



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

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

Request for Opinion No. 20-079A

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 Ethics in Government Law (“Ethics Law”) set forth in Chapter 281A of the Nevada Revised Statutes. Pursuant to NAC 281A.352, a quorum of the Commission considered this matter by submission, without holding an advisory-opinion hearing.¹ The Commission considered the request for an advisory opinion, a list of proposed facts that were affirmed as true by Public Officer and publicly available information.

Public Officer sought an opinion from the Commission regarding the applicability of the Ethics Law to Public Officer’s circumstances, including NRS 281A.420 and the associated disclosure and abstention obligations pertaining to Public Officer’s private business (“Private Business”), and whether any other provisions of the Ethics Law are implicated by Public Officer’s participation and vote on a certain contract between Vendor and the Public Entity (“Vendor Agreement”). Specifically, if the Public Entity does not approve the Vendor Agreement, Private Business may be placed in a favorable position to provide future services.

After fully considering Public Officer’s request and analyzing the facts and circumstances presented, the Commission deliberated and advised Public Officer that Public Officer has a pecuniary interest under NRS 281A.139 and a commitment in a private capacity under NRS 281A.065(5) and (6) to the interests of Public Officer’s Private Business. Public Officer is advised to fully disclose and conduct the abstention analysis on all matters before the Public Entity affecting these pecuniary interests and private commitments. The Commission further advises Public Officer of the contract restrictions set forth in NRS 281A.430 and the requirements of the Code of Ethical Standards applicable to public officers and employees, which is set forth in NRS 281A.400.

¹ The following Commissioners participated in this opinion: Chair Wallin, Vice-Chair Duffrin and Commissioners Gruenewald, Lowry and Yen. Commissioner Towler disclosed that this confidential advisory opinion relates to Public Officer’s disclosure and abstention obligations under the Ethics Law associated with the Vendor Agreement, and Vendor is a client of Commissioner Towler’s private employer. Pursuant to NRS 281A.065(4) and (5), Commissioner Towler has a commitment in a private capacity to his employer and Vendor based upon his employer’s continuing business relationship with this client. Consequently, the independence of judgment of a reasonable person in Commissioner Towler’s situation could be materially affected by voting upon items that could implicate the interests of Vendor. In order to avoid any appearance of impropriety and comply with the Ethics Law and Judicial Canons applicable to the Commission, Commissioner Towler disclosed these relationships and abstained from participation in this matter.

The Commission now renders this final abstract opinion stating its formal findings of fact and conclusions of law. The facts in this matter were obtained from documentary evidence provided by Public Officer. For the purposes of the conclusions offered in this opinion, the Commission's findings of fact set forth below accept as true those facts Public Officer presented. Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those expressed in this opinion. Although the full written opinion was served on Public Officer, for confidentiality reasons, this Abstract Opinion redacts certain Findings of Fact, provides a summary of issues, and removes other identifying information to protect the confidentiality of the requester.²

II. QUESTION PRESENTED

Public Officer questions whether Public Officer was required to have disclosed or abstained on the Vendor Agreement when it was approved by the Public Entity, and also seeks guidance on whether any other provisions of the Ethics Law are implicated by Public Officer's private pecuniary interests and commitments to Public Officer's Private Business.

III. FINDINGS OF FACT

1. Public Officer is a member of the Public Entity.
2. Public Entity has authority to enter into contracts to provide consulting services relating to its operational needs to serve the public.
3. Public Officer owns and is the managing member of a consulting business, which Private Business provides services to the private and public sectors.
4. On behalf of Private Business, Public Officer has submitted certain proposals to private and public sectors seeking to obtain consulting service contracts.
5. Public Entity anticipated considering an award of a Vendor Agreement that had potential, if not approved, to directly affect the likelihood of whether Public Officer's Private Business would receive contracts based upon the proposals Public Officer had already presented to certain private and public sectors.
6. Prior to issuance of this Advisory Opinion, Public Entity considered the Vendor Agreement and Public Officer voted to approve the agenda item, which vote was contrary to the associated business prospects for Public Officer's Private Business.

As a member of the board for Public Entity, Public Officer must avoid conflicts between Public Officer's private interests and those of the general public served by Public Officer. Public Officer has an affirmative duty under NRS 281A.020 to avoid any actual or perceived conflicts of interest. NRS 281A.420 establishes the disclosure and abstention requirements when a public matter implicates private interests or commitments.³ Public officers/employees are also prohibited from seeking or negotiating private contracts with

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).

³ NRS 281A.065 establishes the types of relationships constituting commitments in a private capacity and captures businesses owned by the public officer or employee and those business with which there is a substantial and continuing business relationship.

governmental agencies, especially their own agency, or entering into contracts with a governmental entity regarding which they have a significant pecuniary interest, unless the contracting process is governed by open, competitive bidding, and the public officer or employee has not participated in the contracting process. See NRS 281A.400(3) and (10) and NRS 281A.430.

Furthermore, the Ethics Law establishes a Code of Ethical Standards in NRS 281A.400 to assure public officers and employees maintain proper separation between their private interests and public duties. Proper separation of private interests and commitments promotes the faithful performance of public duties in furtherance of the public trust. For example, the Code of Ethical Standards precludes the use of a public position in government to seek or accept economic opportunities that would improperly influence public duties or secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee or for any person to whom they have a commitment in a private capacity. See NRS 281A.020 and NRS 281A.400(1) and (2). NRS 281A.400 further prohibits a public officer/employee from using government time, property or resources to benefit such private interests. See NRS 281A.400 (7).

A. RELEVANT STATUTES

1. Public Trust and Duty to Avoid Conflicts of Interest - NRS 281A.020 provides:

1. It is hereby declared to be the public policy of this State that:
 - (a) A public office is a public trust and shall be held for the sole benefit of the people.
 - (b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.
2. The Legislature finds and declares that:
 - (a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests.
 - (b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.
 - (c) In interpreting and applying the provisions of this chapter that are applicable to State Legislators, the Commission must give appropriate weight and proper deference to the public policy of this State under which State Legislators serve as "citizen Legislators" who have other occupations and business interests, who are expected to have particular philosophies and perspectives that are necessarily influenced by the life experiences of the Legislator, including, without limitation, professional, family and business experiences, and who are expected to contribute those philosophies and perspectives to the debate over issues with which the Legislature is confronted.
 - (d) The provisions of this chapter do not, under any circumstances, allow the Commission to exercise jurisdiction or authority over or inquire into, intrude upon or interfere with the functions of a State Legislator that are protected by legislative privilege and immunity pursuant to the Constitution of the State of Nevada or NRS 41.071.

2. “Commitment in a Private Capacity” Defined - NRS 281A.065 provides:

“Commitment in a private capacity,” with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

1. Who is the spouse or domestic partner of the public officer or employee;
2. Who is a member of the household of the public officer or employee;
3. Who is related to the public officer or employee, or to the spouse or domestic partner of the public officer or employee, by blood, adoption or marriage or domestic partnership within the third degree of consanguinity or affinity;
4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee;
5. With whom the public officer or employee has a substantial and continuing business relationship; or
6. With whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to a commitment, interest or relationship described in subparagraphs 1 to 5, inclusive.

3. Pecuniary Interest - NRS 281A.139 provides:

“Pecuniary interest” means any beneficial or detrimental interest in a matter that consists of or is measured in money or is otherwise related to money, including, without limitation:

1. Anything of economic value; and
2. Payments or other money which a person is owed or otherwise entitled to by virtue of any statute, regulation, code, ordinance or contract or other agreement.

4. Code of Ethical Standards - NRS 281A.400(1), (2), (3), (7) and (10) provides:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity, for the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity, which would tend improperly to influence a reasonable person in the public officer’s or employee’s position to depart from the faithful and impartial discharge of the public officer’s or employee’s public duties.

2. A public officer or employee shall not use the public officer’s or employee’s position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest or any person to whom the public officer or employee has a commitment in a private capacity. As used in this subsection, “unwarranted” means without justification or adequate reason.

3. A public officer or employee shall not participate as an agent of government in the negotiation or execution of a contract between the government and the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest or any

person to whom the public officer or employee has a commitment in a private capacity.

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

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

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

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

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

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

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

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

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

10. A public officer or employee shall not seek other employment or contracts for the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity through the use of the public officer's or employee's official position.

5. Disclosure - NRS 281A.420(1) provides:

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a significant pecuniary interest;

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interests of another person; or

(d) Which would reasonably be related to the nature of any representation or counseling that the public officer or employee provided to a private person for compensation before another agency within the immediately preceding year, provided such representation or counseling is permitted by NRS 281A.410,

↳ without disclosing information concerning the gift or loan, the significant pecuniary interest, the commitment in a private capacity to the interests of

the other person or the nature of the representation or counseling of the private person that is sufficient to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's significant pecuniary interest, upon the person to whom the public officer or employee has a commitment in a private capacity or upon the private person who was represented or counseled by the public officer or employee. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

6. Abstention - NRS 281A.420(3) and (4) provide:

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

- (a) The public officer's acceptance of a gift or loan;
- (b) The public officer's significant pecuniary interest; or
- (c) The public officer's commitment in a private capacity to the interests of another person.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of another person, accruing to the other person, is not greater than that accruing to any other member of any general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the duty of the public officer to make a proper disclosure at the time the matter is considered and in the manner required by subsection 1.

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer makes a proper disclosure at the time the matter is considered and in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, significant

pecuniary interest or commitment in a private capacity to the interests of another person.

7. Prohibited Contracts - NRS 281A.430 provides:

1. Except as otherwise provided in this section and NRS 218A.970 and 332.800, a public officer or employee shall not bid on or enter into a contract between an agency and any business entity in which the public officer or employee has a significant pecuniary interest.

2. A member of any board, commission or similar body who is engaged in the profession, occupation or business regulated by such board, commission or body may, in the ordinary course of his or her business, bid on or enter into a contract with an agency, except the board, commission or body on which he or she is a member, if the member has not taken part in developing the contract plans or specifications and the member will not be personally involved in opening, considering or accepting offers.

3. A full- or part-time faculty member or employee of the Nevada System of Higher Education may bid on or enter into a contract with an agency, or may benefit financially or otherwise from a contract between an agency and a private entity, if the contract complies with the policies established by the Board of Regents of the University of Nevada pursuant to NRS 396.255.

4. Except as otherwise provided in subsection 2, 3 or 5, a public officer or employee may bid on or enter into a contract with an agency if:

(a) The contracting process is controlled by the rules of open competitive bidding or the rules of open competitive bidding or for a solicitation are not employed as a result of the applicability of NRS 332.112 or 332.148;

(b) The sources of supply are limited;

(c) The public officer or employee has not taken part in developing the contract plans or specifications; and

(d) The public officer or employee will not be personally involved in opening, considering or accepting offers.

↳ If a public officer who is authorized to bid on or enter into a contract with an agency pursuant to this subsection is a member of the governing body of the agency, the public officer, pursuant to the requirements of NRS 281A.420, shall disclose the public officer's interest in the contract and shall not vote on or advocate the approval of the contract.

5. A member of a local legislative body shall not, either individually or through any business entity in which the member has a significant pecuniary interest, sell goods or services to the local agency governed by his or her local legislative body unless:

(a) The member, or the business entity in which the member has a significant pecuniary interest, offers the sole source of supply of the goods or services within the territorial jurisdiction of the local agency governed by his or her local legislative body;

(b) The local legislative body includes in the public notice and agenda for the meeting at which it will consider the purchase of such goods or services a clear and conspicuous statement that it is considering purchasing such goods or services from one of its members, or from a business entity in which the member has a significant pecuniary interest;

(c) At the meeting, the member discloses his or her significant pecuniary interest in the purchase of such goods or services and does not vote upon or advocate the approval of the matter pursuant to the requirements of NRS 281A.420; and

(d) The local legislative body approves the purchase of such goods or services in accordance with all other applicable provisions of law.

6. The Commission may relieve a public officer or employee from the strict application of the provisions of this section if:

(a) The public officer or employee files a request for an advisory opinion from the Commission pursuant to NRS 281A.675; and

(b) The Commission determines that such relief is not contrary to:

(1) The best interests of the public;

(2) The continued ethical integrity of each agency affected by the matter; and

(3) The provisions of this chapter.

7. For the purposes of subsection 6, the request for an advisory opinion, the advisory opinion and all meetings, hearings and proceedings of the Commission in such a matter are governed by the provisions of NRS 281A.670 to 281A.690, inclusive.

8. “Safe Harbor” Legal Advice – NRS 281A.790(5) provides:

5. Notwithstanding any other provision of this chapter, any act or failure to act by a public officer or employee or former public officer or employee relating to this chapter is not a willful violation of this chapter if the public officer or employee establishes by sufficient evidence that:

(a) The public officer or employee relied in good faith upon the advice of the legal counsel retained by his or her public body, agency or employer; and

(b) The advice of the legal counsel was:

(1) Provided to the public officer or employee before the public officer or employee acted or failed to act; and

(2) Based on a reasonable legal determination by the legal counsel under the circumstances when the advice was given that the act or failure to act by the public officer or employee would not be contrary to the provisions of this chapter as interpreted by the Commission.

9. Other Implicated Laws

NRS 281.230 provides in part:

1. Except as otherwise provided in this section and NRS 218A.970, 281A.530 and 332.800, the following persons shall not, in any manner, directly or indirectly, receive any commission, personal profit or compensation of any kind resulting from any contract or other significant transaction in which the employing state, county, municipality, township, district or quasi-municipal corporation is in any way directly interested or affected:

(a) State, county, municipal, district and township officers of the State of Nevada;

(b) Deputies and employees of state, county, municipal, district and township officers; and

(c) Officers and employees of quasi-municipal corporations.

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.

IV. COMMISSION DECISION

A. INTRODUCTION

Public Officer participated and voted on an agenda item concerning the Vendor Agreement without making a public disclosure because Public Officer did not perceive any connection between the Vendor Agreement and the interests of Public Officer's Private Business. This opinion serves to provide Public Officer guidance on Public Officer's past conduct and application of the Ethics Law to the conflict at issue. Specifically, Public Officer is advised about the requirements for proper disclosures as required by NRS 281A.420 before determining whether an abstention is needed and instruction on the application of other provisions of the Ethics Law to Public Officer's circumstances. Further, the Commission reinforces NRS 281A.790(5), which statute promotes obtaining and following legal advice rendered by the official legal counsel for the public agency, which may provide certain safe harbor protections if the legal advice is reasonable, obtained before any action/decision and followed by the public officer or employee.

Determination of the extent of conflicts is a threshold matter in application of the Ethics Law. Public Officer must separate Public Officer's public duties from Public Officer's personal pecuniary interests and private commitments to preserve the public trust. NRS 281A.020. In this opinion, the Commission confirms Public Officer's conflicts regarding actions of Public Entity action that could affect Public Officer's pecuniary interests (NRS 281A.139) and Public Officer's private commitments (NRS 281A.065) associated with Public Officer's private consulting business. Based upon these private pecuniary interests and commitments, Public Officer is advised on the application of the disclosure and abstention requirements set forth in NRS 281A.420.

Further, Public Officer is advised on possible application of other provisions of the Ethics Law so that Public Officer may comply with these statutory requirements, which application is dependent on the circumstances that may be presented in the future. For future matters, the Commission recommends that Public Officer obtain and follow legal advice from legal counsel for the Public Entity, or alternatively, Public Officer may request another advisory opinion from the Commission based upon specific facts and circumstances that may develop.

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B. DISCLOSURE AND ABSTENTION REQUIREMENTS

1. Conflicts Requiring Disclosure

NRS 281A.420(1) requires a proper disclosure when a public officer or employee is carrying out his public duties to approve, disapprove, vote, abstain or otherwise act upon a matter: (a) regarding a gift or loan, (b) in which he has a significant pecuniary interest, (c) which would reasonably be affected by his commitment in a private capacity to the interests of another person, or (d) which would be related to any representation or counseling of a private person for compensation before another agency within the preceding year.

NRS 281A.420 references a significant pecuniary interest and commitments in a private capacity as disclosable conflicts. Based upon Public Officer's ownership interests in Private Business, Public Officer has a significant pecuniary interest in the company Public Officer owns under NRS 281A.139 and Public Officer also has a private commitment to Private Business under NRS 281A.065(5) or (6). The Commission has determined that in cases involving substantial and continuous business relationships, the interests of the business, including its clients, are statutorily attributed to the public officer/employee based on the presumption that a person lacks independent judgment toward the interests of those persons/entities to whom the public officer/employee has such commitments. *In re Public Officer*, Comm'n Op. No. 13-71A (2014). This means that the interests of Private Business are statutorily attributed to Public Officer. See *In re Public Officer*, Comm'n Op. No. 17-10A (2017), at. 6.

In faithfully performing Public Officer's duties as a public officer, Public Officer must disclose any significant pecuniary interests and private commitments to the public, including the nature of the relationship and the full effect of the public matter on both Public Officer's pecuniary interests and the interests of those to whom Public Officer has a private commitment, such as Private Business (may be referenced as "conflict"). It makes no difference whether the effect of the conflict on the public matter constitutes a benefit or a detriment because the requirement established in NRS 281A.420(1) is one of proper disclosure. See NRS 281A.420; *In re Public Officer*, Comm'n Op. No. 12-15A (2012).

Accordingly, Public Officer's vote in favor of the Vendor Agreement resulting in a benefit to the public, and which vote was contrary to interests of Private Business, does not divest Public Officer of the duty to make a proper disclosure about Public Officer's personal interests affected by the matter. Moreover, even if the nexus between the conflict and public matter is remote, the Commission advises to properly disclose such interests in keeping with the public trust. See *In re Romero*, Comm'n Op. No. 19-059A (2019).

In preparing a proper disclosure, Public Officer's personal perception of whether Public Officer can be fair and impartial is not a factor that controls the application of the Ethics Law. In *In re Public Officer*, Comm'n Op. No. 15-74A (2018), the Commission confirmed that:

It is clear from the application of statutory construction principles, that a disclosure is required prior to consideration of abstention. NRS 281A.420(3) and (4) establish the standard for abstention to be the "reasonable person" standard and whether the private commitment would materially affect a reasonable person similarly situated. Consequently, it makes no difference if the [affected business or] employer actually recognizes the private conflict or intends to promote its associated business interests. (Emphasis added).

As confirmed by Public Officer, Private Business was actively promoting its consulting services and if the Vendor Agreement was not approved by Public Entity, Public Officer's (Private Business') personal business dealings would lose the urgency and would probably fall by the wayside. The facts as represented by Public Officer serve to identify the conflict and solidify that a disclosure was appropriate to assure compliance with NRS 281A.420(1). In so advising, the Commission reaffirms the disclosure is required to be made before participation and voting on the agenda item under NRS 281A.420(1). Public Officer's ultimate vote in support of the Vendor Agreement mitigates the concern but does not eliminate the duty to make a proper disclosure under the Ethics Law.

At a minimum, a disclosure should have identified Public Officer's personal interests, including the fact that Public Officer has a private interest in Public Officer's own consulting business, the extent of the proposed consulting work and approximate monetary benefit, and whether Public Officer's vote on the Vendor Agreement could in any way affect these interests. Given the conflict, the disclosure should have told the public that Public Officer's participation on the item, including if the vote to be taken did not adopt the Vendor Agreement and had potential to bolster Private Business' ability to provide consulting services. Even though the Commission does not perceive this conflict as remote, it confirms that a proper disclosure is important even where the conflict is remote to the matter considered. 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 is reminded that the Ethics Law does not recognize a continuing disclosure or a disclosure by reference. The purpose of disclosure is to provide sufficient information regarding the conflict of interest to inform the public of the nature and extent of the conflict and the potential effect of the action or abstention on the public officer's private interests. Silence based upon a prior disclosure at a prior meeting fails to inform the public of the nature and extent of the conflict at the meeting where no actual disclosure occurred. See *In re Buck*, Comm'n Op. No. 11-63C (2011) (holding that incorporation by reference of her prior disclosure, even though based upon the advice of counsel, did not satisfy the disclosure requirements of NRS 281A.420(1)).

2. Abstention Requirements

NRS 281A.420(3) and (4) detail the abstention requirements to be considered after a proper disclosure has been made by the public officer. NRS 281A.420(3) mandates that a public officer shall not vote upon or advocate the passage or failure of a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the disclosed conflict. NRS 281A.420(4) fashions a presumption against abstention in certain limited circumstances. After a proper disclosure is placed in the public record, the presumption permits the public officer to participate if the matter would not result in any form of benefit or detriment accruing to the public officer (or persons/entities to whom he has a private commitment) that is greater or less than that accruing to any other member of the general business profession, occupation or group that is affected by the matter. For example, if the public officer is

voting upon a business license increase and Public Officer's business would be subject to the increase and pay the same amount as other businesses similarly situated, Public Officer may make a proper disclosure and explain to the public why the legal presumption permits Public Officer's participation. As the Commission explained:

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

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

Public Officer's participation on the Vendor Agreement had the potential to affect Public Officer's private business interests. Furthermore, the presumption does not allow Public Officer to participate on the Vendor Agreement given the absence of a disclosure and the fact that the vote could directly affect the individual business prospects of Private Business. The Commission has determined that in cases involving one's own business or substantial and continuous business relationships (Public Officer and Private Business), the interests of a client or business affiliate (Private Business) are statutorily attributed to the public officer (Public Officer) based on the presumption that a person lacks independent judgment toward the interests of a person with whom the public officer shares an important business relationship. *In re Public Officer*, Comm'n Op. No. 13-71A (2014). Thus, a public officer must abstain on all matters before the public body which materially affect the interests of his business and any business affiliate or client. See *In re Derbidge*, Comm'n Op. No. 13-05C (2013).

Therefore, after making a proper disclosure, Public Officer should have also abstained on the Vendor Agreement based upon Public Officer's commitment in a private capacity to Private Business, and its active prospects to obtain certain consulting jobs, which business prospects could have been materially affected by whether the Vendor Agreement was approved.

C. NRS 281A.430 – CONTRACTING PROHIBITION

Based upon Private Business seeking to obtain public consulting work, the Commission takes this opportunity to generally advise Public Officer about the requirements of NRS 281A.430, which prohibit certain contracts with public agencies including the agency served and agencies not directly served by the public officer. 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. See NRS 281A.430(1).

NRS 281A.430(2) states: “[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.” NRS 281A.430(4) provides an exception for contract is competitively bid, with other listed requirements. If Public Officer’s Private Business’ pursues public contracts, each matter would need to be considered to determine whether the proposed contract meets all elements for application of a statutory exception.

Further, 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 he served, thereby securing or granting to himself and a limited liability company in which he had a “significant pecuniary interest” an unwarranted privilege, preference, exemption or advantage.

The Commission confirmed that a 50% equity interest in a limited liability company was a “significant pecuniary interest”. *Id.* The Commission recognized that the Ethics Law prohibits a public officer from bidding on or entering into a contract between a governmental agency and any private business in which he 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) he has not taken part in developing the contract plans or specifications; and (d) he 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). See NRS 281A.430(4), exception to contracting prohibition.

Public Officer is advised to comply with the requirements of NRS 281A.430 should Private Business desire to provide consulting services to any public agency. As additional educational guidance, Public Officer is 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 also NRS 281.230, a criminal statute not within the enforcement authority of the Commission, which is referenced below under other implicated laws.

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

The Commission takes this opportunity to highlight sections of the Code of Ethical Standards set forth in NRS 281A.400, which could be implicated if Private Business pursues or actually contracts for service with a public agency, as follows:

- NRS 281A.400(1) – seeking or accepting engagement or economic opportunity which improperly influences public duties. If Private Business provides consulting services to another public agency, it could place Public Officer in a situation where it could be asserted that Public Officer’s private duties create a direct conflict with Public Officer’s public duties to Public Entity. This further verifies why a proper disclosure and

abstention on such matters is important should Private Business continue in its endeavors to obtain public consulting work.

- 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, including those of Private Business, if Public Officer’s 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(3) – participating as agent of government on private contract in which one holds a significant pecuniary interest. Public Officer is prohibited from using Public Officer’s position as a member of Public Entity to negotiate any contract with Public Officer’s Private Business.
- NRS 281A.400(7) – misusing government resources for a personal purpose. Public Officer must fully separate Public Officer’s private work from Public Officer’s work as a public officer for the Public Entity and government time, property or equipment may not be used for purposes related to Public Officer’s business interests. Public Officer is advised to continue to comply with the provisions of this statute and to work on matters related to Public Officer’s Private Business on Public Officer’s own time and without using public time, equipment, property, resources, or facilities.
- NRS 281A.400(10) – seeking employment/contracts through use of public position. Public Officer is advised that referencing Public Officer’s public position as a member of Public Entity in any marketing communications for Public Officer’s Private Business implicates this statutory prohibition.

The Ethics Law generally does not prohibit a public officer from pursuing private interests and engagements. However, it does set limitations on the nature and extent of such private endeavors to ensure the public officer maintains the appropriate separation between Public Officer’s private matters and Public Officer’s official position and public duties. Central to each of these provisions is the improper use of a public position to acquire a private or personal gain. These statutory provisions are analyzed based upon the facts presented and are not subject to relief or waiver by the Commission. So, care must be taken by public officers/employees to comply with these provisions and maintain the integrity of public service by avoiding actual conflicts or even an appearance of impropriety by properly separating private interests from public duties. NRS 281A.020.

In prior Commission opinions applying the provisions of NRS 281A.400, the Commission has reviewed the circumstances on a case-by-case basis to determine whether there has been a use of a public position to seek or gain a business opportunity or private employment. In *In re Public Employee*, Comm’n Op. No. 18-080A (2019), the Commission found that a public employee’s conduct in using a public position and associated relationships with vendors implicated the improper use of a public position under the Ethics Law. The Commission also has found violations when a public officer/employee used his position to either hire himself or asked a subordinate to assist

with obtaining private employment for the public officer. See *In re McNair*, Comm'n Op. Nos. 10-105C, 10-106C, 10-108C, 10-109C, and 10-0115C (2011); *In re Maurizio*, Comm'n Op. No. 09-40C (2010).

Even when the public officer or public employee does not use a public position to seek the employment opportunity or influence the assistance of a subordinate in the endeavor, other circumstances may be present warranting consideration under the Ethics Law. See *In re Public Employee*, Comm'n Op. No. 15-28A (2016) (concerns expressed regarding use of public position to seek post-separation consulting contract with the employing public entity because anticipated private services were similar to public employee's assigned public duties).

Additionally, the Commission has confirmed that a public officer/employee may not use a public position as a "selling point" in marketing private services. See *In re Hales*, Comm'n Op. No. 07-13A (2008). In *Hales*, the Commission considered Hales' conduct and expressly qualified its guidance to her private marketing endeavors that intricately used her public office as a selling point to promote private services and applied opinion precedent issued by the Commission, some of which are cited in this opinion. Guidance against using a public position for private marketing endeavors was reaffirmed in *In re Public Employee*, Comm'n Op. No. 16-72A (2017).

Here, the Commission emphasizes Public Officer would be well served to seek the legal advice from the Public Entity's legal counsel based upon the particular facts as they develop. NRS 281A.685 permits Public Officer to share/discuss this opinion with legal counsel for the Public Entity without waiving the confidentiality of the opinion, and the Commission authorizes Public Officer to do so. However, Public Officer should be advised that confidentiality of this opinion may be waived by Public Officer's conduct if Public Officer acts in contravention of the opinion or Public Officer voluntarily discloses the opinion to a person not included in the permitted list set forth in NRS 281A.685(3)(c).

E. OTHER IMPLICATED LAWS

The Commission does not interpret statutory prohibitions on government contracting that are set forth in other provisions of Nevada law, including NRS Chapter 281.230. Public Officer is instructed about the existence of this statute so that Public Officer may complete due diligence on its requirements.

V. CONCLUSIONS OF LAW

1. Public Officer is a public officer as defined by NRS 281A.160.
2. Pursuant to NRS 281A.675, the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include guidance from the Commission to Public Officer under NRS 281A.665.
3. Pursuant to NRS 281A.420(1), prior to acting on a matter on behalf of the Public Entity pertaining to Public Officer's private personal or business interests, Public Officer must make proper disclosures under NRS 281A.420(1). Based upon the facts presented, the agenda item related to the Vendor Contract reasonably and materially affected Public Officer's Private Business and warranted disclosure and abstention.
4. Pursuant to NRS 281A.420(3) and (4), Public Officer must abstain on all matters which materially affect Public Officer's pecuniary interests in and private

commitments to Private Business, and the presumption set forth in NRS 281A.420(4) does not apply under the circumstances presented.

5. Based upon the record presented, the requirements of NRS 281A.400, the contracting exceptions listed in NRS 281A.430 and the disclosure and abstention requirements of NRS 281A.420, must be considered and complied with should Public Officer or Private Business pursue contracting with a public agency.
6. Because the compliance obligations under the referenced statutes are fact dependent, the Commission recommends that Public Officer either obtain legal advice from legal counsel for the Public Entity, or alternatively, Public Officer may request another advisory opinion from the Commission once the facts and circumstances related thereto become developed in the future.
7. Pursuant to NRS 281A.400(2), Public Officer must commit to avoid using Public Officer's public position to obtain any unwarranted preferences or advantages for himself or any private person or entity to whom Public Officer has a private commitment under NRS 281A.065, including Private Business, Public Officer's private business.
8. Pursuant to NRS 281A.400(1), (3), (7) and (10), Public Officer may not use Public Officer's public position to: (1) seek or acquire an improper economic opportunity or engagement; (2) negotiate/execute a contract between the government and himself or any business entity with which Public Officer has a significant pecuniary interest or with anyone to whom Public Officer has a private commitment; (3) improperly use government resources; or (4) seek other employment or contracts for himself or any person to whom Public Officer has a private commitment.

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

The following Commissioners participated and approved this opinion:

Dated this 17th day of February, 2021.

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

By: Absent
Damian R. Sheets, Esq.
Commissioner

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

By: Abstained
Thoran Towler, Esq.
Commissioner

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

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

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