

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE STATE GOVERNMENT, INDIAN AND VETERANS AFFAIRS
COMMITTEE SUBSTITUTE FOR
HOUSE BILL 10

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53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

AN ACT

RELATING TO PUBLIC ACCOUNTABILITY; ENACTING THE PUBLIC
ACCOUNTABILITY ACT; CREATING THE NEW MEXICO ETHICS COMMISSION;
PROVIDING FOR AN EXECUTIVE DIRECTOR; PROVIDING FOR THE ISSUANCE
OF ADVISORY OPINIONS; REQUIRING PUBLICATION OF CERTAIN REPORTS;
AUTHORIZING CERTAIN ACCOUNTABILITY AND ENFORCEMENT FUNCTIONS;
PROVIDING FOR THE FILING, INVESTIGATION AND ADJUDICATION OF
COMPLAINTS RELATED TO PUBLIC ACCOUNTABILITY; PROVIDING FOR
CONFIDENTIALITY OF CERTAIN RECORDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
cited as the "Public Accountability Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
Public Accountability Act:

A. "adjunct agency" means an agency, board,

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1 commission, office or other instrumentality, not assigned to an
2 elected constitutional officer, that is excluded from any
3 direct or administrative attachment to a department of state
4 government and that retains policymaking and administrative
5 autonomy separate from any other agency of state government;

6 B. "breach" means an action that is a violation of
7 any of the laws listed in Section 6 of the Public
8 Accountability Act;

9 C. "commission" means the New Mexico ethics
10 commission;

11 D. "complainant" means a person who files a
12 complaint with the commission;

13 E. "complaint" means a formal written assertion of
14 a breach;

15 F. "director" means the executive director of the
16 commission;

17 G. "government contractor" means a person who has a
18 contract with a public body or who has submitted a bid for a
19 contract with a public body;

20 H. "instrumentality of the state" means the New
21 Mexico exposition center authority, New Mexico finance
22 authority, New Mexico industrial and agricultural finance
23 authority, New Mexico lottery authority, New Mexico mortgage
24 finance authority, New Mexico renewable energy transmission
25 authority, New Mexico state fair and water quality control

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1 commission;

2 I. "lobbyist" means a person required to register
3 as a lobbyist pursuant to the Lobbyist Regulation Act;

4 J. "public body" means a department, commission,
5 council, committee or agency of the state; a political
6 subdivision of the state; or an instrumentality of the state;

7 K. "public employee" means a person employed by a
8 public body;

9 L. "public officer" means a person elected or
10 appointed to an office of or a position with a public body; but
11 "public officer" excludes judges;

12 M. "qualified political party" means a political
13 party that has been qualified in accordance with the provisions
14 of the Election Code; and

15 N. "respondent" means a person whose conduct or
16 alleged breach is the subject of a complaint.

17 SECTION 3. [NEW MATERIAL] NEW MEXICO ETHICS COMMISSION
18 CREATED--MEMBERSHIP--TERMS--REMOVAL.--

19 A. The "New Mexico ethics commission" is created as
20 an adjunct agency under the direction of ten commissioners, no
21 more than five of whom may be members of the same political
22 party, appointed as follows:

23 (1) two commissioners appointed by the
24 governor, neither of whom shall be of the same political party;
25 and

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1 (2) as certified by the chief clerks of the
2 respective chambers:

3 (a) two commissioners appointed by the
4 president pro tempore of the senate;

5 (b) two commissioners appointed by the
6 minority floor leader of the senate;

7 (c) two commissioners appointed by the
8 speaker of the house of representatives; and

9 (d) two commissioners appointed by the
10 minority floor leader of the house of representatives.

11 B. A commissioner shall:

12 (1) be a qualified elector of the state;

13 (2) not change, or within two years prior to
14 appointment shall not have changed, political party
15 affiliation; and

16 (3) not be, or within the two years prior to
17 appointment shall not have been, a state officer or employee in
18 the executive or legislative branch of government, a registered
19 lobbyist or a government contractor.

20 C. Commissioners shall be appointed for staggered
21 terms of four years beginning July 1, 2019. The initial
22 appointees shall be appointed such that each appointing
23 authority appoints one commissioner for an initial term of two
24 years and one commissioner for a term of four years.

25 Thereafter, all commissioners shall be appointed for four-year

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1 terms. Commissioners shall serve until their successors are
2 appointed and qualified.

3 D. A person shall not serve as a commissioner for
4 more than two consecutive terms. A vacancy on the commission
5 shall be filled by appointment by the original appointing
6 authority for the remainder of the unexpired term.

7 E. No action shall be taken by the commission
8 unless at least six commissioners concur.

9 F. A commissioner may be removed only for
10 incompetence, neglect of duty or malfeasance in office. A
11 proceeding for the removal of a commissioner may be commenced
12 by the commission or by the attorney general upon the request
13 of the commission. The supreme court has exclusive
14 jurisdiction over proceedings to remove commissioners, and its
15 decision shall be final. A commissioner shall be given notice
16 of hearing and an opportunity to be heard before the
17 commissioner is removed.

18 SECTION 4. [NEW MATERIAL] COMMISSIONERS--QUALIFICATIONS--
19 LIMITATIONS.--

20 A. Before entering upon the duties of the office of
21 commissioner, each commissioner shall take the oath of office
22 as provided in Article 20, Section 1 of the constitution of New
23 Mexico and shall file that oath of office with the secretary of
24 state.

25 B. A commissioner shall not:

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1 (1) seek or hold an office in a political
2 organization required to report pursuant to the Campaign
3 Reporting Act or a qualified political party;

4 (2) seek or hold elective office of a public
5 body or an appointed position with a public body;

6 (3) be a public employee, government
7 contractor or lobbyist;

8 (4) be employed or contracted by a political
9 committee required to file reports pursuant to the Campaign
10 Reporting Act or a person in that person's capacity as a
11 candidate for public office;

12 (5) publicly endorse or publicly oppose a
13 candidate for public office;

14 (6) make speeches on behalf of a political
15 committee required to file reports pursuant to the Campaign
16 Reporting Act; or

17 (7) make a contribution to a candidate or a
18 political committee required to file reports pursuant to the
19 Campaign Reporting Act without disclosing the contribution to
20 the commission.

21 C. A violation of Subsection B of this section may
22 be found to constitute malfeasance in office in a removal
23 proceeding pursuant to Subsection F of Section 3 of the Public
24 Accountability Act.

25 SECTION 5. [NEW MATERIAL] COMMISSION--DUTIES AND

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1 POWERS.--

2 A. The commission shall:

3 (1) meet as necessary to carry out its duties;

4 (2) receive and investigate complaints;

5 (3) hold hearings when necessary to determine
6 whether there has been a breach as alleged in a complaint;

7 (4) administer the applicable compliance
8 provisions of the laws listed in Section 6 of the Public
9 Accountability Act;

10 (5) promulgate rules necessary to implement
11 and administer the provisions of the Public Accountability Act
12 and the applicable compliance provisions of the laws listed in
13 Section 6 of that act;

14 (6) compile, index, maintain and provide
15 access to all advisory opinions and reports required to be made
16 public pursuant to the Public Accountability Act;

17 (7) compile, maintain and provide access to
18 all codes of conduct filed with the commission in accordance
19 with Section 10-16-11 NMSA 1978;

20 (8) draft a proposed code of public
21 accountability and submit the proposed code to each elected
22 public officer and public body for their consideration;

23 (9) appoint an executive director;

24 (10) contract for professional services as
25 necessary to carry out its duties;

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1 (11) have the authority to accept federal
2 funds and other public or private grants to perform duties
3 consistent with the Public Accountability Act; and

4 (12) prepare an annual report of its
5 activities and report to the legislature its recommendations
6 regarding state ethics or public accountability laws and the
7 scope of the commission's powers and duties and the number of
8 complaints received, dismissed, adjudicated and referred to
9 other authorities.

10 B. The commission is limited in its authority to
11 those powers granted by the Public Accountability Act or
12 expressly granted in another applicable statute. In carrying
13 out its responsibilities pursuant to the Public Accountability
14 Act, the commission may:

- 15 (1) sue and be sued;
16 (2) initiate complaints;
17 (3) issue advisory opinions as provided in
18 Section 9 of the Public Accountability Act; and
19 (4) designate committees of the commission to
20 make recommendations for action to the commission.

21 SECTION 6. [NEW MATERIAL] COMMISSION JURISDICTION--
22 COMPLIANCE PROVISIONS.--

23 A. The commission shall have concurrent
24 jurisdiction to enforce the applicable civil compliance
25 provisions of the:

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- 1 (1) Campaign Reporting Act;
- 2 (2) Financial Disclosure Act;
- 3 (3) Gift Act;
- 4 (4) Procurement Code;
- 5 (5) Lobbyist Regulation Act;
- 6 (6) Voter Action Act;
- 7 (7) School District Campaign Reporting Act;
- 8 (8) Governmental Conduct Act; and
- 9 (9) Public Accountability Act.

10 B. The commission shall file any court action to
11 enforce the civil compliance provisions of an act listed in
12 Subsection A of this section in the district court of the
13 county in which the respondent resides.

14 SECTION 7. [NEW MATERIAL] EXECUTIVE DIRECTOR--
15 APPOINTMENT--DUTIES--POWERS--LIMITATIONS.--

16 A. The director shall be:

- 17 (1) a retired state judge or an attorney
18 licensed to practice law in the state, who is knowledgeable
19 about state laws related to public accountability;
- 20 (2) appointed without regard to qualified
21 political party affiliation; and
- 22 (3) appointed, retained and reappointed solely
23 on the grounds of fitness to perform the duties of the office.

24 B. The director shall hold office for a term
25 commencing on the date of appointment through December 31 of

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1 the fourth even-numbered year following the director's
2 appointment.

3 C. Prior to the end of the director's term of
4 office, the director may only be removed by the commission for
5 cause and with the concurrence of at least six commissioners.

6 D. The director shall:

7 (1) take the oath of office required by
8 Article 20, Section 1 of the constitution of New Mexico and
9 file that oath of office with the secretary of state;

10 (2) devote the director's entire professional
11 time and attention to the duties of that office;

12 (3) prepare an annual budget for the
13 commission and submit it to the commission for approval;

14 (4) make recommendations to the commission of
15 proposed rules or legislative changes needed to provide better
16 administration of the Public Accountability Act;

17 (5) publish the commission's advisory opinions
18 and annual reports and a list of persons who failed to file a
19 report of expenditures and contributions or a statement of no
20 activity or to pay a penalty imposed by the commission; and

21 (6) at every meeting of the commission, report
22 on the status of all open investigations and investigations
23 closed since the commission's last meeting.

24 E. The director may:

25 (1) hire a general counsel and additional

1 personnel necessary to enable the commission to carry out its
2 duties; and

3 (2) enter into contracts and agreements on
4 behalf of the commission.

5 F. The director shall not:

6 (1) seek or hold an office in a qualified
7 political party; or

8 (2) seek or hold an elected office of a public
9 body or an appointed position with a public body.

10 G. A director who seeks or holds an office or
11 position as prohibited in Subsection F of this section is
12 deemed to have resigned as director.

13 SECTION 8. [NEW MATERIAL] COMMISSIONERS--RECUSAL--
14 DISQUALIFICATION.--

15 A. A commissioner shall recuse from and not
16 participate in a commission proceeding in which the
17 commissioner cannot render a fair and impartial judgment.

18 B. The commission may disqualify a commissioner who
19 has not recused from a proceeding in which the commissioner
20 cannot render a fair and impartial judgment with the
21 concurrence of at least six commissioners.

22 C. The commission's disqualification of a
23 commissioner may be found to constitute malfeasance in office
24 in a removal proceeding pursuant to Subsection F of Section 3
25 of the Public Accountability Act.

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1 D. If three or more commissioners have recused
2 themselves or are disqualified from participating in a
3 proceeding, the remaining commissioners shall request the
4 appointment of temporary commissioners from the original
5 appointing authorities that appointed the recused or
6 disqualified commissioners. Appointing authorities shall
7 appoint temporary commissioners within twenty days of the
8 request for appointment.

9 SECTION 9. [NEW MATERIAL] ADVISORY OPINIONS.--

10 A. The commission may issue advisory opinions on
11 matters related to the laws listed in Section 6 of the Public
12 Accountability Act. Advisory opinions shall:

13 (1) be requested in writing;

14 (2) present a question regarding whether the
15 requester's conduct would violate any of the laws listed in
16 Section 6 of the Public Accountability Act;

17 (3) be issued within sixty days of receipt of
18 the request, unless the commission notifies the requester in
19 writing of the delay and the reason for the delay, and
20 continues to notify the requester in writing every thirty days
21 until the advisory opinion is issued, which in all cases shall
22 be within one hundred eighty days of the request; and

23 (4) be published on the commission's website
24 after omitting the requester's name and identifying
25 information.

1 B. A request for an advisory opinion and the
2 research conducted to formulate the advisory opinion are
3 confidential.

4 C. Unless amended or revoked, an advisory opinion
5 shall be binding on the commission in any subsequent commission
6 proceedings concerning a person who acted in good faith and in
7 reasonable reliance on the advisory opinion.

8 **SECTION 10. [NEW MATERIAL] COMPLAINTS--JURISDICTION--**
9 **INVESTIGATIONS--SUBPOENAS.--**

10 A. A complaint alleging a breach may be filed with
11 the commission by any person.

12 B. The complainant shall set forth in detail the
13 specific allegations against the respondent and the facts that
14 support the allegations. The complainant shall submit any
15 available evidence that supports the complaint, including
16 documents, records, names of witnesses and other evidence. The
17 complaint shall be in writing, signed and sworn by the
18 complainant and notarized.

19 C. Failure to satisfy a nonsubstantive requirement
20 for filing a complaint does not invalidate the complaint.

21 D. The commission shall not accept or consider a
22 complaint unless the complaint is filed within two years from
23 the last date on which the alleged breach occurred or from the
24 last date on which a reasonable person would have discovered
25 the facts upon which the complaint is based.

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1 E. The director shall determine whether the conduct
2 alleged in the complaint is within the civil enforcement
3 jurisdiction of the commission and warrants investigation.

4 F. The director shall recommend that the commission
5 dismiss a complaint that is frivolous, unfounded or outside the
6 commission's civil enforcement jurisdiction.

7 G. The commission shall issue findings if it
8 dismisses a complaint as frivolous or unfounded and in all
9 cases of dismissal shall notify the complainant and respondent
10 of the dismissal and make public the findings.

11 H. The director shall seek a response from the
12 respondent, and the complaint and response, if any, shall be
13 made public within thirty days after receipt of the complaint.
14 The director may request that the district court issue
15 subpoenas requiring the attendance of witnesses or the
16 production of books, records, documents or other evidence
17 reasonably related to the investigation. If a person fails to
18 comply with the subpoena, the director may apply to a district
19 court for an order enforcing the subpoena and compelling
20 compliance. The director may interview witnesses and examine
21 books, records, documents and other evidence reasonably related
22 to the complaint. A public employee or public official who is
23 a respondent and was acting in an official capacity shall be
24 entitled to representation by the risk management division of
25 the general services department, a local risk management entity

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1 or other appropriate insurance carrier.

2 I. Within sixty days of the initiation of an
3 investigation, the director shall, at a public meeting of the
4 commission, recommend that the commission dismiss the complaint
5 or schedule a hearing to adjudicate the complaint; provided
6 that if the respondent is a candidate for office in a contested
7 election, the commission shall complete the hearing process, if
8 any, and issue its findings or decision at least twenty-nine
9 days before the election.

10 J. No later than July 1 of each even-numbered year,
11 the chief justice of the supreme court shall appoint an active
12 or pro tempore district judge to consider the issuance and
13 enforcement of subpoenas provided for in this section. The
14 appointment shall end on June 30 of the next even-numbered year
15 after appointment.

16 K. The procedures provided in this section and
17 Section 11 of the Public Accountability Act shall be used if
18 those procedures conflict with the procedures provided by any
19 of the laws listed in Section 6 of that act.

20 SECTION 11. [NEW MATERIAL] PRE-HEARING DISPOSITION--
21 COMMISSION HEARINGS--FINDINGS AND CONCLUSIONS--DISCLOSURE--
22 APPEAL OF DISMISSAL.--

23 A. Upon the director's recommendation, the
24 commission may:

- 25 (1) dismiss a complaint and notify the

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1 complainant and the respondent of the dismissal; or

2 (2) set a public hearing, as soon as
3 practicable.

4 B. At any time before or during a hearing provided
5 for in Subsection A of this section, the commission may, at a
6 public meeting of the commission, approve a disposition of a
7 complaint agreed to by the director and the respondent.

8 C. The hearing provided for in Subsection A of this
9 section shall be pursuant to the rules of evidence that govern
10 proceedings in the state's courts. The respondent has the
11 right to be represented by counsel. The parties may present
12 evidence and testimony, compel the presence of witnesses and
13 examine and cross-examine witnesses.

14 D. The commission shall issue a written report that
15 shall include findings of fact and conclusions of law. If the
16 commission finds by clear and convincing evidence that the
17 respondent's conduct constituted a breach, the report may
18 include a public reprimand or censure of the respondent or
19 recommendations for disciplinary action against the respondent,
20 and if at least seven commissioners find that the respondent's
21 conduct constituted a willful breach, the commission shall
22 impose any fines provided for by law.

23 E. The commission shall publicly disclose a report
24 issued pursuant to Subsection D of this section. If the report
25 concerns a willful breach, the commission shall provide the

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1 report, along with all evidence presented to the commission, to
2 the respondent and the:

3 (1) speaker of the house of representatives if
4 the respondent is a public official who is subject to
5 impeachment;

6 (2) appropriate legislative body if the
7 respondent is a member of the legislature;

8 (3) respondent's appointing authority if the
9 respondent is an appointed public official;

10 (4) appropriate public body if the respondent
11 is a public employee;

12 (5) public body with which the respondent has
13 a government contract if the respondent is a government
14 contractor; or

15 (6) respondent's employer if the respondent is
16 a lobbyist.

17 F. The commission shall promulgate rules
18 establishing procedures for hearings.

19 SECTION 12. [NEW MATERIAL] CONFIDENTIALITY OF RECORDS.--

20 A. Except as otherwise provided in the Public
21 Accountability Act, all records and communications collected or
22 generated by the director are confidential, unless:

23 (1) disclosure is necessary at a hearing or
24 meeting of the commission;

25 (2) disclosure is required pursuant to the

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1 provisions of the Public Accountability Act; or

2 (3) they are offered into evidence at a
3 judicial, legislative or administrative proceeding.

4 B. Information and reports containing information
5 made confidential by law or that are exempt from disclosure
6 pursuant to the Inspection of Public Records Act shall not be
7 disclosed by the commission or its director, staff or
8 contractors.

9 SECTION 13. APPLICABILITY.--The provisions of the Public
10 Accountability Act apply to conduct that occurs on or after
11 July 1, 2019.

12 SECTION 14. EFFECTIVE DATE.--

13 A. The effective date of the provisions of Sections
14 1 through 5 and 7 of this act is January 1, 2019.

15 B. The effective date of the provisions of Sections
16 6 and 8 through 13 of this act is July 1, 2019.