

*Via Email Only*

February 14, 2023

John Bjornson  
Director, North Dakota Legislative Council  
600 East Boulevard Avenue  
Bismarck, ND 58505  
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Re: Request for Advisory Opinion dated January 17, 2023 (No. 23-01)

Dear Mr. Bjornson:

The Ethics Commission ("Commission") is in receipt of your request for an advisory opinion dated January 17, 2023. As previously communicated to you, the Commission has decided to issue an advisory opinion in accordance with N.D.C.C. § 54-66-04.2. The question presented to the Commission for consideration is "whether the commission recognizes House and Senate Rules 321 govern conflict of interest disclosure for members of the Legislative Assembly and therefore the neutral reviewer and disclosure requirements of the commission rule do not apply to the Legislative Assembly." To answer the question presented, a review of Senate and House rules, as well as rules promulgated by the Commission is helpful. The Commission notes the following analysis is based upon the current House and Senate rules.

#### LEGAL BACKGROUND

##### North Dakota Legislative Assembly Rules

The following rules are taken from the Senate and House Legislative Manual of the 68<sup>th</sup> Legislative Assembly of the State of North Dakota. These rules are divided into three (3) sections: House Rules, Senate Rules, and Joint Rules. Of the internal rules adopted, several shape how conflicts of interest are disclosed and managed within the Legislative Assembly. Our review of these rules begins with Senate Rule 321:

Every member who is present, before the vote is announced from the chair, shall vote for or against the question before the Senate, unless the Senate excuses the member. If the member has not voted before the key is closed, the member shall vote before the vote is announced. A member cannot cast a vote on behalf of another member unless the vote is cast according to verbal instructions announced to the Senate by that other member while present. However, any member who has

a personal or private interest in any measure or bill shall disclose the fact to the Senate and may not vote thereon without the consent of the Senate. A 'personal or private interest' is an interest that affects the member directly, individually, uniquely, and substantially.

Senate Rule 321. A nearly identical rule applies in the House with only minor, inconsequential differences in language. See House Rule 321. Of most import to the discussion is the portion of House Rule 321 and Senate Rule 321 that directs a member to disclose a personal or private interest in a measure or bill: "[A]ny member who has a personal or private interest in any measure or bill shall disclose the fact to the Senate and may not vote thereon without the consent of the Senate." Senate Rule 321. The rules then define a "personal or private interest" as "an interest that affects the member directly, individually, uniquely, and substantially." Senate Rule 321. Senate Rule 322 then describes the process under which a member asks to be excused from a vote. Specifically, Senate Rule 322 provides:

When a member asks to be excused, or declines to vote, the member shall be required to state the member's reasons. Upon motion, the question must be put to the Senate, 'Shall the member, for the reasons stated, be permitted to vote?' which must be decided without debate. These proceedings must occur before the taking of the vote.

Senate Rule 322. House Rule 322 has identical language to that of Senate Rule 322. The Commission is also cognizant of Senate Rule 324 and House Rule 324 which permits a standing rule of either house to be "reconsidered" or "suspended" by a vote of a majority of the members present. Last, the Commission considers Joint Rule 1001, entitled "Legislative ethics policy." Sections 5 and 7 of Joint Rule 1001 recognizes the inevitability of conflicts of interest for members of the Legislative Assembly and the importance of ethical standards:

The increasing complexity of public policy at all levels, with intervention into private affairs, makes conflicts of interest almost inevitable for every part-time public official, and particularly for a member who must vote on measures affecting the life of every citizen or resident of the state. Consequently, the adoption of standards of ethics does not impugn a member's integrity or dedication; rather, it recognizes the increasing complexity of government and private life and provides members with helpful advice and guidance when confronted with difficult problems in that gray area involving action that is neither clearly right nor clearly wrong.

...

If public confidence in the Legislative Assembly is to be maintained and enhanced, it is not enough that members avoid acts of misconduct. They also must avoid acts



that may create an appearance of misconduct.

Joint Rule 1001(5) & (7). Moreover, Joint Rule 1002 defines ethical standards for the Legislative Assembly to include compliance with all other rules relating to ethics.

#### North Dakota Administrative Code Article 115-04

In October 2022, the Commission promulgated conflict of interest rules pursuant to its constitutional rule-making authority. See N.D. Const. Art. XIV. These conflict of interest rules apply to “public officials” in North Dakota, including members of the Legislative Assembly. N.D.A.C. §115-04-01-02. Section 115-04-01-02 of the North Dakota Administrative Code requires that “[w]hen a matter comes before a public official and the public official has a known potential conflict of interest, the public official must disclose the potential conflict of interest.” N.D.A.C. § 115-04-01-02(2). Section 115-04-01-02 also directs that the public official must disclose the potential conflict of interest prior to taking any action or making any decision and must provide sufficient information “concerning the matter and the public official’s potential conflict of interest.” N.D.A.C. § 115-04-01-02(3). The disclosure is to be completed on a written form approved by the Commission. Id.

According to Article 115-04 of the North Dakota Administrative Code, when a public official discloses a potential conflict of interest, he or she may voluntarily recuse and abstain from further action in the matter or the public official may consult with a neutral reviewer. N.D.A.C. §§ 115-04-01-02(5) and 115-04-01-03(2). For a legislative body, absent a policy or rule designating an individual or committee as the neutral reviewer, the remaining individuals of the legislative body are designated as the neutral reviewer. N.D.A.C. § 115-04-01-01(5)(a). If utilized, a neutral reviewer evaluates the disclosure and determines whether the potential conflict of interest is a disqualifying conflict of interest. If the neutral reviewer determines the potential conflict of interest constitutes a disqualifying conflict of interest, the public official then recuses himself or herself and abstains from participating in the matter. N.D.A.C. § 115-04-01-03(3).

For the purposes of Article 115-04, a “potential conflict of interest” occurs when a public official must make a decision or take action in a matter in which the public official has:

- a. Received a gift from one of the parties;
- b. A significant financial interest in one of the parties or in the outcome of the proceeding;  
or
- c. A relationship in private capacity with one of the parties.

N.D.A.C. § 115-04-01-01(2). A “significant financial interest” is a “direct and substantial in-kind or monetary interest, or its equivalent, not shared by the general public.” N.D.A.C. § 115-04-01-01(8). A “relationship in a private capacity” means “a past or present commitment, interest, or relationship of the public official in a matter involving the public official’s immediate family, individuals residing in the public official’s household, the public official’s employer, or employer

of the public official's immediate family, or individuals with whom the public official has a substantial and continuous business relationship." N.D.A.C. § 115-04-01-01(7).

Moreover, when either the public official or the neutral reviewer evaluates a potential conflict of interest, N.D.A.C. § 115-04-01-03(7), provides the following standards to guide the decision to recuse:

- a. Appropriate weight and proper deference must be given to the requirement that a public official perform the duties of elected or appointed office, including the duty to vote or otherwise act upon a matter, provided the public official has properly disclosed the potential conflict of interest as required by this rule.
- b. A decision that requires a public official to recuse or abstain from further action or decision in a matter should only occur in cases where the independence of judgment of a reasonable person in the public official's situation would be materially affected by the disclosed potential conflict of interest.
- c. The review of a potential conflict of interest and any decision that would require a public official to recuse himself or herself or abstain from further involvement in a matter shall consider any applicable North Dakota law which precludes the public official from recusal or abstention in the matter.
- d. It is presumed that a public official does not have a disqualifying conflict of interest if the public official would not derive any personal benefit which is greater than that accruing to any other member of the general public or any general business, profession, occupation, or group affected by the matter.

N.D.A.C. § 115-04-01-03(7). When a public official discloses a potential conflict of interest, such disclosure is to be reported to the Commission by completing a form available on the Commission's website and submitting the form to the Commission.

Article 115-04 also contains a "safe harbor" provision which provides the Commission will not find a violation of article XIV of the Constitution of North Dakota or the conflict of interest rules if:

- a. The public official consults with and adheres to the neutral reviewer's suggested course of action;
- b. The public official acts in good faith; and
- c. The disclosed materials facts surrounding the potential conflict of interest are substantially the same as the facts presented in the complaint.

N.D.A.C. § 115-04-01-03(4).

The conflict of interest rules within Article 115-04 apply to members of the Legislative Assembly, unless the Legislative Assembly adopts conflict of interest rules which are as restrictive as or more restrictive than those in Article 115-04. See N.D.A.C. §§ 115-04-01-02 and 115-04-01-05. Pursuant to Article 115-04, if the Legislative Assembly has adopted conflict of interest rules that are more restrictive, those rules then control. However, the requirement to report the disclosure of a potential conflict of interest is not displaced by an adopted conflict of interest rule or policy. N.D.A.C. §115-04-01-02(1).



## ETHICS ANALYSIS

The question presented in the request for an advisory opinion essentially asks whether the conflict of interest rules adopted by the Legislative Assembly, namely Senate and House Rules 321 and 322 read in conjunction with the additional rules discussed above, are "at least as restrictive as or more restrictive" than those contained in Article 115-04 and control when a member of the Legislative Assembly evaluates a potential conflict of interest. The companion, follow-up question is then whether the neutral reviewer and disclosure requirements of Article 115-04 apply to members of the Legislative Assembly.

The analysis of whether House and Senate Rules 321 are more restrictive, or at least as restrictive, as the requirements of N.D.A.C. § 115-04-01 should be viewed in the context of the substance of the rules, not necessarily whether the language is identical or similar. When evaluating whether a conflict of interest rule adopted by an agency, board, body, or commission is more restrictive, or at least as restrictive, than the conflict of interest rule outlined in N.D.A.C. § 115-04, the Commission considers the scope of potential conflict of interests subject to the rule, the format and process of disclosure of a potential conflict of interest, and the evaluation of the potential conflict of interest by the agency, board, body, or commission.

### Scope of Potential Conflicts of Interest

Senate and House Rules 321 require a member of the legislative body to disclose a personal or private interest in any measure or bill. Personal or private interest is defined as an interest which affects the member "directly, individually, uniquely, and substantially." Senate and House Rule 321. For the purposes of Article 115-04, a "potential conflict of interest" occurs when a public official must make a decision or take action in a matter in which the public official has: received a gift from one of the parties; a significant financial interest in one of the parties or in the outcome of the proceeding; or a relationship in private capacity with one of the parties. N.D.A.C. § 115-04-01-01(2). A "significant financial interest" is a "direct and substantial in-kind or monetary interest, or its equivalent, not shared by the general public." N.D.A.C. § 115-04-01-01(8). Additionally, a "[r]elationship in a private capacity" means

a past or present commitment, interest or relationship of the public official in a matter involving the public official's immediate family, individuals residing in the public official's household, the public official's employer, or employer of the public official's immediate family, or individuals with whom the public official has a substantial and continuous business relationship.

N.D.A.C. § 115-04-01-01(7).

For the purposes of its analysis, the Commission finds the language in Rule 321<sup>1</sup> requiring disclosure of a “personal or private interest” in any measure or bill parallels the language of Article 115-04 requiring disclosure of a potential conflict of interest. While the language of Article 115-04 and Rule 321 are distinct, the plain meaning of both encompass and identify nearly identical interests which can create disqualifying conflicts of interest. While the language of N.D.A.C. § 115-04-01-01(2) is broader in some respects, that breadth serves the purpose of ensuring the rule applies not only to members of the Legislative Assembly, but to members of boards and commissions, legislative employees, state-wide elected officials, and members of the governor’s cabinet. For the purposes of applying Section 115-04-01-01(2) to members of the Legislative Assembly, the language of Rule 321 is at least as restrictive in defining the scope of potential conflicts of interest to be disclosed. Both rules require disclosure when a member has a significant financial interest in the outcome of a measure or bill that is unique to that member, when a member has received a gift (as defined in N.D.A.C. § 115-04-01-01(3)) from a party, or when a member has a relationship in private capacity with a party. Therefore, the Commission finds Rule 321, read in conjunction with the additional Senate and House rules previously discussed, is at least as restrictive in defining the scope of potential conflicts of interest required to be disclosed by members of the Legislative Assembly.

#### Process of Disclosure for Potential Conflicts of Interest

Rule 321 requires any member of the Legislative Assembly who has a personal or private interest in a matter or bill, to disclose the matter to the legislative body prior to a vote on the matter or bill. The legislative member may not vote on any matter in which the member has a personal or private interest without the consent of the legislative body. Rule 321. In the opinion of the Commission, Rule 321 establishes a mandatory process for disclosure of a personal or private interest which precludes a member’s participation in any vote until the legislative body has considered the matter. What is unclear is whether Rule 321 requires the facts underlying the potential conflict of interest, i.e. the facts giving rise to the personal or private interest in a matter or bill, are required to be disclosed. However, the Commission looks to Rule 322, which directs that when a member asks to be excused, or declines to vote, “the member shall be required to state the member’s reasons.” Senate Rule 322.

N.D.A.C. § 115-04-01-02 establishes a similar mandatory disclosure process. Section 115-04-01-02 directs that a public official must disclose a potential conflict of interest prior to taking any action or making any decision and must provide sufficient information “concerning the matter and the public official’s potential conflict of interest.” N.D.A.C. § 115-04-01-02. However, unlike Rule 321, Section 115-04-01-02 permits the legislative member to voluntarily recuse himself or herself and abstain from further action in the matter without input from the remaining members of the legislative body. N.D.A.C. § 115-04-01-02(5).

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<sup>1</sup> The reference to “Rule 321” herein refers collectively to House Rule 321 and Senate Rule 321 as enacted on the date of this opinion’s publication as the pertinent language of the rules to the issue before the commission is identical.



To determine whether this portion of the Senate and House rules are more restrictive, or at least as restrictive, as the requirements of N.D.A.C. § 115-04-01, the Commission compares how these rules facilitate disclosure. Both rules similarly require disclosure of a potential conflict of interest. Rule 321 automatically precludes a member of a legislative body from voting “without the consent of the legislative body.” Rule 321. Whereas Section 115-04-01-02 permits the legislative member to voluntarily recuse without input from the remaining members of the legislative body. Based upon the plain language of the rules, Rule 321 is more restrictive.

Nonetheless, the Commission takes note of the absence in Rule 321 of the requirement to disclose the sufficient information concerning the matter and the public official’s potential conflict of interest. However, the Commission looks to Rule 322<sup>2</sup>, which directs that when a member asks to be excused, or declines to vote, “the member shall be required to state the member’s reasons.” Rule 322. In the Commission’s view, disclosing sufficient information for the remaining members of a legislative body to evaluate a potential conflict of interest is inherent in Rule 322. The Commission advises that the best practice when declaring a conflict of interest is to provide sufficient information underlying the potential conflict of interest and encourages members of the Legislative Assembly to do so.

#### Evaluation of Potential Conflicts of Interest

Rules 321 and 322 establish a mandatory procedure that any member-disclosed personal or private interest in a matter or bill must be submitted to the full legislative body for consideration prior to the member voting. The member may not vote without the consent of the remaining legislative body. Rules 321 and 322 do not instruct on the factors the legislative body is to consider when evaluating whether a member is precluded from voting based upon the disclosed personal or private interest in a matter or bill.

Article 115-04 takes a different approach. Under N.D.A.C. §§ 115-04-01-03(2) and (3), a member with a potential conflict of interest may either recuse himself or herself from a matter and abstain from voting or defer the evaluation of the potential conflict of interest to a “neutral reviewer.”<sup>3</sup> If the “neutral reviewer” concludes that the disclosed potential conflict of interest constitutes a disqualifying conflict of interest, the member must recuse from the vote. When either the public official or the neutral reviewer evaluates a potential conflict of interest, Section 115-04-04-03(7), provides the standards to guide the decision to recuse, most notably advising recusal by a public official where the independence of judgment of a reasonable person in the public official’s situation would be materially affected by the disclosed potential conflict of interest.

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<sup>2</sup> The reference to “Rule 322” herein refers collectively to House Rule 322 and Senate Rule 322 as enacted on the date of this opinion’s publication as the pertinent language of the rules to the issue before the commission is identical.

<sup>3</sup> For a member of a legislative body, the remaining members of the legislative body are considered as the neutral reviewer. In this respect, Rule 321 and N.D.A.C. Article 115-04 align.

To determine whether this portion of the Senate and House rules are more restrictive, or at least as restrictive, as the requirements of N.D.A.C. § 115-04-01, the Commission compares how these rules evaluate the disclosed potential conflict of interest. The plain language of Rules 321 and 322 do not provide guidance on how a potential conflict of interest is evaluated by the remaining members of the legislative assembly. In fact, the language of Rule 322 indicates a legislative body must decide without debate whether a member may vote after he or she asks to be excused.

While Rule 322 provides no guidance on how to evaluate a potential conflict of interest, other Rules provide some general guidance to members of the legislative assembly. Joint Rule 1001(7) instructs members of the Legislative Assembly not only avoid acts of misconduct, but must avoid “acts that may create an appearance of misconduct.” Joint Rule 1007. Therefore, at a minimum, Senate, House, and Joint Rules require the remaining members to evaluate whether a disclosed potential conflict of interest creates an appearance of misconduct or impropriety.

An evaluation of whether a potential conflict of interest creates an appearance of misconduct or impropriety, by its plain language, is broader than the language used to evaluate potential conflicts of interest contained within Article 115-04 and thus is more restrictive. The best practice is to allow an opportunity for meaningful evaluation of the member’s potential conflict of interest, giving deference to the language of Rule 1007 prior to taking action. Moreover, the Legislative Assembly is free to consider the standards described in N.D.A.C. § 115-04-01-03(7) to guide the decision to recuse. In sum, for the purposes of applying Section 115-04-01-01(2) to members of the legislative assembly, Senate, House, and Joint Rules are at least as restrictive in evaluating of a potential conflict of interest.

#### Documentation of Disclosure of Potential Conflicts of Interest

The remaining question for the Commission’s consideration is whether the disclosure requirement of Article 115-04 applies to the members of the Legislative Assembly. Section 115-04-01-02 instructs that “[i]n any assessment of a possible conflict of interest, the matter will be reported to the ethics commission in accordance with section 115-04-01-04.” N.D.A.C. § 115-04-01-02. Section 115-04-01-04 directs that disclosure required under the conflict of interest rules in Article 115-04 shall be made using the form approved by the Ethics Commission and available on the Ethics Commission website. Section 115-04-01-04 further directs that public entities are to document in minutes that a public official has been recused from further involvement in the matter.

The Commission reads Sections 115-04-01-02 and 115-04-01-04 in conjunction. The dictate of section 115-04-01-02 is that when a potential conflict of interest is disclosed, the disclosure must be reported to the Commission. However, Section 115-04-01-02 describes the mechanism for how the Commission is notified – either by completing the form approved by the Ethics Commission or documenting any recusal in the minutes.



To be clear, if an entity does not have a conflict of interest rule and Article 115-04 applies by default, the mechanism to report conflicts of interest to the Commission is clearly outlined: disclosure shall be made using the form approved by the Commission. However, when an entity has a conflict of interest rule which is at least as restrictive as Article 115-04, the public entity is to document in the minutes that a public official has been recused at a minimum. That entity may also complete the form approved by the Ethics Commission, but is not required to pursuant to Section 115-04-01-04. This approach allows boards, commissions, and bodies that have unique concerns to adopt conflict of interest rules and a notification mechanism for disclosure of a recusal in the minutes in a manner that meets its needs. For instance, if information underlying a conflict of interest is classified as confidential, a board may adopt conflict of interest rules and a notification mechanism to ensure the confidential information remains confidential with the recusal documented in publicly accessible minutes and the confidential information is not disclosed on the form approved by the Commission.

The Legislative Assembly does not have a rule or policy which governs how disclosures of potential conflicts of interest by members of the legislative body are recorded. While the Legislative Assembly does not maintain minutes in the same way minutes<sup>4</sup> are kept by boards and commissions, Section 13 of Article IV of the Constitution of North Dakota requires each house of the Legislative Assembly to keep a journal of its proceedings and a record of the votes. The journal, as well as recordings of hearings, work, or votes, is available on Legislative Council's website. Moreover, legislative sessions are open to the public.

Based upon information received from Legislative Council, when a member declares a conflict of interest during a floor session there is a note made in the journal and such disclosure is recorded on video. When a potential conflict of interest is disclosed during a committee hearing or committee work, there is no written record made, but the disclosure is video-recorded and keyword searchable.

The Commission acknowledges that the sheer volume of video and journal entries produced during the 80-day window of legislative session affects how efficiently the public can access information regarding disclosures of potential conflicts of interest and such issue can be meaningfully addressed. Nonetheless, the Commission considers the current recording mechanism equivalent to either submitting the form approved by the commission or documenting a recusal in the minutes to notify the Commission of a conflict of interest as the disclosure is publicly accessible in the same way meeting minutes are accessible. Members of the Legislative Assembly, however, are free to complete and submit the Ethics Commission form as an additional method to document their disclosure of conflict of interest information.

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<sup>4</sup> Pursuant to N.D.C.C. § 44-04-21, minutes of all open meetings must be kept and are public records, open and accessible to the public. Minutes from open meetings are typically posted on the website or at a physical location of a board or commission and can be reviewed within a reasonable time.

### SAFE HARBOR

While not directly contemplated by the request for an advisory opinion, the Commission addresses how the safe harbor provision of N.D.A.C. § 115-04-01-03(4) interacts with the above analysis.

Article 115-04 also contains a “safe harbor” provision which provides the Ethics Commission will not find a violation of article XIV of the Constitution of North Dakota or the conflict of interest rules if three (3) conditions have been satisfied: (1) the public official consults with and adheres to the neutral reviewer’s suggested course of action, (2) the public official acts in good faith, and (3) the disclosed material facts surrounding the potential conflict of interest are substantially the same as the facts presented in the complaint. N.D.A.C. § 115-04-01-03(4).

The onus of demonstrating the conditions to trigger the safe harbor provision have been satisfied is on the public official. The Commission believes the information outlined on the form approved by the Commission is a good guide for what material facts should be disclosed and the disclosure process to demonstrate the conditions of the safe harbor provision are satisfied. However, whether the public official can take advantage of the safe harbor provision significantly hinges on the quality of the documentation of the disclosed material facts surrounding the potential conflict of interest.

### CONCLUSION

For the reasons set forth above, the Commission answers Director Bjornson’s questions as follows:

- (1) The Commission believes the Senate and House Legislative Manual of the 68<sup>th</sup> Legislative Assembly of the State of North Dakota Rules can be harmonized with the conflict of interest rules in Article 115-04, specifically the applicable Senate, House, and Joint Rules can control the disclosure of conflict of interests, with the guidance provided in Article 115-04 to supplement the Senate and House Rules when those rules are quiet as discussed above.
- (2) The Commission concludes the disclosure requirement of N.D.A.C. §115-04-01-02 apply to the Legislative Assembly. The Commission further finds the mechanism for documenting conflicts of interest in journal entries and video-recordings employed by the Legislative Assembly is equivalent to the mechanism of documenting conflicts of interest in minutes to provide notice to the Commission, thereby satisfying the disclosure requirement.

In accordance with N.D.C.C. § 54-66-04.2, this advisory opinion is to be published on the Ethics Commission website and accessible to the public. The Commission thanks Mr. Bjornson for seeking advice regarding this issue.



This Advisory Opinion was approved by the Ethics Commission at a special meeting held February 14, 2023.

Sincerely,



Rebecca Binstock  
Executive Director, North Dakota Ethics Commission