



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, Governing Body,
Local Government Entity, State of Nevada,

Request for Opinion No. **13-72A**

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer, member of a Governing Body of a Local Government Entity, 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 on October 16, 2013. Public Officer appeared in person and provided sworn testimony.

Public Officer sought an opinion from the Commission regarding Public Officer's disclosure and abstention obligations concerning matters before the Governing Body affecting the private interests of Public Officer's business clients, albeit matters unrelated to Public Officer's specific business.

After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and orally advised Public Officer of its decision that Public Officer has a commitment in a private capacity to the interests of Public Officer's private business clients and must disclose the relationships and interests. However, Public Officer is not required to abstain from voting on measures regarding which the independence of judgment of a reasonable person in Public Officer's situation would not be materially affected by the commitment. The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.²

¹ The following Commissioners participated in this Opinion: Vice Chairman Gale (Presiding Officer) and Commissioners Carpenter, Cory, Groover, Lau, and Shaw. Chairman Lamboley and Commissioner Weaver were absent and did not participate in this Opinion.

² Any individual comment made by a commissioner during the hearing is not binding on the Commission's final decision.

Public Officer elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this abstract of the Opinion.

The facts in this matter were obtained from documentary and testimonial evidence provided by Public Officer. For the purposes of the conclusions offered in this Opinion, the Commission's findings of fact set forth below accept as true those facts Public Officer presented. Facts and circumstances that differ from those presented to and relied upon by the Commission in this Opinion may result in different findings and conclusions than those expressed in this Opinion.

II. QUESTION PRESENTED

Public Officer questions whether disclosure of a relationship with a private business client and abstaining from voting on a matter before the Governing Body that *may* impact Public Officer's client when the matter comes before the Governing Body is required. The matter affecting Public Officer's client is unrelated to Public Officer's business.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

As a public officer, Public Officer must commit to avoid actual and perceived conflicts of interest and must publicly disclose sufficient information concerning any private relationships and interests which would reasonably affect matters before the Governing Body served by Public Officer, including significant pecuniary interests and commitments to business partners and associates. Public Officer also must abstain from voting or otherwise acting on public matters in which private relationships and interests would clearly and materially affect the independence of judgment of a reasonable person in Public Officer's position.

Public Officer serves as a member of Governing Body of Local Government Entity, responsible for voting on and implementing various governmental projects and facilities, many of which involve various transactions related to Public Officer's private business. In Public Officer's private capacity, Public Officer serves as a partner in a business entity ("Firm"), and has represented a specific client ("Client") and Client's private construction company on various business transactions, both personal and commercial. Client's company submitted a bid for approval by the Governing Body for a contract to construct a project ("Project") within the Local Government. Public Officer did not represent Client with regard to this contract. However, Public Officer disclosed Public Officer's business relationship with Client, and abstained from voting on the matter. The Governing Body then awarded the contract for the Project to Client's company as the lowest competitive bidder. However, the Local Government ultimately lacked the necessary funds to support the contract and the Project has been put on hold.

In an effort to establish funding for various projects throughout the Local Government, including potential funding for the Project awarded to Client's company, the

Governing Body is considering a plan (“Plan”) to generate revenue for the Local Government. The Governing Body is expected to authorize the use of a portion of such revenues to support the funding shortfall for the Project. If the Plan is approved and any revenues become available for the Project, the Project would come back before the Governing Body for approval to amend the contract. Public Officer questions whether disclosure and abstention are required when the Governing Body considers the *Plan* which involves a broad-scope revenue-generating plan for the overall needs of the Local Government, but may also generate funding for the Project to the advantage of Client. Public Officer understands that he must disclose and abstain from voting if the *Project* comes back before the Governing Body for amendment of the contract.

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.

2) Disclosure and Abstention

NRS 281A.420(1), (3) and (4) provide:

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.

* * *

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 disclosure of the acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

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

3) "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.

IV. COMMISSION OPINION

A. OVERVIEW

NRS 281A.420(1) requires Public Officer, as a member of the Governing Body, to carefully consider any private interests and commitments that may affect Public Officer's decision in a matter before the Governing Body and disclose sufficient information concerning those private interests and commitments to inform the public of the potential effect of Public Officer's action. Public Officer must also refrain from advocating the passage or failure of the matter and abstain from voting if the independence of judgment of a reasonable person in Public Officer's situation would, under the circumstances presented in the particular matter, be materially affected by those private interests and commitments.

Under the circumstances presented on this record, Public Officer must disclose Public Officer's business relationship with Public Officer's client and abstain from voting regarding any matter before the Governing Body involving the Project between the Local Government and Client's company. Public Officer must also disclose Public Officer's business relationship with Client regarding any agenda item related to the Plan which is intended to generate revenue to support various projects, but may also generate funding for the Project. However, Public Officer need not abstain from voting on matters relating to the Plan, as those matters do not relate specifically to the contract between Client's company and the Local Government, and a separate agenda item would be required at a later time to address that contract.

B. COMMITMENT IN A PRIVATE CAPACITY

Public Officer holds public office which constitutes a public trust to be held for the sole benefit of the people of the State of Nevada, in particular, the people of the Local Government. In Public Officer's private capacity, Public Officer is a partner in a private Firm which has represented Client in various personal and business transactions, including those for Client's company. Therefore, Client has a long-term association with Public Officer, and based upon that substantial and continuing business relationship, Public Officer has a commitment in a private capacity to the interests of Client, which include the interests of Client's company. NRS 281A.065(5).

In *In re Derbidge*, Comm'n Opinion 13-68C (2014), the Commission held that public officer Derbidge had a commitment in a private capacity to his business partner, and therefore must disclose the relationship and abstain on all matters before the governmental entity affecting the interests of his business partner, including interests unrelated to the business shared with Derbidge. By definition, the interests of a person with whom a public officer shares a substantial and continuing business relationship are statutorily attributed to the public officer. The relationship alone triggers possible disclosure and abstention requirements when the interests of those persons could be affected by the public officer's official actions.

C. DISCLOSURE

The Ethics Law requires public officers to disclose sufficient information concerning their private business relationships, including the interests of such business associates, before voting or abstaining from voting on public matters which would reasonably be affected by the public officer's commitment to such persons. NRS 281A.420(1). To promote integrity in public service, the Commission is concerned with situations involving public officers that create the appearance of impropriety and conflicts of interest, as well as actual impropriety and conflicts. (See *In re Maltman*, Comm'n Opinion No. 12-66A (2012)).

In this matter, Public Officer acknowledges that Public Officer's substantial and continuous business relationship with Client and Client's company in various personal and commercial transactions establishes the type of relationship which would affect Public Officer's independence of judgment, and that of a reasonable person in Public Officer's situation, regarding public matters affecting Client's interests. Accordingly, Public Officer and the Commission agree that Public Officer must disclose Public Officer's business relationship with Client before voting or abstaining from voting on any matter affecting Client's interests, including matters affecting Client's company.

In this case, the Local Government is scheduled to consider two separate matters which involve Client's interests. First, the Governing Body will consider approval of the Plan to generate revenue to fund certain government projects. If there are sufficient revenues generated by the Plan, the Local Government intends to authorize such revenues to fund the remaining costs for the Project. However, use of any revenues to support the Project would require the Local Government to consider a second agenda item to amend Client's contract with the Local Government to construct the Project.

Both matters would require Public Officer to disclose Public Officer's business relationship with Client. However, abstention would not be necessary based on the facts presented and described more fully below.

A public officer's disclosure is important even where the conflict is remote in some aspects. In *In re Weber*, Comm'n Opinion 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.

Although the available revenues are not certain and acceptance and/or use of any revenues for the Project would require a specific agenda item to amend the Project contract between Client and the Local Government, public integrity requires disclosure in this instance. Public Officer's commitment to the interests of Client and Client's company mandates disclosure to protect the public trust. Although it is uncertain whether the funds will be available and may be used, Public Officer testified that part of the Governing

Body's consideration of the Plan includes authorizing the use of any available revenues for the Project. Such an interest may be remote and uncertain, but it nevertheless provides at least an opportunity for Client's company's contract with the Local Government to be fully funded. Public Officer must disclose sufficient information regarding Public Officer's business relationship with Client to inform the public of the nature and extent of Public Officer's relationship.

D. ABSTENTION

NRS 281A.020 highlights the importance of government officials serving their government and the people without influence from adverse motives and private interests. Nevertheless, the same statute further 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. 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. The voters, by selecting a farmer or a doctor, are aware of the particular point of view of the legislator and either believe that their views will coincide with the views of farmers or doctors or that the legislator will not be influenced unduly by that position.

In any event, the conflict is unavoidable if we are to elect representatives from every segment of society. This fact is recognized by Ethics Law, which exempts from conflicts of interest those private interests that are shared by a group, class, or profession. See NRS 281A.420(4)(a). 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). Thus, a farmer need not recuse himself from voting on a general measure that inevitably would similarly affect Public Officer's farm as well as every other farm affected by the matter.

The question then focuses on whether the circumstances could reasonably be interpreted to show temptation by the official to depart from his/her sworn public duty. Consequently, the circumstances and facts of each situation should control whether abstention is required. If the circumstances show a likely capacity to tempt the official to depart from his/her duty, then the risk of actual bias is unacceptable and the conflict of interest is sufficient to require abstention.

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. In this matter, there is nothing more tangible. A vote for the Plan creates funding for certain government projects. The Project is one of the potential beneficiaries of the Plan, but the revenues are not certain and the specific Project contract would require amendment.

The record lacks any demonstrative bias, prejudice, or pecuniary interest that would necessitate abstention. There is nothing about Public Officer's relationship with Client or Client's company that would materially affect the independence of Public Officer's judgment when the Plan comes before the Governing Body. The Commission recognizes that the State of Nevada wants people with Public Officer's private qualifications to serve in public office and bring all of their experience, perceptions, philosophies and professional expertise to the Governing Body for the benefit of the public.

The circumstances in this matter do not require Public Officer to abstain on the Plan when it comes before the Governing Body. For a controversial and significant matter under consideration by a governing body, this is the type of difficult decision Public Officer was elected to address, and should address. If Public Officer abstains, the Governing Body will have to approve the matter by a unanimous vote. This highlights the importance of having Public Officer's vote, and not requiring Public Officer's abstaining on a difficult issue. Accordingly, the Plan does not establish a clear case in which the independence of judgment of a reasonable person in Public Officer's position would be materially affected by the interests of Public Officer's private client.

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), the Commission has jurisdiction to render an advisory opinion in this matter.
3. Pursuant to NRS 281A.065 and 281A.420(1), Public Officer must disclose Public Officer's substantial and continuous business relationship with Public Officer's client when the Plan comes before the Governing Body and again if the Project contract comes before the Governing Body for amendment.
4. Pursuant to NRS 281A.420(3), Public Officer should abstain from voting on any matter regarding the Project contract between Client and the Local Government; however, Public Officer need not abstain from voting on the Plan because the independence of judgment of a reasonable person in Public Officer's situation would not be clearly or materially affected by Public Officer's commitment in a private capacity to Public Officer's business client on a matter remote to the interests of Public Officer's client.

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

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The Following Commissioners Participated in this Opinion:

Dated this 31st day of July, 2014.

NEVADA COMMISSION ON ETHICS

By: ABSENT
Paul H. Lamboley
Chairman

By: /s/ Gregory J. Gale
Gregory J. Gale
Vice-Chairman

By: /s/ John C. Carpenter
John C. Carpenter
Commissioner

By: /s/ Magdalena Groover
Magdalena Groover
Commissioner

By: /s/ Timothy Cory
Timothy Cory
Commissioner

By: /s/ Cheryl A. Lau
Cheryl A. Lau
Commissioner

By: /s/ James M. Shaw
James M. Shaw
Commissioner

By: ABSENT
Keith A. Weaver
Commissioner