



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, Public Body,
State of Nevada,

Request for Opinion No. **17-10A**

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer ("Public Officer"), a member of Public Body ("Public Body"), requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) 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"). A quorum¹ of the Commission heard this matter and Public Officer, represented by Public Officer's attorney, appeared in person and provided sworn testimony.

Public Officer sought an opinion from the Commission regarding Public Officer's disclosure and abstention obligations under the Ethics Law as a member of the Public Body on matters relating to the private business interests of Public Officer's Private employer ("Private Employer"), including other private interests of its owners ("owners"). After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and advised Public Officer that Public Officer has commitments in a private capacity to the interests of the Private Employer and its owners pursuant to NRS 281A.065(4). Public Officer must properly disclose such commitments in a private capacity to the interests of the Private Employer and its owners when a matter is presented to the Public Body in which their respective interests are affected.

However, Public Officer is not required to abstain from voting on matters regarding which the independence of judgment of a reasonable person in Public Officer's situation would not be materially affected by the associated commitments. In particular, Public Officer need not abstain from acting on matters before the Public Body that will not impact the Private Employer's or its owners' private interests any more or less than others

¹ The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Weaver and Commissioners Duffrin, Gruenewald, O'Neill and Stewart. Commissioner Duffrin disclosed that he had a professional relationship with a member of Public Officer's family, which does not relate to the matter under consideration. Further, the nature of that relationship did not fall within a commitment in a private capacity to the interest of another person under NRS 281A.065 and the circumstances would not reasonably or materially affect Commissioner Duffrin's independence of judgment or that of a reasonable person in his situation. Public Officer had no objection to Commissioner Duffrin's participation in the matter because the nature of the relationship did not require abstention under the Ethics Law or disqualification under the Judicial Canons applicable to quasi-judicial proceedings. Commissioner Yen, upon realizing the implications of the matter to the interests of one of her family members who is employed by a firm that provides services to the Private Employer, disclosed the relationship and abstained from participation in the matter pursuant to the requirements of NRS 281A.420.

affected by the decision. In consideration of the provisions of the Ethics Law, the Commission informs Public Officer regarding the proper separation between Public Officer's official public position and private employment interests. Since the Public Officer requests confidentiality pursuant to NRS 281A.440(1), the Commission prepares this Abstract of its written opinion for publication.²

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 accepted as true those facts Public Officer presented. The Facts set forth in this Abstract have been redacted for confidentiality. 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. QUESTIONS PRESENTED

Public Officer serves as a member of the Public Body and seeks guidance on the duties established under the Ethics Law, including its disclosure and abstention requirements, associated with Public Body's determinations in certain regulatory matters relating to the Private Employer and its owners' private interests.

III. FINDINGS OF FACT (Redacted)

1. In Public Officer's public capacity, Public Officer is a member of the Public Body.
2. In Public Officer's private capacity, Public Officer has been employed by the Private Employer in a management-level position.
3. The Public Body regulates licensing and certain other activities relating to the interests of the Private Employer, including other separate private interests of its owners.
4. The private interests of the Private Employer and private interests of its owners are interconnected and the connectivity between the Private Employer and separate private interests of its owners is evident. Accordingly, there may be circumstances where the regulation of matters will affect the interests of the Private Employer and its owners' private interests directly or to a greater extent than to any other group affected by the matter to be considered.
5. Public Officer has made disclosures on matters considered by the Public Body with the assistance of the Public Body's assigned attorney. Public Officer indicates that Public Officer consulted with the assigned attorney to confirm Public Officer's belief that certain matters heard by the Public Body did not implicate the abstention requirements of the Ethics Law. If the matter before the Public Body had a material effect on the private interests of Private Employer or its owners, Public Officer testified that Public Officer would abstain on the matter after making a disclosure.
6. Public Officer does not believe that the majority of the matters heard by the Public Body given Public Officer's circumstances would improperly influence a reasonable person in Public Officer's situation to depart from the faithful performance of Public Officer's public duties given Public Officer's commitment in a private capacity to Private Employer or its owners' separate private interests.

² The individual comments made by any Commissioner during the hearing are not binding on the Commission's final opinion.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES; COMMISSION DECISION

A. ISSUES AND OVERVIEW

Under the Ethics Law, Public Officer, as a member of the Public Body, must commit to avoid actual and perceived conflicts of interest, and Public Officer is required to publicly disclose sufficient information concerning any private employment and pecuniary relationships and interests which would *reasonably* be affected by matters before the Public Body. NRS 281A.020 and 281A.420(1). In addition, Public Officer is not required to abstain from voting or otherwise acting on matters unless such relationships would *materially* affect the independence of judgment of a reasonable person in Public Officer's public position. NRS 281A.420(3). Finally, the potential interaction between Public Officer's private employment and public duties as a member of the Public Body requires appropriate separation between the use of Public Officer's official position and the interests of the Private Employer and/or its owners, including advocating or otherwise influencing decisions or using nonpublic government information to benefit these interests. See NRS 281A.400(2) and (5).

Public Officer holds a management-level position with the Private Employer and its owners have responsibility or oversight control over the operations of the Private Employer. The owners' control generally includes hiring and promotional recommendations associated with management. However, certain employment decisions associated with management are subject to review by a separate committee for which the owners are not members and do not control.

Accordingly, Public Officer is advised to continue to disclose the nature of Public Officer's relationship with and interests related to the Private Employer, and its owners. However, Public Officer must only abstain from participation on matters regarding which the independence of judgment of a reasonable person in Public Officer's situation would be materially affected by the commitment; therefore, abstention may not be required for all matters before the Public Body that affect the Private Business and/or its owners. With the appropriate disclosures and abstentions identified in this opinion, Public Officer will properly and effectively avoid such conflicts and preserve the public trust.

B. RELEVANT STATUTES

1. 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.

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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, 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 subsections 1 to 5, inclusive.

3. Use of Government Position to Secure Unwarranted Preferences - NRS 281A.400(2) provides:

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 to whom the public officer or employee has a commitment in a private capacity to the interests of that person. As used in this subsection:

- (a) “Commitment” in a private capacity to the interests of that person” has the meaning ascribed to “commitment in a private capacity to the interests of others” in subsection 8 of NRS 281A.420.
- (b) “Unwarranted” means without justification or adequate reason.

4. Using Non-Public Information Obtained Through Public Position to Benefit Pecuniary Interest - NRS 281A.400(5) provides:

5. If a public officer or employee acquires, through the public officer’s or employee’s public duties or relationships, any information which by law or practice is not at the time available to people generally, the public officer or employee shall not use the information to further the pecuniary interests of the public officer or employee or any other person or business entity.

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 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...

6. 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 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 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 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 persons 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 others.

(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.

C. COMMISSION DECISION

1. Public Trust/Overview

The Legislature has recognized the importance of citizen representation in public service under the Ethics Law by endorsing the public policy of the State to encourage public service by citizens who bring particular philosophies and perspectives shaped by various life experiences such as professional, family and business experiences. NRS 281A.020. Nevertheless, the provisions of the Ethics Law were used to strike the appropriate balance between encouraging those private interests and ensuring impartiality of official actions on behalf of the public. *Id.* Public Officer accurately recognized the potential conflicts between Public Officer's private interests and Public Officer's public duties, and rightfully sought the advice of the Commission to objectively navigate Public Officer's responsibilities under the Ethics Law. The Commission commends Public Officer for acknowledging these conflicts before engaging in any activity, public or private, which may impede the integrity of the public trust.

The disclosure, participation and abstention standards of the Ethics Law apply to Public Officer. NRS 281A.420(1) requires Public Officer, as a member of the Public Body, to carefully consider any private interests and commitments that may affect Public Officer's decision on matters considered by the Public Body. The law requires Public Officer to publically disclose sufficient information concerning the identified private interests and commitments to inform the public of the potential effect the Public Officer's action has on the matter. Further, such disclosure must be made at the time the matter is under consideration by the public body. NRS 281A.420(1)(c).

In addition to Public Officer's general obligation to maintain the public trust and avoid conflicts of interest, the Legislature has deemed employment relationships to implicate conflicts of interest that require disclosure of the relationship and, possibly, abstention from participating including voting. See NRS 281A.065 and NRS 281A.420(1), (3) and (4). Likewise, these conflicts of interest require Public Officer to remain vigilant not to use Public Officer's public position to influence matters affecting the interests of Public Officer's employer or its officers, including improper use of Public Officer's public position to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself/herself or Public Officer's employer, and avoiding the use of nonpublic information acquired through Public Officer's public position to benefit private interests. NRS 281A.400(2) and (5).

2. Commitment in a Private Capacity - Employment

In the present case, Public Officer has a commitment in a private capacity to the interests of the Private Employer and its owners. NRS 281A.065(4). As a result of the employment relationship, the interests of the Private Employer and its owners are statutorily attributed to Public Officer to establish conflicts between Public Officer's private interests and public duties. See *In re Public Officer*, Comm'n Op. No. 13-77A (2014). Further, the interests of the Private Employer and its owners' separate private interests are, at times, interconnected. The Ethics Law recognizes various conflicts or perceived conflicts between public duties and persons with whom public officers and employees have employment commitments. Accordingly, Public Officer must consider the implications of the interests of the Private Employer and associated private interests of its owners in addressing all associated public matters, including the disclosure and abstention requirements of NRS 281A.420 and other standards of conduct governing the improper use of Public Officer's position with regard to matters affecting the Private Employer as set forth in NRS 281A.400.

3. Disclosure

The Ethics Law requires Public Officer to disclose Public Officer's private commitments and relationships with the Private Employer and its owners. A public officer's disclosure is important even where the conflict is remote in some aspects. In *In re Weber*, Comm'n Op. No. 09-47C (2009), the Commission held:

In keeping with the public trust, a public officer's disclosure is paramount to transparency and openness in government. The public policy favoring disclosure promotes accountability and scrutiny of the conduct of government officials. ...Such disclosures dispel any question concerning conflicts of interest and may very well ward off complaints against the public officer based on failure to disclose.

Based on the nature of Public Officer's employment and Public Officer's influence as a member of the Public Body on matters affecting the private interests of the Private Employer and/or its owners, Public Officer is advised to adhere to the provisions of NRS 281A.020 and 281A.420(1). Public Officer should avoid any actual or perceived conflicts as a result of Public Officer's employment with the Private Employer and Public Officer's relationship to its owners by disclosing sufficient information regarding Public Officer's relationship with the Private Employer and its owners' private interests. Such disclosure should properly inform the public of the conflict and how or whether that conflict will interfere with Public Officer's ability to act in the best interests of the public. Public Officer must disclose these relationships before participating or voting on *any* issue before the Public Body involving those interests. The disclosure must include an explanation to the public of the full nature and extent of Public Officer's relationship with the Private Employer and/or its owners, including the connection between these relationships as applicable to matters to be considered by the Public Body. See *In re Woodbury*, Comm'n Op. No. 99-56 (1999).

4. Abstention

NRS 281A.020 highlights the importance of government officials serving their government and the people without influence from adverse motives and private interests. The same statute also highlights the deference the Legislature has seen fit to impose upon the Commission to "citizen legislators" in interpreting and applying the provisions of NRS Chapter 281A. See NRS 281A.020(2)(c). For example, a legislator who is a farmer or a doctor may be disposed to vote in favor of provisions that aid farmers or doctors. This influence generally is accepted as an inevitable aspect of democratic government and is not necessarily undesirable. Moreover, the provisions regarding abstention again require the Commission to consider the public policy in favor of our public officers and employees performing their official duties unless there is a clear and material conflict. NRS 281A.420(4)(b).

While an appearance of non-objectivity is sufficient to trigger the Ethics Law requirements for disclosure, the duty to abstain often depends on something more tangible. For most matters associated with the private interest of the Private Employer or its owners that are regulated by the Public Body, there is nothing more tangible. Further, "[w]hen a public officer serves on a State regulatory commission, the public officer must take great care to avoid situations that will require abstention on licensure matters because licensees may appear before the commission multiple times." See *In re Public Officer*, Comm'n Op. No. 11-57A (2012). Abstention is not automatic but is required in clear cases where the private conflict would materially affect the independence of judgment of a reasonable person in public officer's situation.

With regard to the Public Body's regulation of certain matters, the circumstances as presented demonstrate that the effects of actions taken by the Public Body do not generally affect the interests of the Private Employer or its owners. Once Public Officer completes a proper disclosure, the provisions of NRS 281A.420(3) and (4) are applied in favor of participation because such circumstances do not present a clear case where the independence of judgment of a reasonable, similarly situated public officer would be materially affected by the commitment in a private capacity.

However, this analysis could change should the Private Employer or its owners have a more concrete or direct interest in a particular matter before the Public Body that could have a resulting effect on the private interests of the Private Employer and/or its owners. The Commission has confirmed to Public Officer certain circumstances on which the presumption set forth in NRS 281A.420(4) would not apply given the associated interests of the Private Employer or its owners. If these circumstances or others arise that would affect the application of NRS 281A.420(3) or (4), Public Officer is advised to complete the analysis set forth in NRS 281A.420(4) to ascertain whether abstention is required.

Unless there are changed circumstances as Public Officer has been advised, the Commission concludes that Public Officer need not abstain from acting on the general matters before Public Body as identified by Public Officer that do not affect the interests of the Private Employer or the interconnected private interests of its owners to a greater extent than any other group affected by actions taken by the Public Body. See NRS 281A.420(3) and (4). The potential effect of such matters on the Private Employer's or its owners' interests would not clearly and materially affect the independence of judgment of a reasonable person in Public Officer's situation. However, Public Officer must carefully evaluate each matter before the Public Body to determine whether there are facts or circumstances, which may reasonably relate to the interests of the Private Employer or its owners, would require Public Officer's abstention.

Based on Public Officer's testimony and forthcoming awareness of the conflict created by Public Officer's commitments in a private capacity to the interests of others, the Commission is satisfied that Public Officer understands these responsibilities and will dedicate Public Officer's conduct to preserve the public trust. However, should circumstances arise that implicate additional review on an individual matter before the Public Body, Public Officer is encouraged to seek legal advice from the Public Body's assigned attorney or from the Commission through its advisory opinion process.

In conclusion, NRS 281A.420(4) recognizes the strong public policy requiring public officers to represent their constituents' interests in representative government except in clear cases in which a conflict interrupts the independence of judgment of a reasonable person in the officer's situation. Without other facts or circumstances to support a link to the specific interests of the Private Employer or its owners, Public Officer is advised to carry out Public Officer's public responsibilities and participate after making a proper disclosure on such matters.

5. Other Implicated Provisions of the Ethics Law

The provisions of NRS 281A.400 serve to assist Public Officer in maintaining a proper separation between Public Officer's private interests and public duties. Public Officer must be mindful of the implications of this statute including, without limitation, the prohibition against using Public Officer's public position to influence matters affecting the interests of the Private Employer or its owners, to secure or grant unwarranted privileges,

preferences, exemptions or advantages for Public Officer or the Private Employer, and to avoid using nonpublic information acquired through Public Officer's public position to benefit the Private Employer. NRS 281A.400(2) and (5).

V. 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.020 and 281A.420(1), Public Officer is advised to disclose sufficient information concerning the nature and extent of Public Officer's employment relationship with the Private Employer any time matters implicating the private interests of the Private Employer are affected by matters considered by the Public Body. Public Officer is further advised to disclose the nature and extent of any private interests of the Private Employer's owners in certain matters heard by the Public Body, which may appear at times to be remote to the interests of the Private Employer, but nevertheless involve matters of significance to its owners.
4. Pursuant to NRS 281A.420(3) and (4), under the circumstances presented, the Public Body's consideration of certain matters that do not affect the interests of the Private Employer and/or its owners greater than that accruing to any other group affected by the decision of Public Body, does not establish a clear case in which the independence of judgment of a reasonable person in Public Officer's situation would be materially affected. Therefore, Public Officer's duty to abstain is not absolute unless additional facts or circumstances implicate a more concrete nexus to the Private Employer's interests or its officers' private interests.
5. Public Officer is further advised to consider the implications of NRS 281A.400 to ensure proper separation of Public Officer's public duties and the private interests of the Private Employer and its owners.

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.

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The Following Commissioners Participated in this Opinion:

Dated this 10th day of October, 2017.

NEVADA COMMISSION ON ETHICS

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

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

By: /s/ Keith A. Weaver
Keith A. Weaver, Esq.
Vice-Chair

By: /s/ Lynn Stewart
Lynn Stewart
Commissioner

By: /s/ Brian Duffrin
Brian Duffrin
Commissioner

By: ABSTAIN
Amanda Yen, Esq.
Commissioner

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