



## BEFORE THE NEVADA COMMISSION ON ETHICS

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

Advisory Opinion No. 21-080A

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Public Officer. /

### **ABSTRACT OPINION**

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

Public Officer requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.675, regarding the propriety of Public Officer's conduct as it relates to the requirements of 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.<sup>1</sup> The Commission considered the request for an advisory opinion and a list of proposed facts that were affirmed as true by Public Officer.

Public Officer sought an opinion from the Ethics Commission regarding the disclosure and abstention requirements under NRS 281A.420 that are applicable to an agenda item considered by Public Officer as a member of the Board of the Public Entity, which item pertained to awarding a contract that reasonably affects the private interests of Public Officer's private employer ("Private Employer"). After fully considering this request and analyzing the facts, circumstances and documentation presented by Public Officer, the Commission advises about the duties of disclosure and abstention under NRS 281A.420, and associated compliance obligations with the Code of Ethical Standards set forth in NRS 281A.400.

The Commission now renders this abstract opinion, which facts were obtained from documentary evidence provided and affirmed as true by Public Officer. Although a full written opinion was properly served, 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 Public Officer. Facts and circumstances that differ from those presented to and relied upon by the Commission in this opinion may result in different findings and conclusions than those expressed in this opinion.<sup>2</sup>

#### **II. QUESTION PRESENTED**

Public Officer seeks guidance on the application of the Ethics Law on past conduct relating to the award of a contract that had potential to affect the private interests of Private Employer. In addition, direction is requested on how to comply with the Ethics Law on future public matters that have potential to affect the interests of Private Employer.

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

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

### **III. FINDINGS OF FACT**

1. Public Officer is a member of the Board which has authority to oversee contracts and other matters presented by Public Entity.
2. In a private capacity, Public Officer is employed in a management-level position by Private Employer.
3. Private Employer has clients that pay funds, which in part, contribute to Public Officer's salary. One of these clients is referenced in this opinion as "Business Client."
4. The Board considered agenda items related to a contract award in a series of public meetings, and before each public meeting, Board members are provided briefings on agenda items.
5. Public Officer did not attend the first public meeting but did attend several other meetings at which the contract was considered. Before and during one of the attended meetings, Public Officer received a staff briefing and participated (based upon some confusion occurring during the meeting) on the contract item without making a disclosure. Thereafter, Public Officer made a disclosure to staff and the public and abstained on matters related to the contract item based upon the involved private interests of Private Employer.
6. Public Officer seeks confirmation from the Commission on whether further briefings should be declined and whether the disclosure and abstention requirements applied to the contract agenda item. Separately, Public Officer seeks guidance on how to comply with the Ethics Law on future agenda items that could affect the interests of Private Employer.

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

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

Private commitments can lead to conflict situations with public duties. Consequently, these conflict situations must be recognized and properly navigated to assure compliance with the Ethics Law, including following the policy of the State of Nevada to avoid conflicts and appearances of impropriety. NRS 281A.020. The public trust must be protected when a person has a commitment in a private capacity to the interests of others under NRS 281A.065, which statute details a number of relationships deemed to be private commitments, including an employer. NRS 281A.065(4). For purposes of the application of the Ethics Law, the interests of persons to whom there are private commitments are imputed to be the interests of the public officer or employee for application of the Ethics Law because these types of relationships constitute relationships that would reasonably and materially affect public decisions. See *In re Romero*, Comm'n Op. No. 19-059A (2019); *In re Public Officer*, Comm'n Op. No. 19-049A (2019).

#### **B. RELEVANT STATUTES**

The following provisions of the Ethics Law are relevant to this matter.

## **1) Duty to Avoid Conflicts of Interest**

### **NRS 281A.020 provides in relevant part:**

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) "Commitment in a private capacity" Defined**

### **NRS 281A.065 provides, in relevant part:**

"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:

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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; . . .

## **3) Improper Use of Government Position**

### **NRS 281A.400(1) provides:**

A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity 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.

### **NRS 281A.400(2) provides:**

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 to the interests of that person. As used in this subsection, "unwarranted" means without justification or adequate reason.

### **NRS 281A.400(9) provides:**

A public officer or employee shall not attempt to benefit a significant personal or pecuniary interest of the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity through the influence of a subordinate.

#### **4) Disclosure and Abstention**

##### **NRS 281A.420(1) and (3) provide, in relevant part:**

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; or

(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,

↳ without disclosing information concerning the gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of the 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, or upon the person to whom the public officer or employee has a commitment in a private capacity. 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.

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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.

#### **V. COMMISSION DECISION**

##### **A. COMMITMENTS IN A PRIVATE CAPACITY**

The Legislature has determined that private pecuniary interests and certain private relationships listed in NRS 281A.065 form the foundation for conflicts of interest. A conflict would be present if either Public Officer has a pecuniary interest in the agenda item or if any person to whom Public Officer holds a commitment in a private capacity under NRS 281A.065 has a personal interest in the agenda item. The Commission determines that Public Officer has a pecuniary interest in the salary received from Private Employer that is supported in part by Business Clients. NRS 281A.065(4) lists the employer as a

relationship that constitutes a private commitment. Under the circumstances, Public Officer has a private commitment to Private Employer and its Business Clients.

The Commission has confirmed the commitment to the employer in several opinions including addressing the breadth of the obligation. In *In re Brown*, Comm'n Op. No. 13-28A (2013), the Commission explained: "[t]he Ethics Law recognizes various conflicts or perceived conflicts between public duties and a person with whom public officers and employees have employment commitments." *Id.* at p. 9. This means that the interests of the person to whom there is a private commitment, such as an employer, business affiliate or client, or similar relationships are statutorily attributed to the public officer based on the presumption that a person lacks independent judgment toward the interests of those persons to whom the public officer has such commitments. See *In re Public Officer*, Comm'n Op. No. 13-71A (2014).

In this case, the various interests and commitments of Private Employer are imputed to Public Officer's as a matter of law. Further, Public Officer is employed in a management position that interacts with the Business Clients. When pecuniary interests and private commitments relate to public duties, public officers and employees must comply with the disclosure and abstention requirements of NRS 281A.420 and the Code of Ethical Standards (NRS 281A.400), as addressed below.

## **B. DISCLOSURE REQUIREMENTS – NRS 281A.420(1)**

The disclosure requirements of NRS 281A.420(1) apply to Public Officer every time Public Officer's pecuniary interests or private commitments intersect with public duties. NRS 281A.420(1) requires a proper disclosure when the public officer or employee is carrying out public duties to approve, disapprove, vote, abstain or otherwise act upon a matter: (a) regarding a gift or loan, (b) in which there is a significant pecuniary interest, (c) which would reasonably be affected by 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.

When any significant pecuniary interest of a public officer/employee or any of the identified relationships set forth in NRS 281A.065 are reasonably affected by public duties, the nature of these interests and relationships requires a proper disclosure, which may be extended to the business endeavors and clients to whom there is a private commitment. See *In re Romero*, Comm'n Op. No. 19-059A (2019), at p. 6; *In re Public Officer*, Comm'n Op. No. 15-74A (2018).

### **1. Past Conduct – Board Meeting**

During a meeting, Public Officer participated on the contract agenda item involving the interests of Private Employer, even though there was confusion associated with the matter.<sup>3</sup> The Commission appreciates the confusion, the fact that Public Officer was caught off-guard, and the affirmative steps taken by Public Officer after the meeting to correct the situation. Nevertheless, NRS 281A.420 requires that the disclosure be made before any participation and before taking any form of action. The Ethics Law does not

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<sup>3</sup>The Commission's efforts at outreach and education caution against initiating complaints against current or former public officers and employees in the context of an advisory opinion. The Commission does not intend to thwart or punish a public officer or employee from seeking educational guidance and advice. Therefore, the Commission will not initiate its own complaint in this matter, but it may also not prevent a complaint from being filed by a member of the public under NRS 281A.440(2). If a complaint proceeding is commenced, the Commission will consider Public Officer's mitigating conduct including recognition of the conflict, subsequent disclosures and abstentions, and proactive efforts to seek this advisory opinion.

discern between the many and varied forms of action that may be taken on a matter by a public body that could range from continuances, holds, approvals, disapprovals, or a multitude of other directives. Instead, it requires disclosure at the outset before consideration of the matter. Accordingly, it would have been a better course for Public Officer to have completed more thorough due diligence to support the required disclosure of the interests of Private Employer and Public Officer's own pecuniary interests.

Public Officer is reminded that the Ethics Law does not recognize a continuing disclosure or a disclosure by reference. The purpose of disclosure is to provide sufficient information regarding the conflict of interest to inform the public of the nature and extent of the conflict and the potential effect of the action or abstention on the public officer's private interests and commitments. Silence based upon a prior disclosure fails to inform the public or supervisory head of the organization about the nature and extent of the conflict. See *In re Buck*, Comm'n Op. No. 11-63C (2011) (holding that incorporation by reference of a prior disclosure, even though based upon the advice of counsel, did not satisfy the disclosure requirements of NRS 281A.420(1)). Disclosure further serves to protect the public officer or public employer. 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.

## **2. Future Matters**

If a future matter is considered by the Board that has potential to reasonably affect the interests of either Public Officer or Private Employer and its Business Clients, the disclosure requirements of NRS 281A.420 will apply to the matter. Moreover, to protect Nevada's public officers and employees, the Commission recommends disclosure even when there is a remote connection between these private interests and the matter considered because a proper disclosure is important even where the conflict is remote in some respects. 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.

Public Officer must be diligent and review each item or matter before the Board that relates to private interests and commitments to determine whether there is a reasonable connection to public duties. Public Officer is advised to make a proper disclosure under NRS 281A.420 on any private interests or commitments that could be reasonably affected by the matter under consideration. Thereafter, it is recommended that the abstention requirements be applied to the matter to ascertain whether the participation of a reasonable person in Public Officer's situation would be materially affected so as to require abstention under NRS 281A.420(3) and (4). If Public Officer has a question on whether disclosure is required under NRS 281A.420(1) for a particular matter, in addition to consulting the Board's official legal counsel, Public Officer may seek

an advisory opinion from the Commission under NRS 281A.675 based upon the particular circumstances.

### **C. ABSTENTION REQUIREMENTS – NRS 281A.420(3) AND (4)**

NRS 281A.420(3) and (4) detail the abstention requirements to be considered after a proper disclosure has been made by the public officer/employee. NRS 281A.420(3) mandates that a public officer shall not participate on a matter when the independence of judgment of a reasonable person in the public officer's situation would clearly and materially be affected by the disclosed conflict. NRS 281A.420(4) creates a presumption against abstention and authorizes participation in limited circumstances.

After a proper disclosure, the presumption permits the public officer to participate if the matter would not result in any form of benefit or detriment accruing to the public officer (or persons/entities to whom the public officer has a private commitment) that is greater or less than that accruing to any other member of the general business profession, occupation or group that is affected by the matter. For example, if the public officer is voting upon a general business license increase and public officer's business would be subject to the increase and pay the same amount as other businesses similarly situated, a proper disclosure is advised combined with explanation informing the public why the legal presumption permits participation. As the Commission explained:

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

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

Initially, it is noted that the presumption would not have permitted Public Officer to participate on the contract agenda item. However, for other matters considered by the Board that relate to the interests of Public Officer and Public Employer, the analysis on abstention will be fact dependent. If the matter directly affects the particular interests of Public Officer or Private Employer, the presumption likely will not allow participation; however, without detailed facts on the matter to be considered this cannot be pre-confirmed.

Therefore, the Commission recommends careful consideration on whether abstention is appropriate based upon the facts presented to determine whether a reasonable public officer's participation in the matter likely would be clearly and materially affected by the conflict. Conversely, if the matter does not affect the interests of Public Officer, Private Employer, or its Business Clients more or less than others affected by the matter under consideration, application of the presumption could permit participation and voting on the matter. An analysis of the involved interests is an important consideration

in application of the presumption. Accordingly, the Commission's guidance is general and certainly could change depending on the nature of the circumstances.

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

The Commission commends Public Officer for seeking an advisory opinion and provides information about the requirements of NRS 281A.400 to provide education about other compliance obligations under the Ethics Law when there is a conflict. The requirements of NRS 281A.400 serve to assist in maintaining a proper separation between private interests and public duties when conflict situations are present. For each referenced section of NRS 281A.400, Public Officer must be mindful of the following implications:

- NRS 281A.400(1) – Public Officer's public duties will intersect with the private commitments to Private Employer when the contract agenda item is considered or if other matters are considered that reasonably affect either Public Officer's or Private Employer's interests. To avoid this conflict, Public Officer must not seek or accept economic opportunities that affect or benefit Public Officer's employer's interests, including those relating to Business Clients.
- NRS 281A.400(2) – Public Officer's role as a Board member places Public Officer's in a position to create unwarranted benefits for Public Officer's private interests and commitments if a public position is used to benefit or promote such interests. Therefore, Public Officer must be vigilant and determine the extent of such interests and comply with NRS 281A.400 and the disclosure and abstention requirements of NRS 281A.420.
- NRS 281A.400(9) – Public Officer is advised that influencing a subordinate in an attempt to benefit a private interest or commitment is precluded under the Ethics Law.

The Commission trusts that Public Officer will be proactive and diligent to maintain a proper separation between public duties and private interests by not engaging in conduct that creates unwarranted or improper private benefits for Public Officer, Private Employer or Business Clients. The Commission advises Public Officer about these statutory requirements, so they may be applied to personal circumstances affected by the performance of public duties. Assistance is available in the future because Public Officer can utilize the Commission's advisory opinion process on conflict situations or seek the advice of the Board's official legal counsel, which may provide certain safe harbor protections under NRS 281A.790.

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

1. Public Officer is a public officer as defined by NRS 281A.160.
2. Pursuant to NRS 281A.675, the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include guidance from the Commission to the public officer or employee under NRS 281A.665.
3. Public Officer has pecuniary interest in Public Officer's salary and a commitment in a private capacity to the interests of Private Employer and its Business Clients under NRS 281A.130 and 281A.065(4), respectively. Accordingly, Public Officer must comply with the Code of Ethical Standards set forth in NRS 281A.400.



4. Pursuant to NRS 281A.420(1), prior to acting on a matter reasonably affecting either Public Officer's pecuniary interests or the interests of Private Employer, a disclosure must be made to properly advise the public of the full impact these private interests and commitments could have on Public Officer's public duties and then apply the abstention requirements of NRS 281A.420(3) and (4) to the conflict situations.
5. Pursuant to NRS 281A.020, the Commission further advises Public Officer to take affirmative steps to avoid potential conflicts, which steps favor obtaining legal advice from the Board's official legal counsel in compliance with NRS 281A.790(5) to assist in preparing proper disclosure and abstention remarks to inform the public about the identified conflicts, which could serve to provide Public Officer's the associated safe harbor protections. In addition, the Commission's advisory opinion process is available to obtain guidance on Public Officer's compliance obligations under the Ethics Law.

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.

Dated this 18<sup>th</sup> day of January, 2022.

THE NEVADA COMMISSION ON ETHICS

By: /s/ Kim Wallin  
Kim Wallin, CPA, CMA, CFM  
Chair

By: /s/ James Oscarson  
James Oscarson  
Commissioner

By: /s/ Brian Duffrin  
Brian Duffrin  
Vice-Chair

By: Absent  
Damian R. Sheets, Esq.  
Commissioner

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

By: Absent  
Thorán Towler  
Commissioner

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

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