

Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT E. LAMA
Chief Deputy Attorney General

February 4, 2009

The Honorable Stuart Ingle
New Mexico State Senator
Senate Minority Leader
2106 West University Drive
Portales, NM 88130

The Honorable Dianna Duran
New Mexico State Senator
Republican Caucus Chair
909 8th Street
Tularosa, NM 88352

Re: Opinion Request - Appointment of Mr. Roman Maes to the Transportation Commission

Dear Senators Ingle and Duran:

You requested our advice regarding whether it was appropriate for the governor to appoint Roman Maes to the State Transportation Commission while Mr. Maes was a registered lobbyist for the State Investment Council and other public and private clients.¹ Specifically, you asked:

1. Is it appropriate for Mr. Maes to serve on the State Transportation Commission while simultaneously acting as a lobbyist for other state agencies, governmental entities and private interests?
2. What are Mr. Maes' responsibilities with regard to his selection of clients so as to avoid a conflict of interest or the appearance of impropriety in the execution of his duties on the State Transportation Commission?
3. Is Mr. Maes required to abstain from voting on certain state transportation matters in which his clients may also have an interest?

As discussed in more detail below, we conclude that the governor has broad authority to appoint Mr. Maes, and Mr. Maes may serve as a State Transportation Commissioner, provided he comports with the Governmental Conduct Act, NMSA 1978, ch.10, art.16 (1967, as amended through 2007).

¹ According to the Secretary of State's website, Mr. Maes is a lobbyist for Consumer Data Industry Association, FMR LLC, Microsoft, National Center for Genome Resources, NM Public Relations, State Investment Council, Pueblo of Picuris, Qwest and St. Vincent Hospital.

Article V, Section 14 of the New Mexico Constitution provides:

The members of the state highway commission shall be appointed, shall have such power and shall perform such duties as may be provided by law.

Pursuant to Section 67-3-2, and Section 67-3-4 NMSA 1978, the governor has the power to appoint six members to the state transportation commission with the advice and consent of the senate. The governor must submit the names of his appointees to the senate no later than the thirtieth day of each regular session of the legislature. Neither the constitutional provision nor the applicable statutory provisions limit the broad appointment powers of the governor in any way, except in the event the governor refuses or fails to submit names for confirmation, in which case the senate appoints the commissioners. See Section 67-3-4(B).

The Governmental Conduct Act has several provisions addressing conflicts of interest that may affect Mr. Maes' ability to serve while continuing his private employment as a registered lobbyist. First, Section 10-16-3(A) provides that a public officer must treat the government position as a public trust, and the public officer can only use the position to advance the public interest and not for personal benefit. Mr. Maes must guard the public trust as a State Transportation Commissioner, as he concurrently acts privately as a lobbyist for the State Investment Council and other clients.

Second, Section 10-16-3(C), provides that a public officer must make a full disclosure of any real or potential conflicts of interest. Mr. Maes must use this disclosure as a guiding principal as he determines whether it is appropriate for him to vote on a matter while publicly stating his lobbyist position. Depending on the circumstances, it may be best for Mr. Maes to recuse himself from a vote or temporarily disassociate himself from certain private interests during his term in order to vote on items and appear above reproach.

Third, Section 10-16-4 provides that it is unlawful for a public officer to take an official act for the primary purpose of directly enhancing the public officer's financial interest or position and disqualifies a public officer from engaging in an official act directly affecting the public officer's interest. The Governmental Conduct Act narrowly defines the term "financial interest" as an individual's or family member's ownership interest in business or employment. See Section 10-16-2(D) and (E). Nevertheless, to avoid any question under Section 10-16-4, we believe Mr. Maes must determine whether a matter he is voting on as a commissioner would affect his financial interest or position or the financial interest of a client that hires Mr. Maes as a lobbyist and whether he should disqualify himself from voting on that matter.

Fourth, Section 10-16-6 provides that a public officer shall not use or disclose any confidential information acquired by virtue of his office for the public officer's or another's gain. Mr. Maes would not be able to disclose any confidential information he acquires as a state highway commissioner for his gain or the gain of a client.

In conclusion, there is nothing to prevent Mr. Maes from serving on the State Transportation Commission at the same time that he is acting as a lobbyist for other state and private entities.

The Honorable Stuart Ingle and The Honorable Dianna Duran

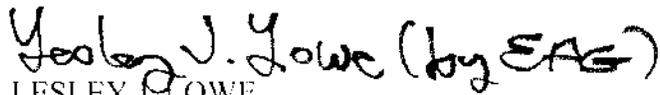
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His appointment to the Commission does not affect his ability to select his clients. However, the clients he serves as a lobbyist may affect his ability to function as a commissioner. There may be times when he will have to refrain from voting on certain matters, where the commission's actions might affect his personal and private financial interests or the financial interests of his clients.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,


LESLEY J. LOWE
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General