings or issue sanctions against requesters of advisory opinions concerning violations of the Ethics in Government Law; to do so would chill the exercise of open and honest requests for advisory opinions that may assist public officers and employees in their future conduct. However, a public officer may not shield himself from a violation of the Ethics Law regarding past conduct by beating the public to the Commission's proverbial doorstep and subsequently claiming confidentiality. The public policy ramifications of such an outcome could encourage a public officer or employee to willfully violate the public trust and as long as he gets to the Commission before a member of the public in a confidential setting to receive advice about his past conduct, he is saved from a violation – and public awareness of the same. Such a result is clearly contrary to the Legislature's intent to promote the public trust. If the Legislature had intended that outcome, it certainly could have expressed it in statute, in particular within the provisions of NRS 281A.480(5)².

Therefore, the Commission has an obligation to the public to properly investigate a Third-Party RFO and make appropriate findings and conclusions regarding allegations that a public officer's past conduct violated the Ethics Law, even

² **NRS 281A.480 Commission authorized to impose civil penalties; duties of Commission upon finding willful violation; circumstances in which violation not deemed willful; effect of chapter upon criminal law; judicial review; burden of proof.**

* * *

5. An action taken by a public officer or employee or former public officer or employee relating to this chapter is not a willful violation of a provision of those sections if the public officer or employee establishes by sufficient evidence that the public officer or employee satisfied all of the following requirements:

(a) The public officer or employee relied in good faith upon the advice of the legal counsel retained by the public body which the public officer represents or by the employer of the public employee or upon the manual published by the Commission pursuant to NRS 281A.290;

(b) The public officer or employee was unable, through no fault of the public officer or employee, to obtain an opinion from the Commission before the action was taken; and

(c) The public officer or employee took action that was not contrary to a prior published opinion issued by the Commission.

if that conduct constitutes the same conduct regarding which the public officer previously received confidential advice. The public officer or employee is not protected from a public finding of a violation and possible sanction in accordance with the procedures outlined in NRS 281A.440(2).

2. Public Policy

NRS 281A.020(1), 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.

The Ethics Law promotes the appropriate separation between public duties and private interests. As a member of the Local Governing Body, Public Officer has public responsibilities that he must separate from his private commitments to and interests in Nonprofit Organization. By serving as a member of the Local Governing Body and voting on matters which affect those private commitments and interests, without making any disclosures, Public Officer may be violating the public trust.

Whether there would be such a conflict between his public duties as a Local Governing Body member and his private commitments and interests in a nonprofit organization must be considered in light of the provisions set forth in NRS 281A and as interpreted by applicable Commission precedent in similar circumstances.

3. “Commitment in a private capacity” defined

NRS 281A.420(8) provides, in relevant part:

8. As used in this section:
 - (a) “Commitment in a private capacity to the interests of others” means a commitment to a person:
 - (1) Who is a member of the public officer’s or employee’s household;
 - (2) Who is related to the public officer or employee by blood, adoption or marriage within the third degree of consanguinity or affinity;
 - (3) Who employs the public officer or employee or a member of the public officer’s or employee’s household;
 - (4) With whom the public officer or employee has a substantial and continuing business relationship; or
 - (5) Any other commitment or relationship that is substantially similar to a commitment or relationship described in subparagraphs (1) to (4), inclusive, of this paragraph.

NRS 281A.420(8) establishes certain relationships that implicate conflicts of interest. In this instance, the Commission holds that Public Officer’s prior tenure as a member of the Nonprofit Organization Board of Directors followed by his present

volunteer service on the finance subcommittee of Nonprofit Organization constitutes a commitment in a private capacity to the interests of that organization. We have previously held that voluntary service on the Board of Directors of a nonprofit organization constitutes a commitment in a private capacity to the interests of that organization. See *In re Public Employee*, Comm'n Opinion No. 10-66A (2012), *In re Public Officer*, Comm'n Opinion No. 11-84A (2012), *In re Public Officer*, Comm'n Opinion No. 12-04A (2012) and *In re Public Officer*, Comm'n Opinion No. 12-15A (2012).

As a volunteer, Public Officer has a fiduciary duty to Nonprofit Organization when he serves as a member of its finance subcommittee. A portion of the subcommittee's duties include budget matters which may form a partial predicate for the nature of Nonprofit Organization funding requests from the Local Government. Public Officer would not volunteer his time and efforts to Nonprofit Organization if he was not interested in and committed to its goals. Accordingly, in his private capacity, Public Officer has a commitment to the interests of Nonprofit Organization.

4. Disclosure

NRS 281A.420(1), in relevant part, 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 pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others,

→ without disclosing sufficient information concerning the gift, loan, interest or commitment 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 pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such 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 to the chair and other members of the body...

In his role as a member of the Local Governing Body, Public Officer should have disclosed his commitment in a private capacity to the interests of Nonprofit Organization on any matters which involved the Local Government's sponsored grants to Nonprofit Organization. The disclosure should have included sufficient information to inform the public of the nature and extent of his private interest in Nonprofit Organization, Nonprofit Organization's interests in the matter before the Local Governing Body, and how or whether his action or inaction would have affected those private interests. His private interest in Nonprofit Organization includes his long-time membership of the Board of Directors, his subsequent service as a member of the finance subcommittee and his responsibilities in that capacity. Of particular relevance in this case is Public Officer's involvement in budget- and fiscal-related

matters that affect Nonprofit Organization and a matter before the Local Governing Body involving funds to Nonprofit Organization. Likewise, Public Officer should have disclosed how his decisions as a member of the Local Governing Body regarding matters involving projects with grant funds would have affected Nonprofit Organization and his role on its finance subcommittee, including budgetary decisions that may affect the nature and amount of grant requests.

In this case, it appears that Nonprofit Organization sought substantial funds and was awarded approximately half of its request. Nonprofit Organization was awarded significantly more funds than other organizations seeking the grant funding. The information before the Commission does not specify why Nonprofit Organization received only a portion of its request or whether the Local Government Body's decision gave more weight or preference to Nonprofit Organization's request. Nevertheless, any amount of money awarded to Nonprofit Organization would have triggered Public Officer's private interests in the organization and should properly have been disclosed.

5. Abstention

NRS 281A.420(3) and (4) provides:

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 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 pecuniary interest; or
- (c) The public officer's commitment in a private capacity to the interests of other's.

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 pecuniary interest or the public officer's commitment in a private capacity to the interests of others 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 others, accruing to the other person, is not greater than that accruing to any other member of the 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 disclosure of the pecuniary interest or commitment in a private capacity to the interests of other.

(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 has properly disclosed the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others 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, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others.

Public Officer's interests in Nonprofit Organization also create a clear case in which the independence of judgment of a reasonable person in Public Officer's position would be materially affected by his public duties on the Local Governing Body. Nonprofit Organization is a nonprofit organization which seeks and accepts grants for various types of program funding. Given Public Officer's role on the subcommittee governing fiscal and budgetary issues and the matter before the Local Governing Body involving funding for Nonprofit Organization programs, the Commission advises Public Officer that he should have abstained from voting on matters involving the grant funds. However, Public Officer is further advised to return to the Commission for specific advice concerning actual or apparent conflicts involving any particular matter which may trigger abstention requirements.

Public Officer's commitments to and interests in Nonprofit Organization and his commitments to its goals are shared by the Local Government and other public and private entities. However, there is competition for the grant funds among various private and public organizations. Accordingly, Public Officer's long-standing and current commitments to Nonprofit Organization and the impact of the grants to Nonprofit Organization on the matter before the Local Governing Body would have clearly and materially affected the independence of judgment of a reasonable person in Public Officer's position to warrant abstention. Public Officer has a responsibility as a public officer to represent his constituents and vote on matters of public importance unless a clear conflict outweighs that duty. In this case, the balance tips in favor of disclosure and abstention.

In the context of this confidential advisory opinion regarding past conduct, the Commission's intent is not to chastise Public Officer for his past failures to disclose or abstain. Rather, the Commission intends this opinion to be instructive and commends Public Officer for reaching out to the Commission to better understand his obligations as a public officer in this instance. We endeavor to assist public officers to understand the Commission's concerns as they relate to the level of private commitments and the nature of relationships that will require disclosure and abstention in future endeavors.

IV. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Public Officer was a public officer as defined by NRS 281A.160.

2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. Pursuant to NRS 281A.420(8)(a)(5), Public Officer, as a long-time member of the Board of Directors and as a current member of its finance subcommittee, has a commitment in a private capacity to the interests of Nonprofit Organization, a nonprofit entity with which he shares a substantially similar relationship to a substantial and continuing business relationship.
4. Public Officer has a public responsibility to the Local Government and a private responsibility to Nonprofit Organization. Accordingly, pursuant to NRS 281A.420(1), Public Officer should have disclosed sufficient information concerning the nature and extent of his commitment to and interests in Nonprofit Organization and how or whether those commitments and interests affected the Local Governing Body's consideration to award grant funds to Nonprofit Organization.
5. Applying NRS 281A.420(3) and (4), Public Officer should have abstained from participating or acting on matters involving the award of grant funds to Nonprofit Organization. Due to Public Officer's relationship over many years as a former member of the Board of Directors and his current membership on the finance subcommittee, this relationship established a clear case in which the independence of judgment of a reasonable person in Public Officer's situation would be materially affected by his commitment in a private capacity to the interests of Nonprofit Organization.

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.

The Following Commissioners Participated in this Opinion:

Dated this 24th day of January, 2013.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman

By: /s/ Timothy Cory
Tim Cory
Commissioner

By: /s/ Paul Lamboley
Paul Lamboley
Vice-Chairman

By: /s/ Gregory Gale
Gregory Gale
Commissioner

By: /s/ John Carpenter
John Carpenter
Commissioner

By: /s/ James Shaw
James Shaw
Commissioner