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OPINION	:	No. 81-108
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The Honorable Carol Hallett, Member of the Assembly, has requested an opinion on the following questions as revised and restated:

1. Do the provisions of the California Fair Employment and Housing Act relating to pre-employment or pre-licensure inquiries apply to application forms for an examination or testing procedure the passage of which is a prerequisite for employment or licensure?

2. May an inquiry which would be prohibited under the provisions of the California Fair Employment and Housing Act relating to pre-licensure inquiries, and which is not required under pertinent licensure statutes, be permitted on a state licensure application?

3. May an inquiry which would be prohibited under the provisions of the California Fair Employment and Housing Act relating to pre-licensure inquiries be made by a state licensing agency on a separate personal identification data sheet?

4. Is the State Department of Justice the only state agency authorized to provide a form requiring personal data for identification purposes?

5. Is each state agency responsible for governing its own compliance with the provisions of the California Fair Employment and Housing Act relating to pre-employment and pre-licensure inquiries?

6. May a pre-employment statement of financial interests be required by the state?

7. Do the provisions of the California Fair Employment and Housing Act relating to pre-employment inquiries apply to inquiries by the state directed to private contractors doing business with the state concerning the contractor's work force?

8. Do the provisions of the California Fair Employment and Housing Act relating to pre-employment inquiries apply to the Governor of California with regard to appointees?

CONCLUSIONS

1. The provisions of the California Fair Employment and Housing Act relating to pre-employment or pre-licensure inquiries apply to application forms for an examination or testing procedure the passage of which is a prerequisite for employment or licensure.

2. An inquiry which would be prohibited under the provisions of the California Fair Employment and Housing Act relating to pre-licensure inquiries, and which is not required under pertinent licensure statutes, is not permitted on a state licensure application.

3. An inquiry which would be prohibited under the provisions of the California Fair Employment and Housing Act relating to pre-licensure inquiries may be made by a state licensing agency specifically acting in accordance with the following conditions: (1) only information regarding race, sex and national origin may be solicited; (2) such information may be solicited only on a voluntary basis; (3) such information may be used only for recordkeeping purposes; (4) where such data is to be provided on an identification form, the form must be separate or detachable from the application form itself; (5) such information may not be used for discriminatory purposes.

4. The State Department of Justice is not the only state agency authorized to provide a form requiring personal data for identification purposes.

5. Each state licensing board is responsible for governing its own compliance with the provisions of the California Fair Employment and Housing Act relating to pre-licensure inquiries. Each state agency is responsible for governing its own compliance with applicable laws and statutes relating to pre-employment inquiries.

6. A pre-employment statement of financial interests may be required by the state, provided that the state's interest in such disclosure is compelling, and that the intrusion, viewed in the light of less drastic alternatives, is necessary to the accomplishment of a permissible state policy.

7. The provisions of the California Fair Employment and Housing Act relating to pre-employment inquiries do not apply to inquiries by the state directed to private contractors doing business with the state concerning the contractors work force.

8. The provisions of the California Fair Employment and Housing Act relating to pre-employment inquiries do not apply to the Governor of California with regard to appointees.

ANALYSIS

It is the public policy of this state to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age. (§ 12920;[1] and *cf*. Cal. Const., art. 1, § 8; *James v. Marinship Corp.* (1944) 25 Cal. 2d 721, 739–740; *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 484; 63 Ops. Cal. Atty. Gen. 457, 460 (1980).) The opportunity to seek, obtain and hold employment without such discrimination is expressly declared to be a civil right. (§ 12921.)

Certain specific provisions in furtherance of this public policy are contained in the California Fair Employment and Housing Act.[2] ("Act," *post*.) Section 12940 provides

[1] Section references herein not specifically identified are to the Government Code.

[2] The Governors Reorganization Plan No. 1 of June 22, 1979, abolished the Division of Fair Employment Practices within the Department of Industrial Relations and established a Department of Fair Employment and Housing within the State and Consumer Services Agency and a Fair Employment and Housing Commission within the department, which entitles succeeded to the former functions and responsibilities of the Division of Fair Employment Practices and of the Fair Employment Practice Commission respectively. Concomitantly, the provisions of the California Fair Employment Practice Act were deleted from the Labor Code and added to the Government Code, section 12900 *et seq*., as part of the California Fair Employment and Housing Act. (Stats.

in part, with respect to employment:

> "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
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> "(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.
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> " . . . . . .
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> "(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex, or any intent to make any such limitation, specification or discrimination. Nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.
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> " . . . . . .

1980, ch. 992, § 4.)

Section 12944 provides in part, with respect to *licensure*:

> "(a) It shall be unlawful for a licensing board to require any examination or establish any other qualification for licensing which has an adverse impact on any class by virtue of its race, creed, color, national origin or ancestry, sex, age, medical condition, or physical handicap, unless such practice can be demonstrated to be job related.
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> " . . . . . .
>
> "(b) It shall be unlawful for any licensing board, unless specifically acting in accordance with federal equal employment opportunity guidelines or regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical handicap, medical condition, sex, or age, or any intent to make any such limitation, specification, or discrimination. Nothing in this subdivision shall prohibit any licensing board from making, in connection with prospective licensure or certification, an inquiry as to, or a request for information regarding, the physical fitness of applicants if that inquiry or request for information is directly related and pertinent to the license or the licensed position the applicant is applying for.
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> " . . . . . .

The first question is whether the provisions of the Act relating to pre-employment or pre-licensure inquiries apply to application forms for an examination or testing procedure the passage of which is a prerequisite for employment or licensure. The second question, which is considered in conjunction with the first, is whether an inquiry which would be prohibited under the provisions of the Act relating to pre-licensure inquiries, and which is not required under pertinent licensure statutes, is permitted on a state licensure application. Both section 12940, subdivision (d), and section 12944, subdivision (b) refer to non-job-related inquiries,[3] either verbal or *through use of an application form* . . . ." (Emphasis added.) It is apparent that application forms for

[3] A non-job-related inquiry is one which is not necessary to the conduct of the employers business, thus, a pre-employment inquiry which is not manifestly related to the regulate qualifications for the job is non-jobrelated" within the meaning of the Act. (*Cf*. 62 Ops. Cal. Atty. Gen. 180, 186 (1979.)

examination or testing and state licensure applications consist of inquiries propounded, and which must be answered prior to selection for employment or granting of a license.[4] In our view, the statutes are unambiguous and apply to any such inquiry made in connection with initial application forms, or in preparation for, conjunction with, or as part of any screening, examination, or testing procedure. It is concluded, therefore, that the provisions of the Act relating to pre-employment[5] or pre-licensure[6] inquiries apply to application forms, including applications for examination or testing which is a condition precedent to employment or licensure.

The third question is whether an inquiry which would be prohibited under the provisions of the Act relating to pre-licensure inquiries may be made by a state licensing agency on a separate personal identification data sheet. Section 12944, subdivision (b) prohibits certain inquiries "unless specifically acting in accordance with federal equal employment opportunity guidelines or regulations approved by the [Fair Employment and Housing Commission." The absence of any such regulation prohibiting any such inquiry is an insufficient basis upon which to invoke the exception; otherwise, the mere absence of such regulation would wholly consume the statutory proscription. Rather, the words "unless *specifically* acting in accordance with . . ." calls for a search for any regulation which actually permits or necessarily requires the acquisition of information by means of pre-employment inquiry.

No such federal guideline or regulation has been discovered which would apply to *licensing agencies* as such[7] which actually permits or necessarily requires, for

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[4] The scope of the questions presented, and hence of this analysis, is specifically limited to *pre*-employment and *pre*-licensure inquiries. We express no opinion, therefore, as to whether the statutes are so limited. It is noted, however, that former Labor Code section 1420, subdivision (d) was amended, inter alia, by Statutes 1974, chapter 573, section 2 to delete the words "in connection with prospective employment."

[5] The term employer" expressly includes the state (§ 12926. subd. (c). 62 Ops. Cal. Atty. Gen. 106, 108 (1979), 62 Ops. Cal. Atty. Gen. 180, 183 (1979).) In accordance with the long established policy of this office to refrain from expressing an opinion as to issues presently in litigation, no opinion is offered as to the application or extent of application of the Act to the state, particularly with respect to the state civil service. (*Cf*. 63 Ops. Cal. Atty. Gen. 24, 31 (1980), 63 Ops. Cal. Atty. Gen. 583, 586 (1980).)

[6] The term "licensing board" for purposes of section 12944 means any state board, agency or authority in the State and Consumer Services Agency which has the authority to grant licenses or certificates which are prerequisites to employment eligibility or professional status. (§ 12944, subd. (e).) Thus, with respect to licensure, the Act applies exclusively to the state.

[7] (*Cf*. tit. 29 CFR, § 1607.2B, Uniform Guidelines on Employee Selection Procedures (1978).) A licensing agency is, of course, subject to applicable federal statutes and regulations governing its conduct as an employer or employment agency. However, its activity as an employer does not

purposes of recordkeeping or otherwise, the acquisition of information concerning licensees or applicants for licensure.

Focusing, in any event, on federal equal employment opportunity guidelines or regulations applicable to *employers, employment agencies, and labor organizations*, as defined in title 42, United States Code, section 2000e, in accordance with the specific reference in section 12944, subdivision (b) to employment guidelines or regulations, no such regulation purports to permit or require any "pre-employment" inquiry which is otherwise prohibited under the provisions of section 12944, subdivision (b) pertaining to licensure, or section 12940, subdivision (d) pertaining to employment. Title 42, United States Code, section 2000e-8, subdivision (c) provides that every employer, employment agency, and labor organization subject to title VII of the Civil Rights-Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, shall make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, preserve such records for such periods, and make such reports therefrom as the Equal Employment Opportunity Commission shall prescribe by regulation or order. Pertinent regulations of the Equal Employment Opportunity Commission are found in part 1602 of title 29, Code of Federal Regulations. With respect to records concerning the composition of an employer's work force, section 1602. 13 provides that required information may be acquired "either by visual surveys of the workforce, or, at [the employer's] option, by the maintenance of post-employment records as to the identity of employees where the same is permitted by State law." Section 1602.30 pertaining specifically to state and local government employers, provides in part:

> "On or before September 30, 1974, and annually thereafter, every political jurisdiction with 15 or more employees is required to make or keep records and the information therefrom which are or would be necessary for the completion of report EEO-4 under the circumstances set forth in the instructions thereto, whether or not the political jurisdiction is required to file such report under § 1602.32 of the regulations in this part. The instructions are specifically incorporated herein by reference and have the same force and effect as other sections of this part."

The instructions provide in part (38 FR 5661, March 2, 1973):

> "An employer may acquire the race/ethnic information necessary for this section either by visual surveys of the work force, or from postemployment records as to the identity of employees. An employee may be included in the minority group to which he or she appears to belong, or is

relate to its licensees, nor does it typically act as an employment agency.

regarded in the community as belonging.

> "Since visual surveys are permitted, the fact that race/ethnic identifications are not present or [sic] agency records is not an excuse for failure to provide the data called for.
>
> "Please note that conducting a visual survey and keeping postemployment records of the race or ethnic origin of employees is legal in all jurisdictions and under all Federal and State laws. State laws prohibiting inquiries and recordkeeping as to race, etc., relate only to applicants for jobs, not to employees."

Thus, nothing in the federal regulations, even as to employers, requires a pre-employment inquiry to be made or supersedes state law prohibiting such inquiries.[8]

The scope of the exception, however, is not limited to federal regulations. The words "federal . . . guidelines or regulations approved by the commission" are, of course, patently ambiguous.[9] Does the word "federal" modify "regulations"? The absence of any punctuation after the word "guidelines" indicates that the sole reference is to federal guidelines or federal regulations which have been approved by the state commission.[10] Further, the word "approved" is not appropriate as to regulations *adopted* or *promulgated* by the commission itself; rather, it assumes the preexistence of such regulations. Moreover, if "regulations" refers to those of the state commission, federal regulations, as distinguished from guidelines, would appear to be excluded.

Nevertheless, there are, in the ultimate quest for legislative intent, persuasive indications to the contrary. First, valid applicable federal standards do not require approval by a state agency; the phrase "regulations approved by the commission" can only refer to its own regulations. In this regard it is noted that the exception was enacted, by way of amendment to former section 1420, subdivision (d) of the Labor Code, by Statutes 1974, chapter 573, section 2. As initially proposed by Assembly Bill No. 2022 in the 1973–1974 regular session, the exception read "unless specifically acting in accordance with federal equal employment opportunity guidelines." As first amended six weeks later, the words

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[8] We have similarly examined Executive Order 11246 (30 FR 12319), as amended, and regulations thereunder enacted by the Secretary of Labor (41 CFR, ch. 60) pertaining to recordkeeping (e.g., pts. 60–2.12(m), 60–3.4).

[9] Compare section 12940, subdivision (d) which is similarly ambiguous. ("federal . . . guidelines and regulations approved by the commission.")

[10] "Commission" refers to the California Fair Employment and Housing Commission. (§ 12925(a).)

"and regulations approved by the commission" were added. By the same bill section 1233 pertaining to local government agencies was added:

> "Acting in accordance with Executive Order 11246 (30 FR 12319), as amended, applicants for employment by, and incumbent employees of, public agencies may be solicited to voluntarily declare their ethnic identification, provided this information shall be used for research and statistical purposes only. Notwithstanding the provisions of this section, it shall be unlawful, for purposes of any appointment, hiring, or promotion, to use this information to discriminate against a prospective or incumbent employee or to give preference to a person identified as a member of an ethnic, racial, or religious group upon the basis of such membership or identification.
>
> "A separate or tear-off portion of the application shall be written and shall be kept in a separate nonpublic file, accessible only to those charged by the personnel director with research responsibility, for the purpose of discharging that responsibility. The separate sheet or tear-off may contain a number to be used as a cross index to the application. Safeguards to prevent misuse of the information shall be *approved* by the State Fair Employment Practice Commission, including the point in time at which the separate sheet or tear-off portion of the application shall be maintained in separate nonpublic file. As used in this section, 'public agency' means every city, county, and city and county whether chartered or not and every district." (Emphasis added.)

Thus, the word "approved" ("safeguards. . . approved by the . . , commission") appeared in the same bill in a context which clearly refers solely to the commission and not to the designated federal executive order. Finally, the exception as originally enacted, and which now appears in section 12940, subdivision (d) was carried over in section 12944, subdivision (b) in identical form except that an apparent attempt to more clearly distinguish between federal guidelines and state regulations was made by changing the words "guidelines and regulations" to "guidelines or regulations."

We turn, then, to the regulations of the Fair Employment and Housing Commission. In order to determine whether any such regulation authorizes a departure from the basic prohibitions of section 12944, subdivision (b), Title 2, California Administrative Code, section 7287.3, subdivision (b), pertaining to pre-employment inquiries, provides:

> "(1) Limited Permissible Inquiries. An employer or other covered

entity may make any pre-employment inquiries which do not discriminate on a basis enumerated in the Act. Inquiries which directly or indirectly identify an individual on a basis enumerated in the Act are unlawful unless pursuant to a permissible defense. However, an employer or other covered entity may make a pre-employment inquiry as to the physical fitness, medical condition, physical condition or medical history of an applicant if, and only if, that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or is directly related to a determination of whether the applicant would endanger his or her health or safety or the health and safety of others.

"(2) Applicant Flow and Other Statistical Recordkeeping. Notwithstanding any prohibition in these regulations on pre-employment inquiries, it is not unlawful for an employer or other covered entity to collect applicant flow and other recordkeeping data for statistical purposes as provided in Section 7287.0(b) of these regulations or in other provisions of state and federal law."

Section 7287.0, subdivision (b), of title 2, pertaining to recordkeeping, provides in part:

"Applicant Identification Records. Unless otherwise prohibited by law and for recordkeeping purposes only, every employer or other covered entity shall maintain data regarding the race, sex, and national origin of each applicant and for the job for which he or she applied. If such data is to be provided on an identification form, this form shall be separate or detachable from the application form itself. Employment decisions shall not be based on whether an applicant has provided this information, nor shall the applicant identification information be used for discriminatory purposes, except pursuant to a bona fide affirmative action or non-discrimination plan."

The term "pre-employment inquiry" is defined as "[a]ny oral or written request made by an employer or other covered entity for information concerning the qualifications of an applicant for employment or for entry into an activity leading to employment." (2 Cal. Admin. Code, § 7287.2(c).) The term 'other covered entity" has been administratively defined as "[a]ny employer, employment agency, labor organization or apprenticeship training program. . . ." (Tit. 2, Cal. Admin. Code, § 7286.5(e).) Further, an activity "leading to employment" is usually in reference to an apprenticeship or other training program. (E.g., §§ 12940, subds. (a) and (c), and 12945, subd. (a).) Pursuant to the specific and unequivocal terms of section 12944, subdivision (b), however, these regulations governing pre-employment inquiries must be deemed applicable in the context of pre-licensure inquiries.

Under the provisions of section 7287.3(b) of title 2, California Administrative Code, pre-employment inquiries are permitted for recordkeeping purposes only, "as provided in Section 7 287.0(b) of these regulations or in other provisions of state and federal law." Section 7287.0(b) pertains only to data regarding race, sex, and national origin. Moreover, since employment decisions may not be based on whether an applicant has provided the solicited information, the response to such inquiries is voluntary.[11] These regulations permitting pre-employment inquiries are subject, then, to five basic limitations: (1) only information regarding race, sex, and national origin may be solicited; (2) such information may be solicited only on a voluntary basis;[12] (3) such information may be used only for recordkeeping purposes; (4) where such data is to be provided on an identification form, the form must be separate or detachable from the application form itself; (5) such information may not be used for discriminatory purposes. Hence, the regulations permit no departure from the statutory prohibition respecting inquiries relating to religious creed, color, ancestry, physical handicap, medical condition,[13] or age.[14]

Section 8310, however, provides:

> "The inclusion of any question relative to an applicant's race, sex, marital status, or religion in any application blank or form required to be filled in and submitted by an applicant to any department, board, commission, officer, agent, or employee of this state is prohibited.
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> "Any person who violates this section is guilty of a misdemeanor.
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> "Notwithstanding the provisions of this section, subsequent to employment, gender and marital status data may be obtained and maintained for research and statistical purposes when safeguards preventing misuse of the information exist, as approved by the State Fair Employment Practice Commission, except that in no event shall any notation, entry, or record of such data be made on papers or records relating to such employment

[11] The term "voluntary" as used here and in other related contexts (fn. 12, *post*) means that no adverse selection decision may be based on the applicant's refusal to provide such information.

[12] Compare sections 1233 (local agencies) and 19705 (state civil service) pertaining to voluntary "ethnic" identification.

[13] "Medical condition" means any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence. (§ 12926, subd. (f).)

[14] Age refers to the chronological age of any individual who has attained the age of 40. (§ 12946, subd. (a).)

application."[15]

State licensing boards clearly fall within the provisions of section 8310. Under the terms of that section, inquiries relating to race, religion, or sex are prohibited.[16]

Assuming the full force and effect of such prohibitions, the only remaining category covered by the regulations which is not prohibited would be national origin.

The phrase "[u]nless otherwise prohibited by law" at the outset of section 7287.0(b) of the regulations does not refer to pre-employment inquiries, but rather to the maintenance of data. Nor do the provisions of section 12944, subdivision (b) indicate an intent to authorize certain inquiries only to the extent that they are not prohibited by some other law. Otherwise, the phrase would be found in the statute itself. The question remains, then, whether section 8310 governs over section 12944. First, in the event of an ostensible conflict between two state statutes, the more specific enactment will control over the more general one. (*Mitchell v. County Sanitation Dist*. (1958) 164 Cal. App. 2d 133, 141; 64 Ops. Cal. Atty. Gen. 425, 429 (1981).) Thus, it is generally stated that where the same subject matter is covered by inconsistent provisions, one of which is special and the other general, the special one, whether or not first enacted, is an exception to the general statute and controls unless an intent to the contrary clearly appears. (*Warne v. Harkness* (1963) 60 Cal. 2d 579, 588; 62 Ops. Cal. Atty. Gen. 494, 497, 498 (1979).) While section 8310 pertains generally to any state department, board, commission, officer, agent, or employee, section 12944 deals specifically with licensing boards. Second, where two statutes enacted at different times treat of the same subject, the later expression of legislative intent will prevail over the earlier. (*City of Petaluma v. Pacific Tel. and Tel. Co*. (1955) 44 Cal. 2d 284, 288; 62 Ops. Cal. Atty. Gen. 494, 497 (1979).) Section 8310 was last amended in 1976, while section 12944 was added by Statutes 1980, chapter 992, section 4.[17] Hence, section 12944, subdivision (b) and the regulations authorized thereunder (*cf*. § 12935) control over the provisions of section 8310 to the extent of inconsistency.

It is concluded that an inquiry which would be prohibited under the provisions of the Act relating to pre-licensure inquiries may be made by a state licensing agency specifically acting in accordance with the following conditions: (1) only information regarding race, sex, and national origin may be solicited; (2) such information

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[15] Compare Education Code sections 45293 (school districts) and 88112 (community colleges) prohibiting inquiries relating to political or religious opinions or affiliations, race, color, national origin or ancestry. sex, or marital status.

[16] It is noted that such prohibitions are limited to written inquiries, and that the recording of such data otherwise obtained is not proscribed under that section.

[17] Originally enacted as Labor Code section 1420 3 by statutes 1978, chapter 1338.

may be solicited only on a voluntary basis; (3) such information may be used only for recordkeeping purposes; (4) where such data is to be provided on an identification form, the form must be separate or detachable from the application form itself; (5) such information may not be used for discriminatory purposes.

The fourth inquiry is whether the California Department of Justice is the only state agency authorized to provide a form requiring personal data for identification purposes. It is assumed that the term "personal data" refers to "personal information" as used in the Information Practices Act of 1977, Civil Code section 1798 *et seq*., which is defined as any information in any record about an individual that is maintained by a state agency, including, but not limited to, the education, financial transactions, medical or employment history of such individual, but excluding information found to be confidential or nonpersonal under subdivision (a) or (c) of section 1798.3 of said code. (Civ. Code, § 1798.3, subd. (b).) The term "agency" generally includes every office, officer, department, division, bureau, board, commission, or other state agency, within the executive branch (Civ. Code, § 1798.3, subd. (d).) Subject to the conditions and limitations of the Information Practices Act (see, e.g., §§ 1798.9–1798.23), each agency is authorized to maintain in its records only such personal or confidential information as is relevant and necessary to accomplish a purpose of the agency required or authorized by the California Constitution or statute or mandated by the federal government. (Civ. Code, § 1798.14.)[18] Assuming that personal information is required for purposes of identification,[19] and that

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[18] Compare federal Privacy Act of 1974 (5 U.S.C. § 552a(e)).

[19] The term "nonpersonal information," to which the Information Practices Act does not apply (Civ. Code, § 1798.2), is defined in subdivision (c) of section 17983 of said code as:

> "(1) Information consisting only of names, addresses, telephone numbers and other limited factual data, which could not, in any reasonable way (i) reflect or convey anything detrimental, disparaging, or threatening to an individual's reputation, rights, benefits, privileges, or qualifications or (ii) be used by an agency to make a determination that would affect an individual's rights, benefits, privileges, or qualifications.
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> "(2) An agency telephone book or directory which is used exclusively for telephone and directory information.
>
> "(3) Any card catalog of any library, or the contents of any book listed within such card catalog.
>
> "(4) Any mailing list which is used exclusively for the purpose of mailing agency information.
>
> "(5) Records required by law to be maintained and used solely as a system of statistical records, but only if such records are maintained for statistical 'research or reporting purposes only and are not used in whole or in part in making any determination about an identifiable individual.
>
> "(6) Records to which an individual has the right of examination pursuant to Article 5

identification is relevant and necessary to the accomplishment of an agency's purposes, an agency is authorized to maintain, and therefore to provide a form requiring such data.

The fifth inquiry is whether each state agency is responsible for governing its own compliance with the provisions of the Act relating to pre-employment and pre-licensure inquiries. As understood, this inquiry is simply whether each agency of the state is initially responsible for assuring compliance with the applicable provisions of the Act. As previously noted (fn. 5, *ante*), no opinion is offered as to the application of the Act to the state, particularly with respect to the state civil service. Each state agency is, of course, responsible for compliance with laws and statutes, including the State Civil Service Act (§ 18500 *et seq.),* specifically applicable to it. (See §§ 19703–19706 pertaining to employment inquiries.)[20] The Act does, however, clearly apply to the state for purposes of its licensing activities, and is directed specifically to each of its licensing boards. (§ 12944.) There can be little doubt, then that each such board which falls within the purview of the Act (fn. 6, *ante*) is responsible for assuring its compliance with the terms thereof.[21]

The sixth inquiry is whether a pre-employment statement of financial interests may be required by the state. As previously noted, such a statement would constitute "personal information" under the terms of the Information Practices Act; each agency is authorized to maintain in its records such information as is relevant and necessary to the accomplishment of its purposes. The disclosure of such information by designated offices and employees is specifically prescribed under the Political Reform Act of 1974 (§ 8 1000 *et seq*.; *Cf.* §§ 87300, 87302; see 58 Ops. Cal. Atty. Gen. 426 (1975)) and the Moscone Governmental Conflict of Interests and Disclosure Act (§ 3600 *et seq*.; *cf.* §§ 3700, 3702; see 57 Ops. Cal. Atty. Gen. 252 (1974)). Principal provisions of the Moscone Act have been effectively suspended by sections 3800 through 3802. In any event, nothing in these statutory provisions, with the exception of section 3701 pertaining to nonincumbent candidates for specified offices and persons nominated or appointed to designated offices, provides for or prohibits financial disclosure by applicants for employment. The question remains, then, whether a pre-employment disclosure requirement is appropriate.

Insofar as the sole conceivable purpose for any such required pre-employment statement of financial interests would be to provide a basis for a selection decision, an issue arises as to whether an applicant's financial concerns prior to

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(commencing with Section 11120) of Chapter 1 of Title I of Part 4 of the Penal Code.

[20] Authority to enforce the civil service statutes is constitutionally vested in the State Personnel Board. (Cal. Const., art. VII, § 3.)

[21] Enforcement authority under the Act rests with the Department of Fair Employment and Housing. (§§ 12930, 12960–12974.)

employment would support any legitimate inferences. As stated in 63 Ops. Cal. Atty. Gen. 583, 586 (1980).

> "It is well established that no person may be denied government employment because of factors unconnected with the responsibilities of that employment. (*Morrison v. State Board of Education* (1969) 1 Cal. 3d 214, 234; *Vielebr v. State Personnel Board* (1973) 32 Cal. App. 3d 187, 192; *Hetherington v. State Personnel Board* (1978) 82 Cal. App. 3d 582, 592.) Similarly, a number of federal cases have held that there must be some reasonably foreseeable specific connection between the disqualifying quality or conduct of an individual and the efficiency of the public service. (*Mindel v. United States Civil Service Commission* (N.D. Cal. 1970) 312 F. Supp. 485, 488; *Norton v. Macy* (D.C. 1969) 417 F.2d 1161, 1164; *Society for Individual Rights, Inc. v. Hampton* (N.D. Cal. 1973) 63 F.R.D. 399, 401, *Beazer v. New York City Trans. Auth.* (S.D.N.Y. 1975) 399 F. Supp. 1032, 1057.)"

A further issue of constitutional dimension arises with respect to the right of privacy. The Supreme Court of the *United States, in Griswold v. Connecticut* (1965) 381 U.S. 479, explicitly recognized the existence of certain "zones of privacy." The court found this right, while nor expressly provided in the Constitution, to be the result of the interrelationship of express constitutional provisions and to be necessary for the implementation of these express protections. In this state, privacy is expressly declared to be an inalienable right. (Cal. Const., art. 1, § 1.) It would, of course, be impossible to enumerate all of the possible zones of privacy, but they have been held to include, by way of example, privacy "in associations" including privacy of membership lists of a constitutionally valid organization (*NAACP v. Alabama* (1958) 357 U.S. 449, 462; *Huntley v. Public Utilities Com.* (1968) 62 Cal. 2d 67, 72–74), privacy in the "private realm of family life" (*Prince v. Massachusetts* (1944) 321 U.S. 158, 166), privacy "surrounding the marriage relationship" (*Griswold v. Connecticut*, *supra*, at p. 486), privacy of one's home (*Boyd v. United States* (1886) 116 U.S. 616, 630; *Camara v. Municipal Court* (1967) 387 U.S. 523, 539; *People v. Edwards* (1969) 71 Cal. 2d 1096, 1099–1105; *Parrish v. Civil Service Com*. (1967) 66 Cal. 2d 260, 263, 271, 276), and privacy in one's personal financial affairs (*City of Carmel v. Young* (1970) 2 Cal. 3d 259, 268). The last cited case involved the right to hold public office as affected by the financial interest's public disclosure statute. (Stats. 1969, ch. 1512, repealed, Stats. 1973, ch. 1166; see now, Moscone Governmental Conflict of Interests and Disclosure Act, *supra*.) The court observed that in determining the constitutional propriety of any such limitation upon the fundamental right of privacy there must be a balancing of interests between the government's need to preserve the efficiency and integrity of the public service on the one hand and the right to maintain privacy in one's personal affairs on the other. In such a case, the government must

demonstrate the necessity for such limitation upon the right in question and must show not merely that the restriction is rationally related to the accomplishment of a permissible purpose but that the need is compelling. Moreover, the intrusion must not be overly broad; it must be viewed in the light of less drastic means for achieving the same basic purpose. (*City of Carmel v. Young*, *supra*, at p. 268; and *cf*. *Fort v. Civil Services Com*. (1964) 61 Cal. 2d 331, 334–335; *Vogel v. County of Los Angeles* (1967) 68 Cal. 2d 18, 22; *Kinnear v. City and County of San Francisco* (1964) 61 Cal. 2d 341; *Bagley v. Washington Township Hosp. Dist*. (1966) 65 Cal. 2d 499.)

Following *City of Carmel*, the right of privacy was expressly incorporated into the California Constitution in order to prevent governmental "snooping," to inhibit the overly broad collection and retention of unnecessary personal information, the improper use of information properly obtained for a specific purpose, and to avoid the evils incident to lack of a reasonable check on the accuracy of existing records. (*Richards v. Superior Court* (1978) 86 Cal. App. 3d 265, 273.)[22] Nevertheless, neither the right to privacy nor the right to seek and hold public office must inevitably prevail over the right of the public to an honest and impartial government. (*County of Nevada v. MacMillen* (1974) 11 Cal. 3d 662, 672.) The public's right to know of matters which might bring about a conflict of interest between the public employment and the private financial interests of those holding public office is a laudable and proper legislative concern and purpose. (*Id*., at p. 671, fn. 7; *City of Carmel v. Young*, *supra*, 2 Cal. 3d at p. 262.)

It is concluded that a pre-employment statement of financial interests may be required by the state, provided that the state's interest in such disclosure is compelling, and that the intrusion, viewed in the light of less drastic alternatives, is necessary to the accomplishment of a permissible state policy.

The seventh inquiry is whether the provisions of the Act relating to pre-employment inquiries apply to inquiries directed by the state to private contractors doing business with the state concerning the composition of the contractor's existing work force. Section 12990, subdivision (a) provides:

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[22] The right of privacy, often equated by the California courts with the right "to be let alone," has traditionally been the subject of civil actions for damages insofar as the unwarranted publication of personal information is concerned. (*Gill v. Hearst Publishing Co*. (1953) 40 Cal. 2d 224, 228; *Carlisle v. Fawcett Publications, Inc.* (1962) 201 Cal. App. 2d 733, 745; and see *Black Panther Party v. Kehoe* (1974) 42 Cal. App. 3d 645, 652.) Moreover, it has been held that the California constitutional provision, added in 1972, is self-executing and confers a judicial right of action. Hence privacy is protected not merely against state action, it is considered an inalienable right which may not be violated by anyone. (*Porten v. Univ. of San Francisco* (1976) 64 Cal. App. 3d 825, 829.)

> "Any employer who is, or wishes to become, a contractor with the state for public works or for goods or services is subject to the provisions of this part relating to discrimination in employment and to the nondiscrimination requirements of this section and any rules and regulations which implement it."

For purposes of the contractor's own employment practices, it is clear that the provisions of section 12940, subdivision (d) are applicable.[23] However, the employees of the contractor are neither the employees of nor applicants for employment by the state. Consequently, the provisions of the Act relating to pre-employment inquiries do not apply to inquiries directed by the state to private contractors doing business with the state concerning the composition of the contractor's existing work force.

The eighth inquiry is whether the provisions of the Act relating to pre-employment inquiries apply to the Governor of California with regard to appointees. The term "employer" within the meaning of section 12940 includes "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the state or any political or civil subdivision thereof and cities." (§ 12926(c).) It is assumed for purposes of this analysis that the Act applies to the state. (See fn. 5, *ante*.)

The present inquiry pertains to appointments to public office, as distinguished from employees, whether or not exempt from the state civil service, of the Governor's office. Various provisions of the California Constitution (e.g., art. V, § 5, vacancies; art. VI, § 8, Commission on Judicial Performance; art. VI, § 16, subds. (c) and (d), the courts; art IV, § 20, Fish and Game Commission; art. VII, § 2, State Personnel Board; art. IX, § 9, subds. (a) and (b), Regents of the University of California; art. XII, § I, Public Utilities Commission; art XX, § 22, Alcoholic Beverage Control Appeals Board) and statutes (e.g., § 1300, generally, § 1774, vacancies; § 13901, State Board of Control, § 25060, county boards of supervisors; § 11200, departmental chief deputies; and departmental directors, § 13000 *et seq*., 14000 *et seq*., 14600 *et seq*., Food & Agr. Code, § 101 *et seq*., Bus. & Prof. Code, § 150 *et seq*., Ins. Code, § 12906, Unemp. Ins. Code, § 9101 *et seq*., Veh. Code, § 1500 *et seq*., Welf. & Inst. Code, § 10550 *et seq*.) provide for the appointment by the Governor of public officers. While the Act does not expressly exclude public officers from its provisions,[24] it refers specifically to employers and

[23] Compare sections 11135–11139.5 pertaining to discrimination with respect to the benefits of any program or activity that is funded directly by or receives any financial assistance from the state. However, employment per se is not generally deemed a benefit, i.e., the goal or objective of such programs or activities.

[24] Compare 42 United States Code section 2000e(f).

employees. The term "employee" does not have a universally applicable precise definition. (*Knight Board of Administration, etc.* (1948) 32 Cal. 2d 400, 402; 9 Ops. Cal. Atty. Gen. 115, 116 (1947). 6 Ops. Cal. Atty. Gen. 318, 319 (1946).) In common currency the term generally connotes a person engaged in some permanent employment or position (9 Ops. Cal. Atty. Gen. 115, *supra*) for compensation (*National Wooden Box Assn. v. United State*s (1945) 59 F. Supp. 118, 121; see Webster's Third New Internat. Dict. (1961) p. 743). It further signifies the existence of a right of control and direction by the employer not only as to the result to be accomplished but also as to the details and means by which the result is accomplished. (*Baugh v. Rogers* (1944) 24 Cal. 2d 200, 206; 9 Ops. Cal. Atty. Gen. 115, *supra.*)

As summarized in 62 Ops. Cal. Atty. Gen. 615, 616 (1979).

> "It has been stated that the power, duties, and functions incident to a position constitute the principal test of a public office. (*People v. Hulburt* (1977) 75 Cal. App. 3d 404, 411; 62 Ops. Cal. Atty. Gen. 126, 130 (1979).) The right, authority, and duty conferred by law must be continuing and permanent, not transient, occasional or incidental, involve an exercise of some of the sovereign power of the state, and require the exercise of judgment and discretion. (*Spreckels v. Graham* (1924) 194 Cal. 516, 528–530; 62 Ops. Cal. Atty. Gen. 126 (1979).) The delegation of some portion of the sovereign functions of government is almost universally regarded as essential to the existence of a public office. (*People v. Hulburt*, *supra*; 62 Ops. Cal. Atty. Gen., *supra*; 56 Ops. Cal. Atty. Gen. 556, 558 (1973).) Finally, it was noted in *People v. Hulburt*, *supra*, that a contract of employment is essentially inconsistent with status as a public officer, who is usually elected or appointed."

While the term "employee" is not defined in the Act except as to exclude "any individual employed by his parents, spouse, or child, or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility" (§ 12926(b)), it has been administratively construed, subject to specified exceptions, as "[a]ny individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written." (Tit. 2, Cal. Admin. Code, § 7286.5(b).) The term "appointment" has no particular connection with the appointment of public officers. (See § 18525.) Rather, the key words are "direction and control," which are peculiar to the employment relationship.

Finally, our view that the provisions of the Act relating to pre-employment inquiries do not apply to the Governor with regard to appointees is reflected in the affirmative obligations expressly imposed by the Legislature upon the Governor and every

other appointing authority. Section 11140 provides:

> "It is the policy of the State of California that the composition of state boards and commissions shall be broadly reflective of the general public including ethnic minorities and women."

Section 11141 provides:

> "In making appointments to state boards and commissions, the Governor and every other appointing authority shall be responsible for nominating a variety of persons of different backgrounds, abilities, interests, and opinions in compliance with the policy expressed in this article. It is not the intent of the Legislature that formulas or specific ratios be utilized in complying with this article."

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