

# GENERAL ADVICE

## FROM GENERAL COUNSEL

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## Anti-Donation Clause and Other Gift Restrictions in Government

The New Mexico legislative season is upon us, and many NMSU employees will have reason to engage in our efforts to promote or oppose various bills and initiatives that will be brought before the Legislature. So, this is a good time to remind everyone about some New Mexico laws that restrict government officials and employees in the giving and accepting of gifts, not only in their dealings with the Legislature, but in other situations as well.

### N.M. Gift Act

Any gift giving to government officials or employees by individuals who interact with these individuals in their official capacity may create the appearance of impropriety and some gift-giving and acceptance is prohibited by law. (NMSA §§ 10-16B-1 et seq. "Gift Act.") Under the New Mexico Gift Act, it is illegal for a "restricted donor" to offer, or for a state officer or employee or their family members ("donees"), to accept from a restricted donor, a gift with a market value greater than \$250.00. A restricted donor is someone who is seeking any kind of benefit (for him/herself or for his/her business or his/her client or employer) from the public officer or employees official actions. Under this law, legislators, as well as other government employees and officials, are restricted in their ability to accept certain gifts. For NMSU employees, both giving and accepting gifts may violate the law in some circumstances.

**Gift Definition:** The law defines a gift as anything of value transferred without commensurate consideration including food, lodging, transportation and tickets for entertainment or sporting events.

**Accepting Gifts:** NMSU employees need to be cognizant of the \$250 restriction when accepting gifts, particularly if the gift is offered by vendors, or students or their parents, or others who have or want to have a business relationship with NMSU. If the gift is intended to solicit your favor as an official of NMSU, it is subject to this restriction. All gifts received and accepted by you individually or by a family member, from individuals doing business with NMSU or seeking to do business with NMSU, with an aggregate value of \$100 must be reported on your conflict of interest form, and should be valued at no more than \$250.

**Giving Gifts:** The giving of gifts by NMSU employees is also subject to several legal restrictions. Under the Anti-Donation Clause of the New Mexico Constitution (Art. 9, §14; more on this law below), it is illegal for NMSU employees to use public money to procure and give gifts. Foundation gift funds are not subject to the Anti-Donation Clause and may be used to provide gifts, subject to the Foundation Gift Spending Policy. However, even when procured with Foundation funds, gifts to legislators or to any other governmental official are suspect and may violate the NM Gift Act.

**Reporting Gifts:** NMSU has two lobbyists registered with the Secretary of State – Ricardo Rel and Vicente Vargas. As the employer of registered lobbyists, NMSU is legally prohibited from donating gifts *of an aggregate market value* greater than \$1,000 in a calendar year to any one state officer or state employee or candidate for public office. To ensure that we do not exceed this limit, Ricardo Rel tracks any and all gifts from any NMSU employee to any legislator or public official or employee. He is required to report all gifts to the Secretary of State - so it is important that any gifts *made by any unit of NMSU in any dollar amount* be reported in advance to Ricardo Rel so he can ensure that we will not exceed the \$1,000 limit.

## Anti-Donation Clause in NM Constitution

Most administrators at NMSU have, at one time or another, been told that a proposed activity would violate the Anti-Donation Clause in the NM Constitution. While the existence of this law is widely known, it is not uncommon for governmental employees in charge of public funds to forget that we do not have the authority to dispose of public funds or assets in any way we choose – and that this legal restriction applies even if our intentions are good and the recipient of the largess is deserving. Public funds subject to this restriction include not only appropriated funds, but also any other funds acquired by NMSU in the conduct of its official business, including funds paid on grants and contracts.

The key phrase from the Constitution states: “Neither the state nor any county, school district or municipality . . . shall directly or indirectly lend or pledge its credit **or make any donation to or in aid of any person, association or public or private corporation . . .**”

**Exceptions:** There are a number of exceptions to the prohibitions on governmental donations, the most relevant of which include allowing government to:

- make provision for the care and maintenance of sick and indigent persons;
- exempt military veterans from paying tuition under specific circumstances;
- loan money to students of the “healing arts” in exchange for contracting to practice within the state in designated areas for a period of years;
- provide land, buildings or infrastructure for facilities to support new or expanding businesses in order to create new jobs, but only when authorized by specific legislation; and
- make donations to assist in the creation of affordable housing, but only when authorized by specific legislation.

In addition, court cases establish that donations from one governmental entity to another are generally exempt (do not violate the clause).

**Additional Compensation or Payments:** One of the most common anti-donation issues that arises at NMSU is the desire to award extra compensation (beyond the contracted amount) to an individual or employee, or to a vendor, for services that have already been rendered. Court cases clearly establish that this is prohibited.

**Disposal of Surplus Property:** Keep in mind that when your unit has surplus property, that property must be disposed of in accordance with law and NMSU policy. Giving such property to a private person or entity – including a charity – is illegal, no matter how low the value. Surplus property can be freely given to other units on campus, and can generally be given to other units of state or local government if NMSU policies and procedures are followed. In all other cases, such property must be disposed of in accordance with state law through our property office.