

See: Minutes of Commission
1/9/70, p. 15, Vol. IX, Tape #43
3/18/70, p. 9, Vol. IX, Tape #49

Minutes of Subcommittee on
Grading and Sentencing
4/5/70, p. 58, Vol. X, Tape #57

CRIMINAL LAW REVISION COMMISSION

311 Capitol Building
Salem, Oregon

ARTICLE 25. ABUSE OF PUBLIC OFFICE

Preliminary Draft No. 2; October 1969

Reporter: Roger D. Wallingford

Subcommittee No. 2

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Section 1. Abuse of public office; definitions. As used in this Article, unless the context requires otherwise:

(1) "Benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary.

(2) "High managerial agent" means an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employes.

(3) "Public servant" includes:

(a) A public officer or employe of the state or of any political subdivision thereof or of any governmental instrumentality within the state;

(b) A person serving as an advisor, consultant or assistant at the request or direction of the state, any political subdivision thereof or of any governmental instrumentality within the state;

(c) A person nominated, elected or appointed to become a public servant, although not yet occupying the position; and

(d) Jurors.

Section 2. <u>Official misconduct in the second</u>	(
<u>degree.</u> A public servant commits the crime of official	(	Existing
misconduct in the second degree if he knowingly violates	(	<u>Law</u>
any statute or lawfully adopted rule or regulation	(
relating to his office.	(	ORS
	(	162.510
	(	162.430
	(	162.440
	(	162.620
	(	162.630
	(	162.640
	(	162.650
	(	162.680
	(	162.690
	(	165.015
	(	167.515
	(	167.555
	(	169.350
	(	141.730
	(	141.090
	(	141.740

Section 3. Official misconduct in the first
degree. A public servant commits the crime of official
 misconduct in the first degree if with intent to obtain
 a benefit for himself or to harm another:

(1) He knowingly fails to perform a duty imposed
 upon him by law or one clearly inherent in the nature
 of his office; or

(2) He knowingly performs an act constituting an unauthorized
 exercise of his official duties.

COMMENTARY - OFFICIAL MISCONDUCT

A. Summary

Section 2 states the basic offense of official
 misconduct. Section 3 raises the offense to first degree
 official misconduct if the public servant is motivated by
 obtaining a benefit for himself or causing injury to
 another. Second degree official misconduct does not require
 this specific intent, but does require a knowing violation
 of duty.

B. Derivation

The official misconduct sections are taken from Michigan
 Revised Criminal Code sections 4805 and 4806.

C. Relationship to Existing Law

Perkins defines "misconduct in office" as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office". Perkins on Criminal Law (2d ed, 1969) p. 485.

Misconduct in public office may take any one of three different forms:

(1) Malfeasance, the doing of that which should not be done at all.

(2) Misfeasance, doing in an improper manner that which would otherwise be acceptable.

(3) Nonfeasance, failing to do that which should be done.

The common law punishment for misconduct in office is by imprisonment or fine, to which may be added removal from office and disqualification to hold future office. (Black's Comm. 121).

CJS, Officers, section 133:

"Malfeasance, misfeasance, nonfeasance, misconduct, misbehavior, or misdemeanor in public office is indictable at common law....At common law a failure or neglect of an officer to perform a ministerial duty imposed on him by law renders him guilty of a misdemeanor....Where, however, the duty which has not been performed is one involving discretion, the failure to perform it is not per se an indictable offense in the absence of wilful and corrupt motives....If a public officer, intrusted with definite powers to be exercised for the benefit of the community, wilfully abuses or fraudulently exceeds them, he is punishable....'Corruption', as applied to public officers, has been defined as an act done with intent to gain advantage not consistent with official duty and the rights of others....The legislature may, in the proper exercise of the police power, make official misbehavior a crime without proof of fraudulent intent...."

The mens rea requirement in section 2 and section 3 recognizes that inadequate performance of official duties should ordinarily be regulated by civil remedies. Criminal liability is justified only when the public servant acts with either (1) an intent to benefit himself or to harm another, or (2) with knowledge that the act violates an applicable statute or regulation. Both sections require a "knowing" violation of duty.

It is not intended that ordinary neglect of duty or negligent performance of duty should be covered. The negligent performance of an official function does not imply an intent to violate a known duty. This type of misconduct is best regulated by civil service procedure and election alternatives.

Section 3 (1), the "omission to act" offense, refers to a failure to perform an official nondiscretionary duty. It requires knowledge of that nondiscretionary duty, which must be one that is imposed by law, or one that is clearly inherent in the nature of the office.

"In those instances where the duties are prescribed by some special or private law, the indictment must show the source of the duties, but where the duties are imposed by a general statute or arise out of the very nature of the office, the source of the duty need not be alleged in the indictment for the courts will take judicial notice of such duties." State v. Weleck, 10 NJ 355, 91 A2d 751 (1952); State v. Winne, 12 NJ 152, 96 A2d 63 (1953).

A significant aspect of the proposed section on official misconduct in the first degree is its specific mens rea requirement not presently found in existing Oregon statutes relating to official misconduct. The culpability requirements in those statutes are vague and uncertain in that, for the most part, they are controlled by the nebulous term "wilfully".

1 Burdick, Law of Crime 388:

"Misconduct in office, or 'official misconduct', means...any unlawful behavior in relation to official duties by an officer intrusted in any way with the administration of law and justice, or, as otherwise defined, any act or omission in breach of a duty of public concern, by one who has accepted public office. The term is broad enough to include malfeasance, misfeasance, and nonfeasance. Under some statutes, it is necessary that the misconduct should be 'wilful', or 'wilful and corrupt', or 'wilful and malicious', but, in the absence of such provisions, corruption or criminal intention is not essential. The official doing of a wrongful act, or official neglect to do an act which ought to be done, is sufficient."

1 Bishop, Criminal Law (8th ed, 1892) section 468:

"One in office is indictable at the common law, confirmed by statutes in most of our states, if he wilfully or corruptly neglects or declines any official duty, equally whether prescribed by the written law or by the unwritten."

Some examples of the types of criminal prosecutions arising under misconduct in office penal statutes:

- (1) State v. Winne, 12 NJ 152, 96 A2d 63 (1953), County prosecutor convicted of criminal nonfeasance for wilful neglect to prosecute gambling offenses in county.
- (2) Kirkland v. State of Florida, 97 S 510 (1923), County Commissioner convicted of malpractice in office for purchasing lumber with county funds in excess of that authorized by budget.
- (3) State of Kansas v. Millhaupt, 61 P2d 1356 (1936), County Commissioner convicted for unlawfully paying a greater sum on an account than that actually due.
- (4) State of Wisconsin v. Larson, 286 NW 41 (1939), Secretary of Public Service Commission convicted of official misconduct for mishandling official records and correspondence.

In the Larson case, the Court states:

"In order to constitute an indictable offense of misbehavior in office, it is not essential that pecuniary damage should have resulted to the public by reason of an officer's irregular conduct or that the officer should have acted from corrupt motives....Proof of corrupt motives is essential only when the offense charged against a public officer is under that part of the statute relating to wilful extortion, wrong, or oppression in the refusal or neglect to perform an official duty required by law."

For further cases, see 134 ALR 1250, Conduct contemplated by statute which makes neglect of duty by public officer or employe a punishable offense.

There are presently sixteen Oregon statutes that deal directly or indirectly with misconduct in public office.

ORS 162.510 is a general statute prohibiting unlawful acts and omission by public officers. It reads:

"Any officer of this state, or of any county, town, or other municipal or public corporation therein, other than the Governor, judges of the Supreme Court or members of the Legislative Assembly, who wilfully and knowingly charges, takes or receives any fee or compensation other than that authorized or permitted by law, for any official service or duty performed by such officer, or who wilfully neglects or refuses to perform any duty or service pertaining to his office, with intent to injure or defraud any-

one to the injury of anyone, or the manifest hindrance or obstruction of public justice or business, whether such injury, hindrance, or obstruction was particularly intended or not, shall be punished upon conviction by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not less than three months nor more than one year, or by fine of not less than \$50 nor more than \$500, or by dismissal from office with or without either of any of such punishments."

ORS 162.430 provides that any sheriff, jailer or other officer who wilfully refuses to take into custody a lawfully committed person or prisoner is guilty of a misdemeanor.

ORS 162.440 prohibits any officer authorized to serve process from wilfully and wrongfully refusing, omitting or delaying execution of any lawful process. Punishable as a misdemeanor.

ORS 162.620 prohibits any person having legal custody of public records from wilfully destroying, secreting or mutilating same. This statute does not refer specifically to public officials. This offense, as it relates to private parties, will be covered under section ____, Tampering with Public Records.

Section 162.630 requires that all public officers, excepting school district clerks, having custody of public funds as "soon as practicable" pay the same to the county or State Treasurer. This statute is designated as a felony offense with a maximum penalty of 20 years imprisonment.

ORS 162.640 prohibits any public officer from making a profit by loaning or otherwise using public funds in his custody. Violation of the statute is a felony, punishable by imprisonment for not more than 20 years.

ORS 162.650 prohibits the State Treasurer from making a profit out of public funds and from removing money out of the treasury depository except as authorized by law. This is a felony offense.

ORS 162.680 prohibits Port Commissioners or public officers from making a profit by loaning or otherwise using any money in the hands of the Port Commissioners. This is a felony offense.

ORS 162.690 prohibits school clerks, school directors, or any public officer from making a profit by loaning or using money in the hands of school clerks. This is a felony punishable by a prison term not to exceed 20 years or a \$50,000 fine, or both.

ORS 165.015 is a larceny statute that prohibits any person from converting public funds to his own use.

ORS 167.515 provides a misdemeanor penalty for any district attorney, sheriff, constable, city or town marshall or public officer who refuses or "wilfully" neglects to diligently prosecute gambling violations.

ORS 167.555 (3) directs peace officers to confiscate and destroy prohibited gambling devices. No criminal penalty is provided for failure to discharge this duty.

ORS 169.350 provides that a sheriff or his officer is guilty of a misdemeanor if served with a judicial paper and "wilfully" fails to act as directed.

ORS 141.730 prohibits any officer from knowingly proceeding under an expired judicial order for interception of telecommunications, radio communications or conversations. Violation is punishable by imprisonment in the penitentiary not to exceed 3 years, a \$3,000 fine, or both.

ORS 141.090 provides a misdemeanor penalty for any person who maliciously and without probable cause procures a search warrant to be executed and issued.

ORS 141.740 prohibits confidential records relating to an application for an order for interception of telecommunications, radio communications or conversations from being released or the material therein disclosed, except by written orders of the court. The penalty is identical with that provided for in ORS 141.730.

There are many additional statutes imposing criminal liability for official misconduct in the various ORS chapters relating to Government Structure and Finances, Public Services and General Welfare, etc. An example is ORS 305.990 (4), relating to the administration of the Tax Court, which reads, "Any public officer who neglects or refuses to perform any of the duties imposed on him by law as to the assessment, levying or collection of taxes shall be punished, upon conviction, by a fine not exceeding \$500 or by imprisonment in the county jail not exceeding one year."

All of these statutes dealing directly with official misconduct would be repealed by the proposed section. Some of the sections are applicable to persons other than public officials. These offenses will be included in other sections, e.g., Tampering with Public Records, Unsworn Falsification to Authorities, Obstructing Administration of Law or Other Government Function.

Those felony offenses relating to the mismanagement or diversion of public funds for personal gain will be covered by the Theft and Embezzlement sections.

Oregon Constitution, Article VII, Section 6, "Incompetency or malfeasance of public officer. Public officers shall not be impeached; but incompetency, corruption, malfeasance or delinquency in office may be tried in the same manner as criminal offenses, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law."

There are no reported Oregon cases that discuss in detail the scope of criminal liability for official misconduct. A number of cases make it clear that such liability is recognized in Oregon:

In Svenson v. Brix, 156 Or 236, 64 P2d 830 (1937), the Court quoted with approval 2 Cooley on Torts (4th ed) 300:

"The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecutions." (p 242)

In Fleischner et al v. Florey et al, 111 Or 35, 224 P 831 (1924), a County Treasurer was held personally accountable for public funds that had been deposited in a bank that failed. The Court, in measuring the public official's responsibility, said:

"Not only our statute but public policy demands that such public official should be responsible for all public moneys received by him irrespective of whether or not he is negligent. The rule of strict accountability is the only rule which will safeguard the welfare of the public."

In State v. Langley, 214 Or 445, 315 P2d 560, 323 P2d 301 (1958), the Multnomah County District Attorney was fined \$100 and removed from office for wilfully refusing to diligently prosecute persons guilty of violating state gambling law.

The Court in Secretary of State v. Hanover Insurance Co., 242 Or 541, 411 P2d 89 (1966), articulated its sense of the public trust in two succinct sentences:

"A strict standard of care is applicable to custodians of public money. Oregon has never departed from this standard, and should not do so now."

TEXT OF REVISIONS OF OTHER STATES

Text of the Model Penal Code

Section 243.0. Definitions.

In this Article, unless a different meaning plainly is required, the definitions given in Section 240.0 apply.

Section 243.1. Official Oppression.

A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor if, knowing that his conduct is illegal, he:

(a) subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights; or

(b) denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity.

Section 243.2. Speculating or Wagering on Official Action or Information.

A public servant commits a misdemeanor if, in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he:

(1) acquires a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action; or

(2) speculates or wagers on the basis of such information or official action; or

(3) aids another to do any of the foregoing.

Text of Illinois Criminal Code of 1961

§ 33-3. Official Misconduct

A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

- (a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or
- (b) Knowingly performs an act which he knows he is forbidden by law to perform; or
- (c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or
- (d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

A public officer or employee convicted of violating any provision of this Section forfeits his office or employment. In addition, he shall be fined not to exceed \$1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years, or both fined and imprisoned. 1961, July 28, Laws 1961, p. 1983, § 33-3.

Text of New York Revised Penal Law

§ 195.00 Official misconduct

A public servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or
2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

Text of Michigan Revised Criminal Code

[Official Misconduct in the First Degree]

Sec. 4805. (1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit for himself or to cause harm to another;

(a) He knowingly commits an act relating to his office but constituting an unauthorized exercise of his official functions;

(b) He knowingly refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office;
or

(c) He knowingly violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Official misconduct in the first degree is a Class A misdemeanor.

[Official Misconduct in the Second Degree]

Sec. 4806. (1) A public servant commits the crime of official misconduct in the second degree if:

(a) He knowingly refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office;
or

(b) He knowingly violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Official misconduct in the second degree is a Class C misdemeanor.

[Failing to Disclose a Conflict of Interest]

Sec. 4720. (1) A public servant commits the crime of failing to disclose a conflict of interest if he exercises any substantial discretionary function in connection with a government contract, purchase, payment or other pecuniary transaction without advance public disclosure of a known potential conflicting interest in the transaction.

(2) A "potential conflicting interest" exists when the public servant is a director, president, general manager or similar executive officer, or owns directly or indirectly a substantial portion of any non-governmental entity participating in the transaction.

(3) Public disclosure includes public announcement or notification to a superior officer or the attorney general.

(4) Failing to disclose a conflict of interest is a Class A misdemeanor.

Section 4. Official oppression. A public servant commits the crime of official oppression if with knowledge that his conduct is illegal he acts or purports to act in his official capacity to:

(1) Subject another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of a personal or property right; or

(2) Deny or impede another in the exercise or enjoyment of any right, privilege, power or immunity secured by law.

Existing Law
ORS
162.510
141.730
141.090
141.740
421.105

COMMENTARY - OFFICIAL OPPRESSION

A. Summary

The proposed section covers all official activities. Opportunities for oppressive exercise of official power exist on all levels and in all areas of the bureaucracy; effective deterrents should not be directed at specific officers to the exclusion of others.

The purely private behavior of a public servant is subject to the same standards and controls as any other person. The penal sanction represented by this section is concerned only with the public servant who makes use of his official status to wrong or injure another. The section requires proof that the public servant acted with knowledge that his conduct was "illegal." This would include knowledge that a legal right of the victim was being infringed. A public servant cannot defend his illegal conduct on the ground that he was acting contrary to law and that therefore the act was unofficial. The Model Penal Code comments:

"It has long been settled that a public servant who does purport to be acting in an official capacity does not save himself from conviction of official oppression by showing that his acts were contrary to law, and for that reason to be regarded as unofficial. To that contention the answer has been that 'misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken under color of' state law." (Citing cases) (Tentative Draft # 9, (1959) p. 215)

The fact that some overlap exists between official oppression and other specific offenses, like bribery or assault, is not considered a compelling reason for narrowing the definition of the offense. It is submitted that such an effort would complicate the draft and tend to reinforce the defense that a public servant was involved in a purely private wrong even where he was clearly acting in his official capacity.

B. Derivation

The section is taken from Model Penal Code section 243.1.

C. Relationship to Existing Law

ORS 421.105 prohibits violence and injury to penitentiary inmates.

ORS 659.020 declares the state's public policy against discrimination.

Refer to commentary in Official Misconduct section for other pertinent statutes.

83 ALR 2d 1007, What constitutes offense of official oppression:

"The common law crime [of official oppression], in general, consists in the inflicting upon any person, from an improper motive, of any illegal bodily harm, imprisonment, or any injury other than extortion, by a public officer while exercising, or under color of exercising, his office. 10 Halsbury's L of Eng (3d ed, p 615). The crime has also been defined as the abuse of any discretionary power invested by law in a public officer committed in the exercise of, or under color of exercising, the duties of his office with an improper motive. 2 Wharton, Criminal Law (12th ed 1898)... Despite the varying language of the statutes...all the reported cases agree that in order to constitute the offense there must be proved facts which show that the official, while acting under the pretext of exercising his authority, has in some way wronged the complainant for his own selfish or vindictive reasons...."

About 25 of the states have penal statutes directed at oppression by public officers. Most of these statutes are confined to specific acts of oppression, particularly in the field of law enforcement. A number of jurisdictions have comprehensive oppression statutes covering every type of "oppression, partiality, misconduct or abuse by public officials." (Kansas Stat Ann 21-807)

Federal law, while penalizing specified oppressive acts, also provides a comprehensive proscription against official oppression:

18 U.S.C. 242, Deprivation of rights under color of law:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both...."

Following are cited three official oppression cases and three state oppression statutes as examples of existing law in the United States:

People v. Rudolph, 303 N.Y. 73, 100 N.E. 2d 142 (1951), Police officer charged with "oppression under color of right" for extorting money from man charged with felonious assault in return for agreement to offer perjured testimony to have charge reduced to disorderly conduct.

Lynch et al v. United States, 189 F2d 476 (5th Circ. 1951), Sheriff and his Deputy convicted under 18 U.S.C. 242 for surrendering Negro prisoners to group of Ku Klux Klan members for beatings and torture.

Brown v. United States, 204 F2d 247 (6th Circ. 1953), State law enforcement officer convicted under 18 U.S.C. 242 for wilfully and without probable cause arresting and imprisoning persons for reasons of extortion.

Calif. Penal Code section 146: Arrests, seizures, levies, or dispositions without process or authority. Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses anyone of lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor.

Kansas Stat Ann 21-807: Oppression, partiality, misconduct or abuse by public official;penalty. Every person exercising or holding any office of public trust who shall be guilty of wilful and malicious oppression, partiality, misconduct, or abuse of authority in his official capacity, or under color of his office, shall on conviction be punished by imprisonment in a county jail for a term not exceeding one year and fined not exceeding \$1,000.

Ohio Rev Penal Code, sec. 2919.17: No person in any office or place of authority without being lawfully authorized to do so, or by color of his office, shall wilfully oppress another under pretense of acting in his official capacity.

Section 5. Misuse of confidential information. A public servant commits the crime of misuse of confidential information if in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he acquires or aids another in acquiring a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action.

Existing Law
None

COMMENTARY - MISUSE OF CONFIDENTIAL INFORMATION

A. Summary

The proposed section attempts to reach elements of unconscionable behavior manifested by speculation and wagering on official action which the actor is in a position to influence, or on the basis of confidential information to which he has access only for official purposes.

The section does not attempt to govern the duty of a public servant with an investment, perhaps antedating his public service, in an enterprise subject to official action by himself or a governmental unit with which he is associated. This involves an area of conflict of interest law that will be considered in section 6 of this Article.

B. Derivation

The section is taken from Michigan Revised Criminal Code section 4810.

C. Relationship to Existing Law

Existing Oregon law provides no general penal statute comparable to the proposed section although there are many specific provisions designed to reach the same evil.

ORS 261.455: Officer or employe of people's utility district prohibited from having pecuniary interest in contract awarded by district. \$500 fine, 6 months imprisonment.

ORS 262.460: Same as 261.455, but applicable to cooperative telephone districts. \$500 fine, 6 months.

ORS 279.360: Interest of public officer or employe in certain public contracts prohibited.

ORS 279.990 (4): Violation of 279.360 is abuse of a public trust. Punishable by \$5,000 fine, 1 year imprisonment.

ORS 332.275: Pecuniary interest in school contracts by director or employe of school district prohibited.

ORS 462.273: Prohibited interests and activities of Racing Commission and staff. ORS 462.990 (1), violation a misdemeanor.

ORS 545.092: Interest of Irrigation District directors or officer in contracts prohibited. ORS 545.990, Penalty \$500 fine, 6 months imprisonment, forfeiture of office.

ORS 552.230: Directors and officers of Water Conservation Districts prohibited from personal interest in contracts. ORS 552.990, Penalty, \$1,000 fine, 1 year imprisonment, forfeiture of office.

ORS 561.170: Prohibited financial interest of Department of Agriculture officer or employe. ORS 561.990 (1), Penalty, \$200 fine.

ORS 706.285: Interest in banking transactions and business by persons occupying position in Banking Division prohibited. ORS 706.990, Penalty, \$1,000 fine, 1 year imprisonment.

ORS 731.228: Prohibited interests and rewards of Department of Insurance officer or employe. ORS 731.992 (2), Penalty, misdemeanor.

While present law provides no general statute equivalent to the proposed section, its legal basis is well recognized:

4 McQuillin, Municipal Corporations, section 12.228c:

"Municipal officers are often made subject to criminal prosecution for violating laws forbidding them from being interested either directly or indirectly in

contracts of any character with the local corporation, or forbidding them from making any contract with any person by which they derive any benefit or advantage from the deposit with him of any moneys or valuable security held by them."

18 U.S.C. 1901 (1952) prohibits officials concerned in the collection or the disbursement of the revenues from trading in the funds, debts or public property of the United States or of any state.

18 U.S.C. 1902 (1952) prohibits officials who have restricted information affecting the market value of crops from disclosing such information prematurely or speculating before the information is made public by buying or selling in any quantity.

U.S.C. 1903 (1952) prohibits speculation in agricultural commodities by officials administering crop insurance programs.

U.S.C. 1904 (1952) prohibits RFC officials from speculating in companies financed by RFC.

TEXT OF REVISIONS OF OTHER STATES

Text of the Model Penal Code

Section 243.2. Speculating or Wagering on Official Action
or Information.

A public servant commits a misdemeanor if, in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he:

(1) acquires a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action; or

(2) speculates or wagers on the basis of such information or official action; or

(3) aids another to do any of the foregoing.

Text of Michigan Revised Criminal Code

[Misuse of Confidential Information]

Sec. 4810. (1) A public servant commits the crime of misuse of confidential information if in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he:

(a) Acquires a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action;

(b) Speculates or wagers on the basis of such information or action; or

(c) Aids another to do any of the foregoing.

(2) Misuse of confidential information is a Class B misdemeanor.

Section 6. Concealing a conflict of interest.

(1) A public servant commits the crime of concealing a conflict of interest if he exercises a substantial discretionary function in connection with a pecuniary transaction involving the government and fails to disclose in advance a known potential conflicting interest in the transaction to either the Attorney General or district attorney of the county wherein he resides.

Existing Law
ORS
261.455
262.460
279.360
279.990 (4)
332.275
462.273
545.092
552.230
561.170
706.285
731.228
462.990 (1)
545.990
552.990
561.990 (1)
706.990
731.992 (2)

(2) When disclosure is made to the district attorney he shall as soon as practicable request the Attorney General for an opinion as to whether a conflict of interest exists.

(3) A "potential conflicting interest" exists when the public servant:

(a) Is a director, officer or high managerial agent of the private entity involved in the transaction; or

(b) Owns or controls a substantial pecuniary interest in the private entity involved in the transaction; or

(c) Is related by consanguinity or marriage to a person who is a director, officer or high managerial agent, or owns or controls a substantial pecuniary interest, in the private entity involved in the transaction.

COMMENTARY - CONCEALING A CONFLICT OF INTEREST

A. Summary

The object of the section is to encourage the public servant to obtain advance rulings on potential conflicts of interest. The duty applies only to a public servant who: (1) exercises substantial discretionary authority with respect to the transaction, i.e., approves the contract, negotiates the terms, and (2) is aware that he has a directorship, officer relationship or substantial ownership interest in the private entity dealing with the government.

On the basis of objections to two provisions of section 6 in Preliminary Draft No. 1, the section was not approved by subcommittee No. 2. The section in that draft required disclosure to "either the public, his superior officer or the Attorney General". The subcommittee felt that this language did not designate with sufficient clarity what persons are qualified to receive disclosure information. Particular objection was directed at the term "public".

That language has been amended in Preliminary Draft No. 2 to read "either the Attorney General or district attorney of the county wherein he resides". The object of this requirement is to give the public servant the benefit of an Attorney General's opinion before he acts. It was necessary to include the district attorney since the Attorney General is prevented by law from issuing opinions to persons other than state officers.

The second objection voiced in subcommittee was directed at the language "owns directly or indirectly a substantial interest in the private entity". The term "indirectly" was used in an effort to reach those situations where the "substantial interest" was constructively controlled by the public servant through the agency of a relative or member of the family. The subcommittee felt that no legal precision attached to the word "indirectly" in the context used, and that such ambiguity left the section open to constitutional challenge.

"Potential conflicting interest" has been redefined in an attempt to avoid that ambiguity. The term "potential" has been added to make it clear that the existence or non-existence of a conflicting interest is often not easily ascertainable in the absence of an objective legal opinion. Subsection (3) (c) clarifies the relationship that was implied by use of the term "indirectly".

Subcommittee No. 2 also questioned use of the term "substantial pecuniary interest", found in subsections (3) (b) and (c). The problem here centers on an objective determination of what constitutes a "substantial" interest as opposed to an "unsubstantial" interest. If the test applied is subjective in character, it is obvious that what is "substantial" to one person may be negligible to another, e.g., a \$10,000 corporation stock interest is relatively negligible to a multimillionaire, while it may be substantial to a low grade public servant with no other stock holdings.

This problem has not been resolved by your reporter. An alternative would be to arbitrarily establish a more definitive measure of the "interest" held by the public servant; for example, if the stock or interest owned by the public servant represented 10% or more of the outstanding stock of the private entity or if the stock held represented 10% or more of all such interests held by the public servant. This test would often produce inconsistent results when applied to persons of widely disparate personal wealth, and when applied to stock of varying value.

It is submitted, therefore, that a case by case determination of whether the pecuniary interest held is "substantial" is preferable, notwithstanding the issue of whether "potential conflicting interest" as defined gives sufficient notice of what interests must be disclosed.

In spite of these drafting problems the subcommittee felt that the section reached an evil of sufficient proportion to deserve consideration by the full Commission. It has been redrafted and submitted on that basis.

B. Derivation

The section is derived from Michigan Revised Criminal Code section 4720.

C. Relationship to Existing Law

An excellent review of current federal and state problems in the field of conflicts of interest is found in 13 Rutgers L Rev 666 (1959), in an article entitled "Conflict of Interest Situations and Remedies ":

"What is the problem of conflicts of interest as it affects government? It embraces the behavior of public officials and the concept of 'public interest.' It is concerned with whether official behavior is consistent

with the public interest. It asked the question: 'Is an official's conduct of his job in accordance with the broad interest of the public or is he subject to influences in his decision-making that move him from an impartial stance?' The area of concern today is the oft-cited 'gray zone'...the collective view holds it to be that situation existing where a public servant finds himself in a position where his personal or private interests clash with his public duties and responsibilities." (p.667)

Current conflict of interest statutes have ancient and historical antecedents. They represent a legal codification of the truism that no man can serve two masters. (For historical background, see "Conflicts of Interest--A Symposium" 24 Fed B J 233, 1964). Complicated conflict of interest situations may best be remedied by civil legislation. Examples of this approach may be found in legislation voiding contracts infected with conflicts of interest and administrative rules sanctioning noncriminal disciplinary action against the interested public servant. The proposed section does not make criminal the existence of a conflict of interest; it is designed to require advance disclosure by penalizing the failure to disclose a conflict of interest.

It seems clear that if a public servant has knowledge of an existing conflict of interest, he has a duty to disclose that interest to the proper authority.

Refer to subsection C of Commentary to section 4.

In the interests of uniformity, particularly in regard to the penalty structure, these statutes should be amended. There exists an unreasonable variance in penalties for unlawful acts of a similar nature. If the proposed section penalizing failure to disclose a conflict of interest were adopted, it might be possible to repeal many of those statutes. If the conflict of interest were properly disclosed, appropriate civil remedies could be applied. In the event of nondisclosure, and subsequent revelation, the criminal sanction represented by the proposed section would apply.

TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

[Failing to Disclose a Conflict of Interest]

Sec. 4720. (1) A public servant commits the crime of failing to disclose a conflict of interest if he exercises any substantial discretionary function in connection with a government contract, purchase, payment or other pecuniary transaction without advance public disclosure of a known potential conflicting interest in the transaction.

(2) A "potential conflicting interest" exists when the public servant is a director, president, general manager or similar executive officer, or owns directly or indirectly a substantial portion of any non-governmental entity participating in the transaction.

(3) Public disclosure includes public announcement or notification to a superior officer or the attorney general.

(4) Failing to disclose a conflict of interest is a Class A misdemeanor.