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State Ethics Commission Proposals Analysis by NM-FOG

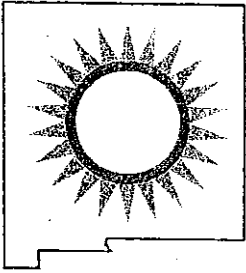
FOG applauds the legislature's efforts to create a robust state Ethics Commission. A fair process for investigating and adjudicating ethical violations serves the cause of accountability in government, and it's long overdue.

However, transparency is a key component of earning the public's trust – not to mention that it's the public's fundamental right and duty to access government information and exercise oversight. FOG understands that some confidentiality is necessary in order to minimize the damage from spurious and politically motivated accusations. However, the current proposals grant almost no concessions to the public's right to know. FOG opposes the following provisions, and proposes workable alternatives:

1. Confidential Documents and Secret Actions.

- a) **Blanket exemption from the Inspection of Public Records Act.** This provision exists in some form in all five bills. "All complaints, reports, files, records and communications collected or generated by the Commission or its director that pertain to alleged ethics violations are confidential and not subject to the provisions of the Inspection of Public Records Act. Such complaints, reports, files, records or communications shall not be disclosed unless: (a) disclosure is required pursuant to the provisions of the State Ethics Commission Act; (b) they are offered into evidence at a judicial, legislative or administrative proceeding (c) disclosure is ordered by a court or (d) the respondent files with the Commission a written waiver of confidentiality." (SB 43 p. 19 lines 15-25; p. 20 lines 1-3.)

Commentary: Before making an entire class of documents confidential, particularly with a severe penalty for disclosure, the legislature should consider whether three tests are being met: (1) a legitimate public interest is served by confidentiality, (2) that interest outweighs the public's interest in disclosure, and (3) the exemption is drawn as narrowly as possible. This blanket confidentiality is not narrowly drawn, and it privileges the privacy interests of public officials above the Commission's and the public's duty to hold those officials accountable.



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Furthermore, this provision shields Commission documents from the public in perpetuity. Compare that to state boards that investigate disciplinary complaints against certain medical licensees, such as chiropractors and psychologists. In those cases, state law provides that documents become public once the board has taken action on a complaint. This compromise protects the defendant during the investigation and allows after-the-fact oversight by the public. (NMSA 1978: 61-4-10C and 61-9-5.1.B(3)C)

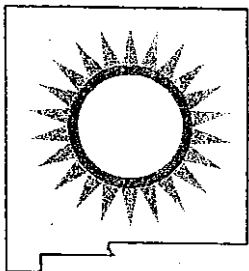
As a practical matter, the current proposals contain so much confidentiality that the Commission's public output would be virtually nil – limited to advisory opinions, findings of guilt and an annual report. This is a slim basis for the public and the legislature to determine the Commission's efficacy and fairness. On the flip side, the Commission is bound by confidentiality and unable to defend against claims of witch hunts or of brushing complaints under the rug.

- b) **Secret Commission Actions.** The Commission is obligated to review the status of complaints every 90 days. If it takes action to dismiss or continue investigating a complaint, it must notify the complainant and respondent. However, "the Commission shall not publicly disclose its action or notification except upon the request of the respondent." (SB 43, p. 17 lines 14-18.) This provision exists in all the bills except SB 108.

Once the investigation is complete, a 'guilty' finding by the Commission would be published and distributed to various parties. But if a complaint is dismissed following a hearing, the Commission must only notify the respondent and complainant. "A notice issued pursuant to this subsection shall not be public except upon the request of the respondent." (SB 43, p. 19 lines 3-10.) (SB 108 takes this a step further and keeps *all* findings secret, even 'guilty' findings.)

Commentary: If there is one fundamental principle enshrined in the New Mexico Open Meetings Act, it is that no action of a public body shall be taken in secret. To wit, these provisions conflict with NMSA 10-15-1.A, which states that "the formation of public policy or the conduct of business by vote shall not be conducted in closed meetings."

Again, in dealing with license revocations or employment matters, the final action of state boards is public in nearly all cases. The Judicial Standards Commission has been cited as a model for the Ethics Commission, but that body's extreme confidentiality was approved by voters as a constitutional amendment.



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On a purely legal note, it is important for any final proposal to differentiate between documents that are confidential and those which are exempt from disclosure under the Inspection of Public Records Act. Provisions stating that documents “shall not be public” do not adequately address this issue.

2. **Exemption from Open Meetings.** Five of the six bills add an 11th exemption to the Open Meetings Act. Provisions A, B and G of the Open Meetings Act, which provide for open public meetings and minute-taking, would not apply to “meetings of the state ethics Commission relating to complaints or investigations of alleged ethics violations.” (SB 43 p. 28 lines 9-11)

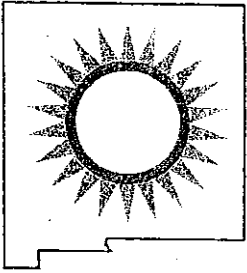
Five of the six bills also specifically make the Commission’s hearings on ethics investigations closed: “notwithstanding the provisions of the Open Meetings Act, Commission hearings held pursuant to this section are closed to the public.” (SB 43 p. 19 lines 11-14)

Commentary: A blanket statutory open-meetings exemption that closes virtually all the substantive discussions *and actions* of a public body is unprecedented and overbroad. FOG sees no reason to extend this extraordinary right to a body dealing with matters of such great public interest and import. This would undermine the very public trust that a State Ethics Commission is meant to bolster.

Aside from being overbroad, the current language is bound to create confusion. Must *any* portion of exempted Commission meetings be open? Does the Commission have to convene in open session before following statutory procedures for entering closed session? This confusion is avoided by current provisions of the Open Meetings Act, which typically exempt discussions or deliberations on very specific topics. (And provide that final action shall be taken in open session.) For example, the Act already offers confidentiality for deliberations in connection with an administrative adjudicatory proceeding.

We could look also to the state Lottery Board or Gaming Control Board; those statutes provide that all meetings are subject to the Open Meetings Act, except those portions of meetings or discussions “devoted to discussing information deemed to be confidential.” (NMSA 1978: 6-24-13B, 60-2E-6C)

Finally, it is unclear what policy interest is served by closing all Commission hearings. Open hearings offer accountability and protection for the defendant. They also build public trust in the Commission’s proceedings. Consider that in the current Open Meetings Act, licensees, aggrieved employees and judicial candidates have the right to demand public hearings. And in the state Personnel Act, “the appealing employee and the agency whose action is reviewed have the right to be heard publicly,” and a record is made of the hearing. (NMSA 1978: 10-9-18A)



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3. **Sealed court proceedings.** In HB 43, SB 43 and HB 138, if the Commission determines that it requires a subpoena for its investigation, “the director shall ask the Commission to petition a district court to issue a subpoena under seal...any challenge to a subpoena shall be heard by the district court in a confidential proceeding.” (SB 43 p. 16 lines 15-25 and p. 17 line 1)

Commentary: Automatically shutting off public access to a new category of court files and proceedings, with little to no discretion available to the court, is an extraordinary step. This is typically undertaken only in cases involving the guardianship of children or wards of the state. In such cases, the privacy interest of vulnerable individuals outweighs the public interest in disclosure.

That is not the case here. The public interest in disclosure is very great in proceedings involving the alleged ethics violations of public officials, and the privacy interests of the defendants are no greater than any other criminal or civil defendant.

Proponents may argue that this provision shields public officials and employees from spurious, retaliatory and/or politically motivated complaints becoming public. However, since the State Ethics Commission must determine that the complaint is neither frivolous nor unfounded before petitioning for a subpoena, that interest has been served.

The Fraud Against Taxpayers Act reaches a compromise under similar circumstances by sealing *qui tam* civil suits for 60 days, giving the state time to evaluate the complaint.

4. **Penalties for disclosure.** In HB 43, SB 43 and HB 138, “a person who discloses any confidential complaint, report, file, record or communication in violation of the State Ethics Commission Act is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year or both. In addition...a court may impose a civil penalty not to exceed \$25,000 for each violation of section 12... (SB43, p. 22 lines 1-11)

Commentary: To the extent that this provision places a gag order upon complainants and/or places a prior restraint upon the publication of information obtained by journalists, it conflicts with the First Amendment to the United States Constitution.

CONCLUSION: Ethics reformers and sunshine reformers are allies; we both want government that is accountable to the public. FOG understands that some confidentiality is justified in principle and politically necessary; however, we do not want to allow the Ethics Commission to operate with extraordinary secrecy powers. FOG could support SB 43 and similar proposals if they contained some reasonable means of access for the public to oversee the Commission’s decisions.