



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2021-04**

February 5, 2021<sup>1</sup>

#### **QUESTIONS PRESENTED**

Does it violate the Governmental Conduct Act for the State Auditor to make public statements that threaten to “apply pressure” on the Martin Luther King, Jr. Commission?

Does it violate the Governmental Conduct Act for a Senator to make public statements about lawsuits that the Senator, in their capacity as a private attorney, filed on behalf of clients against the Martin Luther King, Jr. Commission?

Does it violate the Governmental Conduct Act for a Senator and the State Treasurer, who is also a member of the Martin Luther King, Jr. Commission, to send at total of nine separate requests under the Inspection of Public Records Act to the Martin Luther King, Jr. Commission’s sole employee?

#### **SUMMARY AND ANSWERS**

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<sup>1</sup>This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

Martin Luther King, Jr. is one of the greatest Americans to have ever lived. This advisory opinion concerns a small eponymous state agency that promotes his memory and vision. *See* NMSA 1978, §§ 28-19-1 to -4 (1991). This advisory opinion also concerns the efforts of three elected public officials to hold the Commission accountable to its purpose but which the requester views as damaging affronts. The request for an advisory opinion asked us to opine on whether the conduct of three elected public officials is consistent with the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019).

While the facts the request alleges fail to establish any violation of the Governmental Conduct Act, they also provide a vantage to understand the requester’s view that the alleged conduct of the elected public officials was disproportionate and unfair. We think consideration of the requester’s perspective might improve working relations among the MLK Commission and the elected public officials charged to oversee it and, further, elicit solutions for some of the underlying issues that gave rise to this request.

## FACTS<sup>2</sup>

### I.

On December 2, 2019, the State Auditor sent a letter to the Martin Luther King, Jr. Commission’s Members and Executive Director, communicating concerns arising out of the Commission’s audits in fiscal years 2015 and 2016. The State Auditor remarked that some of his concerns surrounding the FY15 and FY16 audits related to fraud and embezzlement that had occurred at the MLK Commission. The State Auditor encouraged the MLK Commission to ask the Department of Finance and Administration for assistance regarding the Commission’s FY17, FY18, and FY19 audits.

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<sup>2</sup>The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). On January 7, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity.

A year later, on December 7, 2020, the State Auditor sent another letter to the MLK Commission’s Members and Executive Director. In that letter, the State Auditor communicated his continued concern regarding the MLK Commission’s financial statements and controls and expressed disappointment in the MLK Commission’s failure to remedy certain findings in the FY15 and FY16 audits, noting that the MLK Commission’s FY17, FY18, FY19 and FY20 audits contained numerous findings of material weaknesses and material noncompliance. The State Auditor also noted that, in respect to each of these four audits, the MLK Commission’s Executive Director had provided a similar response—namely, that the Executive Director had imposed procedures that should resolve the audit finding in the subsequent fiscal year. To verify that response, the State Auditor requested copies of the written policies and procedures that the Commission implemented to address each individual audit finding.

The following day, on December 8, 2020, the Office of the State Auditor (“OSA”) issued a press release. The press release stated that “[f]indings from four years’ worth of late audit reports show pervasive and troubling issues continue to afflict the Commission under the leadership of the current Executive Director.” In a related statement to the media, the State Auditor concluded, “Frankly, the African American community deserves better leadership. And so, for me, the next steps are really taking an aggressive public stand on applying pressure on the commission to really give us some answers.” Request at 3.

According to the request, the Commission experienced the State Auditor’s press release and related statements to the media as a harmful affront. The request states that the OSA gave the MLK Commission approximately forty-five minutes advance notice of the press release. *Id.* at 4. The request also states that the press release omitted reference to the circumstances that caused the reports to be late. *Id.* at 4. According to the request, the Commission’s audits were delayed not because of negligence or nefarious intent, but rather by “a backlog caused by a prior investigation of the MLK Commission which occurred before Executive Director Waites was hired and before many of the current commissioners were on the board.” *Id.* at 3. The request characterizes these omissions as “attempts to mislead the public, and to marginalize and perpetuate implicit biases through racially tinged statements and thinly veiled public threats . . . .” *Id.* at 4. Last, the request states the MLK Commission’s belief “that the State Auditor’s Office, which is funded by taxpayers, should be expected to assist agencies such as the MLK Commission with annual audits in light of the statutory authority of the State Auditor’s Office under the NM Audit Act.” *Id.* at 3.

## II.

Separately, a member of the New Mexico Senate, in the Senator's capacity as a private attorney, filed three separate discrimination and public-records lawsuits against the MLK Commission and spoke about one or more of those lawsuits to the media. *Id.* at 5. The request states that, in comments to the media, the Senator reiterated some of the State Auditors' concerns with the Commission's audits and financial controls. *Id.* The request also notes that the Senator made six requests for public records under the Inspection of Public Records Act ("IPRA"), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended 2019), to the Commission's Executive Director, who is currently the Commission's only employee. *Id.* at 6.<sup>3</sup>

### III.

Last, the State Treasurer, who is a statutorily designated member of the MLK Commission, made three additional IPRA requests to the MLK Commission's Executive Director. *Id.* These IPRA requests sought documents related to timesheets submitted for Commission employees during FY20; the Commission's contract with its external auditor and a log of the external auditor's work on the Commission's audit; and information related to the Commemoration Grants that the MLK Commission awarded in 2018 and 2019, including an explanation of projects the grants funded and receipts. *Id.* at 6-7. After submitting these IPRA requests and receiving responses, the State Treasurer told the media that while he "was disappointed in the materials that were provided, I think they tried to honor the request." *Id.* at 7.

According to the request, the State Treasurer, in his capacity as member of the MLK Commissioner, already possessed some details about the 2018 and 2019 Commemoration grants. *Id.* The request emphasized that, in his statement to the press, the State Treasurer referred to the MLK Commission and its staff as "they," even though the State Treasurer is a member of the Commission. *Id.* at 8. The request further alleges that, while the aforementioned Senator told the press that "it is troubling" that a sitting commissioner would have to submit an official records request, in fact, the State Treasurer voluntarily chose to frame his email to the Commission's Executive Director as an IPRA request. *Id.* at 7.

### IV.

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<sup>3</sup> The request suggests that the MLK Commission has been constrained to one employee due to the hiring freeze that the Governor and the State Personnel Office implemented in April 2020. *See* Request at 8. *See generally* State Personnel Office General Memorandum 2020-02 (Apr. 22, 2020), available at <https://tinyurl.com/yyn5erbj> (last accessed January 12, 2021) (placing a freeze on hiring and personnel actions).

Together, the statements to the press made by the State Auditor, the State Treasurer, and a Senator, acting in the capacity as a private attorney, directed negative publicity to the MLK Commission and, unsurprisingly, subjected the Commission and its staff to more than “pressure.” According to the request:

As a direct result of this negative publicity the MLK Commission Office has been bombarded with complaints from irate citizens. The Executive Director has received threatening phone calls. The statements to the press by elected officials have put MLK Commissioners and the Executive Director in danger. And, invited speakers have declined previously coveted invitations to speak at future MLK events. The MLK Commission brand has been severely damaged.

*Id.* at 1. The requester further states that the MLK Commission “received numerous calls to action from its constituents who perceive [the above described] actions as slanderous, collusive and deliberate acts of sabotage by elected officials.” *Id.* at 8. “Conversely,” the request states, “the Commission has received a barrage of complaints by citizens who have taken the negative publicity regarding the MLK Commission to heart.” *Id.* Therefore, the request seeks an advisory opinion and “a course of action.” *Id.*

## ANALYSIS

### I.

The Governmental Conduct Act requires legislators, public officers, and public employees to treat their government positions “as a public trust.” NMSA 1978, § 10-16-3(A (1993, as amended 2011). It does not violate “the public trust” for the head of an oversight agency, such as the State Auditor, to release to the public his concerns about the operation of a state agency. Nor does it violate “the public trust” for the head of an oversight agency to convey to the public that the oversight agency will “apply pressure” to remedy perceived shortcomings in another agency. These two conclusions are related: in a well-functioning democratic government, public disclosure is pressure.

A state agency head, however, may not intentionally mislead the public about the operations of another state government, particularly where the misleading statements are intended to redound to the personal, political benefit of the state

agency head. Not only would such conduct break with “the public trust,” but also would amount to the use of “the powers and resources of public office . . . to pursue private interests,” in direct contravention of Section 10-16-3(A) of the Governmental Conduct Act. Although the request characterizes the State Auditor’s omissions regarding details concerning the timing of the Commission’s audit as “attempts to mislead the public,” *see* Request at 4, the facts presented by the request do not establish that the State Auditor violated the Governmental Conduct Act.

The request says that the State Auditor’s December 8, 2020 press release and related statements to the media did not provide the context surrounding the MLK Commission’s FY17, FY18, FY19 and FY20 audits. *See* Request at 3. According to the request, the State Auditor did not explain that those audits were late because of “a previous investigation and incidents which occurred years ago.” *Id.* at 3. While we understand why the requester might perceive this omission as unfair, the State Auditor’s press release and statements to the media, as noted in the request and above, do not undermine the public trust. Based on the materials presented to us, the State Auditor’s statements were not directly concerned with the timing of the MLK Commission’s FY17, FY18, FY19 and FY20 audits; rather, the State Auditor was primarily concerned with the audits’ findings of material weakness and noncompliance and the MLK Commission’s responses to those findings. Accordingly, in view of the State Auditor’s primary purpose in his December 7, 2020 letter to the MLK Commission, the State Auditor’s alleged failure to provide the full context regarding the tardiness of the Commission’s audits would not amount to a violation of the Governmental Conduct Act’s requirement that public officers treat their government positions “as a public trust.” § 10-16-3(A).<sup>4</sup>

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<sup>4</sup> The request compares the State Auditor’s statements to the media about these audit findings against the requester’s expectation that the State Auditor should “assist agencies such as the MLK Commission with annual audits in light of the statutory authority of the State Auditor’s Office.” Request at 3. While the State Auditor may audit the financial affairs of every agency, *see* NMSA 1978, § 12-6-3 (1969, as amended 2011), the State Auditor may also allow independent auditors, subject to the State Auditor’s approval, to conduct audits, *see id.*; *see also generally* 2.2.2 NMAC. But even where the Office of the State Auditor audits an agency’s financial affairs, the State Auditor’s role is to provide an independent review, which limits the assistance the State Auditor can provide in terms of managing and presenting an agency’s finances. *See* § 12-6-3 (“The audits shall be conducted in accordance with generally accepted auditing standards and rules issued by the state auditor.”); 2.2.2.8(L) NMAC (requiring independence between auditors and client agencies); Governing Auditing Standards § 3.18 (U.S. Comptroller Gen. July 2018) (“In all matters relating to the . . . engagement, auditors and audit organizations must be independent from the audited entity.”) Accordingly, the State Auditor’s failure to meet an agency’s expectation of “assist[ance] . . . with annual audits” does not constitute a violation of the Governmental Conduct Act. *See* Request at 3.

For a similar set of reasons, it does not violate the Governmental Conduct Act for a legislator, public officer or public employee to submit an IPRA request to a public agency. In Section 14-2-5 of the IPRA, the Legislature declared that it is “the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees” and that “to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.” NMSA 1978, § 14-2-5 (1993). Given the Legislature’s policy statement, a legislator or public officer does not violate the Governmental Conduct Act by submitting IPRA requests to other state agencies.<sup>5</sup>

Last, the request does not present facts that establish that the Senator, in representing clients asserting claims against the MLK Commission as a private attorney, violated the Governmental Conduct Act. The request adverts to Section 10-16-6 of the Governmental Conduct Act, which prohibits legislators from using or disclosing confidential information acquired by virtue of their position for their or another’s private gain. *See* § 10-16-6. However, the request alleges no facts that suggest the Senator received, much less disclosed, confidential information about the MLK Commission that the Senator acquired through their office as a member of the New Mexico Senate. Further, we cannot conclude that the Senator violated any duty that the Governmental Conduct Act imposes on legislators when, while acting in the capacity of a private attorney acting on behalf of clients, the Senator allegedly spoke to the media about their clients’ claims against the MLK Commission. *E.g.*, §§ 10-16-3 & 10-16-6.

## II.

While we conclude that the alleged conduct of the elected public officials does not violate the Governmental Conduct Act, we also address why the requester perceives their alleged conduct as disproportionate and unfair. Consideration of this perspective, we believe, might not only improve working relations among the MLK Commission and the elected public officials charged to oversee it, but also elicit remedies for some of the underlying causes of the rupture of those relationships.

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<sup>5</sup> Furthermore, because IPRA requests may be submitted by “any person wishing to inspect public records,” NMSA 1978, 14-2-8(A) (1993, as amended 2009), we are uncertain whether the submission of an IPRA request amounts to a use of “the powers and resources of public office” that implicate the requirements of Section 10-16-3(A) of the Governmental Conduct Act.

First, the MLK Commission is a stand-alone state agency and is not administratively attached to a larger executive department. *See generally* NMSA 1978, § 9-1-7 (1977) (providing for the relationship of administrative attachment). As a stand-alone state agency, the MLK Commission must comply, to the letter, with myriad statutes and rules that comprise the basic financial architecture of state government. These laws include: the State Budget Act, NMSA 1978, §§ 6-3-1 to -25 (1957, as amended 2011); the Accountability in Government Act, NMSA 1978, §§ 6-3A-1 to -10 (1999, as amended 2019); the Financial Control Act, NMSA 1978, §§ 6-5-1 to -11 (1957, as amended 2003); the 279-page Model Accounting Practices Manual issued annually by the Department of Finance and Administration, available at <https://tinyurl.com/y4pq77o7> (last accessed Jan. 12, 2021); the Audit Act, NMSA 1978, §§ 12-6-1 to -15 (1969, as amended 2019); the Requirements for Contracting and Conducting Audits of Agencies promulgated by the State Auditor at 2.2.2 NMAC; the Procurement Code, NMSA 1978, §§ 13-1-28 to -199 (1984, as amended 2019); the Procurement Code Regulations promulgated by the State Purchasing Division of the General Services Department, 1.4.1 NMAC; the Regulations Governing the Approval of Contracts for Professional Services promulgated by the Department of Finance and Administration at 2.40.2 NMAC; the State Use Act, NMSA 1978, §§ 13-1C-1 to -7 (2005). To hire employees, the Commission must familiarize itself with the Personnel Act, NMSA 1978, §§ 10-9-1 to -25 (1961, as amended 2009); the regulations promulgated by the State Personnel Board at 1.7.1 NMAC through 1.7.13; and, for those employees that are not subject to the Personnel Act, the Policies for the Governor Exempt Employees, available at <https://tinyurl.com/y3r5ykwc> (last accessed Jan. 11, 2021). In addition, the MLK Commission must comply with New Mexico’s transparency laws, the Open Meetings Act (“OMA”), NMSA 1978, §§ 10-15-1 to -4 (1974, as amended 2013); and the Inspection of Public Records Act, each of which is enforceable by lawsuits promising for prevailing plaintiffs (and their attorneys) an award of costs and attorney’s fees, *see* § 10-15-3(C) (OMA) (1974, as amended 1997); § 14-2-12 (IPRA), and even criminal penalties, § 10-15-4 (OMA) (1974, as amended 1989). Therefore, in order to run a state agency that exists for the comparatively limited purpose “to develop, promote, coordinate and review statewide plans and activities for the annual commemoration and celebration of the birthday of Martin Luther King Jr.,” NMSA 1978, § 28-19-1(A) (1991), the MLK Commission must operate a state agency that strictly conforms to the legal requirements imposed by all of the foregoing statutes and regulations.

In other agencies, the burden of these laws is carried by many shoulders—the agency head, a general counsel, a chief financial officer, a procurement officer, a human resources head, and their respective staffs. The MLK Commission, by contrast, currently has a single employee. Request at 6. The MLK Commission’s



members, who are eligible for *neither* compensation *nor even* per diem and mileage, must count on the Commission's single employee to ensure the Commission complies with its many and weighty legal duties. *See* NMSA 1978, § 28-19-1(E) (1991).<sup>6</sup>

Next, we also observe that in the General Appropriations Act of 2020, the Legislature appropriated \$356,500 to the MLK Commission. Laws 2020, ch. 83, § 4(F). As far as legislative appropriations go, the MLK Commission's total annual budget appropriation is meager. *See generally* Laws 2020, ch. 83, § 4 (appropriating funds to state agencies for their FY21 budgets). Two examples suffice to show just how little money the MLK Commission receives in comparison to other legislative appropriations. First, in 2019, the Legislature appropriated nearly twice as much to the Tourism Department to market and promote a Virgin Galactic flight. *See* Laws 2019, ch. 87, § 10 (appropriating \$600,000 to the Tourism Department “[f]or the marketing and promotion of the inaugural Virgin Galactic flight in New Mexico”). Second, on a much larger scale, the Legislature authorized payment of \$100,000,000 of film production tax credits claimed by film production companies operating in New Mexico through the end of FY19 and approved by the Taxation and Revenue Department. *See* Laws 2019, ch. 87, § 10. To be sure, the officers and employees of state government should be held accountable for every dollar of public funds. But if the accountability of every public dollar matters, it follows that the accountability of more public dollars matters more. From this vantage, we understand why the request communicates a sense of unfairness and disproportionate treatment of the MLK Commission.

Like all state agencies, the MLK Commission requires oversight; but it is clear that the MLK Commission also needs help. To that end, and because the request asked that we recommend a course of action, we encourage the MLK Commission, if it has not already done so, to consider requesting an exemption from the hiring freeze from either the Governor or the State Personnel Office to hire another Governor's exempt or personnel-service staff member, respectively. *See generally* State Personnel Office General Memorandum 2020-02 (Apr. 22, 2020), available at

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<sup>6</sup> We do not understand why members of the MLK Commission should not receive per diem and mileage for their service to the State when members of other state commissions are so entitled. *Compare* NMSA 1978, § 28-19-1(E) (1991) (providing that members of the MLK Commission shall receive no compensation), *with, e.g.,* NMSA 1978, § 28-11B-1(1991, as amended 1999) (providing that “[m]embers of the commission for deaf and hard-of-hearing persons shall be compensated as provided in the Per Diem and Mileage Act and shall receive no other compensation, perquisite or allowance”), *and* NMSA 1978, § 10-16G-3(G) (“[State Ethics] Commissioners are entitled to receive per diem and mileage as provided in the Per Diem and Mileage Act and shall receive no other compensation, perquisite or allowance.”).

<https://tinyurl.com/yyn5erbj> (last accessed January 12, 2021). Alternatively, we suggest the MLK Commission consider using some of its limited budget for contractual services to enter a services agreement with a larger state agency for administrative services support. *See N.M. Mining Ass'n v. N.M. Mining Comm'n*, 1996-NMCA-098, ¶ 1, 122 N.M. 332 (upholding a transfer of funds from the Mining Commission to the Department of Game and Fish for assistance in implementing the State Mining Act). Last, we also encourage the MLK Commission to consider requesting the Legislature to administratively attach the MLK Commission to a larger department, so that the MLK Commission staff can devote more time to the agency's mission of commemorating and promoting Dr. King's vision, and less time to the incidental mission of administering a state agency. *See generally* § 9-1-7 (providing for the relationships between an agency and the department to which it is administratively attached).

## CONCLUSION

The request does not present facts that establish a violation of the Governmental Conduct Act.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**

**JEFF BAKER, Commissioner**

**STUART M. BLUESTONE, Commissioner**

**HON. GARREY CARRUTHERS, Commissioner**

**RONALD SOLIMON, Commissioner**

**JUDY VILLANUEVA, Commissioner**

**FRANCES F. WILLIAMS, Commissioner**