

## **“GOVERNMENT ETHICS ACT”**

**House Bill 5920**

**Sponsor: Rep. Michael Bishop**

**Committee: Constitutional Law and Ethics**

**Complete to 8-15-00**

### **A SUMMARY OF HOUSE BILL 5920 AS INTRODUCED 6-21-00**

The bill would create a new act, the “government ethics act,” to establish a code of ethics for state and local executive and legislative public officials and public employees, to create a 7-member ethics board in the Department of State to administer the proposed act, and to create a 6-member legislative ethics committee in the legislature to act on disciplinary recommendations made by the ethics board regarding state legislators and state legislative employees. Among other things, the bill would require public officials and public employees to publicly disclose conflicts of interest and certain contracts that they had or entered into. The bill would also specify which “authority” would be authorized to impose disciplinary sanctions recommended by the ethics committee for state officials other than the proposed legislative ethics committee for state legislators: the governor would be the “appropriate” disciplinary authority for the attorney general and secretary of state, and the legislature would be the “appropriate” disciplinary authority for the governor and lieutenant governor.

If enacted, the bill would take effect on January 1, 2002, and would require the state supreme court to rule on the constitutionality of the proposed act before this proposed effective date. Finally, the bill would repeal three public acts currently governing the behavior of public officers and employees.

The proposed act would have the following five chapters, described in more detail below.

- Chapter 1: Definitions
- Chapter 2: Code of Ethics
- Chapter 3: Penalties
- Chapter 4: Ethics Board
- Chapter 5: Legislative Ethics Committee

Scope. The proposed act would apply to state and local public officials and public employees (including classified employees) in the legislative and executive branches of government. More specifically, the ethics board created under Chapter 4 of the bill could act only with respect to the current and former executive and legislative public officials and public employees covered by the bill. (Termination of office or employment would not affect the ethics board’s jurisdiction over a former public official or public employee with respect to the requirements imposed by the proposed act on the individual.) If the ethics board recommended disciplinary action that affected a classified

employee, the appropriate authority could initiate proceedings in accordance with the recommendation and under the rules of the appropriate civil service commission. If the ethics board recommended disciplinary action involving a public official or public employee in the legislative branch of government, the legislative ethics committee created in Chapter 5 of the bill would be required to act on the recommendation, and to conduct an investigation and issue a report and recommendation to the appropriate house of the legislature.

The bill would define “*public official*” to mean any of the following people, whether the individual were paid or unpaid:

- An elected or appointed individual in either the executive or legislative branch of a governmental entity (where “*governmental entity*” would mean the executive and legislative branches of the state and its political subdivisions, that is, a county, city, township, village, school district, department, agency, body, board, commission, or other local governmental unit);
- An elected or appointed member of a board of education or of a governing body of a state institution of higher education; or
- A member of an office, administration, agency, board, bureau, council, commission, committee, department or division of a governmental entity that possessed any sort of final decision making authority.

The bill also would define “*public employee*” to mean an employee of a governmental entity, but would not include a person whose employment resulted from election or appointment.

Code of ethics. Chapter 2 of the bill would establish a code of ethics for public officials and public employees. The bill would specify, however, that the proposed chapter would not prohibit or require conduct specifically authorized by statute, rule, regulation, the state constitution, or the United States Constitution.

The chapter generally would prohibit public officials and public employees from using their public positions to obtain, solicit or accept, offer or give “anything of value” for themselves or others persons or entities. It also would prohibit public officials or public employees from lobbying, disclosing confidential information, asking subordinates to participate in election campaigns, or being involved in contracts over \$1.5 million with outside entities. In addition, the bill would require public officials and public employees to abstain from acting in ways that resulted in a conflict of interest or a violation of this chapter (see below), and to file certain reports with the proposed ethics boards in such cases. Finally, it would prohibit former paid public officials from appearing or practicing before their former governmental entities, except on their own behalf, for 3 months after leaving office.

More specifically, the bill would prohibit public officials or public employees from doing the following:

1. Except as otherwise provided by law, using their public positions – or taking or failing to take action – in order to obtain “anything of value” for themselves or for another “person” or

entity. (The bill would define “*person*” to mean an individual, sole proprietorship, partnership, corporation, association, or other legal entity, and “*anything of value*” to mean a tangible or intangible item that had economic value and that could reasonably be considered to be an advantage or of worth, use, or service to the person upon whom it were conferred. “Anything of value,” however, explicitly would not include (1) unsolicited tokens or awards worth less than \$150; (2) unsolicited advertising items worth less than \$50 per year; (3) discounts offered to the general public or to a specified group or occupation under normal business conditions (though the discount couldn’t be based on the fact of public service unless it were a discount program approved by the legislative ethics committee created in Chapter 5 of the bill); (4) contributions to bona fide charities made in response to a direct solicitation from a legislator or a person acting at his or her direction; (5) unsolicited benefits worth less than \$100 per year conferred by a person or business and if there were no express or implied understanding or agreement that a public official’s or public employee’s vote, official action, or decision would be influenced; (6) tangible or intangible items for a legitimate educational purpose or benefit; or (7) campaign contributions made and reported under the Campaign Finance Act.

2. Soliciting or accepting anything of value in connection with his or her official responsibilities. Conversely, the bill also would prohibit a “person” from offering or giving anything of value to a public official or public employee -- or members of his or her immediate family, outside employers or businesses with which he or she were “associated,” or his or her customers or clients -- in connection with the public official’s or public employee’s official responsibilities.

The bill would define “*immediate family*” to mean a spouse, child -- including a stepchild or an adopted child -- grandchild, brother, sister, parent, or grandparent, or a person claimed as a dependent. The bill also would define “*outside employer or business*” to mean (a) an activity, other than service to the governmental entity, when the public official or public employee received compensation for services rendered or goods sold or produced, (b) entities other than governmental entities, if the public official or public employee were compensated as a member, official, director, or employee of that non-governmental entity, other than reimbursement for necessary expenses; or (c) entities in which the public official or public employee had an ownership interest, other than corporations in which he or she owned less than 10 percent of the outstanding stock.

3. Lobbying (“representing for compensation a person in a matter that the person ha[d] before the branch of state government with which the public official or public employee [were] directly affiliated”), including lobbying in all political subdivisions with populations of 25,000 or more. The bill would distinguish between political subdivisions with populations of 25,000 or more – in which case the bill would completely prohibit public officials or public employees from “representing for compensation a person in a matter that the person had before that political subdivision” – and those with populations under 25,000, in which case public officials or public employees could lobby if the political subdivision’s legislative body approved the lobbying by a formal resolution.

4. Using or disclosing confidential information to further a public official’s or public employee’s (or former public official’s or former public employee’s) own or another “person’s” interests, “except to the extent permitted by law.” The bill would define “*confidential information*” to mean information made confidential by law or that were conveyed or accepted with the understanding that the information would be used only for official purposes.

5. Requesting or authorizing a “person” to request that a public official’s or public employee’s subordinate participate in an election campaign or contribute to a political committee unless the subordinate were a political appointee.

6. Entering into a contract valued at \$1.5 million or more with the governmental entity with which the public official or public employee were affiliated unless the contract were awarded through an open and competitive process that included prior public notice of -- and subsequent availability for public inspection -- of the proposals considered and the contract awarded (this prohibition regarding contracts also would apply to members of a public official’s or public employee’s immediate family, and to outside employers or businesses with whom he or she were associated). A contract or agreement executed in violation of this provision would be voidable only if the person who entered into the contract (or took assignment of the contract) had actual knowledge of the prohibited conflict, and only by a decree of a court of proper jurisdiction. In the case of a “person” other than an individual, the actual knowledge would have to be that of an individual or body finally approving of the contract. A court decree could require reimbursing the “person” for the reasonable value of money, goods, material, labor, or services furnished under the contract to the extent the governmental entity had benefitted. This provision would not prohibit the parties from reaching a settlement outside of court.

Conflict of interest, “transactional disclosure statements.” The bill would define “*conflict of interest*” to mean a close economic association or personal relationship between a public official or public employee and a “person” that would likely be substantially affected by an official action or decision by the public official or public employee that a reasonable person would believe either (a) conflicted with the public official’s or public employee’s public duty or obligation to exercise objective independent judgment or (b) created the appearance that the “person” might have “undue” access to confidential information or might otherwise receive favored treatment regarding a public action.

The bill would require a public official or public employee to abstain from acting formally or informally on a matter before a governmental entity with which he or she were affiliated if he or she knew that acting -- or failing to act -- on the matter could result in a conflict of interest or a violation of the bill’s proposed Chapter 2. If a public official or public employee were required to abstain from acting on a matter, he or she would be required to file a “transactional disclosure statement” with the ethics board created under Chapter 4 “within 21 days” and promptly inform his or supervisors, if any. A transactional disclosure statement would have to include all of the information related to the conflict of interest and the public official’s or public employee’s reason for abstaining from acting.

In addition, a public official or public employee who had or later acquired an interest in an actual or proposed contract with the government entity with whom he or she were affiliated would be required to publicly disclose the nature and extent of that interest in a transactional disclosure statement filed with the ethics board.

Lobbying moratorium for former public officials. The bill would prohibit former public officials from appearing or practicing before the governmental entity with which he or she had been affiliated -- or from receiving compensation for working on a matter before that governmental entity

– for 3 months after the termination of his or her official service *unless* he or she were acting on his or her own behalf *or* he or she had performed only ministerial acts during his or her official service. The bill would define “*ministerial acts*” to mean “actions performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the act.”

General prohibition, access to benefits, corporate liability. The bill would prohibit a “person” from inducing or trying to induce a public official or public employee to violate any of the provisions of Chapter 2. However, nothing in this provision could be construed to prohibit a person from receiving a service or benefit, or from using a facility, generally available to the public, so long as the person did so in the same manner or degree that was available to the general public. Finally, under this provision of Chapter 2, a corporation, partnership, limited liability company, or other entity would not be vicariously liable for an employee’s actions unless the employee acted in the execution of company policy or custom.

Penalties. Chapter 3 would establish penalties for violations of the proposed act. A public official or public employee who violated the bill’s provisions would be subject to a civil fine of up to \$1,500 for each violation, in addition to “another” penalty provided in the bill or other state law. The civil fine would be imposed by (a) a court of proper jurisdiction or (b) the appointing authority or person or body authorized by law to impose sanctions. (See “Appropriate disciplinary authority,” below.) If a public official were ordered to pay a civil fine, he or she would have to pay it to the governmental entity with which he or she were affiliated.

In addition, to the civil fines for violations, the bill also would impose certain criminal (misdemeanor) penalties punishable by a fine of up to \$1,000 or imprisonment for up to 90 days, or both. A person who was required to file a “transactional disclosure statement” would be guilty of a misdemeanor if that person willfully filed a false or incomplete statement or failed to file an acceptable statement within the 21 days specified by the bill. And except as otherwise provided in the bill, a person who violated Chapter 2 (Code of Ethics) of the bill also would be guilty of a misdemeanor, and subject to the civil fines specified in the bill.

A person who violated the proposed act also would be liable for damages to the governmental entity for losses or increased costs incurred by the governmental entity as a result of the violation. Damages could be imposed by a court of proper jurisdiction in addition to “another” penalty contained in another provision of law. The governmental entity with which a public official or public employee were affiliated – or the ethics board on behalf of that governmental entity – could initiate an action or special proceeding in the court of appropriate jurisdiction to obtain damages.

Finally, the bill would require the appropriate disciplinary authority (see “Appropriate disciplinary authority,” below) to initiate “appropriate proceedings,” and would allow that authority to take appropriate disciplinary action concerning a public official or public employee who violated the proposed act.

Independent action for damages. If the ethics board failed to file a final determination within 6 months after a complaint had been filed, a person other than the ethics board or a governmental entity could bring an action or “special proceeding” in court to obtain damages under the bill. More specifically, for a person other than the ethics board or governmental entity to bring an action or

“special proceeding” (though not defined, this term appears to refer to actions or special proceedings to obtain damages under the bill), all of the following would have to apply:

- The person initiating the action or special proceeding had filed a sworn complaint alleging the violation by the public official or public employee with the ethics board;
- An allegation in the complaint filed with the court alleged that at least six months had elapsed since the complaint had been filed with the ethics board and the board had failed to file a final determination in the matter; and
- The action or special proceeding commenced within 10 months after the complaint had been filed with the ethics board.

Ethics board. Chapter 4 of the bill would create a 7-member gubernatorially-appointed ethics board as an autonomous entity within the Department of State to administer the bill’s provisions, including reviewing complaints, conducting investigations and hearings, recommending disciplinary actions, imposing civil fines, and issuing advisory opinions regarding the interpretation or application of the proposed act.

The members of the ethics board would be appointed by the governor for 4-year terms (or until a successor were appointed, whichever were later), and no member of the proposed board could serve more than two 4-year terms. The first ethics board members would have to be appointed within 90 days after the proposed act took effect (the bill’s proposed effective date is January 1, 2002), and would serve for staggered terms. Two members of the first ethics board would serve for 2 years, three members would serve for 3 years and two members would serve for 4 years. A term would expire on March 31 of the year in which the term were set to expire. If a vacancy occurred on the ethics board, the governor would make an appointment for the unexpired term in the same manner as the original appointment. The governor could remove an ethics board member for incompetency, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, “or another good cause.” While on the ethics board, a member could not (a) hold or accept appointment to, or become a candidate for, elective public office or elective political party office; (b) be employed or act as a lobbyist; or (c) participate in an election campaign (though ethics board members would be allowed to make campaign contributions). Ethics board members would serve without compensation, though members could be reimbursed for actual and necessary expenses incurred in performing official duties.

The ethics board could appoint an executive director, and delegate authority to him or her to act in the board’s name between board meetings. If the board delegated authority to an executive director, the delegation would have to be in writing and would have to enumerate the specific powers to be delegated. However, the bill would prohibit the board from delegating to an appointed executive director the board’s power to determine violations, recommend disciplinary action, impose civil fines, refer matters to the attorney general, or render an advisory opinion. Any executive director appointed by the ethics board, like the board members themselves, could not hold elective public or political party office (or accept an appointment to or become a candidate for such office), be employed or act as a lobbyist, or participate in an election campaign (though he or she could make campaign contributions).

At its first meeting, the ethics board would elect from among its members a chairperson and vice-chairperson (who would serve as chairperson in the absence of the chairperson). After the first meeting, the ethics board would be required to meet at least quarterly, or more frequently at the call of the chair or if requested by four or more members. Four members would constitute a quorum for doing business, though only a majority of the members serving and present would be required for official action. Voting would be by record roll call. Ethics board business would have to be conducted in compliance with the Open Meetings Act, including notice of board meetings. Ethics board records would fall under the Freedom of Information Act.

The ethics board would be required to do all of the following:

- Review, index, keep on file, and dispose of sworn complaints; make notifications and conduct investigations of complaints (see below);
- Conduct hearings, determine violations, recommend disciplinary action, assess penalties, make referrals to the attorney general, and “initiate appropriate actions and proceedings” in connection with recommending disciplinary actions (see below);
- Promulgate rules to carry out the bill’s provisions and to govern its own procedures;
- Appoint hearing officials, an executive director (if necessary), and other staff necessary to carry out its duties under the bill (the state personnel director also would be required to provide clerical or administrative assistance from the Department of State, if requested by the ethics board);
- Grant waivers of the bill’s provisions to public officials or employees under certain circumstances (see below);
- Examine, index, and maintain for at least 7 years all “transactional disclosure statements” (and the supporting records and other documents) filed with the ethics board by public officials and public employees as required under the bill;
- Render advisory opinions regarding the interpretation or application of the proposed act (and index and keep these advisory opinions on file), and prepare and publish nonconfidential special reports and technical studies to further the purposes of the proposed act (see below);
- Provide training and education to public officials and public employees concerning the proposed act (see below);
- Prepare an annual report for the governor and legislature that summarized the board’s activities and recommend changes to the proposed act (see below);
- Provide for public inspection of certain records as provided by law; and
- Select provisions of the proposed act, special reports, and technical studies that the board considered necessary for reproduction and distribution to, and posting by, the secretary of state and county clerks (see below).

Ethics board investigations. If a majority vote of the ethics board determined that there were reason to believe that the proposed act had been violated, the board would be required to initiate an investigative proceeding to determine whether a violation had occurred. The board would be required to mail notice of the investigation and the nature of the alleged violation to the person under investigation within 5 days after the board had decided to undertake an investigation. Every 60 days, until a final determination were made, the board would be required to mail to both the complainant and the person under investigation notice of the action taken to date by the board, along with reasons for the action or nonaction.

Except as otherwise required by law, the board's actions and the records relative to an investigation would be confidential until the board made a final determination on the complaint. The bill would require all governmental entities to cooperate with the ethics board when it was conducting an investigation.

If the ethics board determined that the proposed act had not been violated, the records and actions relative to the investigation and determination would remain confidential unless the person investigated requested in writing that they be made public. If the ethics board determined that the act had been violated, it would recommend sanctions to the "appropriate [disciplinary] authority." (See below.)

Appropriate disciplinary authority. Although not included in the definition section, the bill would define the "appropriate authority" to impose disciplinary sanctions recommended by the ethics board in Section 411 as the appointing authority, person, or body authorized by law to impose or recommend sanctions for public officials and public employees. More specifically, the bill would specify who would have the appropriate authority for imposing disciplinary sanctions as follows:

- for appointed officials or employees, the appointing authority with supervisory responsibility for the person whose activities were investigated;
- for a legislator, the legislative ethics committee created under Chapter 5 of the proposed act;
- for the attorney general or secretary of state, the governor; and
- for the governor or lieutenant governor, the legislature.

Recommendations for disciplinary action. After a hearing providing for due process procedural requirements and subject to applicable provisions of law and collective bargaining agreements, the ethics board could recommend disciplinary action under the penalty section of the proposed act (see "Penalties," above). Recommendations for disciplinary action would have to be made to the appropriate authority (see above). The board would be required to conduct and complete the hearing with "reasonable promptness." If the board referred the matter to the appropriate authority or to the attorney general, it could adjourn the matter pending determination by that authority or by the attorney general.



The bill appears to repeat the provision that after a hearing providing for due process procedural requirements, the ethics board could recommend that sanctions and penalties be imposed upon a public official or public employee whom the board had found to have violated the proposed act. The recommendation, again, would have to be made to the appropriate authority (such as the legislature, the legislative ethics committee, the governor, or the appointing authority with supervisory responsibility for the person whose activities were investigated).

Attorney general and criminal violations. The ethics board could refer possible criminal violations of the proposed act to the attorney general. (The bill says to “the prosecutor,” and then specifies that “[the prosecutor for public officials and public employees is exclusively the attorney general.]”) Nothing contained in the bill could be construed to restrict the authority of the attorney general to prosecute a person for a violation of the proposed act or of any other law. (See also “Advisory opinions,” below.)

Remedies. A person aggrieved by a decision of the ethics board could seek judicial review and relief in a court of proper jurisdiction.

Ethics board waivers. The ethics board would be allowed to grant waivers of the bill’s provisions to public officials or public employees under certain circumstances. The public official or employee would have to make an application (for a waiver) in writing and show “compelling need,” and the waiver could be granted only at an open meeting after public notice (stating that a waiver were being considered) as provided in the Open Meetings Act. A waiver would have to be in writing and state the grounds upon which it had been granted. Within 10 days after granting a waiver, the ethics board would have to send a copy of the decision to the public official or public employee, “the appointing authority” of the public official or public employee, and the secretary of state. The copy would have to state the name of the person requesting the waiver and a general description of the circumstances of the waiver. All applications, decisions, and other records and proceedings relating to waivers would have to be indexed and kept on file by the ethics board.

Advisory opinions. The ethics board would be required to render written advisory opinions regarding the interpretation or application of the proposed act upon written request from a public official or public employee. Advisory opinions and requests for advisory opinions would have to be indexed and kept on file by the ethics board. The attorney general would be required to advise the board concerning legal matters in issuing advisory opinions, investigative and other reports, and recommendations.

If the ethics board failed to issue an advisory opinion within six months of a request by a public official or public employee, he or she could bring a civil action against the board to compel it to issue the opinion. More specifically, the bill would specify that a public official or public employee who had submitted a written request to the ethics board for an advisory opinion could “bring and maintain” a civil action by right against the board to compel it to issue the advisory opinion. The complaint would have to clearly identify the matters or proceedings before the board that were involved, and no action could be prosecuted or maintained unless both of the following applied:

- The complaint or petition alleged that at least 6 months had elapsed since the filing of the request and that the ethics board had failed to “file a final determination” in the matter; and
- The action was commenced within 10 months after the request for the advisory opinion had been submitted.

Until and unless amended or revoked, an advisory opinion rendered by the ethics board would be binding on the ethics board in subsequent proceedings concerning the person who requested the opinion and who acted in good faith, unless the person omitted or misstated a material fact. The opinion also could be relied upon by the person – and could be introduced and used as a defense – in a civil action brought by the ethics board or [a] governmental entity.

Distribution of information about the proposed act. The bill would require the ethics board to do both of the following:

- Make information concerning the proposed act available to each public official and public employee of each governmental entity, to the public, and to persons interested in doing business with a governmental entity, through the secretary of state, county clerks, and “other necessary means”; and
- Develop educational materials and an educational program for public officials and public employees of their duties and responsibilities under the proposed act.

In addition, within 90 days after its first meeting (and then whenever appropriate after that), the ethics board would have to transmit to the secretary of state and the county clerks (“in a suitable form”) copies of the provisions of the bill that the board considered necessary for posting and distribution. Within 10 days of receiving these copies, the secretary of state and county clerks would have to do all of the following with the copies received from the ethics board:

- Conspicuously post the copies in each public building under the jurisdiction of each governmental entity covered by the bill;
- Distribute the copies to each public official and public employee of each governmental entity; and
- Make the copies available to the public.

A public official or a public employee elected or appointed after the bill took effect would have to be furnished with a copy of the provisions of the act that the ethics board considered necessary for posting and distribution within 10 days after entering upon his or her duties. However, failure of the secretary of state or a county clerk to comply with these requirements, or failure of a public official or public employee to receive a copy of the provisions, would not affect the duty of compliance with the proposed act or the enforcement of its provisions.

Finally, the ethics board would be required to transmit to the secretary of state and each county clerk, in a form suitable for distribution, copies of the special reports and technical studies relating to the proposed act and its administration.

Annual report and review. The ethics board would be required to prepare and submit an annual report to the governor and legislature summarizing the board's activities. The report also could recommend statutory or administrative changes to the proposed act. The bill also would require the ethics board to annually review the proposed act and the board's rules, regulations, and administrative procedures "to determine whether they promote[d] integrity, public confidence, and participation in state and local government and whether they set forth clear and enforceable common sense standards of conduct."

Legislative ethics committee. Chapter 5 would create a six-member legislative ethics committee in the legislature, with three members from each of the chambers. At least one member from each house would have to be a member of the minority party, and would be appointed in the same manner as standing House and Senate committee members. Members would serve without compensation, but would be entitled to actual and necessary expenses while on committee business. The committee could, by majority vote, establish its rules and procedures.

The legislative ethics committee would be required to act on recommendations made by the ethics board in the Department of State, and to conduct investigations and issue reports and recommendations to the appropriate house of the legislature.

Other provisions. The bill would allow political subdivisions of the state (that is, counties, cities, townships, villages, school districts, departments, agencies, bodies, boards, commissions, or other local governmental units) to adopt ordinances or enforce existing ordinances relating to ethics regulations for their public officials and public employees that substantially corresponded to the bill. Ethics ordinances adopted or enforced under the bill could be more restrictive than the bill itself.

Repealers. The bill would repeal three public acts currently governing the behavior of public officers and employees: Public Act 318 of 198, which deals with conflicts of interest (MCL 15.301 to 15.310); Public Act 317 of 1968, which deals with contracts of public servants with public entities (MCL 15.321 to 15.330); and Public Act 196 of 1973, which deals with standards of conduct for public officers and employees (MCL 15.341 to 15.348).

Effective date. If enacted, the bill would take effect on January 1, 2002.

Supreme court. The bill would require the state supreme court, under Section 8 of Article III of the constitution, to rule on the bill's constitutionality by January 1, 2002. (Article III, Section 8

of the 1963 state constitution reads as follows: *Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.*")

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.