

11/23/73

Memorandum 73-100

Subject: Governmental Conflict of Interests Act

This memorandum attempts to determine what are the requirements of the new Governmental Conflict of Interests Act (Cal. Stats. 1973, Ch. 1166, effective January 1, 1974) and how these requirements may be satisfied as they apply to the Commissioners. Under Section 3708 of the act, the Secretary of State is given the responsibility to disseminate information about the requirements of portions of the act. This information is not expected to be issued until early December; however, in an effort to interpret difficult points, the staff talked informally with a member of the Secretary of State's staff who is working on this information. Attached to this memorandum are a copy of the act and a memorandum analyzing part of the act which was forwarded to the staff by Commissioner Gregory.

The following discussion is broken down into four parts: I. Prohibitions, II. Disclosure, III. Enforcement, and IV. Procedure for Adopting Guidelines and Rules.

#### I. Prohibitions

##### Requirements of Section 3625

Section 3625 contains two prohibitions. Subdivision (a) states that "no official shall have economic interests which are in substantial conflict with the proper exercise of his official duties and powers." Subdivision (b) states that:

no public official shall participate in, or in any way attempt to influence governmental action or decisions relating to any matter within the responsibilities of his agency in which he knows or has reason to believe he has an economic interest.

These general statements are apparently limited by subdivision (c) which indirectly defines "economic interest" as follows:

An official has an economic interest in a matter if the action or decision will have a material economic effect on:

(1) Any business entity [defined in Section 3610(a)] in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000);

(2) Any real property [defined in Section 3610(i)] in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000);

(3) Any source of income [defined in Section 3610(e)], loans or gifts [defined in Section 3610(d)] aggregating two hundred fifty dollars (\$250) or more in value received by or promised to the public official within 12 months prior to the time when the action is taken or decision made;

(4) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Subdivision (c) also explains the meaning of "indirect investment or interest."

It should be noted that the definition of "economic interest" in subdivision (c) may not limit that term as it is used in subdivision (a) since the first sentence and paragraph (3) of subdivision (c) as well as subdivision (b) refer to actions taken and decisions made, whereas subdivision (a) refers more generally to official duties and powers. The term "economic interests" in subdivision (a) could be held to have a broader meaning than it is given in subdivision (c), in which case subdivision (a) is even more vague than subdivision (b). The terms are also separately referred to in Section 3626. However, the Secretary of State's office at this time considers subdivision (c) to be a limitation on both subdivisions (a) and (b).

Section 3627 contains certain prohibitions applicable to former officials.

### Application of Prohibitions to Commission

There is little doubt that the prohibitions of Section 3625 apply to the Commission. Section 3610(g) defines "public agency" to include a "commission," and Section 3610(h) defines "public official" as "any elective or appointive officer of any public agency." (Comparison with earlier versions of the bill suggest that the staff, including the Executive Secretary, is not covered by the term "officer.") Additionally, it should be noted that Section 3602 provides that the act is to be "liberally construed, to the end that the public interest be fully protected."

A technical, but unconvincing, argument that the Commission is not covered by the prohibition in Section 3625(b)(and perhaps in subdivision (a)), follows from the language of subdivision (c) that there is an economic interest if the "action or decision will have a material economic effect" on the four interests listed therein. Commission actions and decisions do not of themselves have any material economic effect; it is only when Commission decisions are in effect ratified by the Legislature that any economic effect can occur. While this is technically correct, the staff believes that this result would not be in accord with the intent of the act. The Secretary of State's office suggested that they would agree with the staff opinion in this regard.

### Determination of a Conflict

There are many difficulties and ambiguities facing a Commissioner who tries in a given case to determine whether he has an economic interest which is in substantial conflict with the proper exercise of his duties or which prevents him from participating in Commission decisions. The problem is not made much simpler if it is assumed that the delineation of "economic interest"

in subdivision (c) of Section 3625 limits the scope of both subdivisions (a) and (b). As pointed out in the attached memorandum, there are several difficulties in applying subdivision (c): (1) "Material economic effect" is a concept crucial to the determination of whether the official has an economic interest which prevents him from participation in agency decisions, but that term is nowhere defined. (2) Assuming the official knows what a material economic effect might be, it will often be an exceedingly complex matter to determine whether a particular agency decision might have that effect on the business entity, real property, or other source of income listed in subdivision (c). (3) The official is required not to participate where he knows or reasonably believes that he has a conflicting economic interest, but it is impossible to know until the act is interpreted what the standards of reasonableness are to be.

Section 3626 offers a faint prospect for resolving some of these problems. Section 3626 allows the agency to adopt "guidelines" to aid its officials in determining whether they have economic interests in violation of subdivision (a) of Section 3625 and whether they have an economic interest in violation of subdivision (b). When such guidelines are "complied with in the good faith belief that they are consistent" with subdivisions (a) and (b) of Section 3625, the official is exempt from the civil penalties of Section 3751 and the forfeiture of office provision of Section 3753.

Because of the vagueness and difficulty of application of Section 3625, the Commission may want to attempt to develop guidelines consistent with Section 3625 which would permit a Commissioner to more confidently determine whether he has an economic interest or interests for the purposes of subdivisions (a) and (b). The staff believes it will be very difficult to develop specific guidelines. The staff would be particularly handicapped in

attempting to develop guidelines since we do not have the necessary information concerning financial interests of the Commissioners. If the Commission decides to attempt the development of guidelines, the staff would need significant aid and information from the Commissioners. But, basically, the determination of the application of Section 3625 is a matter peculiarly within the knowledge of each Commissioner.

#### Exceptions to Prohibitions

Subdivisions (d) and (e) of Section 3625 contain three exceptions to the prohibition of subdivision (b); there are no exceptions to subdivision (a). Subdivision (d) states that subdivision (b) does not apply to a "constitutional officer" or to "any public official with respect to any matter which could not legally be acted upon or decided by his public agency without his participation," on condition that the officer or official disclose as a matter of public record any interest described in subdivision (c) before he participates in the decision and that he not attempt to influence any other official. Subdivision (e) contains the following exception to subdivision (b):

Subdivision (b) of this section shall not apply if the action or decision affects an economic interest of the official as a member of the public or a significant segment of the public or as a member of an industry, profession or occupation, to no greater extent than any other such member of the public, segment of the public or an industry, profession or occupation.

This exception does not require disclosure.

#### Application of Exceptions to Commission

Assuming that a Commissioner has concluded that, under the terms of subdivisions (b) and (c) of Section 3625, he should not participate in the Commission's decision, will any of the three exceptions to subdivision (b) allow his participation?

Constitutional officer exception. The two legislative members are constitutional officers as defined in Section 3610(c), but it is not clear from subdivision (d)(1) whether a constitutional officer is exempt from subdivision (b) when he is acting as a Commissioner. Presumably the policy behind the constitutional officer exception is to allow elected state officials to participate so long as they disclose their interests and avoid influencing other officials in the matter. Since there is no contrary indication, the staff concludes that this policy probably applies as well where the legislator is acting as a Commissioner.

Necessity exception. The meaning of this exception in subdivision (d)(2) is not further explained. The staff assumes that the term "legally" encompasses agency regulations. The Secretary of State's office indicated the word "legally" was left purposefully vague. The Commission's Handbook of Practices and Procedures contains the following:

Quorum. Four voting members of the Commission constitute a quorum and must be present before the Commission may attend to any business. Any action may be taken by a majority of those present if a quorum is present, but any final recommendation to the Legislature must be approved by a minimum of four affirmative votes. The Chairman is authorized to determine that less than four voting members constitutes a quorum for the purposes of a particular meeting and members attending the meeting are entitled to per diem and travel expenses but no final action shall be taken at such meeting.

If the word "present" in the first sentence of the above rule is interpreted as "present and able to vote," then the necessity exception would apply where the Commissioner with a conflict of interest is necessary to make up a quorum. Of course, under the last sentence of the above rule, the Chairman may determine that fewer than four members is a quorum; but this is a determination that no decisions or final action will be made at all and would not seem to vitiate the exception in Section 3625(d)(2). It seems that the necessity exception would also apply where the matter being voted on is a final

recommendation and the Commissioner with a conflict of interest is necessary to achieve the four affirmative votes needed for such action. The Commission should clarify these rules in light of the new act.

Of course, where the necessity exception applies, the Commissioner is required to disclose his economic interest as a matter of public record and to refrain from influencing other Commissioners.

Occupation exception. Subdivision (e) allows an official to participate even where there is a conflict under subdivision (b) if the matter would affect his interests only generally as a member of the public or as a member of an industry, profession, or occupation. This exception does not require any disclosure before participation.

Like many other provisions of the act, subdivision (e) is subject to varying interpretations, depending on the meaning of the terms "member of an industry, profession or occupation." The tentative interpretation of these terms by the Secretary of State's office is such as to include as a member of an industry an official who has a direct or indirect investment worth more than \$1,000 in a business entity of that industry, who has any source of income from that industry, or who is a director, officer, partner, trustee, employee, or holds any position of management in a business entity of that industry. This interpretation is necessary to avoid the anomalous result of allowing a company president (clearly a member of the industry) to participate in agency decisions while forbidding the participation of a mere stockholder having a \$1,000 investment or receiving \$250 in dividends. Hence, the exception of subdivision (e) should apply to any Commissioner who would otherwise be prevented from participating in Commission decisions under subdivisions (b) and (c) because he has stock in a business entity, is an employee of a business entity, or has a business entity for a client.

Once it is determined that a Commissioner is a member of an industry for the purposes of subdivision (c), the exception applies if the Commission decision affects the Commissioner "to no greater extent than any other such member of . . . an industry . . . ." This condition should always be satisfied by Commission decisions since the function of the Commission is to recommend legislation which by its nature will apply equally to all members of an industry who are similarly situated.

As indicated above, Section 3626 allows the agency to adopt guidelines to aid its officials. Although Section 3626 refers only to subdivisions (a) and (b), the opinion of the Secretary of State's office is that, since compliance with subdivision (b) requires reference to the exceptions of subdivisions (d) and (e), Section 3626 would provide authority for adopting guidelines interpreting these exceptions. The staff recommends that the Commission adopt guidelines reflecting the interpretation of the exception in subdivision (e) and perhaps also the exception in subdivision (d)(2).

## II. Disclosure

Section 3703 seemingly requires every official, including Commissioners, to "file a statement disclosing his financial interests." However, by its terms, Section 3703 requires a filing "as required by Section 3704" and Section 3704 provides that "every public agency may adopt and promulgate rules governing disclosure of financial interests by its officials." It is interesting to note that, in earlier versions of the bill, this provision read "shall" instead of "may." The Secretary of State's office indicates that they think there is an ethical and political burden on the agency to adopt such regulations. However, Section 3704 is unambiguous in making the adoption of rules permissive. The staff concludes that the adoption of disclosure rules is probably

at the Commission's option. In considering this option, the Commission should remember that the exceptions in Section 3625(d) require disclosure as a condition to their application. Presumably this form of disclosure could be regulated under the authority of Section 3704.

### III. Enforcement

The act may be enforced by a district attorney, by the Attorney General, or by any citizen or group of citizens. The court may restrain execution and ultimately void agency action upon a preliminary showing that there are reasonable grounds to believe that a violation has occurred in relation to the action. (Section 3751(a) and (b).)

A penalty of as much as three times the amount of a benefit received or an interest not reported may be imposed on the official who violates Section 3625. (Section 3751(c) and (d).) A violation is also grounds for forfeiture of office. (Section 3753.)

### IV. Procedure for Adopting Guidelines and Rules

As discussed above, the Commission may want to adopt guidelines for making determinations under Section 3625 and also may want to adopt rules governing disclosure under Section 3704. Discussion of the act with the Secretary of State's office raises the question of whether adoption of guidelines and rules is subject to the Administrative Procedure Act. The staff tentatively concludes that the Administrative Procedure Act does not govern these matters as far as the Commission is concerned. Section 11371 of the Government Code provides that, for the purposes of Chapter 4.5 (Sections 11371-11445) concerning rules and regulations, "'state agency' does not include an agency in the judicial or legislative departments of the State Government." The provisions establishing and governing the Commission are Chapter 2 (commencing

with Section 10300) of Part 2 (Aids to the Legislature) of Division 2 (Legislative Department) of Title 2 of the Government Code. For purposes of the budget, the Commission is a legislative agency. Hence, the staff believes that the Commission may adopt guidelines and rules according to its own practice and procedure.

Respectfully submitted,

Stan G. Ulrich  
Legal Counsel

Senate Bill No. 716

CHAPTER 1166

*An act to add Division 4.5 (commencing with Section 3600) to Title 1 of, and to repeal Article 4.6 (commencing with Section 1120) of Chapter 1, Division 4 of Title 1 of and Division 4.5 (commencing with Section 3600) of Title 1 of, the Government Code, relating to conflicts of interest.*

(Approved by Governor October 2, 1973. Filed with  
Secretary of State October 2, 1973.)

LEGISLATIVE COUNSEL'S DIGEST

SB 716, Moscone. Conflict of interest.

Deletes certain provisions requiring the disclosure by members of governing body, boards and commissions of any local public agency of direct personal financial interests in noncontractual matters coming before them.

Deletes and adds provisions relating to specified financial disclosure by specified public officers and candidates for public office and requires yearly disclosure, by a public official, of, among other things, all investments in a business entity worth more than \$1,000; a description of any real property he is interested in whose fair market value is worth more than \$1,000; and the source of income, loans, or gifts in excess of \$250 received in the previous 12 months.

Defines terms used.

Makes provision for filing such a statement.

Provides for enforcement of such provisions and for specified penalties for violation of such provisions.

Provides that, due to specified findings, neither appropriation is made nor obligation created for the reimbursement of any local agency for costs incurred by it pursuant to the act.

*The people of the State of California do enact as follows:*

SECTION 1. Article 4.6 (commencing with Section 1120) of Chapter 1 of Division 4 of Title 1 of the Government Code is repealed.

SEC. 2. Division 4.5 (commencing with Section 3600) of Title 1 of the Government Code is repealed.

SEC. 3. Division 4.5 (commencing with Section 3600) is added to Title 1 of the Government Code, to read:

## DIVISION 45. CONFLICT OF INTEREST

## CHAPTER 1. LEGISLATIVE POLICY

3600. This division shall be known and may be cited as the Governmental Conflict of Interests Act.

3601. The Legislature enacts this division

(1) To assure the independence, impartiality and honesty of public officials in governmental actions and decisions;

(2) To inform citizens of the existence of personal economic interests which may present a conflict of interest between the official's public trust and private gain;

(3) To prevent public office from being used for personal gain, other than the remuneration provided by law;

(4) To assure that governmental decisions and policy be made in the proper course according to the proper procedures and considerations;

(5) To prevent special interests from unduly influencing governmental decisions and policy; and to assure to the extent possible, that governmental decisions and policy reflect the public interest.

3602. The provisions of this division are to be liberally construed, to the end that the public interest be fully protected. If any provision of this act or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this act which can be effected without the invalid provision or application, and to this end the provisions of this act are severable.

3603. Nothing in this division shall prevent any public agency from adopting rules relating to conflicts of interest of its officers which require disclosure or disqualification in addition to the requirements of this division.

3604. (a) Every document, record, or statement required to be filed pursuant to the provisions of this division is a public record and shall be made available at reasonable times for inspection by any member of the public.

(b) A copy of each such document, record, or statement shall be given to any member of the public upon payment of a reasonable charge, not to exceed ten cents (\$0.10) per page.

## CHAPTER 2. DEFINITIONS

3610. The terms used in this division are defined as follows:

(a) "Business entity" means any undertaking operated for economic gain, including, but not limited to, a corporation, partnership, trust, business, proprietorship, firm, association, or joint venture.

(b) "Candidate" means any person who seeks nomination for or

election to a state, county, regional, general law or chartered city, or district office at any primary or special or general election.

(c) "Constitutional officer" means the Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, Attorney General, State Superintendent of Public Instruction, Members of the Legislature, and all other elected state officials.

(d) "Gift" means any thing of economic value given without valuable consideration but does not include campaign contributions nor gifts from relatives.

(e) "Income" means income of any nature from any source derived, including but not limited to any salary, wage, advance, payment, dividend, interest, rent, return of capital, forgiveness of indebtedness, rebate of money, or anything of economic value.

(f) "Investment" means any economic interest, but does not include a time or demand deposit in a financial institution, shares in a credit union or the cash surrender value of life insurance or of any debt instrument having a set yield unless it is convertible to an equity instrument.

(g) "Public agency" means the Legislature, the office of any constitutional officer, county, city and county, charter or general law city or district, and any agency, department, commission, or bureau office or comparable unit of the state, any county, city and county, general law or charter city or district government.

(h) "Public official" means any elective or appointive officer of any public agency.

(i) "Real property" means any interest or option to purchase any interest in any real property, but does not include a home or property used by the owner primarily for personal or recreational purposes.

### CHAPTER 3. PROHIBITIONS

3625. (a) No official shall have economic interests which are in substantial conflict with the proper exercise of his official duties and powers.

(b) No public official shall participate in, or in any way attempt to influence, governmental action or decisions relating to any matter within the responsibilities of his agency in which he knows or has reason to believe he has an economic interest.

(c) An official has an economic interest in a matter if the action or decision will have a material economic effect on:

(1) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000);

(2) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000);

(3) Any source of income, loans or gifts aggregating two hundred fifty dollars (\$250) or more in value received by or promised to the public official within 12 months prior to the time when the action is

taken or decision made.

(4) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent children of the public official, by an agent on his behalf, or any business entity controlled by the public official or by a trust in which he has a substantial economic interest. A business entity is controlled by a public official if the public official, agents, spouse or dependent children, possess more than 50 percent of the ownership interest in the entity. A public official has a substantial economic interest in a trust, when the official, his spouse or dependent children have a present or future interest worth more than one thousand dollars (\$1,000).

(d) Subdivision (b) of this section shall not apply to the following:

(1) To any constitutional officer;

(2) To any public official with respect to any matter which could not legally be acted upon or decided by his public agency without his participation;

provided that the constitutional officer or official specifically disclose as a matter of official, public record the existence of any economic interest described in subdivision (c), and describe with particularity the nature of the interest before he acts or decides or participates in any action or decision; and provided further that he in no way attempts to influence any other public official with respect to the matter.

(e) Subdivision (b) of this section shall not apply if the action or decision affects an economic interest of the official as a member of the public or a significant segment of the public or as a member of an industry, profession or occupation, to no greater extent than any other such member of the public, segment of the public or an industry, profession or occupation.

3626. Each public agency may adopt guidelines for its officials in their determination whether they have an economic interest or interests which are in substantial conflict with the proper exercise of their official duties and powers under subdivision (a) of Section 3625 and in determining whether they have an economic interest in matters for purposes of subdivision (b) of Section 3625. These guidelines shall not supersede the requirements of subdivisions (a) and (b) of Section 3625, but when complied with in the good faith belief that they are consistent with those provisions they shall exempt officials from the civil penalties in Section 3751 and the sanctions in Section 3753.

3627. (a) Except as a governmental employee or consultant, no former official shall influence or attempt to influence for compensation, the public agency by which he was employed or which he served, or any of its members, officers or employees in their

official duties within a period of two years after the termination of his employment or service.

(b) Within a period of two years after termination of his service or employment, no former public official shall receive compensation from any person whose economic interests were the subject of or affected by any action or decision in which he participated or was involved in his official capacity during the period of his service or employment, unless the action or decision was one which affected the person's interests as a member of the public or a significant segment of the public, or as a member of an industry, profession or occupation to no greater extent than any other such member of the public or the industry, profession or occupation.

(c) Subdivisions (a) and (b) of this section shall not apply to a former public official unless the official receives compensation or other thing of value from a business entity having a contractual relationship with the public agency by which the official was employed.

#### CHAPTER 4. DISCLOSURE

3700. (a) This section is applicable to constitutional officers, county supervisors and chief administrative officers, mayors, city council members, members of planning commissions and planning officers, and managers and chief administrative officers of general law or charter cities.

(b) During April of each year, officials designated in subdivision (a) of this section shall file a statement containing the following information:

(1) The name, principal address, and general description of the nature of the business activity of any business entity in which he has, or at any time during the year had, a direct or indirect investment worth more than one thousand dollars (\$1,000), and whether the value of such investment exceeds ten thousand dollars (\$10,000);

(2) A description of any real property in which he has, or at any time during the year had, a direct or indirect interest worth more than one thousand dollars (\$1,000), including the street address of the property, the place, book and page number where such interest is recorded and whether the value of such interest exceeds ten thousand dollars (\$10,000).

(3) Each source of income, loans or gifts, aggregating two hundred fifty dollars (\$250) or more in value, received in the preceding 12 months, including the name, address, and general description of the business activity of each source, a statement of the consideration, if any, for which the income was received, and whether the aggregate value of the income, loans and gifts received was worth more than one thousand dollars (\$1,000).

(4) Any employment, position of management or office, salaried or otherwise, held at the time of filing, or at any time during the year

by the public official and the name, principal address and a general description of the nature of the business activity of the business entity.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent children of the public official, by an agent on his behalf, or by any business entity controlled by the public official or a trust in which he has a substantial economic interest. A business entity is controlled by a public official if the public official, his agent or spouse and dependent children, possess more than 50 percent of the ownership interest in the entity. A public official has a substantial economic interest in a trust when the official, his or her spouse or dependent children have a present or future interest worth more than one thousand dollars (\$1,000).

(c) The statement required by this section need not disclose any interest otherwise includable under subdivision (b) including investments, interests or income, which could not be affected materially by any action, failure to act or decision taken by the public official acting within the scope of his official duties.

(d) For the purposes of this section, an interest in real property located within the jurisdiction of the official's agency or an investment in a business entity, a source of income or a position of employment, office or management in any business entity located within the jurisdiction or doing business within the jurisdiction shall be regarded as an interest which could be effected materially by the official in the scope of his official duties.

3701. (a) Each nonincumbent candidate, at the time he files his nomination papers or his declaration of acceptance, shall file a statement containing the information required by Section 3700 for persons holding elective office.

(b) Each person nominated for appointment or appointed to public office designated in subdivision (a) of Section 3700, 10 days or more before he is confirmed or assumes office shall file a statement containing the information required by Section 3700 for persons holding that office.

3702. Every public official designated in subdivision (a) of Section 3700 who ceases to hold office shall, within 30 days after ceasing to hold office, file the statement containing the information specified in subdivisions (b) and (c) of Section 3700.

3703. During April of each year every official, except those designated in subdivision (a) of Section 3700 shall file a statement disclosing his financial interests as required by Section 3704.

3704. (a) Every public agency may adopt and promulgate rules governing disclosure of financial interests by its officials. County and city and county boards of supervisors, city councils of general law and chartered cities and the governing boards of special districts may adopt and promulgate the rules for officials in the agencies subject to their control.

district attorney fails to take action, or any citizen or group of citizens of this state, may bring an action in superior court to enjoin violations of or compel compliance with the provisions of this division.

(b) Upon a preliminary showing that there are reasonable grounds to believe that a violation of Section 3625 has occurred, the court may restrain the execution of any decision, contract, order, permit, resolution or other official act in relation to which a violation of this section is alleged to have occurred, pending final adjudication, provided that any injury suffered by innocent persons relying on the official act does not outweigh the public interest in a temporary stay of the act. If it is ultimately determined that a violation has occurred, the court may set aside as void any decision, order, permit, resolution, contract or other official action affected by the violation.

(c) If it is determined that a violation of Section 3625 has occurred, and if the public official who committed the violation realized an economic benefit as a result of the action or decision, the court may impose a penalty against the public official of up to three times the value of the benefit.

(d) If it is determined that an interest which should have been disclosed in the report required by Section 3700 was omitted, the court may impose a penalty of up to three times the value of the omitted interest.

3752. The court may award reasonable attorney fees and court costs to the prevailing party or parties, whether or not there has been a final judgment in the matter.

3753. A violation of any provision of this division shall be grounds for forfeiture of office as provided in Section 1700 of the Government Code and for disqualification from holding public office as provided in Section 1021 of the Government Code.

3754. (a) No public official required to file a statement pursuant to Section 3700 shall receive any compensation from the government for the period in which he is in violation if the statement is not filed as required.

(b) No public official required to file a statement pursuant to Sections 3700 or 3703 shall take office until the statement as required has been filed.

3760. If any provision of this act or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this act which can be effected without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. 4. The Legislature recognizes that during any legislative session a variety of changes to laws relating to crimes and infractions may cause both increased and decreased costs to local government entities and school districts which, in the aggregate, do not result in significant identifiable cost changes.

The duties, obligations, or responsibilities imposed on local governmental entities or school districts by this act are such the

related costs are incurred as a part of their normal operating procedures.

Therefore, no appropriation is made by this act nor is any obligation created thereby under Section 2231 of the Revenue and Taxation Code, for the reimbursement of any local agency for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on or performed by it by this act.

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MEMORANDUM

October 9, 1973

Senate Bill No. 716

When is one prohibited from acting on a matter which could affect something in which he has a financial interest?

Answer: Not definitely answerable.

Discussion: Chapter 3 (§ 3625-3627) of the act which delineates when a public official may or may not act in his official capacity is a prime example of inept draftsmanship. It utilizes terms which have generally understood meanings as words of art having different meanings. Moreover, words critical to the application of the chapter which, at most, have vague objective definitions are left undefined.

For example, § 3625(b) provides "[N]o public official shall participate in, or in any way attempt to influence, governmental actions or decisions relating to any matter within the responsibilities of his agency in which he knows or has reason to believe he has an economic interest." However, economic interest is particularly defined for the purpose of this chapter as follows: "[A]n official has an economic interest in a matter if an action or decision will have a material economic effect" on the business entity in which he has an investment of more than \$1,000; any source of income, loans or gifts aggregating to \$250 or more in value within twelve months prior to the time when the action is taken or decision is made; any real property in which he has an interest of more than \$1,000; or any business entity in which he is a director, official, partner, trustee, employee, or holds any position in management. Material economic effect is a very vague phrase and is nowhere defined.

The wording of this chapter would seem to leave the public official in a rather precarious position. Suppose a public official has \$1,000 worth of stock in a major department store and his agency is working on something relating to whether the adjusted balance method of computing charges on revolving charge accounts is to be used as opposed to the previous balance method of computing such charges. The adjusted balance method results in lower charges than does the previous balance method. It would, therefore, be obvious that a change to the adjusted balance method would affect the income of the department store in which the public official owned stock, and,

therefore, he would have at least some indication that he may have an economic interest in the matter as defined by § 3625(c). However, it would seem extremely difficult or impossible for him to determine whether or not the action of the agency would have a material economic effect on the business of the department store. First of all, material economic effect is not defined. Would a change in receipts due to the use of the adjusted balance which exceeds 10% of the current assets of the department store be considered material? Compare the definition of "material" for purposes of disclosing the existence of legal proceedings in SEC Registration Statement (Securities Act Forms, Form S-1, Item 12). Would a change in the income of the store in excess of \$30,000 be material? Compare the definition of "material" for the purpose of disclosure of the interests of management in transaction for purposes of the SEC Registration Statement (Securities Act Forms, Form S-1, Item 20).

Even assuming one could apply the material economic effect standard objectively, it may be virtually impossible for the official to determine whether the action of the agency would have such an effect on the business in which he owns stock. It would appear that even if the official obtained the financial records of the department store, it would still be a matter of pure guesswork as to whether the action of the agency would effect the business of the department store in any stated amount. It should also be noted that under § 3625(b), the official would not be prohibited from acting if the agency's action or decision would not affect the department store in which he owns shares to a greater extent than any other department store. There are certain department stores which already have the adjusted balance method and, therefore, would not be affected by the action at all. Does this section mean that the official could act only if every department store was affected in the same way or if a majority of the department stores are affected in the same way?

In view of the difficulty in knowing the effect on the corporations, with all the guesswork involved, the public official may be safe from penalty by the requirement of § 3625(b) that he must know, or have reason to believe he has an economic interest. However, the elements of knowledge the official might have, which would lead him to believe he does not have an economic interest may be found by others to have

been sufficient to cause him to have reason to believe that he did have an economic interest.