

# FINANCIAL DISCLOSURE SYNOPSES 1995-2019

## Filing--Who and How

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### Commission Op. 95-01:

Financial Disclosure reports are to be filed by “public officers.” 29 Del. C. § 5813. The statute identifies the specific persons or positions that must file. 29 Del. C. § 5812(n)(1)(a.-t.). The rules of statutory construction require that interpretation be consistent with the manifest intent of the General Assembly. 1 Del. C. § 301. In determining legislative intent, Court looks first to the statutory language. *Goldstein v. Municipal Court*, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991). Where the persons and things to which the statute refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature. *Norman v. Goldman*, Del. Super., 173 A.2d 607, 610 (1961). Thus only the persons/positions identified by the statute must file.

“Honorary State officials” are persons who serve as an appointed member, trustee, director or the like of any State agency and who receive or expect to receive not more than \$5,000 in compensation for such service in a calendar year (not including reimbursement of expenses). 29 Del. C. § 5804(6). “Honorary State Officials” are not included within the definition of “public officers” under 29 Del. C. 5812, and therefore are not required to file an annual disclosure report.

By law, certain officials hold State positions while also holding positions on boards. For example, the State Treasurer is also Treasurer of the Board of Education and the Attorney General is Legal Counsel to the Board. 14 Del. C. §§ 106 and 109. Because the State Treasurer and the Attorney General are elected officials, they are required to file based on 29 Del. C. § 5812(n)(1) which defines “public officer” as including “any person elected to any state office.” When filing, these individuals should report any income, reimbursement of expenses, gifts or honoraria received as a result of their position on the Board, if the threshold requirements of value are met for the income, reimbursement or gifts. There is no threshold value for honoraria.

### Filing After Leaving Public Office—Commission Op. 95-01:

The Code requires public officers to file within 14 days of becoming a public officer and on March 15 of each year thereafter. 29 Del. C. § 5813(d). The only reference to what occurs when an individual leaves public office is that the form must be retained on file as long as the person is a public officer, and for at least 5 years thereafter. 29 Del. C. § 5814(d). As the legislature was silent as to any requirement to file after leaving office, the individual is not required to file the report after leaving office because to do so would be to graft additional language onto the statute. See *Goldstein v. Municipal Court*, Del. Super., C.A. No. 89A-AP13, J. Gebelein (January 7, 1991) (*citing State v. Rose*, Del. Super., 132 A. 864, 867 (1926) (in general, additional language will not be grafted onto the statute)). Therefore, if a public officer files a disclosure statement on March 15 and leaves office during that same year, they will not

be required to file a financial disclosure report for the following year.

Additionally, in reading the statute in its entirety, it is noted that the legislature found that "persons serving in state government" hold positions of trust and this trust is best preserved if a public official refrains "from acting in his official capacity" where there is a direct or indirect personal financial interest that might reasonably be expected to impair objectivity. 29 Del. C. § 5811. By using the terms "persons serving in state government" and "acting in his official capacity" it appears the legislative concern was with persons in office. When the individual has left office, the legislative concerns would no longer be applicable.

Further, the legislature, in the State Code of Conduct, also provided that State employee, State officers and honorary State officials have an ongoing obligation during the course of their employment to avoid reviewing or disposing of matters where there is a personal or private interest, including a financial interest, that would impair judgment. 29 Del. C. § 5805. "State Officers" encompasses the same persons encompassed by the term 'public officer,' except for members of the General Assembly and the Judiciary, who conduct is governed respectively by the General Assembly's Ethics Committees and the Code of Judicial Conduct. Thus, for State officers, compliance with the standards of conduct would insure that between the time of filing and the time of termination of employment that the legislative concerns are met.

#### **Members of Boards and Commissions--Commission Op. Nos. 97-10 & 97-12:**

This Commission previously ruled that appointees who receive no more than \$5,000 a year in compensation ("Honorary State Officials") are not required to file annually. *Commission Op. No. 95-01*. It subsequently received a number of inquiries regarding whether appointees who make more than \$5,000 per year are required to file on an annual basis. This opinion discusses at length why appointees are not subject to the financial disclosure subchapter.

First, it is noted that when such persons are nominated or re-nominated, the Governor requires them to complete a financial disclosure form and submits a copy to the Senate prior to confirmation. However, for the reasons detailed below, the Commission concluded that while such persons are subject to the State Code of Conduct subchapter, they are not "public officers," and therefore not subject to the Financial Disclosure subchapter's annual filing requirement.

The State Code of Conduct applies to "State employees," "State officers," and "Honorary State officials." See, 29 Del. C. § 5804(11), (12) and (13). The Code of Conduct gives those to whom it applies "the benefit of specific standards to guide their conduct." 29 Del. C. § 5802(2). It specifically addresses rules of conduct to follow not only where there is a financial interest, but where there are other types of interests that may create a conflict. The standards include not only disclosing financial interests under certain circumstances, but restrict participation where there is a financial or other interest which creates a conflict. See, 29 Del. C. § 5805(a) (restrictions on deciding matters where a personal or private interest, a close relative, or a financial interest is involved); 29 Del. C. § 5806(b) (restrictions on accepting compensation, gifts, payment of expenses, or any other thing of monetary value); 29 Del. C. § 5806(c) (restrictions on acquiring financial interests); 29 Del. C. § 5806(d) (disclosure of financial interest in any business if it is subject to the regulatory jurisdiction or does business with a State agency). Moreover, it provides rules for other situations that might create conflicts, such as using public office to secure unwarranted privileges, improper disclosure or use of confidential information, etc. See, e.g., 29 Del. C. § 5806(e), (f) and (g).

While the Code of Conduct establishes rules of conduct in situations where a conflict exists as a result of financial or other interests, the Financial Disclosure subchapter, on the other hand, is merely a reporting statute. Courts have recognized that such statutes are broadly written; do not devise an objective scheme of relevant and irrelevant interests; do not guarantee the absence of conflicts; and cannot be tailored to the myriad of offices affected because it would be impractical. *Annotation, Validity and Construction of Orders and Enactments Requiring Public Officers and Employees or Candidates for Office to Disclose Financial Condition, Interests, or Relationships*, 22 ALR 4th 237, *See also, Senate Report No. 95-170, "Ethics in Government Act," p.42* (federal financial disclosure law applies to "high-level officials in all three branches of the Federal Government. It does not in any way regulate permissible conduct or prohibit the holding of any financial interest.")

Because reporting statutes are broadly written without regard for relevant or irrelevant interests, such reporting requirements have been "vigorously challenged in the courts" as unconstitutional because they are vague, over broad, and/or are an invasion of privacy. 22 ALR 4th 237 § 2. However, Courts have upheld the constitutionality of broad reporting provisions where the statute clearly identifies the persons to whom it applies and where such broad reporting requirements are reasonably relevant to the decision making authority of the persons required to file. *Id. at § 3(b)*. Where the reporting requirements are applied indiscriminately to persons holding office regardless of the nature of the activities of the agency, with no effort to relate the reporting requirements to the range of the public officers' decision making authority, the Courts have concluded that the reporting requirements can be "fatally over-broad." *Id. at § 3(c)*. Conversely, courts have upheld statutes that clearly define the persons to whom they apply and tailor the reporting requirements to elected officials, high-level officers, and heads of principal departments of state government because "these officials were most likely to become involved in conflicts of interest, since they bore the major responsibility for carrying out the functions of state government and personally participated in the decision making-process." *Id. at § 5(a)*. Courts have noted that the decision making authority and possibility of conflicts for such persons are "logically of different proportions" than for appointees to State Boards and a requirement for such dissimilar persons to file the same report can be "arbitrarily and unreasonably over inclusive." *Id. at 5(b)*.

With those distinctions in mind, a review of the Delaware Financial Disclosure law reveals that the General Assembly provided that "public officers" are required to file the disclosure report. The act then goes on to clearly and unambiguously define "public officer" to be those persons who hold the specific offices listed. *See, 29 Del. § 5812(a)(1)-(18)*. It limited "public officer" to include the types of officials who would have major responsibility for carrying out State functions. When the language is clear, a statute must be held to mean what is clearly expressed. *Norman v. Goldman*, 173 A.2d 607, 609 (Del. Super. 1961); *Labor's Educational and Political Club Independent v. Danforth*, Mo. Supr., 561 S.W. 2d 339, 345 (1977) (court held that when interpreting financial disclosure statute "it is a well-settled rule of law that the legislature's own construction of its language by means of definition of terms should be followed in interpreting the statute and is binding").

When no ambiguity exists, and the intent is clear from the statutory language, there is no room for statutory interpretation. *General Motors v. JAB*, 545 A.2d 1186, 1191 (Del. 1988). Also, Delaware Courts have held that where the persons and things to which the statute refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature. *Norman v. Goldman*, 173 A.2d 607, 610 (Del. Super. 1961). Where the legislature is silent, words will not be grafted onto the statute because to do so would, in effect,

be creating law. *Goldstein v. Municipal Court*, C.A. No. 89A-AP-13, J Gebelein (Del. Super., January 7, 1991); See. *Snider v. Shapp*, Pa. Cmwlth, 405 A.2d 602, 612 (1979) (court refused to engraft certain appointed officials onto the definition of "public official" in the financial disclosure law because "it would change the plain language"). Clear and unambiguous statutory language is ordinarily conclusive evidence of legislative intent. *Helfand v. Gambee*, 136 A.2d 558, 561 (Del. Ch., 1957). Moreover, the General Assembly is presumed to have known of such appointees and could have included them had it so desired. This presumption is clearly supported by reading the two subchapters in conjunction. In the Code of Conduct, the General Assembly defined the group of persons to whom it applies to cover "State employees," "State officers" and "honorary State officials." See, 29 Del. C. § 5804(11), (12) and (13).

"State employee" means any person who: (1) receives compensation as an employee of a State agency; or (2) serves as an appointed member, trustee, director or the like of a State agency and receives or reasonably expects to receive more than \$5,000 for such service in a calendar year (not including reimbursement of expenses). 29 Del. C. § 5804(11)(a). "Honorary State Official" means a person who serves as an appointed member, trustee, director or the like of any State agency and who receives or reasonably expects to receive not more than \$5,000 in compensation for such service in a calendar year (not including any reimbursement for expenses). 29 Del. § 5804(13). Thus, appointees to boards and commissions are either "State employees" or "Honorary State Officials."

The General Assembly separately and distinctly defined "State Officer" in the Code of Conduct as "any person who is required by subchapter II of this chapter to file a financial disclosure statement," except members of the General Assembly and members of the Judiciary. See, 29 Del. C. § 5804(12). [Note: General Assembly and Judicial Members have their own Codes on conflicts. See, 29 Del. C. §1001, "Legislative Conflicts of Interest," and The Delaware Rules Annotated, "The Delaware Judges' Code of Judicial Conduct."] By classifying appointees as "State employees" or "Honorary State officials," rather than "State Officers," the General Assembly recognized a distinction between appointees and those required to file annual disclosure reports. "Where a provision is expressly included in one section of a statute, but is omitted from another, it is reasonable to assume the legislature was aware of the omission and intended it." *General Motors v. JAB*, 545 A.2d at 1191 (Del. 1988). Courts may not engraft on a statute language which was clearly excluded. *Id.*

Not only does the clear language support the presumption that the General Assembly was aware of, but chose to omit, such appointees, but the legislative history shows that legislation was introduced to require appointees to boards such as the Industrial Accident Board, Unemployment Insurance Appeals Board, etc., to file annual reports but the legislation was never passed. See, *H.A. No. 14 to H.S. No. 1 for House Bill No. 83* (June 9, 1983). Thus, the legislative history also supports the presumption that the General Assembly was aware of, and could have included, those positions.

To summarize, the General Assembly: (1) clearly defined "public officer"; (2) tailored the definitions to persons with broad-ranging responsibilities in carrying out government functions; (3) recognized the distinction between the decisional authority of high-level officials as opposed to appointees; (4) clearly identified board members as "State employees" or "honorary State officials" as distinct from "State officers" who must file the report; and (5) insured that in fulfilling their more narrow responsibilities that they are governed by conflict of interest rules in the Code of Conduct, including financial conflicts. Accordingly, it would not be consistent with the statutory language, which expresses the legislative intent, for the Commission to graft a requirement on to the disclosure statute for appointees to boards and commissions to file an

annual report under the Financial Disclosure statute. Rather, changes, if any, to the classification of persons required to file must be made by the General Assembly.

### **Public Officers and Equivalent Positions--Commission Op. No. 97-02:**

An individual said he worked for an agency headed by an elected official, holds a high pay grade merit position, and has substantial responsibilities. He asked if he must file an annual report.

His specific position was not listed under the definitions of "public officer" in 29 Del. C. § 5812. The Commission noted that a determination of whether an individual is a "public officer" is not based on whether it is a merit or exempt position or on a specific pay grade or whether the agency is headed by an elected official. Rather, it looks to the statutory definitions to decide if an individual falls within the meaning of "public officer."

As most categories are very specific, such as candidates, elected officials, judges, etc., the only two categories under which his inquiry could be based are the requirement for filing by: (1) Cabinet Secretaries and their equivalents within the Executive Branch and (2) Division Directors and their equivalents within the Executive Branch. As he was neither a Cabinet Secretary nor a Division Director, the question was whether his position was within the category of "equivalents."

This Commission's research indicates that there are four (4) positions "equivalent" to a Cabinet Secretary: State Personnel Director, Budget Office Director, Office of Information Services Director and the Delaware Economic Development Office Director. Five (5) positions are "equivalent" to Division Directors: Higher Education Commission Director; State Housing Authority Director; Criminal Justice Council Director; DELJIS Director; and Statistical Analysis Center Director. As he held none of these positions, he was not required to file. However, the Commission noted that he was still subject to the Code of Conduct provisions which address the rules of conduct when there is a financial interest, etc., and in certain circumstances, those provisions specifically require disclosure to the Commission. See, 29 Del. C. § 5805(a) and 29 Del. C. § 5806(d).

### **Commission Op. 97-04:**

The Commission previously held that Deputy Principal Assistants to a Cabinet Secretary are not required to file annual disclosure statements under the financial disclosure statute. See, *Commission Op. No. 96-06*. A Principal Deputy Director asked if he were required to file and the Commission concluded that his position was similar to that of a Deputy Principal Assistant, in that they were similarly identified under the personnel statute. See, 29 Del. C. § 5903(5). As the financial disclosure statute defines "public officer" without including such positions, it is presumed that the General Assembly knew of the positions, especially as they were specifically identified in the personnel statute, the Commission concluded he was not required to file. It did bring to his attention that although not required to file an annual disclosure statement, he was still subject to the State Code of Conduct provisions which, among other things, require filing of financial disclosure statements under certain specific circumstances. See, 29 Del. C. § 5805(a) and 29 Del. C. § 5806(d).

### **Failure to Notarize (or Certify)—Commission Op. 99-08:**

The financial disclosure statute requires that reports be notarized. 29 Del. C. § 5813(a). It also provides if a public officer willfully fails to file a report in violation of Section 5813 of the statute, it is a class B misdemeanor. 29 Del. C. § 5815(a).

A candidate for State office did not have his report notarized. He was sent notice of the requirement by the Commission, but stated that he would not have it notarized. The matter was referred to the Attorney General's office pursuant to 29 Del. C. § 5815(c), which provides that the Commission may refer suspected violations to the Attorney General. The Attorney General's office concluded that there was substantial compliance in filing the report.

### **Failure to File—Commission Op. 99-13:**

A Public Officer failed to file an annual financial disclosure report by the statutory date of mid-February [the date has since been changed to mid-March]. After the due date passed, notice that the report was not received was sent to the officer. After no response, a second notice was sent by certified mail. It was returned as "refused." Subsequent efforts were made to contact the public officer by leaving phone messages, sending e-mails, and writing additional letters. After repeated attempts resulted in no response, the Commission referred the matter to the Attorney General pursuant to 29 Del. C. § 5815(c), which provides that suspected violations may be referred to the Attorney General. One provision of the statute is for the public officer to willfully fail to file a report. 29 Del. C. § 5815(a). The officer responded after notice from the Attorney General's office.

### **Must "Masters" File Financial Disclosure Reports?—Commission Op. 00-16:**

The Commission was asked if Masters in Superior Court were required to file a financial disclosure report. It concluded that the statute does not include such positions. That decision is consistent with a prior opinion, holding that as a general rule of law, where a statute lists the persons to whom the law applies, there is an inference that the legislature intended all omissions. *Commission Op. No. 95-01.*

We have made only one exception to that general rule, holding that although Court Commissioners were not listed in the statute, they are required to file. *Commission Op. No. 96-03.* We based that ruling on the fact that Court Commissioner positions did not exist when the statute was passed. Therefore, the General Assembly, in creating the legislation, could not have contemplated or had any intent in mind on whether those persons must file. *Commission Op. No. 96-03.* Because of the similarity between Court Commissioners and Judges, persons holding those positions would be required to file. *Id.*

However, the Master's position was not the same as a Court Commissioner's position (e.g., Master is not nominated by the Governor and approved by the Senate, etc.). Also, while Court Commissioner positions did not exist when the legislation was passed, Master's positions did exist in several courts. Therefore, by law, it is presumed that the omission of the Master's position was intended, especially as the General Assembly specifically listed not only Judge's positions but also positions such as Court Administrators, as persons who are required to file. Accordingly, as the position is not listed in the statute, but did exist when the legislation was passed, such persons need not file a financial disclosure report.

**Candidates Failure to File-- Commission Op. Nos. 00-30; 00-43 thru 00-45; 00-47 & 00-48:**

The Commission may refer any suspected violation of the Disclosure Reports subchapter on financial disclosure reporting to the Attorney General for investigation and prosecution, subject to the discretion of the Attorney General. 29 Del. C. § 5815(c).

The financial disclosure statute provides that every "public officer" as defined in 29 Del. C. § 5812 shall file a report disclosing financial interests. 29 Del. C. § 5813(a). "Public officer" includes "any candidate who has filed for any state office." 29 Del. C. § 5812(a)(3). Several candidates for State office did not file a financial disclosure report, after having been notified of the requirement to file and having been notified that "willful failure to file" may constitute a misdemeanor pursuant to 29 Del. C. § 5815(b).

The facts are as follows: The Commission's staff worked with the Commissioner of Elections to insure that the financial disclosure form was included with other candidate registration materials. To insure candidates are aware of the requirement, the Commission also obtained a list of candidates from the Commissioner of Elections. If the candidate had not filed, the Commission's staff sent the candidate notice of the filing requirement, giving the candidate a date by which to file. If there was no response to the first notice, a second notice was sent by certified mail to insure that the candidate had received the materials. In each instance, both a first and second notice was sent to the candidates.

Beyond the correspondence, the Commission's Legal Counsel, spoke with one candidate by phone. Subsequently, the candidate came to the Commission's office and the Commission's Legal Counsel reviewed the form with the candidate, but no financial disclosure form was filed.

**Referral of Suspected Violations—Commission Op. 02-43:**

Eleven candidates for State office failed to file a financial disclosure report within 14 days of becoming a public officers, as required by 29 Del. C. § 5813(c). Notice was sent by regular and certified mail to advise the candidates of the requirement to file. If a public officer willfully fails to file a report, it is a class A misdemeanor. 29 Del. C. § 5815(a).

After the reports were not filed by the time given in the letters, the Commission acted to refer the matters to the Attorney General, as it may file suspected violations with that office to further investigate and determine if the individuals would be prosecuted. 29 Del. C. § 5815(a). (*Commission Op. Nos. 02-44 thru 02-54*).

Section 5813 of the Financial Disclosure law requires that public officers report assets valued at more than \$5,000 that are "constructively controlled." 29 Del. C. § 5813(a)(2). "Constructively controlled" includes assets "held jointly with a spouse" or "any financial interest of the spouse." 29 Del. C. § 5812(b).

A candidate for State office did not indicate if his spouse held the types of financial interests that were required to be reported. The candidate was of the belief that such information should not have to be reported. It was explained that the statute required such

information. The candidate was advised that failure to provide information required under Section 5813 could result in criminal penalties. The candidate did not provide the information and signed a statement that he was advised of the reporting requirement. The Commission referred the suspected violation to the Attorney General's office, pursuant to 29 Del. C. § 5815(c).

### **Meaning of "Equivalent"—Commission Op. 05-03:**

The Code requires that Cabinet Secretaries and Division Directors and their "equivalents" must file a financial disclosure report. 29 Del. C. § 5812(n)(13) and (14).

The Commission was asked if two Department positions were "equivalent to Division Directors," making them subject to filing a report under the financial disclosure law. Based on the following law and facts, the Commission concluded that the positions were not equivalent. While not equivalent, the Department may adopt a policy that is more stringent than State law and require filings with the agency or this Commission.

#### **I. Applicable Law and Facts**

The financial disclosure law requires filings by, among others, Cabinet Secretaries, Division Directors, and "persons of equivalent rank." 29 Del. C. § 5812(n)(13) and (14). The Department believed the following positions were "equivalent" to a Division Director.

(A) Director, Administration: Pay Grade 23; Merit Position; job description says duties include "directing" the Office of Administration; principal contacts are with "other" Division Directors; other State/Federal Administrators, legislators and vendors.

(B) Chief, Office of Occupational & Labor Market Information: Pay Grade 21; Exempt position classified as an Administrative Management position.

The term "equivalent" is not defined by the law. The rules of statutory construction require that interpretations be consistent with the manifest intent of the General Assembly. 1 Del. C. §301. If technical words and phrases have a peculiar and appropriate meaning in the law they are construed and understood based on that meaning. 1 Del. C. § 303. Based on the following, the "peculiar and appropriate" use of Division Directors and heads of "Offices" does not result in "equivalent" positions.

##### **A. Statutory Organization of the State**

The statutory structure of various State agencies shows that "Division Directors" and heads of "Offices" are not equivalent. "Division Director" has a legal and technical meaning, generally understood to be separate and apart from heads of "Offices." "Division Directors" head a statutorily identified "division," giving the term a technical and legal meaning. However, heads of "offices" may be elected or appointed, and maybe equivalent in some instances to Cabinet Secretaries and Division Directors, but that "equivalency" is generally included in the statutory terms. See, e.g., Office of the State Auditor (elected head of agency); Office of the Budget (appointed head of agency is "equivalent" to Cabinet Secretary); Chief Administrator of Department of Technology and Information is "Cabinet level," etc. Generally, the chief Administrative Officer, is the head of an "Office of Administration." (*all citations omitted*). However, in rare instances, the chief Administrative Officer may head up a "Division." See, e.g.,

29 Del. C. §§ 8805 and 8805 (former Department of Administrative Services; chief Administrative officer, by law, a "Division Director." Thus, where the General Assembly wanted to identify a position as "equivalent," it has done so.

#### B. Department's Statutory Structure

The statute clearly separates the functions and duties of "Division Directors" and heads of the "Offices." 29 Del. C. § 8503(2)(a) thru (f). Moreover, it provides that if the Secretary's position is vacant, the Governor shall have the power to fill the position by appointing "the director of any division of the Department" as acting Secretary. 29 Del. C. § 8502(c). By omitting any reference to the heads of either "Office," the implication is that the Division Directors and the heads of "Offices" are not "equivalent" for purposes of appointment to the Secretary's job. Also, the statute gives the Secretary authority to establish, consolidate or abolish "divisions, subdivisions and offices within the Department...". 29 Del. C. § 8502(3)(4). A logical reading is that "subdivisions" and "offices" are different from a "division."

#### C. Legislative History

The "office" positions were created in 1970. That was 14 years before the financial disclosure law was written. The law presumes that the General Assembly was aware that agencies had both "Divisions" and "Offices," but chose not to include heads of departmental "offices" within the terms.

#### D. Treatment in State budget

Division Director's salaries are line items in the State budget but the heads of department "offices" generally are not unless they are uniquely equivalent to a Cabinet Secretary or Division Director. The State budget includes line items for this Department's Division Directors but not the "Offices." Again, the law did not appear to treat them as "equivalent."

#### E. Treatment by Commission

The Commission dealt with a similar situation where a State employee asked if he was the "equivalent" of a Division Director. Commission Op. No. 97-02. In that opinion, the Commission identified five (5) State positions as "equivalent" to "Division Directors." This Department's "offices" are not among them.

## II. Conclusion

Historically and legally, heads of "offices" and "Division Directors," within a Department are not treated as "equivalent." Consistent with the Commission's prior ruling, absent legislative action, under these particular facts, the Commission found that these positions were not equivalent.

Although the disclosure law does not include such positions, the Department can have a policy on which persons should file as long as the policy is not less stringent than the State law. *Nardini v. Willin*, 245 A.2d 164 (Del., 1968). In adopting a policy, the Department may wish to review laws which identify the reasons for filing and the constitutional issues that may arise if policies are too expansive. *Commission Op. No. 97-10 & 97-12*.

## **"Equivalent" to Division Director—Commission Op. 06-31:**

After a reorganization of State agencies where personnel from a former Department were absorbed by two other Departments, clarification was sought on whether certain positions were equivalent to "Division Directors" as the reorganization statute did not use "Division Director" titles for the positions. The decision entailed reviewing the statute of the former department and the statutes for the reorganization, which described the statutory duties in the former agency, as compared to statutory language describing their new positions. The actual duties of the officials also were reviewed. As the Commission is required to strive for consistency in its decisions, it also reviewed prior rulings. Further, the Budget law was reviewed to see if the positions were line items in the budget, which was some indicia of their status. It interpreted their status only as it related to 29 Del. C., Ch. 58, Subchapter II.

### **(A) The following positions are required to file**

- (1) Director of the Office of Management and Budget.
- (2) Management Services Administrator - Official has the same statutory job description as a Division Director while with the Department of Administrative Services (DAS), and, thus, is "equivalent" to a Division Director.
- (3) Facilities Management Administrator - Official has the same statutory job description as a Division Director with DAS, and, thus, is "equivalent" to a Division Director.
- (4) Government Support Services Administrator - Official has the same statutory job description as a Division Director while with DAS and, thus, is "equivalent" to a Division Director.
- (5) Human Resource Management Administrator - With the exception of one paragraph, the official's statutory duties are identical to duties previously performed by the State Personnel Office (SPO) Director. That position was previously equivalent to a Cabinet Secretary. *Commission Op. No. 97-02*. With this reduction in duties, and the fact that a Cabinet Secretary is already in place, the individual is at least the "equivalent" of a Division Director.
- (6) Benefits and Insurance Administrator - This official's statutory duties are identical to part of the duties previously assigned to the SPO Director, which was equivalent to a Cabinet Secretary. *Commission Op. No. 97-02*. As the duties were prior duties of a Cabinet Secretary, and as OMB already has a Cabinet Secretary, this official is at least the "equivalent" of a Division Director.
- (7) Statistical Analysis Center Director - The question was not asked about SAC and other entities and whether persons in those agencies were required to file. However, in a prior opinion, the Commission ruled that the SAC Director position is "equivalent" to a Division Director and must file. *Commission Op. No. 97-02*. The opinion resulted from discussions with State Personnel, payroll, etc., in 1997. There has been no change in the SAC Director's duties. Absent anything to the contrary, the SAC Director should continue to file.

### **(B) The following positions are not required to file**

- (1) Director of Financial Integration - Unlike the above jobs, this position was not created by statute; was not a line item in the budget; did not have the "Administrator" title; did not have such statutory authority as to act as the Cabinet Secretary in her absence; supervised only one person (the PHRST Director), which was unlike Division Directors and their equivalents, who supervise multiple employees, etc. It was basically the same job held prior to the reorganization, which was not previously found to be a Division Director "equivalent." *Commission Op. No. 97-02*. The primary responsibilities were to oversee OMB's Enterprise Resource Planning projects; work on projects at the direction of the Cabinet Secretary, act as

Statewide controller, and manage one-time items and contingencies.

(2) Director of Policy and External Affairs - Position was similar to the above Director's in that the position was not created in Code; not a budget line item; had little or no supervisory authority; and had no authority to act as the Secretary in her absence. The position was held by the former "Deputy Budget Director." Prior to the reorganization, the Budget Office was split into two distinct sections under the Budget Director. The Deputy Budget Director had supervisory responsibility over the financial and policy sections of the office. Several Directors were under the position: Director of Management Efficiency, the Director of Fiscal Operations, the Director of Financial Management and the Chief of Fiscal and Policy Analysis (and the Fiscal/Policy section under the chief). The Commission previously held that Deputies or Principal Assistants to a Cabinet Secretary are not required to file. *Commission Op. Nos. 96-06 and 97-04*. As a result of the reorganization, the responsibilities changed substantially. The position was now part of the Office of the OMB Director. Duties were for press relations; legislative issues; constituent relations; and coordination with the Governor's office on policy issues. One person reports to the position--an administrative management position that served as the Deputy to the position and also was the Executive Director of the Office of Minority and Women Business Enterprises. While the actual duties in the new position had changed, the new duties were similar to duties usually performed by Deputies to a Cabinet Secretary. As noted in the Commission's prior opinions, such positions existed before the General Assembly passed the Financial Disclosure Reporting law. *Commission Op. No. 96-06*. As the General Assembly is presumed to know of their existence, there is an inference that the omission was intended. *Commission Op. No. 95-01 (citing Norman v. Goldman, 173 A.2d 607, 610 (Del. Super., 1961))*, see also, e.g., 29 Del. C. § 7903(2) (statutorily authority to appoint Deputy to Cabinet Secretary is identified separate and apart from Division Directors).

(3) Director of PHRST - The title includes "Director" but, like those above, a title alone does not make the position "equivalent" to a Division Director. The position was not a line item in the budget law; the supervisory and other responsibilities were not equivalent to those of a division director, etc.; the position was not previously held to be Division when it was under the SPO; there were no indicia of the position having authority to assume the Cabinet Secretary's duties in her absence; the newsletter discussing the various parts of OMB referred to it as a "section." Under Delaware statutes, when there is reference to such things as "Division," "office," "section," etc., it is presumed to be a smaller unit than a Division. *Commission Op. No.05-03*.

(4) Director of the Office of Pension - Like the situations above, the position had never been required to file. Moreover, the Commission had held that when the term "office" was listed as a subordinate to a Cabinet Secretary, the term had a legal meaning that made it something less than a Division. See, *Commission Op. No.05-03*. The position had existed for years and had never been required to file a financial disclosure report. The Commission had never issued a specific opinion on the position, however, consistent with prior rulings, the office administrator's position did not fall within the meaning of "equivalent" to a Cabinet Secretary or a Division Director.

First, before the reorganization, the Director of State Personnel's statutory authority included a provision that the Director "shall be responsible for the clerical administration of all state pension funds." 29 Del. C. § 5910(d). The law establishing the duties of the Director's office did not specifically provide for a Division or even an office for the Pension Administrator. A separate law creating a Board of Pension Trustees, gave that entity: "The power and duty to appoint an Executive Secretary who shall be responsible for determining the eligibility for

retirement pension benefits for all state administered pension plans including the determination of eligibility for paraplegic veterans' benefits as provided for in §1001 of Title 20." 29 Del. C. § 8308(b)(2). The Pension Administrator was hired by, and reports to, the Board. One indicia of a "Division Director" is that generally as a matter of law, the Division Director reports directly to the head of an agency. Another indicia is that generally a Cabinet Secretary has statutory authority to delegate responsibilities to "division directors," but not to other employees within the agency. See, e.g., 29 Del. C. § 8404(7). As a matter of law, where there were "divisions" and "offices" created by statute, the statute limited the delegation of a Secretary's duties to the "division directors." See, 29 Del. C. § 8503(2) and (6). No statute establishes the pension "office," and no provision permits the OMB Director to delegate Cabinet level duties to the head of the pension "office." Thus, the Pension Administrator's position, at a minimum, lacks those indicia of a "division director."

Under the statute creating the reorganization, OMB's Director has authority:

To establish, consolidate or abolish such divisions, subdivisions and offices within the Office or transfer or combine the powers, duties and functions of the divisions and other groups within the Office, with the written approval of the Governor, as may deem necessary, provided that all powers, duties and functions required by law shall be provided for and maintained...". 29 Del. C. § 6303A(13) (emphasis added).

The plain language of the statute recognizes a clear distinction between divisions, subdivisions and offices: in other words, they are not "equivalent." Rather, the legal structure of the hierarchy identifies "offices" as something less than a division. All words of a statute must be given meaning. *Goldstein v. Municipal Court*, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991). If an "office" were equivalent to a "division" the term "office" in the ordinary context of the statute would have no meaning.

That statutory structure is not unique to OMB. See, e.g., 29 Del. C. § 7903(7); § 8003(4); § 8103(5); § 8203(4); § 8404(5) (cabinet secretaries' "power to establish...divisions, subdivisions, and offices"); § 8304(4) ("establish...division and offices"). As the General Assembly has consistently recognized this legal hierarchy, there is a legal presumption that it was aware of and knew the differences between a division and an office when it wrote the legislation that required reporting by "Division Directors" and their "equivalents." As it knew of such distinctions, but did not require filings by those holding an "office" that was a subset of the agency's structure, there is a presumption that the omission was intentional. *Commission Op. No. 95-01* (citing *Norman v. Goldman*, 173 A.2d 607, 610 (Del. Super., 1961)).

Second, the responsibilities of the Pension Administrator had not changed as a result of the reorganization. Thus, he was performing the same duties in his "office." The only change relative to the position was that the Board and the OMB Director now had a combined power to hire and oversee the Pension Administrator. While their powers or duties had been combined, his duties did not change. No facts suggested he had assumed additional duties that would move him up from holding an "office" position to holding a "division" position.

Because of administering the pension plans, when audits were conducted he must disclose or deny any financial interest he has related to those plans as part of the audit. Thus, his disclosure was more specifically related to his job in order to insure that his own financial interests did not recreate a conflict of interest for him. The reports by Division Directors and their equivalents were much broader and not specifically directed at their particular job.

