The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1968

PUBLICATION OF THIS DOCUMENT APPROVED BY ALFRED C. HOLLAND, STATE PURCHASING AGENT.

900-6-69-949789 Estimated Cost Per Copy: $4.155

The Commonwealth of Massachusetts

BOSTON, DECEMBER 4, 1968

To the Honorable Senate and House of Representatives:

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1968.

Respectfully submitted,
ELLIOT L. RICHARDSON,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
ELLIOT L. RICHARDSON

First Assistant Attorney General
LEVIN H. CAMPBELL[21]
JAMES J. KELLEHER[22]

Assistant Attorneys General

CHRISTOPHER J. ARMSTRONG
RICHARD E. BACHMAN
SHIRLEY D. BAYLE[2]
AILEEN H. BELFORD
GEORGE D. BROWN[18]
OSCAR S. BURROWS
EUGENE R. CAPUANO[19]
DONALD L. CONN
BARRY F. CORN[20]
WILLIE J. DAVIS[1]
ALAN J. DIMOND
SAMUEL W. GAFFER
PAUL M. GOLLUB
FREDERIC E. GREENMAN
DAVID C. HAWKINS[6]
HENRY S. HEALY
ROBERT L. HERMANN
JAMES B. KRASNOO[1]
CARTER LEE
MARTIN A. LINSKY[3]
WALTER H. MAYO III[9]
ROBERT L. MEADE
HOWARD M. MILLER
PAUL F. X. POWERS
GLENDORA M. PUTNAM
THEODORE REGNANTE, SR.
CHARLES H. ROGOVIN
GEORGE R. SPRAGUE
DAVID A. THOMAS[8]
HERBERT F. TRAVERS, JR.
HERBERT E. TUCKER, JR.[17]
ELIZABETH G. VERVILLE[12]
HENRY G. WEAVER, JR.

Assistant Attorney General; Director, Division of Public Charities

JAMES J. KELLEHER

Assistant Attorneys General Assigned to Department of Public Works

BURTON F. BERG
COLEMAN G. COYNE
ARTHUR S. DRINKWATER[10]
FRANK H. FREEDMAN[14]
JAMES N. GABRIEL
ROBERT H. GORDON[4]
EDWARD D. HICKS
DANIEL J. LEONARD
CHARLES W. PATTERSON[11]
ALFRED R. PODOLSKI[16]
HAROLD PUTNAM
RUDOLPH A. SACCO
EDWIN M. SATTER III[13]
RICHARD L. SEEGEL
JOHN E. SHEEHY
F. DALE VINCENT, JR.
JAMES G. WALSH, JR.[15]
JOHN W. WRIGHT

Assistant Attorneys General Assigned to Metropolitan District Commission

JOHN M. ROSE RICHARD A. SAVRANN[5]

Assistant Attorneys General Assigned to the Division of Employment Security

JOSEPH S. AYOUB HARTLEY C. CUTTER[11]
JAMES TWOHIG

Assistant Attorneys General Assigned to Veterans' Division

RICHARD E. MASTRANGELO

Chief Clerk

RUSSELL F. LANDRIGAN

Head Administrative Assistant

EDWARD J. WHITE

---

[1]Appointed July 1, 1967
[2]Appointed July 17, 1967
[3]Resigned July 31, 1967
[4]Appointed August 14, 1967
[5]Appointed August 28, 1967
[6]Appointed September 1, 1967
[7]Resigned September 15, 1967
[8]Resigned September 30, 1967
[9]Appointed October 2, 1967
[10]Resigned October 31, 1967
[11]Appointed November 1, 1967
[12]Appointed November 15, 1967
[13]Appointed December 18, 1967
[14]Resigned December 29, 1967
[15]Resigned January 20, 1968
[16]Appointed January 22, 1968
[17]Resigned January 26, 1968
[18]Appointed January 29, 1968
[19]Appointed February 1, 1968
[20]Appointed February 5, 1968
[21]Resigned June 13, 1968
[22]Appointed June 14, 1968

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period July 1, 1967 — June 30, 1968

Appropriations

0801-01	Attorney General's Salary	$ 25,000.00
0801-02	Administration	1,245,687.00
0801-03	Veterans' Legal Assistance	21,000.00
0801-05	Recovery of Certain Unclaimed Court Deposits	25,000.00
0801-10	Certain Legal Services	21,472.00
0802-01	Claims, Damages By State Owned Cars	100,000.00
0802-02	Moral Claims	8,000.00
	Total	$1,446,159.00

Expenditures

0801-01	Attorney General's Salary	$ 25,000.00
0801-02	Administration	1,241,171.43
0801-03	Veterans' Legal Assistance	20,999.52
0801-05	Recovery of Certain Unclaimed Court Deposits	917.81
0801-10	Certain Legal Services	
0802-01	Claims, Damages By State Owned Cars	100,000.00
0802-02	Moral Claims	8,000.00
	Total	$1,396,088.76

Income

0801-40-01-40	Fees — Filing Reports — Charitable Organizations	$13,020.00
0801-40-02-40	Fees — Registration — Charitable Organizations	2,620.00
0801-40-03-40	Fees — Professional Fund Raising Council or Solicitor	80.00
0801-69-99-40	Miscellaneous	141.60
	Total	$15,861.60

Financial Statement Verified (under requirements of C. 7, S. 19, G.L.), October 16, 1968.

By JOSEPH T. O'SHEA,
For the Comptroller

Approved for publishing.

M. JOSEPH STACEY,
Comptroller

The Commonwealth of Massachusetts

Department of the Attorney General
Boston, December 1, 1968

To the Honorable Senate and House of Representatives:

Pursuant to the provisions of section 11 of chapter 12 of the General laws, as amended, I herewith submit my report.

The cases requiring the attention of this department during the fiscal year ending June 30, 1968, totaling 26,856, are tabulated as follows:

Extradition and interstate rendition	121
Land Court Petitions	189
Land Damage cases arising from the taking of land:	
Department of Public Works	1,997
Metropolitan District Commission	120
Civil Defense	7
Department of Natural Resources	32
Department of Public Safety	7
Department of Public Utilities	2
Government Center Commission	4
Massachusetts Board of Regional Community Colleges	2
Registry of Motor Vehicles	1
Salem Teachers College	1
Southeastern Massachusetts Technological Institute	14
State Colleges	1
County Commissioners, Worcester	8
University of Massachusetts	6
Miscellaneous cases, including suits for the collection of money due the Commonwealth	11,937
Estates involving application of funds given to public charities	3,179
Settlement cases for support of persons in State institutions	914
Small claims against the Commonwealth	246
Workmen's compensation cases, first reports	6,596
Cases in behalf of Employment Security	670
Cases in behalf of Veterans' Division	802

Introduction

My second Annual Report as Attorney General of the Commonwealth of Massachusetts, as required by G.L. c. 30, § 32, encompasses the fiscal year from July 1, 1967 to June 30, 1968.

The multiple responsibilities of the Attorney General as chief law enforcement officer in the state, legal counsel for all state agencies and officers of employees, and the "people's lawyer" have enlarged to keep pace with the growing problems confronting the citizens of the Commonwealth. In the second year of my administration, I have concentrated my efforts on imple-

menting existing programs and developing new projects to meet pressing needs.

My energies have focused on carrying forward a comprehensive program to combat organized criminal activity. The Organized Crime Section of my Department, unique in its inception, has attracted national attention in its attack against the invisible empire of organized crime. Working closely with federal, state, and local law enforcement agencies, the staff of the Organized Crime Section has conducted investigations and amassed a great deal of criminal intelligence which has resulted in indictments against leading underworld figures. Crime undermines the very foundations of society, draining hundreds of millions of dollars from our economy each year. Only a coordinated effort among law enforcement agencies at every level can hope to wage an effective war against organized crime.

In an effort to stem the alarming increase in the use of harmful drugs especially by young people, my Department is assuming a major role as coordinator of the activities of various public and private groups concerned with drug abuse. Initially, efforts are being concentrated on an inventory and investigation of the overall attack against drug abuse in the Commonwealth. It is hoped that the Department will act as a catalyst in stimulating research by universities and hospitals into new methods of prevention, treatment, and rehabilitation of drug dependency and addiction.

In the 18 months since I became Attorney General, I have endeavored to provide the citizens of the Commonwealth with the best legal services available. As the "people's lawyer", it has been my primary concern to insure that their rights are fully protected. The Citizens Aid Bureau and the Consumer Protection Division, both established in my administration, were created specifically to insure that private citizens receive equitable and efficient treatment of their problems.

Originated in 1967, the Citizens Aid Bureau acts as a channel through which the citizen is directed to the state agency best equipped to handle his particular legal, financial, or personal problem. The marked increase in the number of requests, inquiries, and complaints submitted to the Bureau has proven that a definite need for this type of service exists. I intend to enlarge the Citizens Aid Bureau in order to lessen the gap between the government and the governed.

To this end, I have also stressed the vital role of the Consumer Protection Division in extending to the buying public all the protection it is possible for the Department of the Attorney General to provide. The passage of new legislation which allows the application of Federal Trade rules and regulations at the state level gives the Consumer Protection Division additional legal tools to safeguard the citizen in the marketplace from fraudulent business practices and deceptive advertising techniques.

The success of the programs outlined above, and the effectiveness of the work of the entire Department is dependent upon the talent and energies of my staff. Recruited from leading law firms, university faculties, and law schools throughout the Commonwealth and nation, attorneys in my Depart-

ment received their appointments solely on the strength of background and experience. Carefully screened by a special committee established during my administration, they were selected strictly on a non-political basis. It has been a proud accomplishment of my administration that so many highly-qualified and dedicated lawyers have joined the Department, many at a financial sacrifice.

With great regret, I accepted the resignation of my First Assistant, Levin H. Campbell, effective June 13, 1968. Mr. Campbell, who became a fellow of the John F. Kennedy School of Government at Harvard University, served as First Assistant for more than thirteen months and previously as an Assistant Attorney General under me and my predecessor. I have appointed James J. Kelleher, Chief of the Public Charities Division, as Interim First Assistant. Mr. Kelleher has been in public service for more than 40 years, having joined the Attorney General's staff in 1927. Wilmot Hastings, presently associated with a leading Boston law firm, will assume the responsibilities of First Assistant on August 1, 1968.

In January, 1968, I initiated a new system for the submission of quarterly reports by all the divisions in the Department on a uniform basis. The adoption of this system has permitted the Department to assemble a great deal of overall statistical information for the first time. The results obtained for the period beginning January 1, 1968, and ending June 30 of that year are appended to this Report as Exhibit "A". While the totals cover only the second half of the fiscal year, they do give some idea of the volume of work handled by the Department.

Boston was chosen as the site for the Annual National Association of Attorneys General Conference held on June 8-12, 1968. Preparations for the conference were handled by members of my staff who devoted their efforts in insuring its success.

In the area of legislation, my staff has engaged in a continuing review of our present laws, and the drafting of new legislation when a need has been determined. This year I submitted 38 bills for consideration by the Legislature, and my Department assisted in the drafting of five other bills. A list of this proposed legislation appears as Exhibit "B".

The Administrative Division

The Administrative Division is charged with responsibility for most of the problems reaching the Department in the fields of administrative, constitutional and municipal law, and those arising under the laws relating to taxation and state finance. The scope of the Division's activities is therefore extensive and varied, reflecting the growing responsibilities of state government as a whole. These activities include representing numerous state officers and agencies in civil proceedings in the Supreme Judicial Court, the Superior Court, the District Courts, and also the Federal Courts, including the Supreme Court of the United States.

Favorable decisions were received in twelve of the fourteen cases argued during the period by members of the Administrative Division before the Su-

preme Judicial Court including: (1) a decision upholding the Attorney General's certification of the initiative petition to reduce the size of the Massachusetts Legislature; (2) a decision upholding a tariff of the Department of Public Utilities with respect to furniture movers; (3) a successful appeal from a Superior Court decision which had declared invalid the "post off" policy of the Alcoholic Beverages Control Commission; (4) a decision that proceeds received by a beneficiary of a private retirement plan are subject to the Massachusetts inheritance tax; and (5) the dismissal of a suit challenging the right of an officer of the Department of Labor and Industries to serve as an officer in a labor union. Before the United States Supreme Court, an adverse decision was received in *First Agricultural National Bank of Berkshire County* v. *State Tax Commission,* 392 U.S. 339, in which the court held that federal legislation prohibited the imposition of the Massachusetts sales and use tax on purchases by national banks.

The Administrative Division also rendered advisory services to a variety of state agencies and officers. In this capacity the Division reviewed all requests for opinions of the Attorney General received during the period and drafted virtually all of the 82 formal opinions actually issued and appearing in this Report. These opinions were researched and drafted with painstaking care, since they provide an authoritative interpretation of the law which is relied upon by public officials and private citizens alike. It will be obvious from an examination of these opinions that many of them involved legal questions of considerable sensitivity and broad implication.

The formal opinions referred to are exclusive of the 34 opinions issued by me during the period under the Massachusetts Conflict of Interest Law, all of which were prepared by members of the Administrative Division.

The opinions issued formally over my signature, however, represent only a fraction of the advisory services actually furnished by the Administrative Division. A majority of the requests for formal opinions received during the period were disposed of informally — in some cases by letters of advice from members of the Division, in others by conference. In a great many instances state officials took their problems directly to members of the Administrative Division without even seeking a formal opinion of the Attorney General. While it was possible to dispose of most of these problems relatively quickly, some of them required as much legal research and analysis, if not more, than the average formal opinion.

The Division is also responsible for reviewing all town by-laws and recommending their approval or disapproval by the Attorney General. 795 such by-laws were processed during the period covered by this Report. Because of the experience the Division has thereby acquired in the field of municipal law, it was frequently called upon to advise the town counsel on legal questions confronting them.

Other functions performed by members of the Administrative Division include the preparation of legislation to be submitted by me and by other state officials, the drafting of rules and regulations for various state agencies, the preparation of the descriptive materials required by law for initiative and referendum petitions appearing on the ballot, and service on various state boards as my designees.

The Citizens' Aid Bureau

The complex nature of governmental structure often confuses the private citizen faced with a technical, legal, financial or personal problem. In 1967 I formed the Citizens' Aid Bureau to act as a liaison between the troubled citizen and the state and local agency which could best assist him. The Bureau was designed to provide the people of Massachusetts with an effective means by which their particular problems could be solved.

Receiving an average of 65 new complaints, inquiries or requests each day, the Bureau deals in all types of personal and governmental problems. All legitimate requests are treated individually and an attempt is made in each case to assist the citizen with his problem and acquaint him with his rights. Legal advice and interpretations of the law are not provided, but if the situation requires professional counseling, it is suggested that a lawyer be contacted. In the case of indigent persons, the address of the local legal aid office is provided. Every effort is made to guide the citizen through the complexities of the governmental process.

The Bureau fills all requests received by the Attorney General's office for information concerning the Commonwealth. Students and educators regularly contact the Bureau on specific topics and are supplied with all available publications to aid them in their research. Out-of-state businesses often request basic information on Massachusetts laws. Copies of these laws are provided if available for public distribution.

In order to familiarize state agencies with the role of the Citizens' Aid Bureau, conferences were held to discuss the nature and scope of its services. Representatives of the Department of Public Works, Registry of Motor Vehicles, the Alcoholic Beverages Control Commission and a number of other agencies have met with members of the Bureau within the past year.

The existence of the Citizens' Aid Bureau and its proven effectiveness in solving the problems of private citizens has received a great amount of public attention. The increased workload has necessitated the hiring of additional personnel and the preparation of new reference materials. For example, a complete listing of all legal and social services available to citizens throughout the state has been compiled to facilitate the work of the Citizens' Aid Bureau.

The Civil Rights And Liberties Division

In the decade since its establishment, the Civil Rights Division has endeavored to insure the vigorous enforcement of laws safeguarding civil liberties. The Attorney General's Advisory Committee on Civil Rights and Civil Liberties continued in the past year to assist and advise the Division on general and specific issues relating to its official role. This advisory body consists of distinguished representatives from a variety of fields including religion, education, communications, and organizations dedicated to the protection of the rights of minority groups.

The Division acts as chief counsel to the Massachusetts Commission

Against Discrimination, the principal governmental body in the state entrusted with the protection of civil rights. The MCAD administers the state laws prohibiting discrimination on the basis of race, color, religion or national origin. Members of the Division represent the MCAD in all court proceedings.

In *LaPierre* v. *Massachusetts Commission Against Discrimination,* a case involving a review of an administrative proceeding by the MCAD under the Fair Housing Practices laws, the Massachusetts Supreme Judicial Court concluded that there was substantial evidence to support a finding of discrimination against the respondent, although remanding the case to the Commission on other grounds. In addition, the Court ruled that the term "national origin" is broad enough to include national ancestry unless controlled by the context and use of the term in the applicable statute.

Massachusetts Commission Against Discrimination v. *Wattendorf* was an extremely significant case for the Commission because of its problems with repeat violations and large property dealers and owners whose business is handled by employees and agents. In the Wattendorf case the respondent was a repeat violator of the Fair Housing laws. In a prior case brought before the MCAD, the respondent had been ordered to cease and desist denying consideration to Negroes in renting apartments over which he had control. An order from the Superior Court issued enforcing the Commission's order. Subsequently, a Negro filed a complaint with the MCAD alleging that an employee of the respondent had denied him premises because of his race. The MCAD brought an action for contempt of the court's order against the respondent. The trial judge found that the respondent's employee had discriminated but declined to hold the respondent in contempt as a matter of law. The MCAD appealed and the Supreme Judicial Court affirmed the ruling of the trial judge. The Supreme Judicial Court ruled in effect that there was no evidence that the respondent himself was involved in the unlawful act. Hence, there was no conduct on his part comprising the willful violation of the injunction necessary to constitute contempt. The Civil Rights Division is submitting legislation for the 1969 Session of the General Court to remedy the situation and make the principal under a court order for a fair housing violation liable for the actions of his agent.

Attorneys in the Division also appear regularly in Superior Court proceedings to prevent discriminatory practices, particularly in the area of housing.

In addition to handling litigation in the Supreme Judicial Court and the lower courts, the Division handles a great many inquiries and complaints in its daily operation. Since the protection of the civil rights of citizens is its first concern, members of the Division conduct investigations of all complaints. Students' rights, police malpractice, visitation rights of hospital patients, and obscene literature were among the areas investigated during the past year. State agencies and local police departments regularly consult attorneys in the Division.

Of particular concern is the passage of legislation to insure greater pro-

tection for the civil rights of all citizens, and members of the Division testified at many legislative hearings. A bill permitting the MCAD to bring "in rem" proceedings to enjoin the housing of a non-resident (H. 1012) was actively supported by the Division and subsequently enacted.

Public speaking engagements, the development of guidelines in the areas of obscenity and police malpractice, and allied education projects were among the many efforts undertaken by the Division to fulfill its function. The Harvard Divinity School Fieldwork Project, in which students receive practical experience in government and other fields, received the encouragement and support of the Civil Rights Division. The supervision of these students, who were assigned to various governmental departments, was undertaken by members of the Division.

The Consumer Protection Division

In the eighteen months of its existence, the Consumer Protection Division has experienced a rapid growth in its functions, powers, and personnel. Created in 1967, the Division was established to protect the citizen as a consumer by enforcing existing state laws against fraud, deceptive advertising campaigns and price-fixing conspiracies. The passage of the Federal Trade Commission Model Bill by the Massachusetts legislature greatly increased the Division's powers by permitting the Attorney General to apply all Federal Trade Commission rules and regulations to intrastate activities in the Commonwealth. Since May 10, 1968, when the F.T.C. rules and regulations were promulgated throughout the state, there has been a rapid acceleration in Division activity. The new statute gives the Attorney General certain subpoena powers in the deceptive practices area and allows speedy injunctions against such acts without the necessity of showing "scienter,"; allows for assurances of discontinuance; and, in certain situations, provides for corporate dissolution.

The broadening of the Division's authority in the past year has greatly increased an already heavy workload. In addition to conducting numerous investigations and prosecuting cases stemming from these investigations, the Division engages in many advisory services — answering numerous complaints from citizens; meeting with government officials, business representatives, and consumers; the publication of a weekly column; and the preparation of a consumer handbook.

In the area of litigation, anti-trust suits were brought against certain companies in industries closely connected with the public — drug manufacturers, library book publishers, milk companies, copper-piping producers and rock salt companies:

(1) An anti-trust suit was brought against five major drug manufacturers (American Cyanimid, Charles Pfizer, Olin Mathieson, Upjohn, and Bristol Myers) for alleged price-fixing in the sale of a broad-spectrum antibiotic, Tetracycline. The case is pending in the United States District Court.

(2) After a thorough investigation of the book publishing industry in the Commonwealth, suit was initiated against 27 book publishers charging them with price-fixing with regard to the library editions of books. Although the suit is still pending, a major wholesaler involved in the litigation has made a settlement with the commonwealth.

(3) The sum of $162,000 was recovered from three national rock salt companies (Morton, Diamond Crystal, and International) in settlement of an anti-trust suit brought by the Division. Over 250 cities and towns in the Commonwealth received their fair share of the damages.

(4) Anti-trust suits against several copper-piping companies and milk companies are still pending in the federal courts.

Several criminal convictions were obtained under M.G.L. c. 255 D for the defendant's failure to disclose the rate of finance charge involved, and to notify the concerned parties of their right to cancel the contract within 24 hours.

Over 400 separate investigations were conducted in the past year with tangible results obtained in a significant number. The primary areas of consumer complaints continue to exist in the fields of magazine subscriptions, home improvements, transmission repairs, automotive transactions, and various related industries:

(1) An investigation of the transmission repair industry resulted in the initiation of practices safeguarding the customer — an itemized parts list, prior customer authorization for all repairs, and trained personnel.

(2) The Crescent Pool Company was enjoined from engaging in "bait and switch" practices. Forty-five criminal complaints were obtained, all resulting in convictions, against the Syra Pool Company of Connecticut for 15 separate violations of M.G.L. c. 255 D and for bait advertising practices.

(3) The All State Tractor Training Center and other heavyduty equipment training schools were under surveillance in the past year by members of the Division. The investigations resulted in the establishment of state supervision by the Department of Education over the operation of these schools.

(4) The Finance Industry was investigated to determine the extent of the use of "kickbacks" by the finance companies to automobile dealers to increase business.

In addition to litigation and investigation, the Division acts as advisor to the consumer and various government officials and agencies. Numerous inquiries and complaints are handled either by mail or telephone. During the past year, the Division handled approximately 10,000 inquiries or complaints by the general public. A standard consumer complaint form was adopted in order to facilitate the disposition of the great volume of com-

plaints. While some of these were readily handled, others required extensive investigation.

The Attorney General is an ex-officio member of the Consumers' Council and the Chief of the Consumer Protection acts as his representative at all regular meetings of the Council. Frequently, the Chief gives his opinion or advises the Council in areas of common interest. Members of the Division address various consumer groups in order to alert citizens to fraudulent activities. Groups of all ages were reached, including senior citizens, college students, ladies' clubs, and consumers in low income neighborhoods. Meetings with business leaders in various industries were scheduled to discuss problem areas.

An informed consumer is the best defense against fraudulent practices. As part of a continuing program of consumer education, I initiated a weekly news column called "Consumer News" which is distributed to more than 200 newspapers throughout the Commonwealth. The column was designed to inform the consumer of his legal rights and obligations, and alert him to existing deceptive practices. The requirements of a legal contract, fraudulent business and advertising methods and descriptions of various "rackets" were among the subjects discussed in the column. A consumer's handbook, prepared by the Division, is currently awaiting publication and is expected to serve as a guide to the consumer in the marketplace.

The Contracts Division

The work of the Contracts Division includes the preparation and trial of highway and building construction cases before auditors, Justices of the Superior Court, and the Supreme Judicial Court. Members of the Division appear on motions and depositions incident to these cases, in addition to prosecuting appeals in public contract matters. All public contracts, bonds and leases are reviewed by the Division for correctness of legal form. Conferences with officials from more than 80 state agencies are frequently scheduled to deal with questions relative to state contracts.

Several significant cases were argued during the past year by members of the Division in the Supreme Judicial Court. In *Marinucci Bros. Co., Inc. v. Commonwealth,* for example, the Court overturned an award of $143,651.77 to the Contractor for damages allegedly resulting from a breach of contract by the Commonwealth in the relocation of the Mystic River in Medford as part of the construction of Route 93. This decision resulted in a saving of more than $180,000 to the Commonwealth, including the interest awarded by the trial judge.

The Division has been involved in extensive litigation concerning the new State Office Building, and has utilized the third party impleader procedure under G. L. c. 231, §4B to fully protect the Commonwealth's rights in these cases. Attorneys in the Division represent the Metropolitan District Commission concerning the work on the Deer Island sewage treatment plant and has made numerous Court appearances relative to their interests.

In addition to its involvement in litigation, the Division has attended con-

ferences with various department heads and officials, investigated factual backgrounds in contract disputes, and researched statute and case law.

Members of the Division drafted a contract for consultant services, reviewed several new contract forms prior to printing and conferred with the Purchasing Agent's Division over excise tax forms.

The Division was also responsible for the review and approval of the form of all documents prepared in connection with note issues and notices of sale of bonds under financial assistance housing programs for the elderly and veterans of low income.

The Criminal Division

Reorganized into three sections, the Criminal Division has structured its operations to meet the increasing demands of its responsibilities. These three sections — Organized Crime, Trial and Investigation, and Appellate — reflect the primary concerns of the Criminal Division, which is now the largest in the Department.

The formation of the Organized Crime Section in May, 1967, made Massachusetts the first state in the nation to establish a unit specifically designed to fight organized criminal activities. Even in the early stages of its development, the Organized Crime Section has made important contributions to law enforcement. Significant progress has been achieved in developing, for the first time, a comprehensive picture of organized criminal activity in the Commonwealth. A thorough investigation by the Organized Crime Section into widespread gambling in southeastern Massachusetts resulted in more than 300 indictments against 24 different individuals. To date, 22 of the 24 persons involved have been convicted, and the other two cases are awaiting trial. This Section also conducted major investigations to determine the extent of organized crime's infiltration into the banking industry. As a result of these investigations, a large scale conspiracy to defraud a major North Shore bank was uncovered, resulting in grand jury indictments against 21 individuals and one corporation. For the first time in the modern history of the Department, murder indictments against three men were sought and obtained. Presently awaiting trial, the three defendants face charges for the gangland-style killing of a leading underworld figure.

The number of post-conviction proceedings and appeals to all courts of the Commonwealth and Federal courts have increased under the jurisdiction of the Appellate Section. Two cases were heard in the United States Supreme Court, one of which was personally argued by the Attorney General.

Perhaps the most significant prosecution ever undertaken by the Criminal Division was the so-called second Small Loans Trial which began on July 17, 1967, and terminated on June 12, 1968. Preceded by a lengthy investigation, this trial was recorded as the longest in Massachusetts history. It resulted in the conviction of three corporations, a former Supervisor of Small Loan Agencies and five company public relations officers. The convictions are now on appeal, together with the appeals of the convictions in the first Small Loans Trial (which lasted 5 ½ months).

The Division also undertakes to provide all law enforcement personnel with information regarding recent cases, statutes, and current changes of law. Many hours of research and revision were spent by members of the Division in the preparation of a Criminal Law Handbook, the first such publication to provide a single, authoritative source for police use. The Handbook, prepared by the Division for the Governor's Committee on Law Enforcement and the Administration of Justice, covers the areas of arrest, "stop-and-frisk", search and seizure, police duties following arrest, prisoner's rights and treatment of juveniles.

In the past year, several programs were undertaken by the Division in cooperation with other law enforcement agencies. An example of this cooperative effort is the Department's membership in the Law Enforcement Intelligence Unit, a nationwide organization dedicated to the collection of organized crime intelligence and the sharing of this information among member units.

The Eminent Domain Division

All suits against the Commonwealth arising from its exercise of the power to take private property for public use are the responsibility of the Eminent Domain Division. Ninety percent of the Division's cases are Petitions for the Assessment of Damages in Superior Court under Chapter 79, the statute providing legal redress to the property owner who is dissatisfied with the price offered by the Commonwealth. The remaining ten percent consist of land suits under Chapter 130 (whereby which the Department of Natural Resources is authorized to take wet lands and swamps for conservation purposes), equity cases, and other cases involving real estate problems.

A great majority of the court actions are jury trials requiring extensive legal research and preparation. Three-hundred and seventy-three new cases were filed with the Division in the past year. With the disposal of 240 cases, the number of cases pending at the end of fiscal 1967-1968 was 709.

A case of great importance to the Commonwealth's major roadbuilding effort affecting the entire Southwest Transportation corridor was *Bartlett v. Commonwealth,* in which the Boston and Providence Railroad and the New Haven and Hartford Railroad contended that the Commonwealth could not take by eminent domain certain segments of their right of way needed for this Corridor. Since the Railroads were in bankruptcy, it was held that their property was under the exclusive control and jurisdiction of the Federal courts. The Federal District Court ruled against the Commonwealth but this decision was reversed by the Court of Appeals. Subsequently, the United States Supreme Court refused to entertain any further appeal.

Added to a great number of court actions, the Division assumes responsibilities in other allied areas. Drafting and filing new legislation is of particular concern. The passage of a Division drafted bill to control oil spills was lauded by the Federal Water Pollution Control Administration as the first state legislation of its kind and the first such state program to be funded.

Advisory services, both written and oral, are rendered to innumerable agencies and departments. All eminent domain or real estate problems encountered by state agencies are referred to this Division, whose members also represent the Commonwealth in the Land Court.

Members of the Division have also been concerned with the problem of air and water pollution, the seaward jurisdiction of the states and a proposed Massachusetts Highway Code. The Attorney General's Conference on Air and Water Pollution was held in the past year to explore the means by which an effective program could be launched to combat the increasing peril of pollution in our air and water supply. Working with the Department of Public Works, the Division has spearheaded a program to clean-up the harbor fronts of the Commonwealth, thereby eliminating unsightly and dangerous piers which are holding back the orderly re-development of the state's waterfronts.

Plans are being developed for the first conference of Atlantic Seaboard Attorneys General on the question of the seaward jurisdiction of the states. A real possibility exists of the development of oil and natural gas resources under the Continental Shelf. Members of the Eminent Domain Division are leading the effort to secure a fair share of the lease revenue for the states.

The Employment Security Division

Through the efforts of the Employment Security Division, substantial sums of money are recovered each year by the Commonwealth. This Division prosecutes employers who are delinquent in paying their employment security taxes and employees who file fraudulent claims for unemployment benefits.

Attorneys in the Division argued three cases before the Supreme Judicial Court, all of which involved the question of "availability" of the claimant seeking unemployment compensation.

Members of the Division also conducted an investigation into claims against corporations that continue business operations after dissolution by the Secretary of State's office, and the responsibility of the corporation and its officers for liabilities incurred during this period.

The Health, Education And Welfare Division

The rapidity with which such problems as swelling public assistance costs, drug abuse, and air and water pollution have reached near-crisis proportions has been reflected in a parallel growth in the responsibilities of the Health, Education and Welfare Division.

As the principal attorneys for a host of state agencies, the seven lawyers in the Division are called upon to perform a wide variety of legal services, including representation in judicial proceedings, review of regulations, advice on legal questions and preparation of legislation.

Much of the litigation handled by the Division during the year concerned sensitive and significant subjects. A review of major cases follows.

In *Massachusetts General Hospital* v. *McCarthy,* the Supreme Judicial Court upheld the position of the Department of the Attorney General by ruling that the Commissioner of Administration had improperly attempted to increase the 1965 rates of reimbursement to hospitals for treating patients who qualify for public assistance. Although the Court indicated that such rates may properly be revised during the course of a year, it held that there must be a public hearing before such revisions could be made. It was the Commissioner's failure to hold such a hearing that invalidated his attempted revision of the rates. The ruling resulted in the saving of an estimated five million dollars for the Commonwealth.

In litigation arising out of the controversial film *Titicut Follies* made at Massachusetts Correctional Institution, Bridgewater, the Superior Court sustained the Department's position and enjoined showing of the film. The Court held that the film constituted an invasion of the privacy of the patients at the institution, and that the defendant producer of the film violated the contractual agreement pursuant to which he was authorized to make the film. The particular legal significance of the case is that it is the first to recognize the right of privacy as a legally protected right in Massachusetts. The defendant has claimed an appeal to the Supreme Judicial Court.

A public health crisis was averted by a preliminary injunction obtained at the request of the Governor to enforce a declaration of emergency by him for the purpose of keeping open the Saugus Dump. This dump is used for trash disposal by twelve communities, innumerable large commercial establishments and a large Navy base. The Town of Saugus had ordered the dump closed, whereupon the Governor declared an emergency and ordered the dump kept open so that an alternative site for trash disposal facilities could be found. When Town officials ordered the entrance to the dump barricaded in defiance of the Governor's emergency order, the Health, Education and Welfare Division obtained the preliminary injunction. The trial has been postponed pending legislative efforts to establish a suitable replacement.

Another interesting and important case involved the withholding of state aid for support of schools from the City of Lawrence. Due to a teachers' strike, Lawrence chose to close its schools five days early in June, 1967. This left the City without the minimum number of days of school required to receive full state aid. The Department of Education believed that it was not necessary to close the schools for the balance of the year, and accordingly withheld a pro rata share of state funds. The City petitioned for judicial review of the decision of the Department of Education, and the Division successfully defended the decision. The City has claimed an appeal to the Supreme Judicial Court.

Great strides were made in the attack on water pollution during the year. The Division appeared before the Safety and Licensing Board of the Atomic Energy Commission and the Vermont Water Resources Board to prevent Vermont Yankee Nuclear Power Company from causing thermal pollution of the Connecticut River, which would have endangered fish, wildlife and the operation of sewage treatment plants. Our efforts culminated in an

agreement pursuant to which Vermont Yankee agreed to install cooling towers capable of eliminating any harmful increase in the temperature of the river as a result of its operation of the nuclear power plant.

In another successful proceeding, the Division obtained an order of the Superior Court holding that Cumberland Cattle Company was causing pollution of a stream which is used as a source of water for the City of Attleboro.

In a controversy certain to set an important precedent in the history of attempts to abate pollution of the Merrimack River, the Division was instrumental in compelling the Town of Amesbury to agree to construct a sewage treatment plant by 1970.

Activity in the air pollution field included the institution of judicial proceedings to enforce Department of Public Health regulations prohibiting open burning, and to abate pollution by American Biltrite Rubber Co. in Cambridge. Also, the Division assisted the Department of Public Health in preparing and issuing a cease and desist order against Boston Edison Company.

In the welfare sphere, in addition to performing our traditional role of defending appeals brought against the Department of Public Welfare by applicants who have been refused public assistance, the Division was called upon to render advice regarding sit-ins and demonstrations and to defend a growing number of cases brought in the Federal District Court attacking the constitutionality of certain state statutes and regulations. For example, one such case involved an attack on the constitutionality of the Commonwealth's one-year residency requirement for welfare eligibility.

There were several special projects in which the Division took part during the year. Perhaps the most significant of these was the Bridgewater Release Project. I assigned five special assistant attorneys general to review files at Bridgewater State Hospital to determine whether or not any patients were illegally held. It was concluded that approximately three hundred, or nearly fifty percent, of the patients were indeed unlawfully confined. Accordingly, legislation to provide special hearings for any patient considered to be illegally held was drafted by the Division, filed by the Governor, and enacted as Chapters 619 and 620 of the Acts of 1967. During the year hearings were held at Bridgewater for 113 of the patients in question, all of whom were determined by the Superior Court to be illegally confined. Of the 113, 2 were discharged, 96 were committed to state hospitals under the jurisdiction of the Department of Mental Health, 4 were recommitted to Bridgewater (having been found to be so dangerously mentally ill that strict security was required), 8 were permitted to remain at Bridgewater at their own request, and 3 were committed to Veterans Administration hospitals. The vast number of transfers and discharges benefited not only the patients involved in the hearings, but also the remaining patients at Bridgewater, due to the salutary effect upon the staff-patient ratio there. It was a particularly gratifying experience to be involved in providing hearings for these "forgotten men", some of whom had been held unlawfully for many decades.

Legislation played a major role in the activities of the Division. In addition to the Bridgewater hearings statute, the Division participated in the drafting of Chapter 492 of the Acts of 1968, which established a Rate Setting Commission to set rates payable by governmental units to providers of health services under medical assistance programs.

Also drafted were comprehensive bills for the treatment and rehabilitation of alcoholics and drug addicts, and a "Good Samaritan" bill to extend immunity from civil suit for damages to any person who renders aid in an emergency to anyone who is seriously ill or injured.

Other activities of the Division included participation in conferences which I called on administrative law and on air and water pollution, the publication of bulletins relative to such matters as inspections pursuant to the state sanitary code and films and research projects involving state institutions, and assistance to the Department of Education and other interested agencies in developing drug abuse education programs.

The Industrial Accidents Division

The Industrial Accidents Division acts as legal counsel to the Commonwealth in all workmen's compensation cases involving state employees. Under G.L. c.152, §69A, the Attorney General must approve all payments of compensation benefits, lump sum settlements and disbursements for related medical and hospital expenses in compensable cases. In contested cases, members of the Division represent the Commonwealth before the Industrial Accident Board, and, in any case where the Board's decision is appealed, before the Superior Court and, on occasion, the Supreme Judicial Court.

In the past fiscal year, the Supreme Judicial Court decided two cases argued by attorneys from this Division. Each of these cases presented issues of considerable interest and importance in the field of workmen's compensation law. In *Leveille's Case* a petition was filed by an insurance carrier for reimbursement out of the second-injury fund, known as the General Industrial Accident Fund. The relevant statute (G.L. c.152, §§37 and 65) provides for reimbursement where an employee has suffered a physical impairment resulting in the loss by severance or the permanent incapacity of a hand above the wrist or a foot above the ankle, and then suffers a personal (industrial) injury which causes further disability by the loss or permanent incapacity of the opposite bodily member. In this case, the impairment involved only the partial loss of function in each hand. The Industrial Accident Board found that the petition came within the purview of the applicable statute, and the Superior Court concurred, ordering the State Treasurer to reimburse the insurer in the sum of $5,345.22. As legal custodian of the second-injury fund, the Commonwealth appealed the decision to the Supreme Judicial Court which reversed the lower court finding. The court ruled that this was not a case for reimbursement under the statute and that the second (industrial) injury while substantially disabling, did not render that hand completely disabled. It agreed with the Commonwealth's argument that allowance of reimbursement on the facts of this case would establish a broader standard for hand or foot injuries than is now applied by the same statute for eye injuries (which is the reduction to twenty seventieths of normal vision or industrial blindness).

Begin's Case involved a claim by a correctional officer employed at the Bridgewater State Hospital for an alleged injury in 1962 consisting of an emotional disturbance which he attributed to his associations with the criminally insane. He claimed that during his employment there he witnessed incidents involving inmates which upset him emotionally. He was treated by a psychiatrist for an "acute anxiety state". The single member of the Industrial Accident Board awarded compensation to the employee amounting to $10,773 and his decision was affirmed by the Reviewing Board and, on appeal, upheld by the Superior Court. The Commonwealth appealed the decision to the Supreme Judicial Court, which reversed the decision and ordered a decree entered for the Commonwealth. The Court concluded that the illness suffered by this employee was not a "personal injury" within the meaning of the act, affirming doctrine elucidated in earlier cases that a "disease of mind or body which arises in the course of employment, with nothing more, is not within the [Workmen's Compensation] act."

During the past fiscal year a total of 6596 accident reports were filed on state employees' industrial injuries, an increase of 280 over the prior year. Of the lost-time disability cases, the Division approved 1128 cases, an increase of 37 over the prior fiscal period.

The Division handled 521 assignments at the Industrial Accident Board, including hearings and pre-trial conferences, and appearance before the Courts in appellate matters, an increase of 54 over the prior period. The Division also participated in an indeterminate number of informal conferences at the Industrial Accident Board, including those required in the weekly review of new claims pending evaluation and approval by the Attorney General under the statute.

Total payments made by the Commonwealth on state employees' claims under Chapter 152, including those on accepted cases, Board and court decisions and lump sum settlements approved by the Industrial Accident Board, for the period July 1, 1967 through June 30, 1968 were as follows:

Industrial Accident Board (General Appropriation) *	
Incapacity compensation	$1,360,439.50
Hospital costs, drugs, etc.	222,998.97
Doctors, Nurses, etc.	213,761.59
	$1,797,200.06
Metropolitan District Commission **	
Incapacity compensation	$143,381.21
Medical and hospital costs	45,837.69
	$189,218.90
Total Disbursements	
Incapacity compensation	$1,503,820.71
Hospital and medical costs	482,837.69
	$1,986,658.40

* Appropriated to the Division of Industrial Accidents of the Department of Labor and Industries and administered through its Public Employees Section.

** These disbursements are from MDC appropriated funds for payment of claims involving MDC employees.

These disbursements represent a total increase in payments of $168,046.34 over the prior fiscal year. This is largely attributable to the statutory increase in compensation rates and rising hospital rates.

In addition to its responsibilities cited above, the Division represents the Commonwealth in its capacity as custodian of the second-injury funds under §65 (General Fund) and §65N (Veterans Fund) of Chapter 152. Members of the Division appear before the Board on petitions filed by insurers and self-insurers under §§37 and 37A of Chapter 152 for reimbursement out of these funds. The Division's members are also required to hold conferences from time to time with representatives of insurers to negotiate payments into these funds in those fatal industrial accident cases in which the issue of liability has been compromised.

At the close of the fiscal year, the General Fund (§65) held an unencumbered balance of $135,197.25. Payments totalled $11,232.08 and receipts totalled $6,950.

Receipts in the Veterans Fund (§65N) during the fiscal period were $99,461.67 with payments of $54,523.05, leaving an unencumbered balance of $269,618.68 at the close of the period.

The Public Charities Division

It is the responsibility of the Public Charities Division to review and examine the annual reports of charitable organizations, investigate complaints of possible fraud and deception, and enforce compliance with the laws regulating the activities of public charities. The Division represents the Commonwealth in legal actions to revive dormant charitable funds, to change the provisions of philanthropic bequests, and to appoint public administrators to collect and disburse the assets of estates of persons who die leaving no heirs.

The number of cases involving court proceedings (other than such formal matters as allowance of accounts and petitions for licenses to sell, without contest) totaled 225 for the year. Many of these cases, including petitions for instructions, cy pres applications and compromises of will contests, required court appearances and hearings, and all involved pleadings.

The total amount collected on account of escheated estates where the deceased die leaving no known heirs totaled $260,180.77. In addition to the usual type of escheat in the case of an estate handled by a Public Administrator, escheats also resulted in cases where a deceased left a will but no known heirs, and the will did not dispose of all the property.

A matter of particular interest handled by the Division was the proceeding in the Dedham Probate Court in which it was determined that the homestead property of *Katherine Endicott* in Dedham could be given to the Commonwealth for a Governor's mansion if, as it happened, the town of Dedham did not accept the gift.

In two petitions for the sale of real estate in Boston of the *George Robert White Fund,* members of the Division objected to the original prices proposed, $55,000 and $276,000. At public auctions requested by the Division, the prices of $70,000 and $335,000 were obtained.

The Susanna Tobey estate in Plymouth involved a fund of $1,500,000 for a Home for Aged Women in Wareham. Such a use being impracticable under present conditions, the Probate Court permitted the use of a larger part of the funds for the erection of an addition to the Tobey Hospital in Wareham. Somewhat similar arrangements were approved in the *Parmenter* estate in Worcester. The funds bequeathed there for an old people's home in Athol were insufficient and were permitted to be used in connection with the Athol Memorial Hospital.

In August the Attorney General was requested by an order of the House of Representatives to investigate the activities of the Morgan Memorial, Goodwill Industries and International Goodwill Foundation, Inc., especially in connection with newspaper reports of the proposed construction by the corporations of a stadium in the town of Stoughton and the possible violation of the statutory ceiling relative to the amount of property each corporation could hold.

Upon inquiry it was learned that Morgan Memorial, Inc., and Goodwill Industries of America, Inc., were not involved in any way in the proposed stadium project and had taken no action with regard to it. International Goodwill Foundation, Inc., a new charitable corporation, with which the other organizations had no legal relationship, was the organization which had been interested in the stadium. The Foundation, in answer to our inquiries, wrote stating it was not qualified under its charter to build the stadium; and, since it would require special legislation to so qualify, its Board of Trustees decided to have the Foundation withdraw from the stadium project. The Legislature was informed of the action of the Foundation and that it was the view of the Division that the provisions of General Laws, chapter 180, section 9, clearly could be invoked to prevent the Foundation from engaging in a project such as the construction of the proposed stadium if it involved the Foundation's holding property of a value in excess of $5,000,000, there being no special legislation authorizing the Foundation to hold property in excess of that amount. The Legislature was also furnished with full information as to the activities of the three corporations.

Members of the Division received information from several sources concerning letters sent by organizations located in Massachusetts and other states offering copies of court records in possible escheat cases. The letters were sent to persons with the same name as the deceased, the names being selected indiscriminately from telephone directories. No indication of the method of selection of the addressees was given in the letters. The Division brought the matter to the attention of the postal authorities and the attorneys general of the states involved. The activities of the persons engaged in sending these letters were largely abandoned as a result of requirements im-

posed that disclosure be made in the letters as to the method of selecting the addressees.

In addition to its other responsibilities, attorneys in the Division conducted inquiries into the operations of various organizations soliciting contributions from the public.

The Torts, Claims, And Collections Division

The Torts, Claims, and Collections Division represents the Commonwealth, its officers and employees, in tort actions arising in the performance of their official duties. Acting as legal counsel, it represents the Commonwealth and the Metropolitan District Commission in claims brought for injury and damage resulting from defects in state highways and MDC roads. In addition, the Division handles all claims, including court proceedings involving claims, which result from the operation of state-owned motor vehicles by state employees.

After a thorough investigation of all motor tort claims, the Division authorizes direct payment, either to satisfy judgments or in settlement, from a $100,000 fund appropriated by the General Court. The relevant statute (G. L. Chapter 12) now provides for maximum payments of $25,000 per person for personal injury, and $10,000 for property damage. Prior to January, 1966, the maximum authorized payments under this statute were only $10,000 for personal injury and only $5,000 for property damage. Yet the same annual appropriation has been made and no supplemental appropriations have been sought as these increases in liability limits went into effect — which testifies to the excellent performance of lawyers in the Division. During the past year there were 230 motor tort claims processed to a conclusion by the Division for amounts totaling $95,595.76 with an average settlement of $401.50 — a comparatively low figure considering the marked increase of claim costs.

Damages occurring in circumstances which impose a moral, though not a legal, responsibility upon the Commonwealth are also dealt with the Torts, Claims, and Collections Division. There have been several special statutes requiring compensation to be paid for damage from sewerage or water pipe breaks under Metropolitan District Commission jurisdiction which have been made subject to approval by the Attorney General. This responsibility has been assigned from time to time to the Division.

An increasing number of Civil Rights actions brought in the Federal Court against state officials and judges have been defended by members of the Division.

Seven road defect cases were disposed of in the past year with an average cost of $145.50 per claim.

The Collections Section of the Division represents the Commonwealth in claims for damage to state property and for recovery of monies due on account of care of patients in state institutions, as well as amounts owing to various other state agencies. The following is a summary of cases involved in this phase of the Division's work:

Department	*Amount*	*Number of Claims*
Mental Health	109,061.46	127
Mental Health Tort case	144.00	1
Public Health	98,697.12	436
Public Health Tort case	100.00	1
Public Works	32,297.22	423
Division of Waterways	3,015.89	4
Metropolitan District Commission	21,136.27	112
Corporations and Taxation	271,473.26	41
Education	1,897.22	51
Public Safety	1,643.12	2
Treasury	12,119.53	13
State Colleges	3,430.76	35
Correction	94.53	2
Public Welfare	25.00	5
Civil Defense Agency	336.08	3
State Auditor	13,113.13	1
Fisheries and Game	355.50	1
Labor and Industries	185.00	1
Office of Secretary	175.00	7
Total	569,300.09	1,266

These figures do not include all payments recovered by the Commonwealth as there were actions involving the Department of Corporations and Taxation wherein arrangements were made for direct payments to that Department in substantial amounts.

Attorneys from the Division represent the Attorney General on the Motor Vehicle Appeal Board in its sessions throughout the state.

The Veterans Division

With the passage of legislation authorizing payment of a bonus to certain Vietnam veterans, this Division's duties as advisor to veterans and their families have increased. The Chief of the Division was designated to serve as a member of the Vietnam Bonus Board and handled a significant number of inquiries from veterans seeking to ascertain their eligibility. In addition, the Division Chief acted as counsel to members of the staff of the Treasurer and Receiver General in interpreting the law and setting up the mechanics of paying the bonus.

In the past year, the Veterans Division continued to assist veterans and their families, informing them of their rights and obligations under the law. The Division also participated in the drafting of formal opinions pertaining to veterans' affairs. Conferences with various state and federal agencies and local tax authorities were held to assist veterans in securing the special services to which the law entitles them.

Conclusion

It is difficult to summarize the innumerable activities of the Department of the Attorney General without sacrificing many significant details. The above outline is submitted as a synopsis of the year's work and a brief indication of the sphere of the Department's concerns.

With the assistance of my exceptional staff, I will strive to consolidate past achievements and introduce new measures when the need arises in order to insure the highest quality of legal services to the citizens of the Commonwealth.

Respectfully submitted,

ELLIOT L. RICHARDSON,

Attorney General.

EXHIBIT "A"

Statistical Record of Department of the Attorney General, January 1-June 30, 1968

A.	*Litigation: caseload.*	
1.	Number of cases pending Jan. 1	9,545
2.	Number of new cases commenced	2,102
3.	Number of cases disposed of	4,893
4.	Number of cases pending June 30	6,754
B.	*Litigation: activity on cases.*	
1.	Number of trials over five days in length	10
2.	Number of trials over one but not over five days	102
3.	Number of trials one day or less	542
4.	Number of appellate arguments in U.S. Supreme Court	3
5.	Number of appellate arguments in U.S. Courts of Appeals	1
6.	Number of appellate arguments in Supreme Judicial Court	33
7.	Number of appearances other than for trial or appellate argument	1,301
8.	Number of briefs and legal memoranda submitted	300
9.	Number of extraordinary writs	41
10.	Number of oral depositions	22

C. *Money collected or saved in litigation.*

1. Amount collected by Commonwealth or its agencies	$752,333.13[1]
2. Amount claimed against Commonwealth or its agencies	$4,921,679.41[2]
3. Amount paid on account of such amounts claimed	$2,949,121.22[2]
4. Amount saved by Commonwealth or its agencies (i.e., line 2 minus line 3)	$1,972,558.19[2]

D. *Advisory services.*

1. Number of formal opinions issued other than under Conflict of Interests Law	25
2. Number of formal opinions issued under Conflict of Interests Law	16
3. Number of informal opinions and legal memoranda (other than those involved in litigation)	2,159
4. Number of administrative hearings attended (other than involving Commonwealth as a party litigant)	187
5. Number of rules, regulations and administrative orders drafted	45
6. Number of contracts, leases and other legal instruments processed for approval	1,706
7. Number of town by-laws processed for approval	490
8. Number of fiduciary accounts processed	1,659
9. Number of other other probate matters processed	726
10. Number of inquiries and complaints from private individuals and organizations processed	6,738[3]

E. *Investigations.*

1. Number of investigations pending Jan. 1	48
2. Number of new investigations commenced	537
3. Number of investigations closed	507
4. Number of investigations pending June 30	78

EXHIBIT "B"

1968 Legislation Proposed by the Attorney General

1. An act extending the special hearing procedures for persons committed or confined at the Bridgewater State Hospital. (Chapter 44, Acts of 1968)

[1]Exclusive of certain collections by Consumer Protection Division.

[2]Exclusive of workmen's compensation cases.

[3]Exclusive of those processed by Public Charities Division.

2. An act allowing school adjustment counsellors to serve in secondary schools. (Chapter 66, Acts of 1968)

3. An act increasing the authority of constables to serve process. (Chapter 74, Acts of 1968)

4. An act extending the Bail Reform Act of 1966 until 1970. (Chapter 127, Acts of 1968)

5. An act permitting the indictment, trial, and conviction of an accessory in the same manner as a principal. (Chapter 206, Acts of 1968)

6. An act exempting non-resident military personnel from the provisions of law imposing license fees on trafler coach parks. (Chapter 464, Acts of 1968)

7. An act clarifying the powers of the Division of Waterways regarding the burning and dumping of rubbish in the harbors of Massachusetts. (Chapter 626, Acts of 1968)

8. An act to curb the oil pollution of Massachusetts waters. (Chapter 648, Acts of 1968)

9. An act making the crime of conspiracy a felony. (Chapter 721, Acts of 1968)

10. An act prohibiting electronic surveillance except by law enforcement officials under strict court order. (Chapter 738, Acts of 1968)

11. An act making principals liable for the acts of agents. (Chapter 11, Resolves of 1968)

12. An act to curb air pollution caused by automobile exhausts. (Chapter 65, Resolves of 1968)

13. An act further clarifying the Campaign Spending and Disclosure Law. (Chapter 84, Acts of 1968)

14. An act making corrective changes in the law relative to entry upon land taken for highway purposes. (Chapter 93, Resolves of 1968)

15. An act clarifying payment procedures for property taken through eminent domain proceedings. (Chapter 93, Resolves of 1968)

16. An act providing for payment of expenses incurred by the Real Estate Review Board. (Chapter 93, Resolves of 1968)

17. An act extending the authority to excercise the power of eminent domain to Capital Outlay Programs. (Chapter 93, Resolves of 1968)

18. An act providing protection for the consumer against unfair trade practices. (S. 170)

19. An act authorizing the granting of immunity to witnesses under certain circumstances. (S. 354)

20. An act authorizing the Attorney General and district attorneys to subpoena books and records of certain corporations and agencies of the government. (S. 377)

21. A resolve providing for a study relative to developing the water resources within Massachusetts and the advisability of creating water basin commissions. (S. 442)

22. An act applying competitive bidding procedures to public authorities. (S. 663)

23. An act permitting state income tax returns to be made available to the Attorney General on court order to assist in criminal cases. (S. 723)

24. An act revising and codifying the laws governing the use of the highways in the Commonwealth. (S. 928)

25. An act requiring public authorities to maintain open records. (S. 715)

26. An act providing for the establishment of a comprehensive alcoholism treatment and rehabilitation program. (S. 1169)

27. An act requiring a stenographer at hearings of the State Ballot Law Commission. (H. 1448)

28. An act providing for the admissibility as evidence of stenographic transcripts of administrative proceedings. (H. 1478)

29. An act authorizing the posting of notice of a complaint by the Massachusetts Commission Against Discrimination. (H. 1539)

30. An act establishing a schedule of fines for corporations found guilty of certain crimes. (H. 1815)

31. An act providing for the summoning of witnesses on behalf of indigent defendants. (H. 1823)

32. An act putting Massachusetts law in conformity with the United States Supreme Court rulings relating to juvenile offenders. (H. 1823)

33. An act relating to the disposal of property acquired by the Commonwealth as a result of search and seizure. (H. 1829)

34. An act establishing juvenile courts in Worcester and Springfield. (H. 1835)

35. An act making certain corrective changes in the Massachusetts Clean Waters Act. (H. 1853)

36. An act establishing the Governor's Committee on Law Enforcement and the Administration of Justice. (H. 1861)

37. An act relating to the position of the Chairman of the Massachusetts Commission Against Discrimination. (H. 1882)

38. An act extending the jurisdiction of the Massachusetts Commission Against Discrimination to include complaints concerning the public welfare system. (H. 1921)

Major Legislation Which The Department Assisted In Drafting

1. An act strengthening the Commonwealth's Firearm control laws. (C. 737 Acts of 1968)

2. An act establishing special rules for retired justices recalled to active service for reviewing the commitments of persons confined to Bridgewater State Hopital. (H. 3794)

3. An act providing for the recodification of the mental health commitment laws within the Commonwealth. (S. 876)

4. An act overruling the 1968 *Commonwealth* v. *Federico* Supreme Judicial Court decision. (Chapter 725, Acts of 1968)

5. An act establishing a commission with authority for setting the rates to be paid by each governmental unit to providers of health services under medical assistance programs. (Chapter 497, Acts of 1968)

Number 1. JULY 6, 1967.

HONORABLE QUINTIN J. CRISTY, *Chairman Alcoholic Beverages Control Commission*

DEAR MR. CRISTY: — You have requested my opinion as to whether c. 323 of the Acts of 1967, entitled "AN ACT AUTHORIZING THE SALE OF ALCOHOLIC BEVERAGES TO BE DRUNK ON THE PREMISES BETWEEN MIDNIGHT ON SATURDAYS AND ONE O'CLOCK ANTE MERIDIAN ON SUNDAYS," amending G. L. c. 138, § 33, will authorize such sales absolutely, or only subject to the permission of local licensing authorities.

It is my opinion that the "local option," so-called, applies, so that when c. 323 becomes effective, sales between midnight Saturdays and 1:00 A. M. Sundays will not be authorized except where permitted by the local licensing authorities.

General Laws c. 138, § 33, as it is currently in effect, prohibits sales at any time on Sundays by holders of tavern licenses under § 12, and prohibits sales by other § 12 licensees during the thirteen-hour period between midnight on Saturdays and 1:00 P. M. on Sundays. The prohibition respecting tavern holders is not affected by c. 323 of the Acts of 1967. But when c. 323 becomes effective, the present prohibition respecting other § 12 licensees will no longer apply during the one-hour period between midnight Saturdays and 1:00 A. M. Sundays.

Yet although § 33 will no longer prohibit sales by these other licensees during this one-hour period, it does not follow that they will automatically be given a privilege to sell during that hour. Section 33 is framed in terms of a prohibition against certain sales, not in terms of an authorization. The authority to sell must be found in G. L. c. 138, § 12, which states:

> "The hours during which sales of . . . alcoholic beverages may be made by any licensee . . . shall be fixed by the local licensing authorities either generally or specially for each licensee . . . [subject to the statutory privilege of a licensee to sell during the period between 11:00 A. M. to 11:00 P. M. on secular days]."

The effect of c. 323 of the Acts of 1967 is thus merely to add the hour between midnight Saturday to 1:00 A. M. Sunday to the hours during which local licensing authorities may, in their sound discretion, permit licensees to sell.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 2. JULY 6, 1967.

DR. RICHARD M. MILLARD, *Chancellor, Board of Higher Education*

DEAR DOCTOR MILLARD: — You have requested my opinion on whether or not the Board of Higher Education may compensate President Daniel H. O'Leary of Lowell State College, Dr. Andrew Torrielli, a faculty member of Lowell State College, and one Henry Goguen, who is not employed by the Commonwealth, for screening applications for scholarships to be awarded by the Board, and making recommendations thereon to the Board. Although your letter does not so state, President O'Leary, by vote of state college presidents, also serves as a member of the advisory commission to the Board. See G. L. c. 15, § 1B.

Mr. Goguen is not already employed by the Commonwealth, and there is no problem in compensating him for his services in screening applications. His employment is, in my opinion, permitted under G. L. c. 15, § 1D, which authorizes the Board "to administer a scholarship program" and to "employ . . . consultants . . . to study specific matters of concern to the board."

President O'Leary and Dr. Torrielli may, in my opinion, be compensated under the foregoing section for the screening services described above, provided the following four conditions are met:

(1) The services are rendered only occasionally.

(2) The services are performed outside the normal working hours of President O'Leary and Dr. Torrielli as salaried personnel.

(3) The services are not required to be performed by President O'Leary and Dr. Torrielli as part of their salaried duties.

(4) No other person is available to perform the services as part of his regular duties.

Your inquiry requires first a construction of G. L. c. 30, § 21, which provides:

> "A person shall not at the same time receive more than one salary from the treasury of the commonwealth."

General Laws c. 4, § 7, Twenty-Seventh, provides that in construing statutes, unless a contrary intention clearly appears, " 'Salary' shall mean annual salary." And in *Maynard* v. *Royal Worcester Corset Co.,* 200 Mass. 1, it was said at page 4, that "This word [salary] is perhaps more frequently applied to annual employment than to any other, and its use may import a factor of permanency." See also *Mahoney* v. *Hildreth & Rogers Co.,* 332 Mass. 496, 499.

It is the factor of permanency that has been underscored in a series of opinions by Attorneys General in determining whether compensation from the Commonwealth is a "salary" within the meaning of G. L. c. 30, § 21. See Report of the Attorney General for the Year Ending June 30, 1956, p. 42 (and opinions cited therein). As stated in 5 Op. Atty. Gen. 699, 700 (1920).

> "It is not necessary to quote authorities in defining what is meant by the word 'salary' other than to point out that it is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called 'piece work' basis, and are more frequently subject to deductions for loss of time."

If, therefore, compensation for President O'Leary and Dr. Torrielli is established upon the basis of only occasional employment in their screening of applications, the first of the four conditions enumerated above will be satisfied.

The second and third conditions are based on G. L. c. 29, § 31, which reads in part as follows: "Salaries payable by the commonwealth shall . . . be in full for all services rendered to the commonwealth by the persons to whom they are paid." As interpreted by my predecessors, this section bars compensation for extra services unless the services are not required in the performance of the salaried position and are rendered outside the usual hours of employment therein. 2 Op. Atty. Gen. 309 (1902); 5 Op. Atty. Gen. (1920) 699, 701. Attorney General's Report for the Year Ending November 30, 1937, p. 120. Attorney General's Report for the Year Ending June 30, 1956, p. 42.

Applying these criteria to the present situation, the duties of presidents and faculty members of state colleges as defined in the "job descriptions" compiled by the trustees of state colleges pursuant to G. L. c. 73, § 16, do not include the screening of applications for scholarships to be awarded by the Board of Higher Education. Although President O'Leary has also been chosen by a vote of state college presidents to serve on the advisory commission to the Board, I do not believe that this additional responsibility disqualifies him from being compensated for screening scholarship applications. He receives no additional compensation for serving on the advisory commission; his only duty as a member thereof is to attend meetings of the Board and, of course, to give it advice. G. L. c. 15, § 1B. In my opinion, this does not carry with it the duty to screen scholarship applications submitted to the Board. I assume that the number of applications is considerable and that the screening of them is a time-consuming, painstaking task which, in the interest of applying uniform criteria, should be performed by a small group of examiners. Screening thus does not appear to be an incident of the regular duties of the members of the advisory commission.

The next issue concerns the requirement, derived from G. L. c. 29, § 31, that the extra services must be performed outside usual hours of employment. Neither the statute establishing the positions of President and faculty members of Lowell State College (G. L. c. 73, § 16) nor the "job descriptions" which are prepared pursuant to it prescribe the usual hours of em-

ployment for President O'Leary or Dr. Torrielli. Since each serves in a professional capacity, a certain degree of flexibility must be presumed. Nevertheless, it is for your Board to establish that the screening of scholarships by President O'Leary and Dr. Torrielli in no way interferes with the performance of their salaried duties during the hours that they ordinarily devote to them. If there is no interference, then it is my opinion that they satisfy the third condition.

The fourth condition — that no other person is available to perform the services as part of his regular duties — was first enunciated by Attorney General J. Weston Allen in 1920, 5 Op. Atty. Gen. 697, 698-699. This condition, like the first three conditions, presents a question of fact which must be determined by your Board in the exercise of sound discretion.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 3. JULY 7, 1967.

HONORABLE HOWARD WHITMORE, JR., *Commissioner Metropolitan District Commission*

DEAR COMMISSIONER WHITMORE: — You have requested my opinion as to the power of the Metropolitan District Commission to lease certain land under its control in the City of Newton to a private organization. Your office has advised me that the land is part of a larger tract which was purchased by the Commonwealth, acting through the Metropolitan Park Commission, on June 6, 1916, and, to the extent of any outstanding interests therein, included in an order of taking by eminent domain adopted by the Park Commission on January 31, 1917. It is my understanding that both the purchase and the taking were made under authority of St. 1894, c. 288 and St. 1912, c. 699, for the purpose of laying out and constructing a portion of the Hammond Pond Parkway. In 1954 the Metropolitan District Commission, which had succeeded to the powers of the Metropolitan Park Commission in 1919, sold a portion of this tract abutting on the Parkway to Temple Mishkan Teffila, a private religious organization. The Temple now wishes to lease from the Commission an additional portion of this land, also abutting on the Parkway, and adjacent to the land previously purchased by it, for use as a parking area. I assume that the proposed lease would be for a term of ninety-nine years or less.*

The questions you have raised are in substance as follows:

1. Is the Metropolitan District Commission authorized by G. L. c. 92, § 83 to lease the land in question to the Temple?
2. If such a lease is authorized, is the Commission required:
   (a) To restrict the use of the leased property to uses consistent with the purposes for which the land was acquired?
   (b) To obtain the concurrence of the Park Commissioners of the City of Newton, as provided in G. L. c. 92, § 85?

*Under G. L. c. 186, § 1, a lease for a term of one hundred years or more is for many purposes treated as a conveyance of an estate in fee simple. Thus, the conclusions in this opinion do not necessarily apply to such a lease.

QUESTION 1.

With reference to Question 1, G. L. c. 92, § 83 plainly authorizes the Metropolitan District Commission to grant leases for various purposes in certain lands under its control. Section 83 provides:

> "The [metropolitan district] commission may, for all purposes consistent with the purposes specified in sections thirty-three and thirty-five [parks and boulevards], erect, maintain and care for buildings, and grant easements, rights of way or other interests in land, *including leases*, in any portion of the lands taken or acquired by it for the purposes of said sections, and may accept and assent to any deed containing reservations of such easements or other interests in land, all for such considerations or rentals, and upon such terms, restrictions, provisions or agreements, as the commission may deem best." (Emphasis supplied.)

There is nothing in this statute or elsewhere in G. L. c. 92 to suggest that leases thereunder may be granted only to municipalities or other public bodies, and not to private individuals and organizations. On the contrary, the two sections which immediately follow § 83 in G. L. c. 92 imply that the Legislature was thinking primarily in terms of private lessees. Sections 84 and 85 deal with the Commission's power to dispose of such land by abandonment and by sale respectively, and both sections refer to the "heirs and assigns" of the transferee — terms which make no sense if applied to other than a *private* individual or entity. These two sections, together with § 83, form a closely related statutory sequence, and the eligibility of private persons to acquire such land by abandonment and sale under §§ 84 and 85 suggests that they are likewise eligible to acquire it by lease under § 83.

While the power to grant leases under G. L. c. 92, § 83 is confined to land acquired "for the purposes of" G. L. c. 92, §§ 33 and 35 [parks and boulevards], I think that the land in question falls within this category even though it was acquired under St. 1894, c. 288 and St. 1912, c. 699. Section 1 of the 1894 statute authorized land acquisition by the Metropolitan Park Commission to "connect any road, park, way or other public open space with any part of the cities or towns of the metropolitan parks district under its jurisdiction, by a suitable roadway or boulevard. . . ." In almost identical language, G. L. c. 92, § 35 empowers the Metropolitan District Commission to acquire land to "connect any way, park or other public open space with any part of the towns of the metropolitan parks district under its jurisdiction by suitable roadways or boulevards. . . ." This similarity between the two statutes resulted from the incorporation of the 1894 statute into the General Laws upon their adoption in 1921.* Under G. L. c. 281, § 2, "the provisions of the General Laws [such as G. L. c. 92, § 35], so far as they are the same as those of existing statutes [such as St. 1894, c. 288, § 1], shall be construed as a continuation thereof and not as new enactments. . . ." For this reason I conclude that any land acquired under the 1894 statute is land acquired "for the purposes of" G. L. c. 92, § 35, within the meaning of G. L. c. 92, § 83. (The fact that powers conferred by St. 1912, c. 699 were also involved in the acquisition of this land does not alter this conclusion, since the 1912 statute merely authorized the particular acquisition and appropriated money therefor.)

*In the same way, G. L. c. 92, § 83 is traceable to St. 1895, c. 450, § 1, which was in effect when this land was acquired.

Nor does any serious difficulty arise from the fact that the land was originally acquired by the Metropolitan *Park* Commission rather than the Metropolitan *District* Commission. The Park Commission was abolished by St. 1919, c. 350, § 123, and the Metropolitan District Commission created in its place. The same statute declared that "all the rights, powers, duties and obligations of [the Park Commission] are hereby transferred to and shall hereafter be exercised and performed by the metropolitan district commission established by this act, which shall be the lawful successor of said commission. . . ."

It is therefore my opinion, subject to the qualification stated in my answer to Question 2(a), that the Metropolitan District Commission is authorized by G. L. c. 92, § 83 to lease the land in question to Temple Mishkan Tefila.

QUESTION 2(a).

The answer to Question 2(a) lies in the opening portion of G. L. c. 92, § 83: "The commission may, *for all purposes consistent with the purposes specified in sections thirty-three and thirty-five* [parks and boulevards] . . . grant . . . leases. . . ." The land involved in the contemplated lease, as stated in my answer to Question 1, was acquired under St. 1894, c. 288, § 1, the statutory predecessor of G. L. c. 92, § 35, for the purpose of laying out and constructing the Hammond Pond Parkway. It is therefore my opinion that the use of the leased land must be restricted to uses consistent with that purpose.

Whether or not the use of this land by the Temple for a parking area would be consistent with the purposes for which the land was acquired is essentially a question of fact. As a practical matter, the answer turns largely on the degree to which the proposed parking area would be beneficial to members of the general public using the Parkway. Under this test, the statute would not, in my opinion, authorize a parking area which was restricted to use by members and licensees of the Temple. On the other hand, the allocation of an appropriate portion of parkway land to public parking might be consistent with the purposes for which the land was acquired by the Commission. See *Revere Housing Authority* v. *Commonwealth*, Mass. Adv. Sh. (1966) 1047, 1050. Thus, if it were demonstrated that there is a substantial need for a public parking area in this particular location, and if the leased premises would be available for parking by the public generally, I think that the use requirements of G. L. c. 92, § 83 would be satisfied. Such factual determinations must, of course, be made by the Commission rather than by this Department.

QUESTION 2(b).

Question 2 (b) involves the relationship between §§ 83 and 85 of G. L. c. 92. The first paragraph of § 85 provides:

> "The [metropolitan district] commission, *with the concurrence of the park commissioners,* if any, in the town where the property is situated, may *sell* at public or private sale any portion of the lands or rights in land the title to which has been taken or received or acquired and paid for by it for the purposes set forth in sections thirty-three and thirty-five, and may, *with the concurrence of such park commissioners, execute a deed thereof,* with or without covenants of title and warranty, all in the name and behalf of the commonwealth, to the purchaser, his heirs and assigns,

> and deposit said deed with the state treasurer, together with a certificate of the terms of sale and price paid or agreed to be paid at said sale, and, upon receipt of said price and upon the terms agreed in said deed, he shall deliver the deed to said purchaser. The state treasurer may, by the attorney general, sue for and collect the price and enforce the terms of any such sale." (Emphasis supplied.)

I do not think that the "concurrence" provisions of § 85 are applicable to leases granted under § 83. Just as § 83 confers power to "erect, maintain and care for buildings, and grant easements, rights of way or other interests in land, including leases," § 85 confers power to "sell at public or private sale . . . lands or rights in land. . . ." Intervening between these two sections is § 84, which authorizes the Commission to "abandon any easement or right in land less than the fee. . . ." As previously indicated, all three sections deal with the power of the Commission to dispose of land held for park or boulevard purposes under G. L. c. 92, §§ 33 and 35, and, together, they form a statutory sequence. The phrase "with the concurrence of the park commissioners" appears in §§ 84 and 85, but is absent from § 83. This leads me to believe that for leases under § 83 no such requirement exists.

This conclusion is supported by the language of the second paragraph of § 85:

> "If the commission votes, *under this or the preceding section, to abandon or sell* any portion of the lands or rights in land so taken or acquired by it, and the park commissioners in any town where said property or right in property is situated refuse or fail to concur with the commission within fourteen days from the giving of written notice of such vote to said park commissioners, the commission, upon written notice of not less than seven days to said park commissioners, may appear before the governor and council and ask their concurrence in such sale or abandonment; and if the governor and council, after hearing, concur in such sale or abandonment, it shall have full force and effect." (Emphasis supplied.)

I think it significant that the references here are confined to §§ 84 and 85 ("this or the preceding section") and to the abandonment and sale of land. Again, the absence of any mention of § 83 or to leases thereunder suggests that the procedures prescribed in § 85 have no bearing on leases granted under § 83.

It is therefore my opinion that the concurrence of the Newton Park Commissioners, referred to in G. L. c. 92, § 85, is not required for the proposed lease.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 4. JULY 13, 1967.

HON. QUINTIN J. CRISTY, *Chairman Alcoholic Beverages Control Commission*

DEAR MR. CRISTY: — You have requested my opinion relative to the licensing requirements of G. L. c. 138 (the alcoholic beverages laws) con-

cerning alcoholic beverages imported through points of entry in Massachusetts and destined to a recipient outside the Commonwealth. Your question is cast in the form of an inquiry whether the merchandise may "be cleared into Massachusetts by the United States Customs Authorities out and from any Massachusetts Port of Entry for transportation to a destination outside of this Commonwealth?" From the context of your inquiry, I gather that your essential question is whether a recipient in a state outside Massachusetts must hold an importer's and wholesaler's license under G. L. c. 138, § 18. On the facts submitted, the recipient, whom you designate as the "consignee," has no connection with Massachusetts other than arranging for the alcoholic beverages to be shipped from abroad to a point of entry in Massachusetts in a continuous movement to the out-of-state destination. Transportation of the alcoholic beverages through Massachusetts is done by an independent carrier, as to whom you have raised no licensing question.

You indicate that the Commission is of the opinion that the consignee must be licensed under G. L. c. 138, § 18. You base your conclusion on G. L. c. 138, § 2, which provides in relevant part:

> "No person shall . . . *import* or export alcoholic beverages or alcohol, except as authorized by this chapter. . . ." (Emphasis supplied.)

General Laws c. 138, § 18 provides, in relevant part:

> "The commission may issue to any individual who is both a citizen and resident of the commonwealth and to partnerships composed solely of such individuals, and to corporations organized under the laws of the commonwealth whereof all the directors are citizens of the United States and a majority thereof residents of the commonwealth, licenses as wholesalers and importers (1) to sell for resale *to other licensees under this chapter* alcoholic beverages manufactured by any manufacturer licensed under the provisions of section nineteen and *to import* alcoholic beverages into the commonwealth from holders of certificates issued under section eighteen B* whose licensed premises are located in other states and foreign countries *for sale to such licensees*, or (2) to sell for resale wines and malt beverages so manufactured to such licensees and *to import* as aforesaid wines and malt beverages *for sale to such licensees*." (Emphasis supplied.)

Your question is answered by determining the meaning of the word "import" as used in §§ 2 and 18 of G. L. c. 138. The activities as set forth above which a licensee under § 18 may engage in are specifically enumerated. It is a familiar rule of statutory construction that such a specific enumeration precludes other uses. *Spence, Bryson Inc.* v. *The China Products Co.*, 308 Mass. 81, 88. In both of the enumerated activities under this section the term "import" is used in connection with a sale to "licensees under this chapter," all of whom have a Massachusetts location. On the other hand, the situation you describe does not contemplate a sale to any person in Massachusetts but simply involves the transportation of alcoholic beverages through Massachusetts, destined for use elsewhere. Since this latter activity does not involve a sale within Massachusetts, I am of the opinion that G. L. c. 138, § 18 is not applicable to the consignee you describe.

*Section 18B relates to "certificates of compliance" issued with respect to licenses granted outside the Commonwealth for sales to licensees therein.

It, therefore, remains for me to consider whether or not the term "import" as used in G. L. c. 138, § 2 was intended to apply to the importation of liquor into Massachusetts destined for use in another state. The same terms used in different parts of a statute should be given the same meaning where possible so as to create harmonious legislation covering the same subject matter. Having already concluded that the term "import" in § 18 was intended to cover only sales to licensees in Massachusetts, I am in like manner of the opinion that the term "import" in G. L. c. 138, § 2 should be restricted to the same kind of sales.

In your request you have directed my attention to § 2 of the 21st Amendment of the Constitution of the United States, which provides:

> "The transportation or importation *into* any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. (Emphasis supplied.)

This Amendment does not, however, make a state's jurisdiction paramount in all circumstances. The United States Supreme Court has indicated that a state may not prevent the transportation of liquor through its territory for use in another state. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324.*

However, since the Legislature has used the term "import" in G. L. c. 138 only in connection with sales within the Commonwealth, no constitutional question is raised by the facts you have set forth. Accordingly, I am of the opinion that a consignee of the type and under the circumstances which you describe need not hold an importer's and wholesaler's license under G. L. c. 138, § 18.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 5. JULY 13, 1967.

DR. RICHARD M. MILLARD, *Chancellor, The Board of Higher Education*

DEAR DOCTOR MILLARD: — You have requested my opinion as to "whether the 'representative' members of the Board of Higher Education, i.e., those elected by the Boards of Trustees of the several segments, . . . are . . . entitled to designate representatives [alternates] to serve at meetings of the Board in their unavoidable absence." Subject to the limitations set forth below, it is my opinion that such designations may be made.

Section 1A of c. 15 of the General Laws establishes a Board of Higher Education consisting of eleven members, seven of whom are appointed by the Governor, the other four members, known as the representative members being:

> ". . . a member of the board of trustees of the University of Massachusetts selected by a majority vote of all the members of said board, a member of the board of trustees of state colleges selected by a majority vote of all the members of said board, a member of the board of regional community colleges selected by a majority

* A state may, however, regulate and control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the state. *Ibid.*

> vote of all its members, and a member of the board of trustees of Lowell Technological Institute or of the board of trustees for the Southeastern Massachusetts Technological Institute selected alternately by majority vote of all the members of said respective board, each of said four members to serve for a term of one year. . . ."

Authority of a representative member to name an alternate must be found in G. L. c. 30, § 6A, which provides in pertinent part:

> "If any member of a permanent state board or commission . . . *who serves as such by virtue of holding any other office or position* is unable by reason of absence or disability to perform his duties as such member, he may, by a writing filed in the office of such board or commission, *designate an officer or employee in his department* who shall, without additional compensation therefor, perform such duties in case of and during such absence or disability, but a person so designated shall have no authority to make any appointments or removals. Any such designation may in like manner be revoked at any time." (Emphasis supplied.)

Since the alternate must be an officer or employee in [the member's] department, a reasonable construction of section 6A imports a requirement that the member must hold an office or position *in the same department*. "Department" is used in the technical sense of a "department of the Commonwealth." G. L. c. 30, § 1. The Department of Education is, of course, one of these departments. General Laws c. 15, § 1; and G. L. c. 15, § 19 provides that the boards of trustees of the University of Massachusetts, Lowell Technological Institute, and Southeastern Massachusetts Technological Institute "shall serve in the department [of education]."

Since the "representative" members of the Board of Higher Education are selected by their fellow members of the respective constituent boards, I regard the "representative" members as serving on the Board of Higher Education "by virtue of holding" an office or position on the constituent board, within the meaning of G. L. c. 30, § 6A, quoted above. The primary qualification of a "representative" member is that he be a member of one of the constituent boards. That he must also be selected by a majority of his fellow members of his constituent board is not such a further warrant of title to membership on the Board of Higher Education as to prevent his membership on the constituent board from being the primary and sufficient source of his eligibility. His selection by his fellow members should be considered to be simply a procedure to implement his original and basic authority to serve.

The remaining question involves the selection of the designee or alternate.

Under § 6A, the designee must be an officer or employee in the "department" of the member of the Board of Higher Education. It is my opinion that any officer or employee of the member's board would be eligible to serve as an alternate since such officer or employee would clearly be "in [the member's] department" within the meaning of § 6A. Whether or not any other officers or employees in the Department of Education could properly be designated to serve does not appear to be presented by your inquiry.

It should be pointed out that the word "absence" as used in § 6A is not,

as you suggest, limited to "unavoidable" absence. It contemplates inability to attend meetings for any reason whatsoever. As has been stated by a prior Attorney General:

> "To give effect to [the] legislative intent, the word 'absence' as used in said section 6A is not to be construed narrowly, but in a broad general sense so as to comprehend an 'absence' from a meeting however occasioned." Report of the Attorney General, December 1, 1942 to June 30, 1944, p. 114, 116.

Finally, I should call to your attention the following portion of § 1A of c. 15:

> "If any member [of the Board of Higher Education] is absent from four regularly scheduled meetings, exclusive of July and August, in any calendar year, his office as a member of said board shall be deemed vacant."

In my opinion, this provision is not affected by G. L. c. 30, § 6A. Thus even though a "representative" member may appoint an alternate for certain meetings, he may not himself be absent from more than four (4) regularly scheduled meetings of the Board of Higher Education, exclusive of July and August, in a calendar year.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 6. JULY 13, 1967.

HON. QUINTIN J. CRISTY, *Chairman, Alcoholic Beverages Control Commission*

DEAR MR. CHRISTY: — You have requested my opinion concerning the validity of the action of two of the three members of the Marlborough Licensing Board in accepting seven applications for a "package goods" store license, calling hearings thereon, approving one application and denying the other six, under the following circumstances: The Chairman of the Board, you state, "refuses to call any meeting to consider these applications"; "the remaining two Members did accept applications on their own and processed them"; "the Chairman refused to attend the hearing on these cases stating it was an illegal hearing"; and "the other two members, as a result of the hearing, approved one applicant for the available license and denied all the other applicants." Supplemental information furnished to me by your Commission indicates that the Chairman regarded any meeting as illegally called unless he had called it himself.

The question of the validity of the majority's action comes before your Commission in connection with its responsibility under G. L. c. 138, § 15 to approve or withhold approval of the granting of "package goods" store licenses by licensing boards. Since the Commission should not approve any invalid action taken by a licensing board (*Piona* v. *Alcoholic Beverages Control Commision,* 332 Mass. 53, 56), it is entitled to request my opinion concerning the law that must govern its determination of the validity of the Marlborough Board's action.

The law requires that the members of a local licensing board act jointly

and not by the separate action of its individual members. *Pettengell* v. *Alcoholic Beverages Control Commission,* 295 Mass. 473. A board's official actions "must be determined at a formal and regularly constituted meeting of the board and must be made a part of its records." *Pettengell* v. *Alcoholic Beverages Control Commission, supra,* at 477. See also G. L. c. 30A, § 11A and G. L. c. 39, §§ 23A-23C, the "open-meetings" statutes.

The law does not, however, require that all members of the board attend a meeting as a condition of the validity of actions taken thereat. Numerous cases have decided that, if a quorum is present, an administrative board may validly conduct its business. See *George* v. *School District in Mendon,* 6 Metc. 497, 511. *Cooke* v. *Scituate,* 201 Mass. 107, 109. *Codman* v. *Crocker,* 203 Mass. 146, 154. Specifically, in the case of a licensing board organized in accordance with the Alcoholic Beverages Control Laws, G. L. c. 138, §§ 4-9, it is provided in § 6 that "Two members shall be a quorum for the transaction of business." And G. L. c. 4, § 6, Fifth, relative to the construction of statutes, provides: "Words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons." Therefore, the fact that the license in question was granted at a meeting attended by only two of the three members of the board does not in itself cause the grant to be invalid.

On the other hand, it is clear that notice of meetings to all members, adequate and reasonable under the circumstances, is an essential condition of a formal and regularly constituted meeting. "Ordinarily [a board] cannot act legally without a meeting of all the members, or a reasonable notice to all, such as to give every member, if he pays proper attention to his public duties, an opportunity to be present with the others and participate in the business before the board." *Damon* v. *Selectmen of Framingham,* 195 Mass. 72, 77. *Robie* v. *Massachusetts Turnpike Authority,* 347 Mass. 715, 724-725.

Notice of meetings reasonable under the circumstances is required even as to a member who has expressed an intention of refusing to participate, in order that he may have the opportunity to change his mind. In *George* v. *School District in Mendon,* 6 Met. 497, one of the town of Mendon's three duly elected assessors refused to take his oath of office, and when given notice by the other two assessors of a meeting, declined to attend. Chief Justice Shaw, in a decision affirming actions taken by the other two assessors at that meeting, stated at page 511: "If a majority do qualify, by taking the oath, and the third has not taken the oath, still, *if he has notice of their proceeding to execute the office,* and declines to take the oath and act with them, their acts will be good, in the same manner as if he had taken the oath and declined to act with them. . . ." (Emphasis supplied.)

In deciding whether the Marlborough license in question was granted at a duly called and conducted meeting of the Marlborough Licensing Board, the Commission may proceed on the presumption that until shown to be irregular, the acts of public officials will be regarded as having been validly performed. *Robie* v. *Massachusetts Turnpike Authority,* 347 Mass. 715, 725. The burden would then be on the appellants to establish that the hearing before the board was invalid for lack of proper notice to the absent member.

The fact that the absent member was the chairman of the board does not put him on a different footing from the other members. It is a fundamental

principle that a public board or committee must be able to function notwithstanding the opposition, absence, neglect or refusal to participate of a minority of its members, whoever they may be. See, for example, Roberts Rules of Order Revised (75th Anniv. Ed.), § 52, at 212: "It is the duty of the chairman to call the committee together, but, if he is absent, or declines to call a meeting of the committee, it is the duty of the committee to meet on the call of any two of its members."

If, as your letter indicates, the chairman "refuses to call any meeting to consider these applications," and "the chairman refused to attend the hearing on these cases," it accordingly was the duty of the licensing board, provided proper notice was given to the chairman, to act on the application.

In summary, then, even though the chairman of the Marlborough Licensing Board did not call or attend the meeting in question, you may proceed on the presumption that the meeting was validly held unless the appellants establish before your Commission that the chairman, after failing to call the meeting himself, was not given an opportunity, by reasonable notice from the other two members to him, to participate therein. If the Commission determines that the meeting was properly held, it should then proceed to consider the approval or disapproval of the Board's action, in the usual manner.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 7. JULY 14, 1967.

HONORABLE CLEO F. JAILLET, *Commissioner of Corporations and Taxation*

DEAR COMMISSIONER JAILLET: — You have requested my opinion as to whether under the provisions of G. L. c. 58, §§ 13-17, relating to reimbursement of municipalities for loss of taxes on land used for public institutions, the Commonwealth is required to reimburse for lost taxes the cities and towns in which property of the following tax-exempt educational institutions is located: Southeastern Massachusetts Technological Institute (S.M.T.I.), Lowell Technological Institute of Massachusetts (Lowell Tech), institutions under the Board of Trustees of State Colleges, and institutions under the Massachusetts Board of Regional Community Colleges. It is my opinion that such reimbursement is required.

General Laws c. 58, § 13, which is the provision that defines the property in respect of which the reimbursement is to be made, states:

> "In nineteen hundred and fifty-seven, and in every fifth year thereafter, the commission shall, between January first and June first, determine as of January first the fair cash value of all land in every town owned by the commonwealth and used for the purposes of a fish hatchery, game preserve or wild life sanctuary, a state military camp ground, the Soldiers' Home in Massachusetts, the Soldiers' Home in Holyoke, a state forest, the University of Massachusetts, or a public institution *under* the department of correction, *the department of education,* the department of mental health, the department of public health, the department of public welfare, or the youth service board, and of all land owned by the

commonwealth and under the care and control of the department of natural resources or the division of public beaches in the department of public works and used for recreational or conservation purposes. . . ." (Emphasis supplied.)

The educational institutions in question are governed by a series of separate statutes — S.M.T.I., by G. L. c. 75B; Lowell Tech, by G. L. c. 75A; institutions under the Massachusetts Board of Trustees of State Colleges, by G. L. c. 73, §§ 1-18; and institutions under the Massachusetts Board of Regional Community Colleges, by G. L. c. 15, §§ 27-39. Each of the foregoing institutions has a large degree of autonomy, in that its operations are determined by a board of trustees. Thus the trustees of S.M.T.I. shall, subject only to . . . general authority in the board of higher education, have all authority, responsibility, rights, privileges, powers and duties customarily and traditionally exercised by governing boards of institutions of higher learning." G. L. c. 75B, § 1. General Laws c. 15, § 19 provides that the trustees of S.M.T.I. "shall serve in the department [of education]."

Lowell Tech is "a state institution within the department of education but not under its control and shall be governed solely by [its] board of trustees whose authority, responsibility, rights, privileges, powers and duties . . . shall be the same as those traditionally exercised by governing boards of institutions of higher learning. In exercising such authority . . . and duties, said board shall not in the management of the affairs of the institute be subject to, or superseded in any such authority by, any other state board, bureau, department or commission, except the board of higher education. . . ." G. L. c. 75A, § 1. General Laws c. 15, § 19 provides that the trustees "shall serve in the department [of education]."

The State Colleges are governed by the Board of Trustees of State Colleges, which is given certain broad powers by G. L. c. 73, §§ 1-17 but does not appear to have the explicit autonomy conferred on the trustees of S.M.T.I. and Lowell Tech by the statutes referred to above.

Finally, the Board of Regional Community Colleges is "established in the department [of education], but not subject to its control." G. L. c. 15, § 27. "Each regional community college . . . shall be governed solely by the board of regional community colleges. In exercising the authority, responsibility, powers and duties specifically conferred upon it, the board shall, subject only to general authority in the board of higher education, have all the authority, responsibility, rights, privileges, powers and duties customarily and traditionally exercised by governing boards of institutions of higher learning. In exercising such authority, responsibility, powers and duties said board shall not in the management of the affairs of said colleges be subject to, or superseded in any authority by, any other state board, bureau, department or commission, except the board of higher education. . . ." G. L. c. 15, § 28.

The Board of Higher Education, to which reference is made in the statutes respecting S.M.T.I., Lowell Tech, and the Board of Regional Community Colleges, is established by G. L. c. 15, § 1A, as amended by § 2 of c. 572 of the Acts of 1965, which provides: "There shall be in the department [of education], but not subject to its control, a board of higher education."

It is thus clear that the various educational institutions with which we are

here concerned, because of their wide autonomy, are not "under" the Department of Education, in the sense of being subject to its direction or control. If that is the meaning of "under" as used in G. L. c. 58, § 13, then it would be my opinion that the various educational institutions would not fall within the scope of that statute, and reimbursement in respect of lost taxes on their property would not be required. After careful consideration, however, I have concluded that "under" was not used in that sense but rather in the sense of "being associated with" or "being in." My reasons for this conclusion require an examination of the origin and history of the statute.

General Laws c. 58, § 13 originated with §§ 1 and 2 of c. 607 of the Acts of 1910 which provided for reimbursement of cities and towns for loss of taxes on "land used for the purposes of a public institution." Public institutions were defined as "all institutions subject to the supervision of the state board of insanity, state board of charity or the board of prison commissioners. . . ." As the result of several amendments in the intervening years, the statute as embodied in the General Laws of 1921 defined the property in respect of which the reimbursement of taxes was to be made as "land . . . owned by the commonwealth and used for the purposes of a public institution under the department of mental diseases, the department of public welfare or the department of correction, a fish hatchery or game preserve, a state military camp ground, or a state forest." G. L. (1921 ed.) c. 58, § 13. In the same year, 1921, however, the statute was again amended by describing the subject property simply as "all land in every town owned by the commonwealth and used for the purposes of a public institution, a fish hatchery or game preserve, a state military camp ground, or a state forest." The term "public institution" was, however, not defined nor was there any requirement that it be *under* any department.

With several later amendments not here relevant, the statute remained in this form until 1956 when, by c. 701 of the Acts of that year, the statute was rewritten by eliminating the general reference to land "used for the purposes of a public institution" and substituting the reference, now in the statute, to land "used for the purposes of . . . a public institution under the department of correction, the department of education, the department of mental health, or the youth service board. . . ."

I do not regard the 1956 amendment as changing the essential character of the "public institution" provision of the 1921 amendment. Rather, the purpose of the 1956 amendment was, in my opinion, simply to clarify the law so as to specify the general classes of public agencies whose property would meet the reimbursement test. I find nothing in the amendment or its purpose or legislative history that indicates that the Legislature intended the right of a city or town to reimbursement for lost taxes to depend on a fine-spun analysis of the extent to which any particular institution was subject to the control of the department in which it was placed.

This conclusion finds support in that portion of the 1956 amendment that refers first to "a public institution under the department of correction, the department of education, the department of mental health . . .," and then goes on to include in the class of property eligible for reimbursement of lost taxes "all land owned by the commonwealth and under the *care and control* of the department of natural resources or the division of public beaches in the department of public works and used for recreational or conservation purposes. . . ." (Emphasis supplied.) The use of the phrase "care and con-

trol" is here used with reference to the land itself whereas the phrase "under," when used alone, pertains only to the relationship of the particular institution to the department with which it is connected. That relationship, however, as I have already stated, I do not regard as requiring the presence of an element of control by the department involved.*

In reaching the conclusion, I have not overlooked the amendment made by the Legislature in 1960 by c. 593, § 1 of the Acts of that year, whereby the University of Massachusetts was specifically included as an institution in respect of whose real estate the Commonwealth was to make reimbursement for lost taxes. I regard this amendment as only a clarification intended to dispel doubts that the statute apparently presented with respect to the University. Further, nothing in this opinion should be regarded as requiring reimbursement contrary to the provisions of G. L. c. 58, § 15A, relative to land exempt from local taxation at the time of its acquisition by the Commonwealth. In short, I am of the opinion that the communities where the educational institutions in question are located are, subject to the qualification stated in the preceding sentence, entitled to reimbursement for lost real estate taxes in respect of their property.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 8. JULY 19, 1967.

HONORABLE JOHN A. GAVIN, *Commissioner of Correction*

DEAR COMMISSIONER GAVIN: — In a recent letter you have asked my opinion "as to whether the Commissioner of Correction has the authority under [G. L.] Chapter 127, Section 97 to transfer a prisoner from another Massachusetts Correctional Institution to the State Hospital section of the Massachusetts Correctional Institution, Bridgewater."

Chapter 127, § 97 provides in pertinent part:

> "The commissioner [of correction] may transfer any prisoner from one correctional institution of the commonwealth to another . . .; provided that no person sentenced to the state prison . . . shall be so removed to any other institution except the Massachusetts Correctional Institution, Walpole, the Massachusetts Correctional Institution, Concord, or the Massachusetts Correctional Institution, Bridgewater, except with the approval of the governor and council."

In view of a provision in G. L. c. 125, § 18 that "The Bridgewater state hospital shall be part of the Massachusetts Correctional Institution, Bridgewater[,]" the foregoing language might, by itself, seem to permit you to transfer prisoners to the Hospital there as well. Yet, after careful consideration, I am of the opinion that your authority does not reach that far. I believe that transfers to the Hospital are governed by G. L. c. 123, §§ 102 and 103, and require the issuance of a warrant by the Superior Court. General Laws c. 123, §§ 102 and 103 provide:

*House Bill No. 1704 of 1956, which originated the 1956 amendments, also used the phrase "under the care and control of" in relation to the enumerated departments. This was changed to "under."

§ 102. "The department [of mental health] shall designate two persons, experts in insanity, to examine prisoners in the correctional institutions of the commonwealth, alleged to be insane. If any such prisoner appears to be insane or in such mental condition that his commitment to an institution for the insane is necessary for his proper care or observation pending the determination of his insanity, the warden or superintendent shall notify one or both of said experts, who shall, with the physician of such penal institution, examine the prisoner and report the result of their investigation to the superior court for the county where such penal institution is situated."

§ 103. "The superior court upon a report under the preceding section, if it considers the prisoner to be insane or in such mental condition that his commitment to an institution for the insane is necessary for his proper care or observation pending the determination of his insanity, and his removal expedient, shall issue a warrant, directed to the warden or superintendent, authorizing him to cause the prisoner, if a male, to be removed to the Bridgewater state hospital, and, if a female, to be removed to one of the state hospitals for the insane, subject to the provisions of section one hundred and five."

Past practice seems to have relied on these provisions as the basis of the transfer of prisoners to the Hospital, despite the existence of provisions corresponding to the present G. L. c. 125, § 18 (relative to the Hospital being a part of the Correctional Institution) and the present G. L. c. 127, § 97 (relative to the Commissioner's authority over prisoner transfers). *Commonwealth* v. *Sacco,* 255 Mass. 369, 408. This practice reflects a recognition of the well-settled rule that a statute directed specifically to a particular subject (in this case, the transfer of persons to mental hospitals, of which the Hospital at Bridgewater is one) will prevail over a general statute not focused thereon; and it reflects also a construction that makes the statutes concerning your authority, on the one hand, and the jurisdiction of the Superior Court, on the other, parts of a harmonious and consistent body of legislation.

My opinion that the Legislature intended the Superior Court warrant procedure to control the transfer of prisoners to the Hospital finds confirmation in legislation enacted in 1955 which made numerous changes in the correctional system of the Commonwealth but continued in force both the Commissioner's authority to transfer prisoners under G. L. c. 127, § 97 and the Superior Court warrant procedure under G. L. c. 111, § 102. St. 1955, c. 770, §§ 5 and 58. Such an affirmation of the viability of both procedures indicates that neigher of them was regarded as superseded by the other, and that each was intended to operate in its pre-existing sphere of jurisdiction.

I therefore conclude that transfers of a prisoner from a correctional institution of the Commonwealth to the State Hospital at Bridgewater can be effected only in accordance with the provisions of G. L. c. 123, §§ 102 and 103, and that G. L. c. 127, § 97 does not authorize the Commissioner of Correction to make such a transfer himself.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 9. July 19, 1967.

M. Joseph Stacey, *Comptroller, Executive Office for Administration and Finance*

Dear Mr. Stacey: — You have requested my opinion on the effect of a distribution to the Metropolitan Area Planning Council (the "MAPC") of funds appropriated by Item 3015-05 of the Supplementary Budget for the 1967 Fiscal Year (St. 1966, c. 709, § 2).

Under Item 3015-05, $30,000 was appropriated from the Local Aid Fund to the Department of Commerce and Development "for the reimbursement, on a matching basis, of regional planning agencies for a program of planning studies. . . ." Since an appropriation from the General Fund of $107, 000 had already been made directly to the MAPC for its "expenses" in Item 0474-01 of the Budget for the same year (St. 1966, c. 411, § 2), a question arose as to whether or not the MAPC was eligible to share in the appropriation under Item 3015-05. In an opinion dated June 5, 1967 to the Executive Director of the MAPC, I expressed the view that "the MAPC is among the 'regional planning agencies' referred to in Item 3015-05 . . . and hence is eligible to receive a portion of the funds appropriated thereunder."

My opinion to the MAPC was, of course, confined to the issue of whether or not such a distribution of funds to the MAPC was permissible, and did not deal with the question of how such funds, once distributed, should be accounted for. However, I did point out that under G. L. c. 6, § 114, sums appropriated by the General Court directly to the MAPC are (within certain limits) thereafter recovered by the State Treasurer from the member cities and towns through annual assessments made upon them, and that "a distribution of money from the Local Aid Fund to the MAPC under Item 3015-05 will thus have the effect of reducing the assessments upon these municipalities."

You state in your letter that the above-quoted statement from my opinion to the MAPC leaves you in doubt as to whether funds distributed to the MAPC under Item 3015-05 may be expended by that agency, or may be used solely to reduce assessments upon the constituent municipalities under G. L. c. 6, § 114. Specifically, you have asked the following questions:

> "1. May the MAPC spend the amount of an allocation made by the Department of Commerce and Development from Item 3015-05 in addition to the amount appropriated to it under a separate item, 0474-01 of Chapter 411 of the Acts of 1966?
>
> "2. If the answer to Question #1 is in the negative, may the Department of Commerce and Development allocate funds to MAPC to be used only to reduce assessments on the cities and towns on account of expenses made from appropriations authorized by the Legislature directly to the MAPC?"

Since I am of the opinion that Question 1 calls for an affirmative answer, no answer to Question 2 is required.

The stated purpose of Item 3015-05 is "the reimbursement . . . of regional planning agencies" for certain projects undertaken by them. The usual

rule is that words appearing in statutes "shall be construed according to the common and approved usage of the language. . . ." G. L. c. 4, § 6, Clause Third. The word "reimburse" is ordinarily understood as a synonym for the word "pay" with reference to "the return of an exact equivalent for an expenditure. . . ." Webster's Third International Dictionary (1964), p. 1659. It means "to pay back (an equivalent for something . . . expended) to someone. . . ." *Id.*, p. 1914.

In the present context the "someone" to be reimbursed is the MAPC, as one of the "regional planning agencies" referred to in Item 3015-05. The occasion for such reimbursement is the expenditure of other funds by the MAPC (presumably from its appropriation under Item 0474-01) "for a program of regional planning studies." Thus, once the Department of Commerce and Development is satisfied that such expenditures have been made and orders a distribution of funds "for the reimbursement" of the MAPC therefor, the conditions of Item 3015-05 have been fulfilled and the MAPC may disburse the funds so distributed for any purpose which its statutory powers permit.

The alternative interpretation of Item 3015-05 which is suggested by Question 2 would mean that a distribution thereunder to the MAPC would be nothing but a paper transaction. If that interpretation were adopted, the amount of the "distribution" would merely be applied in reduction of the annual assessments upon the member municipalities and the money involved would never actually leave the State Treasury. It seems to me improbable that the Legislature would have chosen such a complex and roundabout procedure merely to accomplish the relatively simple objective of reducing municipal assessments. Moreover, such an interpretation is difficult to reconcile with the language of Item 3015-05: a "reimbursement" is a payment on account of expenditures previously made and not a reduction in the amount of a prospective charge; Item 3015-05 calls for the reimbursement "of regional planning agencies" and not of their constituent cities and towns.

While Item 3015-05 speaks in terms of "reimbursement. . . of regional planning agencies" rather than reimbursement of their member communities, the communities, of course, are indirect beneficiaries. Funds distributed to the MAPC under Item 3015-05, unlike appropriations made directly to it under Item 0474-01, are not recoverable from the municipalities. The expenses to which the money so distributed is applied are, at least in theory, expenses for which funds would otherwise have to be appropriated directly to the MAPC. Hence, the practical effect of such a distribution, other things being equal, may be to permit a reduction in the direct appropriations thereafter needed by the MAPC, and a corresponding reduction in the assessments upon the constituent municipalities. When I stated in my opinion to the MAPC that a distribution of funds under Item 3015-05 would "have the effect of reducing the assessments upon these municipalities," I meant to refer only to the possible consequences of such a distribution and not to the legal conditions under which a distribution could be made or expended.

It is therefore my opinion that the MAPC may spend any sums distributed to it by the Department of Commerce and Development under Item 3015-05 of the 1967 Supplementary Budget, in addition to funds allocated to it by direct appropriation.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 10. July 25, 1967.

Honorable Kevin H. White, *Secretary of the Commonwealth*

Dear Secretary White: — You have asked for my opinion on whether you should accept for filing under G. L. c. 180 the Articles of Organization of a corporation to be known as Fraternal Order of Eagles, John Adams Aerie, No. 1180, the stated purposes of which are:

> "To unite fraternally for mutual benefit, protection, improvement, social enjoyment and association, generally *all persons of the Caucasian race,* of good moral character, who believe in a Supreme Being; to inculcate the principles of Liberty, Truth, Justice and Equality; to perpetuate itself as a Fraternal Organization, and to provide for its government, as the laws, by-laws, rituals, or other organization rules and regulations may from time to time provide. Said Aerie being incorporated in conformity with, subject to and under the jurisdiction and control of the laws of the Fraternal Order of the Eagles." (Emphasis supplied.)

You state that:

> ". . . It would seem that public policy would dictate that the Commonwealth of Massachusetts would have a right to question whether or not a charter should be issued to an organization with a purpose clause as set forth in their articles of organization. Past court decisions, however, regarding the functions of the Secretary of State's Office would seem to indicate that this office cannot refuse to issue a charter to this organization."

Assuming that all the requirements for incorporation have been satisfied, it is my opinion that your understanding of the law is correct. General Laws c. 180, § 2 provides that corporations organized under that chapter shall, among other requirements, be formed in the manner prescribed in and subject to G. L. c. 156, § 11, which provides:

> "The articles of organization and the agreement of association shall be submitted to the secretary who shall examine them and who may require such amendment thereof or such additional information as he deems necessary. *If he finds that the provisions of law relative to the organization of the corporation have been complied with, he shall endorse his approval on the articles.* Thereupon, the articles shall, upon payment of the fee provided by section fifty-three, be filed in the office of the state secretary." (Emphasis supplied.)*

It is settled that the approving authority under G. L. c. 156, § 31 has only an administrative function to perform. As stated in *Arnold* v. *Commissioner of Corporations and Taxation,* 327 Mass. 694, 701:

> "The duties imposed upon the commissioner [now the Secretary of State] by G. L. (Ter. Ed.) c. 156, § 11, are not discretionary but are limited to the administrative function of certification according to law."

---

*St. 1962, c. 750, § 17 amended this section to its present form by substituting the Secretary of State for the Commissioner of Corporations and Taxation as the approving authority.

This limitation has been held to preclude the approving authority from withholding his approval because of his personal opinion of the undesirability of the proposed organization. *Elmer* v. *Commissioner of Insurance,* 304 Mass. 194, 197. In relation to corporations organized under c. 180, when you receive a report from the Commissioner of Public Welfare approving the articles of organization and containing findings of fact as to the purposes of the corporation, the present need therefor and the suitability of the applicants, you "shall accept the findings of fact. . . ." G. L. c. 180, § 6. Thus there is no room for you to substitute your own judgment for that of the Commissioner.

I have considered the possible application of the Civil Rights Act of 1964, 42 U.S.C. § 2000(a), et seq., as well as the provisions of our G. L. c. 272, § 92A. The first of these statutes, however, does not extend to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment that is a place of public accommodation. 42 U.S.C. § 2000(a) (e). General Laws c. 272, § 92A is similarly limited in scope. Nor does the United States or Massachusetts Constitution, as thus far interpreted by the highest courts, prohibit the chartering of a private club or similar institution having membership limitations of the kind in question.

Accordingly, however understandably offensive the restriction in the Articles of Organization before you may be, it is my opinion that under existing law, if you have received from the Commissioner of Public Welfare the required approval and findings of fact, and if the other requirements for organizing a corporation under c. 180 have been satisfied, you must approve the proposed articles of organization pending before you.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 11. JULY 25, 1967.

HONORABLE CHARLES N. COLLATOS, *Commissioner of Veterans' Services*

DEAR COMMISSIONER COLLATOS: — You have requested my opinion regarding your rights and obligations as Commissioner of Veterans' Services in a matter before the Governor and Council.

You state that "The Commissioner of Veterans' Services for the City of Somerville[1] granted benefits in excess of the standard budget, and reimbursement was denied under Section 6, Chapter 115" of the General Laws which states in pertinent part:

> ". . . The Commissioner [of Veterans' Services of the Commonwealth of Massachusetts] may decide upon the necessity of the amount paid in each case, and may allow any part thereof which he deems proper and lawful. . . ."

The Somerville agent then requested a hearing before the Governor and Council.

[1]The position of Commissioner of Veterans' Services for the City of Somerville is similar to that commonly known as Veterans' Agent in other communities.

You further state that "Although there is no authority in the statutes to permit a hearing in such a situation, one was scheduled. Two members of the Commissioner's staff did attend to explain the matter and to request a dismissal. The Council, through one of its members, requested a personal appearance of the Commissioner to personally explain the Directives that are promulgated and issued." In concluding your letter, you request my opinion as to your "position and attendance in a matter that is not properly before the Council and one in which [you] have sole powers and discretion under the law."

It is my understanding that you did, however, appear before the Council and that the matter in question was disposed of without formal action of any kind by the Council, thus rendering the circumstances outlined in your request for my opinion moot and hypothetical.

In an opinion dated February 14, 1935, Attorney General Paul A. Dever defined the settled practice relative to the issuance of formal opinions by the Attorney General. He said:

> "The long-continued practice of this department and the precedents set by my predecessors in office indicate, what is undoubtedly the correct rule of law, that it is not within the province of the Attorney General to determine hypothetical questions which may arise, as distinguished from questions relative to actual states of fact set before the Attorney General, upon which states of fact public officials are presently required to act; nor is it the duty of the Attorney General to attempt to make general interpretations of statutes or of the duties of officials thereunder, except as such interpretations may be necessary to guide them in the performance of some immediate duty."
>
> Attorney General's Report (1935) p. 31.

Attorney General Dever concluded with a statement as applicable to the Department of the Attorney General today in 1967 as it was in 1935:

> "The members of this department are always at your service for consultation and assistance with reference to the work of your Commission, but for the foregoing reasons I may not properly, in a formal opinion, comply with the request contained in your letter."

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 12. JULY 25, 1967.

HONORABLE ANTHONY P. DEFALCO, *Commissioner of Administration*

DEAR COMMISSIONER DEFALCO: — You have asked my opinion on whether the Honorable Frank J. Murray, a Justice of the Superior Court until his resignation on April 21, 1967 upon his induction into his present office of Judge of the United States District Court for Massachusetts, is entitled to continue in force his group life and health insurance issued through

the Group Insurance Commission. You state that Judge Murray is not seventy years of age and you correctly point out that notwithstanding his continuous service as a Justice of the Superior Court since 1946, he is not eligible for a pension under G. L. c. 32, § 65A. You then ask whether he might nevertheless be treated as a "Deferred Retiree" under G. L. c. 32A, § 10 and thereby remain eligible to continue his insurance in force.

After careful consideration of the matter, I am of the opinion that your question must be answered in the negative. Judge Murray's insurance was apparently issued under the provisions of G. L. c. 32A. In order for an insured person, on the termination of his service for the Commonwealth to continue in force his insurance issued under that chapter, he must have either (1) retired or (2) be an employee "who has a right to retire but whose retirement is deferred as provided in section ten of chapter thirty-two. . . ." G. L. c. 32A, § 10.

It is my opinion that Judge Murray meets neither of these requirements. The first requirement is not satisfied, since the termination of Judge Murray's service as a Justice of the Superior Court resulted from his resignation, not his retirement. The second requirement is not satisfied for two reasons.

First, at the time of his resignation Judge Murray did not have a "right to retire" (a term which I regard as meaning the right to receive a pension or other payment upon termination of service) since as a member of the judiciary his right to a pension was conditioned on his continuation in service until he reached the age of seventy. G. L. c. 32, § 65A. A judicial pension is a noncontributory benefit and thus carries with it no right to any payment if a judge should leave the bench before he has attained the age of seventy even though he may have satisfied the requirement in G. L. c. 32, § 65A that he shall have also served for at least ten years.

Second, the condition relative to deferment of retirement as provided in G. L. c. 32, § 10 is not satisfied since the right to defer receipt of a retirement allowance is conferred only on a "member." That term in c. 32 is defined, however, in section 1 of that chapter as:

> " 'Member', any *employee* included in the state employees' retirement system, in the teachers' retirement system or in any county, city or town contributory retirement system established under the provisions of sections one to twenty-eight inclusive, or under corresponding provisions of earlier laws, and if the context so requires, any member of any contributory retirement system established under the provisions of any special law." (Emphasis supplied.)

Not only is a Justice of the Superior Court not included in any of these enumerated retirement systems, he is not regarded as an "employee," since he does not come within the definition of that term in G. L. c. 32, § 1. That section defines an "employee," for the purposes of §§ 1-28 of c. 32, in the case of "persons whose regular compensation is paid by the commonwealth" (as is that of a Justice of the Superior Court) as:

> ". . . any person, whether employed or appointed for a stated term or otherwise, who is engaged in duties which require that his time be devoted to the service of either such governmental unit in each year during the ordinary working hours of regular and permanent employees, and who is regularly and permanently em-

ployed in such service, including employees of the general court, state officials, constitutional officers, members of the general court or other persons elected by popular vote, but *excluding members of the judiciary*. . . ." (Emphasis supplied.)

Thus Judge Murray does not meet the second element of the conditions for qualification as a "Deferred Retiree."

I therefore conclude that Judge Murray is not entitled to continue in force his group life and health insurance issued through the Group Insurance Commission.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 13. JULY 26, 1967.

HONORABLE HUGH MORTON, *Chairman, Civil Service Commission*

DEAR MR. MORTON: — You have requested my opinion regarding the authority of the Commissioner of Corporations and Taxation, without proceeding under G. L. c. 31, § 43(a), to "assign" a female employee holding the permanent position of Senior Clerk in the Inheritance Tax Bureau, Division of State Taxes in the Department of Corporations and Taxation to a position in the Bureau of Analysis and Processing in the same Division of the Department. There is nothing to indicate that the duties of the two positions are the same, if that should be material.

General Laws c. 31, § 43(a) provides in pertinent part:

> "Every person holding office or employment under permanent appointment in the official or labor service of the Commonwealth, or of any county, city or town thereof, shall have unlimited tenure of office or employment, subject to the provisions of this chapter and the rules made thereunder. He shall not be . . . *transferred* from such office or employment without his consent in writing, . . . except for just cause and for reasons specifically given him in writing." (Emphasis supplied.)

In your request you state that the employee was appointed to her position as Senior Clerk in the Inheritance Tax Bureau on July 14, 1963 as the result of passing a promotional examination for the filling of two vacancies for females in that Bureau. She has been a member of the staff of the Bureau since April 4, 1961.

On January 13, 1967 the employee was notified by letter signed by the then Commissioner of the Department of Corporations and Taxation that she was *"assigned"* to the *Bureau* of Analysis and Processing of the Department. On January 18, 1967, she requested a hearing before the Civil Service Commission under the provisions of G. L. c. 31, § 46A, alleging that she was being transferred without her consent.[1] A hearing was held on Jan-

[1]The relevant section of G. L. c. 31, § 46A provides ". . . if any person alleges that his employment or compensation has been affected by action of the appointing authority in failing to follow the requirements of section forty-three, he may file a complaint with the Civil Service Commission. . . . This complaint may be filed with the request of the said person for hearing under the provisions of said section forty-three and if it is determined by the Civil Service Commission that the said authority has failed to follow the requirements of section forty-three or the rights of said person have been prejudiced thereby, the said commission may order said appointing authority to restore immediately said person to his employment without loss of compensation or other rights."

uary 27, 1967 before a disinterested person designated by the Chairman of the Civil Service Commission in accordance with the requirements of G. L. c. 31, § 43. It is in connection with this hearing that you ask the following two questions:

> "(1) Does the action of the Commissioner of Corporations and Taxation . . . constitute a transfer from the Inheritance Tax Bureau as the word 'transfer' is used in General Laws, Chapter 31, Section 43, despite the terminology of the word 'assigned' as used by the Commissioner?
>
> "(2) If your answer to Question 1 is in the affirmative, do the provisions of General Laws, Chapter 14, Section 3, exempt the Commissioner from complying with the provisions of General Laws, Chapter 31, and more particularly the provisions of Section 43 thereof?"

Your first question seems to assume that there would be a "transfer" between the two bureaus within the meaning of G. L. c. 31, § 43, except possibly for the word "assigned" used by the Commissioner in his letter of January 13, 1967. I concur with your conclusion that there may be a transfer within the meaning of G. L. c. 31, § 43 between bureaus within the same department and, indeed, a former Attorney General reached the same conclusion in like circumstances.[2] Simply because the Commissioner chose to use the word "assigned," the substance of this action is not changed. I therefore answer your first question in the affirmative.

As regards your second question, you state that it was the view of the Commissioner of the Department of Corporations and Taxation that he need not comply with G. L. c. 31, § 43 by virtue of G. L. c. 14, § 3, which provides in relevant part:

> "The commissioner shall assign to all officials, agents, clerks and other employees of the department their respective duties, and may *transfer* them." (Emphasis supplied.)

However, it is my opinion that the foregoing section does not render inapplicable the limitations fixed by the Civil Service Law. The context of the entire section indicates that employment in the Department of Corporations and Taxation is ordinarily subject to the Civil Service Law. Thus the fourth paragraph of the section makes appointments and removals subject to that Law "when applicable." In a similar situation the Supreme Judicial Court held that a broad power in an appointing authority to "employ and remove" employees does not render inapplicable the provisions of that Law. *Walsh* v. *Civil Service Commission,* 300 Mass. 244. As stated by the court in that case:

> "The words 'employ and remove,' or other equivalent phrases standing alone without qualification in statutes respecting public employment, do not ordinarily render inapplicable the civil service laws." page 246.

---

[2]Report of the Attorney General for the Year Ending June 30, 1947, page 24, involving the change of employment of an engineer from the Park Division of the Metropolitan District Commission to the Commission's Sewerage Division. See G. L. c. 31, § 16A also dealing with transfers of civil service employees and especially the portion which provides "No transfer shall be made without the consent of the employee and the approval and consent of the appointing authority *in the department or departments involved.*" (Emphasis supplied.) Sections 43 and 16A must be read together. *Cooper* v. *Civil Service Commission,* 314 Mass. 76.

Therefore, in answer to your second inquiry, it is my opinion that the provisions of G. L. c. 14, § 3 do not exempt the Commissioner of Corporations and Taxation from complying with the provisions of G. L. c. 31, §, 43 relative to transfers.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 14. JULY 31, 1967.

HONORABLE THEODORE W. SCHULENBERG, *Commissioner of Commerce and Development*

DEAR COMMISSIONER SCHULENBERG: — You have asked for my opinion on certain questions relating to the renovation of a state aided low-rent housing project. You state:

> "The Lynn Housing Authority has made application for approval by the Division of Housing within our Department of Commerce and Development of a project involving a substantial remodeling, reconstruction, repair and renovation of an existing state aided Housing Project. The existing project known as 'American Park' was completed some eighteen years ago under the applicable provisions of Chapter 121 of our General Laws. It is a completely state aided low rental project and not federally aided. The Authority now deems it necessary and has plans for an extensive remodeling, reconstruction and renovation job which includes enlarging some of the units to make them available for larger families of low income. The cost of this work will be quite substantial. . . ."

You then ask the following four questions, which I have renumbered for convenience in answering:

> "1. Are Sections 26 J and 26 NN of Chapter 121 as amended by Chapter 705 of the Acts of 1966 or any other sections of said Chapter 121 applicable to a project of renovation, remodeling, reconstruction and repair of *an existing* state aided low rental Housing Project such as herein described? (Emphasis in original.)
>
> "2. Does the Division of Housing within the Department of Commerce and Development have the authority to approve an application from the Lynn Housing Authority for a project herein described, thereby committing the Commonwealth to obligations described in Chapter 121 as amended?
>
> "3. If your answer [to Question 1] is 'yes', does the new project of renovation etc. come within the scope of Section 6 of Chapter 705 of the Acts of 1966, thereby qualifying it for the annual contribution by the Commonwealth of 5% rather than 2½% of cost?
>
> "4. May it be determined in your opinion that Section 3 of Chapter 705 of the Acts of 1966 is not applicable to our instant case?"

General Laws c. 121, § 26J (as most recently amended by c. 705 of the Acts of 1966) defines a "low-rent housing project," in relevant part, as follows:

> ". . . (2) any work or undertaking to provide decent, safe and sanitary dwellings, apartments, or other living accommodations for families of low income. . . The term 'project' may also be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and other work performed in connection therewith. Construction activity in connection with a project may be confined to the reconstruction, remodeling or repair of *existing* buildings." (Emphasis supplied.)

General Laws c. 121, § 26NN begins as follows:

> "The commonwealth, acting by and through the [Division of Housing in the Department of Commerce and Development*], may enter into a contract or contracts with a housing authority for state financial assistance in the form of a guarantee by the commonwealth of notes and/or bonds of the housing authority issued to finance the cost of a housing project or projects, and annual contributions by the commonwealth."

Since it is clear from the above-quoted portion of § 26NN that the Division of Housing may, on behalf of the Commonwealth, give financial assistance to a local housing authority for a "housing project," the answer to your first question depends, as you correctly point out, upon whether or not a "low-rent housing project" as defined in § 26J includes the renovation of an *existing* project. Your second question raises the same issue.

The definition of a "low-rent housing project," quoted above, is very broad. In relation to the making of renovations, the definition is sufficiently comprehensive to include not only work performed on buildings acquired by purchase but also work performed on buildings originally constructed by a housing authority itself, as the Lynn project appears to have been. I find nothing in the definition that excludes renovation of the latter class of buildings. Any suggestion that such renovations should be excluded is opposed not only by the broad provision, already quoted, but by the purpose of the statute "to provide decent, safe and sanitary dwellings, apartments, or other living accommondations for families of low income." G. L. c. 121, § 26J. Plainly, this objective could not be fulfilled if renovations of buildings originally constructed by a housing authority itself were prohibited and the structures were not merely allowed to decline into obsolescence but were required to lapse into that condition.

The answer to your second question requires but one more reference to the statute. Section 26NN(b) of c. 121 states, in relevant part:

> "Each such annual contribution by the Commonwealth to the housing authorities *shall be paid* by the Commonwealth *upon approval and certification by the* [*Division of Housing*] to the state comptroller." (Emphasis supplied.)

---

*I assume that the Department's authority, so far as material to this opinion, is to be exercised by the Division of Housing.

This specific language, combined with the opening statement in § 26NN, quoted above, leads me to conclude that the Division of Housing has the authority to approve the stated application of the Lynn Housing Authority and may thereby commit the Commonwealth to the indicated obligations.

Your third question concerns the effect of § 6 of c. 705 of the Acts of 1966. That section states in part:

> ". . . [T]his paragraph and the following paragraph shall apply to those projects which are completed after [July 1, 1966]. Each contract for state financial assistance or for supplementary state financial assistance shall provide that the commonwealth will pay to the housing authority annual contributions; provided, however, that the total amount of such additional annual contributions contracted for by the commonwealth for any one year shall not exceed one million eight hundred and seventy-five thousand dollars. . . .
>
> *The annual contributions for any one project shall be payable in an amount not exceeding five per cent of the cost of the project, as determined by the [Division of Housing]. . . .*" (Emphasis supplied.)

Its effect was to increase the amount of the annual contributions by the Commonwealth for any one project *completed* after July 1, 1966 from 2½% to 5% of the total cost. Since the renovation proposed by the Lynn Housing Authority would, in my opinion, qualify as a "project," it follows that the five per cent rate will apply.

Your fourth question asks if § 3 of c. 705 of the Acts of 1966 is applicable to this case. That section amends § 26AA of c. 121 relative to the conditions of the Division's approval of a project and the requirements of a public hearing thereon. The amendment specifically exempts, however, ". . . projects involving the reconstruction, remodeling or repair of existing buildings. . . ." I therefore conclude that § 26AA as thus amended is not applicable to the instant case.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 15. JULY 31, 1967.

HON. HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission*

DEAR COMMISSIONER WHITMORE: — You have requested an opinion as to whether certain ramps that are to be built in connection with a high-level bridge to be constructed by the Metropolitan District Commission (MDC) over the Charles River from Leverett Circle in Boston to City Square in Charlestown are "necessary approaches" to the bridge within the meaning of the statute, Chapter 682 of the Acts of 1964 (cited as Chapter 682), providing for its construction. The question is important, since it concerns the source of the funds to be used for payment of the ramps. If the ramps are "necessary approaches," the Massachusetts Port Authority may contribute to the cost of their construction. Otherwise, the MDC must bear the entire cost itself.

Section 1 of c. 682 provides:

> "In order to relieve congestion, to expedite the flow of vehicular traffic, and to promote the public safety, the metropolitan district commission, hereinafter referred to as the commission, is hereby authorized and directed to construct and maintain a high level bridge over the Charles river from Leverett circle in the city of Boston northeasterly over said river, over mainline tracks of the Boston and Maine Railroad Company, and over the proposed relocated mainline tracks of the Metropolitan Transit Authority, then back to grade to intersect with the proposed reconstructed Rutherford avenue in the vicinity of City Square in the Charlestown district of said city, *together with the necessary approaches thereto*." (Emphasis supplied.)

Accompanying your request for an opinion is an engineering firm's report of a preliminary study of the project, containing drawings as well as verbal descriptions. From Plate 3 of the drawings it appears that at the Leverett Circle end of the bridge, as part of a new intersection, there will be four ramps, designated as D, J, K and L, respectively. None of the ramps, however, lead traffic on or off the bridge. Instead, as you state in your letter, "They divert traffic around it."

An explanation of the need for the bridge and the ramps and the manner in which they will relieve traffic congestion appears in the introduction to the engineering firm's report. After describing the expanding sources of traffic across the lower end of the Charles River, the report states:

> "It is obvious that the resulting congestion will be intolerable unless something is done about it. . . The proposed high level bridge will divert traffic from the worst trouble spot, namely, the Fitzgerald Expressway Bridge, and will bring relief to all of the expressways connected to it. . . The approach on the Leverett Circle side includes a completely remodeled intersection with all movements handled at grade, designed to carry traffic estimated for [the year] 1990." (pp. 1-2.)

The report also states:

> "In the Leverett Circle area, the public facilities to be taken consist of a police station and adjacent recreational and parking areas owned by the Metropolitan District Commission; also parking areas owned by the Commonwealth of Massachusetts and used by the Department of Public Works. A narrow strip of land is required from the property on which high rise apartments are located, but the taking will not affect the buildings or appurtenances. Another property affected consists of land on the north side of Nashua Street, formerly occupied by some of the tracks in the North Station. This land is owned by the Massachusetts General Hospital and is now used for parking." (p. 17.)

I turn now to the term "necessary approaches" in § 1 of c. 682. A strict interpretation of the word "approaches" might confine it to ways that are directly connected to each of the ends of the bridge. Such an interpretation was used in *Whitcher* v. *Somerville,* 138 Mass. 454, which was an action against a city for personal injuries resulting from a defect in a road running under a railroad bridge. The city unsuccessfully asserted in defense that it

was not liable since the road was an "approach" to the bridge and therefore came within a statutory responsibility of railroads to maintain and keep in repair railroad bridges, "with their approaches." There was evidence that the road has been lowered by the railroad when the bridge was built. In rejecting the city's contention that the road was an "approach" to the bridge, the Court said, at page 455,

> "The approaches to a bridge are the ways at the ends of it, which are a part of the bridge, or are appendages to it. . . By the common law, the duty to keep a bridge in repair carried with it the duty to keep in repair, as a part of the bridge, the highway at each end of it, for a space of three hundred feet. . . This limit of space has not been adopted in this Commonwealth, but the highways at the ends of a bridge have been recognized as, and called the approaches to it, in several decisions. . . As the bridge in the present case was not a part of the highway, but was a part of the railroad track, and crossed the highway over the level thereof, the approaches to it did not include any part of the highway, and the city was not relieved of its liability to keep in repair that portion of the highway where the accident happened."

Although I have found no later Massachusetts decisions dealing with the question of what constitutes an "approach" to a bridge, I am nevertheless of the opinion that the statement in *Whitcher* v. *Somerville,* quoted above, that "The approaches to a bridge are the ways at the ends of it . . ." does not control the answer to the question that you have presented. In the present case, we have a bridge that forms part of a general plan, stated in § 1 of c. 682, quoted above, "to relieve congestion, to expedite the flow of vehicular traffic, and to promote the public safety. . . ." The *Whitcher* case, on the other hand, involved simply a railroad bridge, which, as the Court noted, was "not a part of the highway, but was a part of the railroad track . . ."; and the bridge and the road that passed beneath it plainly did not form a part of any larger traffic design.

With regard to a bridge that forms part of a general plan to expedite the flow of automobile traffic, there is, in my opinion, no simple test to determine the "approaches" thereto. The question is rather essentially one of fact, to be determined in each case primarily by the agency charged with the execution of the particular project.

I find support for this view in the case of *State* v. *Zangerle,* 43 Ohio App. 30, 182 N.E. 644 (1932), where the court was called upon to construe the term "necessary approaches" to a bridge, in a controversy involving the meaning of that term in a resolution authorizing a bond issue to finance the construction. County commissioners had determined that certain streets in the immediate vicinity of the bridge should be improved for the purpose of diverting travel to the bridge. Rejecting an objection that these streets did not constitute "necessary approaches," the court said:

> "A bridge without adequate approaches, such as to assure the fullest and most convenient use of such bridge, would be of little avail and would almost defeat the purpose of its erection. Those who are by law directed and empowered to carry out the will of the people . . . are under a mandatory duty not only to build the bridge, but also to build the necessary approaches thereto in order to afford the fullest use of the monumental structure. . . .

> "All the contending parties are agreed that the officers now sought to be enjoined are acting in good faith, and that it is merely a question of want of power to make the expenditures. Therefore, the county commissioners having studied the situation in good faith, as it is now conceded, and having determined that certain improvements are necessary as approaches to the bridge in order to provide maximum use thereof, this court cannot substitute its judgment for the judgment of the commissioners." 43 Ohio App. at page 37.

Like deference for the judgment of the public officials charged with responsibility for construction of a bridge was expressed by a majority of the Supreme Court of Washington in *State* v. *Yelle,* 197 Wash. 110, 84 P.2d 688 (1938). That case involved the construction by the Washington Toll Bridge Authority of a toll bridge "together with approaches thereto wherever the same is considered necessary or advantageous or practicable." In ordering a writ of mandamus to issue to compel approval of certain vouchers relating to certain work that the Authority regarded as constituting "approaches," the court stated,

> "There is no question of bad faith urged in this action; thus it remains only to consider whether the Authority abused its discretion in the determination of the meaning and extent of the approaches.
>
> ". . . In considering the question presented we must view the project as a whole and ascertain the purpose sought to be accomplished. . .
>
> "It was a manifest intention of the legislature to give to the Authority all those powers necessary to cope with the intricate questions incident to our modern and complex problems of transportation, and to vest in the Authority a wide discretion in the exercise of those powers." 197 Wash. at pages 117 and 122.

For like reasons, in a complex factual situation such as the present one, I believe that it would be inappropriate for me to attempt to make an independent determination of whether the ramps involved in the construction of the Leverett Circle bridge are "necessary approaches" thereto. Moreover, the Legislature appears to have lodged with the MDC and the Boston Port Authority the right to make the determination themselves. Thus § 4 of c. 682 provides:

> "No monies shall be expended by the [MDC] under this act unless the [Massachusetts Port Authority] shall have entered into an agreement with the [MDC], approved as to form by the attorney general, to pay to the [MDC] a sum equal to one half the cost of the construction authorized in section one [for the bridge and necessary approaches], if the total cost thereof does not exceed three million dollars; and if the total cost of said construction exceeds three million dollars, to pay to the [MDC] that part of such total cost which is in excess of one and one half million dollars.
>
> "The [Massachusetts Port Authority] is hereby authorized to enter into such agreement and do all things necessary under this act, notwithstanding any contrary provision of chapter four

hundred and sixty-five of the acts of nineteen hundred and fifty-six [the act creating the Authority]."

You ask whether — if the question is, as I regard it to be, one of fact — the MDC and the Authority may resolve the matter in their interagency agreement to be executed under the foregoing section. It is my opinion that such a resolution would indeed be appropriate and that the interagency agreement, entered into in good faith and not in an abuse of discretion, will be a final determination of the matter.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 16. AUGUST 9, 1967.

HIS EXCELLENCY JOHN A. VOLPE, *Governor of the Commonwealth*

DEAR GOVERNOR VOLPE: — You have requested my opinion as to whether the advice and consent of the Executive Council must be obtained in appointing a person to fill a vacancy in the office of district attorney.

General Laws c. 54, § 142, in relevant part, states:

"Upon a vacancy in the office of district attorney . . . the governor with the advice and consent of the council may appoint some person thereto until a district attorney . . . is qualified."

Although the language of § 142 by its terms appears to require the advice and consent of the council, this language must be read in connection with the later language of the Acts of 1964, c. 740, § 3. Section 3 provides, in relevant part:

"Subject to section two of this act [not here relevant] and except as required by the constitution of the commonwealth, so much of each provision of the General Laws . . . as requires the advice and consent of the council to any appointment in the executive department . . . is hereby repealed."

Because the Constitution of the Commonwealth does not require the advice and consent of the Council with respect to interim appointments to the office of district attorney, the only relevant question is whether such an appointment is an "appointment in the executive department" within the meaning of c. 740, § 3.

"Executive department" is defined by § 1 of c. 740 as follows:

"As used in this act, the phrase 'executive department' shall include, without limitation, all departments, divisions, boards, bureaus, commissions, institutions, councils and offices of state government and of county government, and any instrumentality or agency within or under any of the foregoing, whether or not serving under the governor or under the governor and council, and any independent authority, district, commission, instrumentality or agency, but expressly excluding therefrom the legislative and judicial departments and any instrumentality or agency of a city or town."

It is my opinion that the office of district attorney is encompassed within the broad language of § 1, and is therefore an office "in the executive department" as that phrase is used in § 3. This result is consistent with an earlier Opinion of the Attorney General. See 6 Op. Atty. Gen. 1921, pp. 360-362.

It follows from this that the approval of the Executive Council is not required as to an interim appointment to the office of district attorney under G. L. c. 54, § 142.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 17. AUGUST 9, 1967.

HONORABLE HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission*

DEAR COMMISSIONER WHITMORE: — You have asked for my opinion on whether the Metropolitan District Commission (MDC) may, without incurring liability to a contractor, reduce by one foot the depth to which the contractor under his contract with the MDC is required to dredge a portion of the Mystic and Malden Rivers. For the reasons set forth below, I am of the opinion that the MDC may make the change, without incurring liability therefor.

The contract in question originally provided for excavation to a depth designated as elevation 100. Because of an unexpected increase in certain costs of the project, your engineers have recommended that the amount of dredging be reduced by raising the dredging depth to elevation 101. However, the contractor asserts that he calculated his bid price on the assumption that he would use barges that would need the deeper draft of elevation 100 for their intended heavy loading. The revision to elevation 101 would, it is said, result in less water for flotation of the barges and would prevent them from being loaded beyond 50% of their capacity. The contractor's expenses would thereby be increased.

However, the "Information for Bidders" issued in connection with the letting of the contract provided:

> "All bids will be compared on the basis of the estimate of the quantities of work to be done as set forth in the proposal, and the Commission does not expressly or by implication agree that the actual amount of work will correspond therewith, but reserves the right to increase or decrease the amount of any class or portion of the work, as may be deemed necessary or expedient by the Commission."

Further, the contract itself contained several pertinent provisions. Section 2(f) of the Special Provisions stated:

> "Dredging lines shown on the drawings or modified as directed by the Engineer indicate only the pay lines to which excavation will be measured and paid for, except as otherwise provided. They are not intended to and do not necessarily represent the actual lines to which excavation must be made to satisfactorily per-

form the work. The actual lines necessary to perform the work may vary from those shown, depending on the material dredged and on the method of dredging applied. The Engineer may change any slope or dredging line as required by unusual conditions or existing structures encountered. However, unless otherwise directed by the Engineer, excavations must be made at least equal to or lower than the elevations indicated on the contract drawings."

Article XVII of the General Provisions, a broader provision, stated:

"The Engineer may make alterations in the line, grade, plan, form dimensions or materials of the work, or any part thereof, either before or after the commencement of construction and may increase or decrease the amount of any class or portion of the work as may be deemed necessary or expedient and an increase or decrease in the quantity for any item shall not be regarded as a sufficient ground for an increase or decrease in the prices nor in the time allowed for the completion of the work, except as provided in this contract. . . . The Contractor agrees that he has entered into this agreement upon his own examination of the location of the proposed work and the character of the work required, and not upon any statements made or plans furnished by the Commission or any officer, employee or agent thereof."

A clause very similar to this last cited provision was involved in the recent case of *Wes-Julian Construction Corporation* v. *Commonwealth,* Mass. Adv. Sh. (1967) 103. In that case a contract for the construction of the Southeast Expressway contained a clause (p. 111, footnote 5) reading in part:

"An increase or decrease in the quantity of any item shall not be regarded as cause for an increase or decrease in the prices. . . ."

The contract in that case required the excavation of two classes of materials. Although the cost of removal of one class was nearly eight times that of the other, the contractor submitted a combined bid of one dollar a cubic yard, based on the ratio of the originally required amounts of each class. After the execution of the contract, the Commonwealth reduced the quantity of each class of materials but not by the same proportion in which they originally were to be excavated. As a result the contractor incurred an increased cost of $13,574. The Supreme Judicial Court ruled, however, that the quoted contract clause controlled the outcome and denied the contractor's claim for additional compensation.

In the matter submitted by you, the reference in Section 2(f) of the Special Provisions to the power of the engineer to "change any slope or dredging line as required by unusual or existing structures encountered" does not purport to limit the provisions of Article XVII, nor are the two provisions incompatible. Specifically, I do not regard the Engineer's authority to change a dredging line to be limited to circumstances caused by "unusual conditions or existing structures encountered." Although that phrase is found in Section 2(f), I regard it as only a specific application of the broad authority given by Article XVII of the General Provisions to make changes. In consequence, I conclude that on the facts presented to me you may, upon the making by the Engineer of an alteration in the dredging depth, proceed

under Article XVII to make the indicated change of elevation, without incurring liability to the contractor therefor.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 18. AUGUST 11, 1967.

OUTDOOR ADVERTISING BOARD

GENTLEMEN: — You have requested my opinion as to whether a certain billboard is exempt from the outdoor advertising regulations promulgated by your Board pursuant to G. L. c. 93, § 29. For the reasons set forth below, I conclude that it is not exempt.

You state that on the premises of the Boston Bowl, a bowling alley, on William T. Morrissey Boulevard, Dorchester, there is a billboard advertising Cott Beverages; that the Cott Bowling League bowls on the premises; and that Cott Beverages can be purchased there. I assume that the beverages are sold for consumption on the premises. I also assume that the Boston Bowl occupies the entire premises.

General Laws c. 93, § 30 forbids the maintenance of any billboard or other advertising device on any public way or on private property within public view from any highway, public park or reservation, which advertises any business or article unless it conforms to the regulations established by your Board under G. L. c. 93, § 29. Section 30, however, exempts from the regulations signs and devices which are —

> "erected and maintained in conformity with law and which advertise or indicate either the person occupying the premises in question or the business transacted thereon, or advertise the property itself or any part thereof as for sale or to let and which contain no other advertising matter . . . or which are maintained on land owned by a person . . . engaged in the outdoor advertising business if owned by the same person . . . on [January 1, 1925]. . . ."

On the facts set forth in your request, it is my opinion that the Cott billboard in question does not come within the exemption, since it does not "advertise or indicate either the person [the Boston Bowl] occupying the premises, or the business [bowling] transacted thereon"; and it does not, of course, "advertise the property itself or any part thereof as for sale or to let." (I assume that the exemption of persons engaged in the outdoor advertising business is not applicable.)

In reaching this conclusion, I have given careful consideration to the case of *Attorney General* v. *J. P. Cox Advertising Agency,* 298 Mass. 383. That case involved signs which were located on grocery stores and drug stores, and which advertised products such as beverages, chewing gum, candy and cigars regularly sold therein. The Supreme Judicial Court decided that the signs must be regarded as advertising "the business transacted" on the premises within the meaning of G. L. c. 93, § 30, since they advertised articles sold therein and had some tendency to induce passers-by to enter the premises to buy the advertised items. It was not necessary, the court held, for the sign to indicate the general character of the store — grocery or drug store — to which the sign pertained.

It would, in my opinion, be an unwarranted extension of the *J. P. Cox Advertising* case to regard it as affording an exemption in the present situation. In each of the cases where the *J. P. Cox Advertising* case exempted the sign, the business in question carried on as its principal activity the sale of articles — groceries, beverages, tobacco and candy — of the same general character as those advertised on the signs. In the present case, however, the Boston Bowl has as its principal activity the rendering of a service — bowling — not the sale of beverages. Its dealing in beverages is only incidental to its principal business, bowling, and therefore does not, in my opinion, constitute "the business transacted" on the premises within the meaning of G. L. c. 93, § 30. I recognize that there may be cases where there may be considerable difficulty in distinguishing between a principal business and one that, as in the present case, is only incidental. As each such case arises, it will have to be considered on its own facts.

In summary, then, it is my opinion that the billboard to which you refer in your request for an opinion is not exempt from regulations promulgated pursuant to G. L. c. 93, § 29.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 19. AUGUST 11, 1967.

HONORABLE EDWARD J. RIBBS, *Commissioner of Public Works*

DEAR COMMISSIONER RIBBS: — You have asked for my opinion on several questions relative to the decline in the level of Kingsbury Pond, a great pond, in the town of Norfolk, as affected by action of the adjacent town of Franklin in pumping water from an artesian well. A report, dated January 9, 1967, entitled "Drastic Lowering of Kingsbury Pond, Norfolk Massachusetts," to which you make reference, prepared by the United States Geological Survey in cooperation with the Massachusetts Department of Public Works, gives the relevant facts.

The report states that during recent years the level of the pond has dropped to a level about 13 feet below normal high water and 8.4 below its previous recorded low level in 1949. In this period the area of the pond has shrunk from 26 acres to about 9 acres. The entire northwestern part of the pond is now dry, leaving many residents of the pond without use of their docks, boathouses, and other shore facilities. Wells are also drying up. Property values are said to have declined and the market for homes around the pond is said to be nonexistent.

On July 3, 1964, the adjacent town of Franklin began pumping water from an artesian well that it had dug for the purpose of increasing its water supply. The well is next to a certain tract of 6.87 acres in Norfolk that Franklin acquired at about that time by authority of c. 437 of the Acts of 1964, which authorized the latter town, with the assent of the Selectmen of the town of Norfolk, to acquire the tract "for the purpose of increasing [Franklin's] water supply. . . ." Precisely how this increase was to be accomplished does not appear. In any event, on the facts submitted, the artesian well does not appear to be situated on this tract.

Following the digging of the well, the level of Kingsbury Pond, which

had, it seems, already been dropping because of a drought, continued to drop, and it has since continued to do so. Production from the well averaged about eleven million gallons a month in the years 1964 and 1965, rising to eighteen million gallons a month in 1966. Production in the summer months, however, is substantially higher than the average. Yet, despite the well's addition to Franklin's water supply, the facts which have been presented to me indicate that Franklin still lacks an adequate supply of water to meet its present and future demands.

You also state that the town of Norfolk is convinced that the well is the "direct and primary cause" of the present condition of the pond. Support for this conclusion is contained in the foregoing report of the United States Geological Survey, which states that the slope of the ground-water inflow to the pond has been reversed as the result of the expansion of a "cone of depression" extending from the well to an area that includes the pond. This expansion has probably occurred since July 3, 1964.

Your request for an opinion also refers to c. 27 of the Resolves of 1967 which reads as follows:

> *"Resolved,* That the department of public works, through its division of waterways, is hereby authorized and directed to make an investigation and study relative to dredging and cleaning Kingsbury Pond in the town of Norfolk and the feasibility of diverting a portion of the waters of the Mill River in said town into Kingsbury Pond. Said department shall report to the general court the results of its investigation and study and its recommendations, if any, together with estimates of cost, and drafts of legislation necessary to carry such recommendations into effect by filing the same with the clerk of the house of representatives on or before the last Wednesday of January, nineteen hundred and sixty-eight."

Mill River, according to a map annexed to the report of the United States Geological Survey, is located principally in the town of Norfolk.

Based on the foregoing facts, you ask the following questions, the order of which I have rearranged for convenience in answering.

1. "Has the Massachusetts Department of Public Works the authority to raise or lower the level of Kingsbury Pond?

2. "Under the above facts has the Massachusetts Department of Public Works the right to request [require?] that the town of Franklin restrict its use of its artesian well allegedly contributing to the extremely low level of Kingsbury Pond?

3. "Has the Massachusetts Department of Public Works plain and explicit legislative authority to divert a portion of Mill River into Kingsbury Pond on a permanent or temporary basis?"

Since Kingsbury Pond has recently had an area of 26 acres, it is a great pond within the meaning of both G. L. c. 91, § 35[1] and G. L. c. 131, § 1.[2]

---

1. "The provisions of this chapter relative to great ponds shall apply only to ponds containing in their natural state more than ten acres of land. . . ."

2. "[T]he following words shall have the following meanings . . .
" 'Great pond', a natural pond the area of which is twenty acres or more."

As such, it is under the custody and control of the Waterways Division of the Department of Public Works. G. L. c. 91, § 11. In G. L. c. 91, § 19, it is provided:

> "Except as authorized by the general court and as provided in this chapter, no structure shall be built or extended, or piles driven or land filled, or other obstruction or encroachment made, in, over or upon the waters of any great pond below the natural high water mark; nor shall any erection or excavation be made at any outlet thereof whereby the water may be raised or lowered."

In the recent case of *Sacco* v. *Department of Public Works*. Mass. Adv. Sh. (1967) 1005, it was said at p. 1006,

> "The great ponds of this Commonwealth are among its most cherished natural resources. Since early times they have received special protection."

Again, as stated in *Attorney General* v. *Jamaica Pond Aqueduct Corporation,* 133 Mass. 361, 364,

> "The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public, are regarded as valuable rights, entitled to the protection of the government."

Applying the foregoing principle, it has been held that in the absence of explicit authority from the Legislature, a well in the vicinity of a great pond cannot be dug if it will intercept underground waters which supply the pond. *Attorney General* v. *Jamaica Pond Aqueduct Corporation*, 133 Mass. 361. The fact that a city or town may be the agency which intercepts the flow does not change this rule. See *Stoneham* v. *Commonwealth,* 249 Mass. 112, 118, holding that a town has no proprietary rights in the waters of a great pond. It follows that a town may not use the waters as a source of its water supply, at least if such use conflicts with the public's rights in the pond.

Turning now to the questions raised by your request for an opinion, it is my view that your Department, as the agency charged with the control and care of great ponds, and under its statutory authority and indeed its duty given by G. L. c. 91, § 11 concerning the "improvement, development, maintenance and protection of . . . great ponds," may take appropriate action to raise the Kingsbury Pond to its former level. Lacking more detailed facts, I cannot express an opinion as to the validity of any particular action that may be contemplated. Specifically, for lack of sufficient facts, I am unable to express an opinion on the application of G. L. c. 91, §§ 13 and 19 to any particular plan. Section 19, already quoted in this opinion, places certain restrictions on various activities such as the building of structures and the making of obstructions "in, over or upon the waters of any great pond below the natural high water mark . . ." and the making of erections or excavations "at any outlet thereof whereby the water may be raised or lowered." Section 13 vests in your Department the power to license certain construction and other activities in great ponds, with a proviso that a license "shall not validate acts beyond the line of riparian ownership or affecting the level of the waters in such [a] pond unless approved by the governor and council."

Yet whatever the exact scope of the foregoing limitations may be as applied to a particular set of facts, I am of the opinion that they are all designed to preserve great ponds in their natural state and at their normal levels. They should not be construed in a way that will restrict action that may be necessary to restore the depressed level of a great pond, such as Kingsbury Pond in the present circumstances, as nearly as may be to its natural level.

Your second question asks whether your Department has "the right to request [require?] that the Town of Franklin restrict its use of its artesian well allegedly contributing to the extremely low level of Kingsbury Pond?" It is my opinion that if your Department determines that there is a causal connection between the use of the well and the decline in the level of the pond, it may then, in the exercise of sound discretion, order the town of Franklin to restrict its use of the well. The *Jamaica Pond Aqueduct* case, already cited in this opinion (133 Mass. 361), provides adequate legal support for this conclusion. In reaching this result, I am not unmindful of the important public interest of the town of Franklin in maintaining an adequate supply of water for its citizens. This fact should be given careful consideration by your Department in fixing the scope of an order to cease and desist and the timing of action to be taken thereunder.

Your third question asks whether your Department has "plain and explicit legislative authority to divert a portion of Mill River into Kingsbury Pond on a permanent or temporary basis." Mill River, you state, is a tributary of the Charles River, and diverting water from it will take water from the Charles River watershed.

I answer this last question in the negative. I know of no statute that plainly and explicitly authorizes such diversion.

The problems raised by your questions pose important issues of public policy. To the extent that existing law is not adequate to resolve them, further legislation may be required.

Very truly yours,

Elliot L. Richardson, *Attorney General*

Number 20. August 11, 1967.

Hon. Howard Whitmore, Jr., *Commissioner, Metropolitan District Commission*

Dear Commissioner Whitmore: — You have asked for my opinion on (1) whether your determinations of the class and aggregate amount of work that a prospective bidder is qualified to perform are to be treated as public or confidential records and (2) whether the Metropolitan District Commission (MDC) and the Department of Public Works (DPW) may exchange information which a prospective bidder is required to submit.

General Laws c. 29, § 8B, as most recently amended by St. 1967, c. 54, provides in part:

> "The commissioner of public works or the commissioner of the metropolitan district commission shall require that any person proposing to bid on any work, excepting the construction, recon-

struction, repair or alteration of buildings, to be awarded by the department of public works or by the metropolitan district commission, respectively, and the commissioner of public works shall require that any person proposing to bid on any such work to be awarded by a municipality under section thirty-four of chapter ninety,* submit a statement under the penalties of perjury setting forth his qualifications to perform such work. Such statement shall be in such detail and form and shall be submitted at such times as such commissioner may prescribe under rules promulgated by said department or commission, respectively, subject to the requirements of chapter thirty A. Such rules may require such information as may be necessary to implement this section and may establish a basis for the classification and maximum capacity rating of bidders which shall determine the class and aggregate amount of work such bidders are qualified to perform. The statement shall set forth, among other matters that may be prescribed by the rules, the proposed bidder's financial resources, his experience, the number and kinds of equipment which he has for use on such work, and the number, size and completion dates of other construction jobs, whether in this state or another state, which he has under contract. The information contained within such statement, together with other relevant available information and the proposed bidder's past performance on work of a similar nature, may be considered by said department or commission in determining whether or not the proposed bidder is qualified to perform any specific work for which proposals to bid are invited.

"Such statement shall be in such detail and form and shall be submitted at such times as such commissioner may prescribe under rules promulgated by said department or commission, respectively, subject to the requirements of chapter thirty A. Such rules may require such information as may be necessary to implement this section and may establish a basis for the classification and maximum capacity rating of bidders which shall determine the class and aggregate amount of work such bidders are qualified to perform. The statement shall set forth, among other matters that may be prescribed by the rules, the proposed bidder's financial resources, his experience, the number and kinds of equipment which he has for use on such work, and the number, size and completion dates of other construction jobs, whether in this state or another state, which he has under contract.

"Based on information received and available and on past performance of the prospective bidder on work of a similar nature, each such commissioner, acting through a prequalification committee consisting of engineering personnel of said department or commission, respectively, to be appointed by him, shall determine the class and aggregate amount of work that a prospective bidder is qualified to perform, and shall limit a proposed bidder to such class and aggregate amount of work as he may be qualified to perform. Said department or commission shall limit the bid proposals to be furnished to a prospective bidder to such bidders as are determined by its commissioner to have the classification and capacity rating to perform the work required.

*G. L. c. 90, § 34 (relating to the use of the Highway Fund).

> "Any such statement filed with either such commissioner by a prospective bidder shall be confidential, and shall be used only by the department of public works or the metropolitan district commission, as the case may be, in determining the qualifications of such prospective bidder to perform work for said department or commission, or for a municipality under the provisions of said section thirty-four. No information contained in such statement shall be imparted to any other person without the written consent of said bidder."

I will begin with your second question (relative to exchange of information between the MDC and DPW). The statute says that the statements submitted by prospective bidders "shall be confidential, and shall be used *only* by the department of public works *or* the metropolitan district commission, *as the case may be*, in determining the qualifications of such prospective bidder to perform work for said department or commission, or for a municipality under the provisions of said section twenty-four [relative to the use of the Highway Fund]." (Emphasis supplied.) The emphasized words clearly indicate that the information is to be used exclusively by the agency receiving it. Therefore, it is my opinion that the MDC and the DPW may not exchange information contained in a contractor's statement under the statute.

Your first question concerns the public or confidential status of your determination of the class and aggregate amount of work a prospective bidder is qualified to perform. Section 8B requires you, acting through a prequalification committee composed of engineering personnel from your commission, to make this determination based upon information received, other information already available and past performance of the contractor on work of a similar nature. The final determination will presumably be in the form of a simple statement that the contractor is capable of performing one or more kinds of work and is rated as having a maximum performance capacity, expressed in dollars.

Although § 8B states that the information on which your determination is based "shall be confidential," it is silent on the question whether your determination based thereon shall also be confidential. Hence, unless the statute impliedly contains such a requirement, your determination, which will of course be written, will be a "public record" within the meaning of G. L. c. 4, § 7, Twenty-Sixth,* and will be subject to public inspection under G. L. c. 66, § 10.**

After careful consideration I have concluded that the statute does not make your determination confidential. Presumably, the reason why § 8B provides that the information submitted to you shall be confidential is that it may contain peculiarly private matters such as the names and addresses of creditors and debtors, as well as profit-and-loss statements. This information could, in fact, go far beyond that required to be included in a certificate of condition required to be filed by a corporation with the Secretary of the Commonwealth. Hence, the understandable concern of the Legislature in allowing such data when furnished to you to be kept confidential.

---

*"Public records" shall mean any written or printed book or paper, any map or plan of the commonwealth, or of any county, district, city or town which is the property thereof, and in or on which any entry has been made or is required to be made by law. . . ."

**"Every person having custody of any public records shall, at reasonable times, permit them to be inspected and examined by any person, under his supervision, and shall furnish copies thereof on payment of a reasonable fee. . . ."

On the other hand, a mere determination of the class and aggregate amount of work that a contractor is qualified to perform does not disclose peculiarly private matters. In fact, in view of the general policy of promoting open, free and competitive bidding on government contracts (see G. L. c. 29, § 8A), it could well be in the public interest to treat your determination as public so that unsuccessful bidders on your Commission's contracts, as well as the public generally, may be assured that contracts are not being awarded to ineligible bidders. I recognize the possibility that your determination respecting one contractor may be used by other contractors to ascertain whether the first contractor is likely to be a rival bidder on a particular contract, and that the knowledge thus obtained may affect the bids that the other contractors may then submit. Yet I am not persuaded that this possibility is sufficient in itself to justify reading into § 8B a restriction which its language does not contain.

My conclusion of the public nature of your determination is, as I have indicated, based on the assumption that your findings will consist merely of a statement of (1) the kinds of work that a contractor is capable of doing and (2) his maximum performance capacity, expressed in dollars. If, however, you should go beyond the simple statement that I assume you will make, then consideration would have to be given to the question whether the enlarged statement might be an indirect means of releasing the information that has been defined as confidential, and thereby be in violation of the statute.

In short, having weighed the Legislature's expressed declaration of concern with maintaining a fair system of competitive bidding on MDC contracts against its comparably explicit intention to protect the right of a contractor to keep his private affairs confidential, I have concluded that if the Legislature had intended that a determination such as I have assumed you will make under the statute should be confidential, it would have said so.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 21. AUGUST 11, 1967.

WILLIAM C. MAIERS, *Clerk House of Representatives*

DEAR SIR: — You have transmitted to me the following Order adopted by the House of Representatives on July 10, 1967:

> "[T]he Attorney General of the Commonwealth be forthwith requested by the House of Representatives to render an opinion to be delivered to the Speaker and Clerk of the House of Representatives as soon as may be on the following question: —
>
> In view of the definition of the term 'Airport properties' in paragraph (b) of Section 1 of Chapter 465 of the Acts of 1956, as amended by Section 1 of Chapter 599 of the Acts of 1958, and particularly of the exclusion from such definition of 'that part of Logan Airport now under lease to United States of America nor that part of Logan Airport now used or controlled by the military division of the commonwealth for purposes of the air national guard', and considering the provisions of Section 4 of said Chap-

> ter 465 which limit the power of said Port Authority to acquire such part of Logan Airport, does the Massachusetts Port Authority own or have control over any of the aforementioned part of Logan Airport which is not at present leased to the United states of America or which is not used or controlled by the military division of the Commonwealth for purposes of the Air National Guard?"

Since the Order does not describe in detail the areas involved and the history of their use and control, it does not permit me to make any factual determinations as to specific parcels of real estate. In any event, determination of questions of fact in a matter of this type is not within the province of the Attorney General. See G. L. c. 12, §§ 1-11A (as amended through St. 1966, c. 472). I therefore confine my answer to an analysis of the applicable legal principles.

The Massachusetts Port Authority (the Authority) was created by St. 1956, c. 465, § 2. Section 5 of this act stated that "Title to the airport properties shall be vested in the Authority upon the payment" of specified sums to the State Treasurer. The term "airport properties" was defined in § 1(b), as follows:

> "The term 'airport properties' shall include the General Edward Lawrence Logan International Airport, hereafter called the Logan Airport, and Laurence G. Hanscom Field, together with all buildings and other facilities and all equipment, appurtenances, property, rights, easements and interests acquired or leased by the commonwealth in connection with the construction or the operation thereof and in charge of the state airport management board.
>
> "The term 'airport properties' shall not be construed to mean that part of Logan Airport *now under lease* to the United States of America nor that part of Logan Airport *now used or controlled* by the military division of the commonwealth for purposes of the air national guard." (hereafter called "the Excepted Areas" [Emphasis supplied.])

Sections 3(k) and 4 of the act state that nothing in the act shall be construed to confer upon the authority any power to take by eminent domain under existing or future statutes any part of [the Excepted Areas]. The final paragraph of § 23 stated that "the commonwealth, acting by its military division, shall have the right, in connection with the retention of title to a portion of Logan Airport, as provided in sections one (b), three (k) and four, to use for purposes of the air national guard the facilities of said airport necessary or proper for the air national guard to perform its present or future assigned missions."

In 1958, St. 1956, c. 465, § 2 was amended extensively by St. 1958, c. 599. The principal purposes of this amendment were to increase the maximum interest rate on Authority bonds from four to five per cent and to delete references in the original statute to the Sumner Tunnel (transferred to the Massachusetts Turnpike Authority by St. 1958, c. 498).

The "Definitions" section of St. 1956, c. 465 was struck out by St. 1958, c. 599, § 1, and a new "Definitions" section inserted in its place. While changes were made in other definitions, the definition of "airport prop-

erties" in St. 1958, § 1(a) is identical with that in St. 1956, c. 465, § 1(b). Section 23 of St. 1956, c. 465 was also struck out and a new section substituted. The previously quoted portion of the last paragraph of § 23 was, however, transferred intact into the new § 23 as amended by St. 1958, c. 599, § 11.

The definition of airport properties in both the 1956 and 1958 acts excepted property (the Excepted Areas) ". . . now under lease to the United States . . . [or] . . . now used or controlled by the . . . commonwealth for purposes of the air national guard." Section 23 established that the Commonwealth retained title to the Excepted Areas. It is my opinion that title to these areas is still in the Commonwealth. The fact that the Excepted Areas may have been used, subsequent to 1956, for some purpose other than ". . . for purposes of the air national guard" has not divested the Commonwealth of its title. The present situation is not unlike that of a conveyance in which a grantor excepts, for certain stated purposes, a portion of his premises, and later changes the use of the excepted property. It is settled that the change of use does not affect the title to the excepted portion. See *Thomas* v. *Jewell,* 300 Mich. 556, 560 (1942); *Mayor, etc. of New York* v. *New York Central & Hudson River R.R. Co.,* 69 Hun. 324, 326 (N. Y. Supreme Ct. 1893), aff'd 147 N.Y. 710 (1895); *Matter of Commissioner of Public Works of New York,* 135 App. Div. 561, 574 (N. Y. Supreme Ct. 1909), aff'd 199 N.Y. 531 (1910); see *Delano* v. *Luedinghaus,* 70 Wash. 573, 576 (1912); Annotation, 139 A.L.R. 1339 (1942).

The substitution of § 1(a) appearing in St. 1958, c. 599, § 1 for St. 1956, c. 465, § 1(b) makes it necessary for me to ascertain whether the limits of the Excepted Areas are to be determined as of the effective date of the 1956 act or of the 1958 amendment. I again point out that the definitions of "airport property" in the 1956 and 1958 statutes are identical.

It is a fundamental rule of statutory construction that when statutes are repealed by amending acts which retain portions of an old law, the retained provisions are considered to be a continuation of the original. *McAdam* v. *Federal Mutual Liability Ins. Co.,* 288 Mass. 537, 541 (1934); Sutherland, Statutory Construction § 1933 (3rd Ed. 1933).* Statutory terms containing words referring to a point in time which are subsequently re-enacted as part of an amendment speak as of the effective date of the original statute. *Barrows* v. *People's Gaslight & Coke Co.,* 75 Fed. 794, 795-96 (C.C.N.D. Ill. 1895) ("now existing"); *Allgood* v. *Sloss-Sheffield Steel & Iron Co.,* 196 Ala. 500, 501, 504 (1916) ("within two years before the approval of this act"); *Thompson* v. *Massburg,* 193 Ind. 566, 573-575 (1923) ("pending at the time of taking effect of this act"); *Moore* v. *Mausert,* 49 N.Y. 332, 335 (1872) ("hereafter"); *State ex rel. Durr.* v. *Speogel,* 91 Ohio St. 13, 18-22 (1914) ("hereafter"); *Wisconsin Trust Co.* v. *Munday,* 168 Wis. 31, 45 (1918) ("before the passage of this section").

Applying these principles to the present case, it must follow that the limits of the Excepted Areas are to be determined as of the effective date of St. 1956, c. 465, § 1(b). There is nothing in the purpose or content of the 1958 statute and nothing in the legislative history of either the 1956 or the 1958 statute which is inconsistent with this conclusion. See Report of the Special Commission on the Massachusetts Port Authority, 1956 House Doc. 2575; (containing bill submitted by the Special Commission); 1956 House Doc.

*This principle has been codified for purposes of the construction of the General Laws, G. L. c. 281, §2.

2800 (the bill substituted by House Committee on Ways and Means); *Opinion of the Justices to the Senate,* 334 Mass. 721 (1956); 1958 House Doc. 3203 (the bill recommended by the Governor); 1958 House Doc. 3206 (the bill substituted by House Committee on Ways and Means).

In summary, then, it is my opinion that the Massachusetts Port Authority does not have title to that part of Logan Airport which was under lease to the United States of America or used or controlled by the military division of the Commonwealth for purposes of the air national guard on the effective date of St. 1956, c. 465. It is as of that date, not as of 1958 or as of the present time, that the necessary factual determinations must be made.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 22. AUGUST 14, 1967.

WILLIAM C. MAIERS, *Clerk House of Representatives*

DEAR MR. MAIERS: — The House of Representatives has requested my opinion on the following questions concerning the Sales and Use Tax (St. 1966, c. 14, §§ 1 and 2) in relation to commercial fishing:

"1. Does the word 'directly' as used in paragraphs (r) and (s) of subsection 6 of section 1 of chapter 14 of the Acts of 1966 apply to commercial fishing?

"2. Do the provisions of said paragraphs (r) and (s) prohibit the taxation of machinery, parts, equipment, tools, and materials commonly used in or on commercial fishing vessels and in the business of commercial fishing?

"3. Does the determination by the state tax department that certain items commonly used in commercial fishing indicated on the list attached hereto [not appended to this opinion] are taxable violate the provisions of said paragraphs (r) and (s) which exempt from taxation machinery, equipment, materials, tools and fuel in so far as they are used in commercial fishing?

"4. Does the said determination by the State Tax Commission attached hereto [not appended to this opinion] regarding exemptions as provided for by said paragraphs (r) and (s) as they apply to the commercial fishing industry nullify the legislative intent which was to provide an exemption for the commercial fishing industry?"

Needless to say, this opinion is an interpretation of the law as the Legislature wrote it. Considerations of economic policy are beyond my province and are for the Legislature alone. Further, since the questions submitted to me do not refer to paragraph (0) of Subsection 6 of Section 1 of the Sales and Use Tax, relative to an exemption in connection with "vessels engaged in foreign and interstate commerce," I assume that the House of Representatives does not desire me to discuss that paragraph.

Paragraphs (r) and (s) of Subsection 6 of Section 1 of the Sales and Use Tax exempt from taxation:

> "(r) Sales of materials, tools and fuel, or any substitute therefor, which become an ingredient or component part of tangible personal property to be sold or which are consumed and used *directly* in agricultural production; in commercial fishing; in an industrial plant in the process of the manufacture of tangible personal property to be sold, including the publishing of a newspaper; in the operation of commercial radio broadcasting or television transmission; in the furnishing of power to an industrial manufacturing plant; or in the furnishing of gas, water, steam or electricity when delivered to consumers through mains, lines or pipes. For the purpose of this paragraph, the raising of poultry and livestock shall be construed to be included in the term 'agricultural production'. (Emphasis supplied.)
>
> "(s) Sales of machinery, or replacement parts thereof, used *directly* in agricultural production; in commercial fishing; in an industrial plant in the manufacture, conversion or processing of tangible personal property to be sold, including the publishing of a newspaper; in the operation of commercial radio broadcasting or television transmission; in the furnishing of power to an industrial manufacturing plant; or in the furnishing of gas, water, steam or electricity when delivered to consumers through mains, lines or pipes. For the purposes of this paragraph, the raising of poultry and livestock shall be construed to be included in the term 'agricultural production'." (Emphasis supplied.)

I am satisfied that the natural syntax and meaning of each of the foregoing paragraphs require that the words "used directly" should be read as introducing each enumerated item. To relate "directly" only to the first item, "agricultural production," would, for no apparent reason, treat that category differently from each of the four succeeding categories and in so doing would necessarily enlarge the exemptions afforded by them. Settled rules of interpretation of tax laws, however, require that exemptions be strictly construed. *First Agricultural Bank of Berkshire County* v. *State Tax Commission,* Mass. Adv. Sh. (1967) p. 1301. Accordingly, I answer your first question in the affirmative.

I continue to the problems raised by Question 2. Paragraphs (r) and (s) are specific in designating the classes of property that enter into the exemptions. Paragraph (r) refers to "materials, tools and fuel, or any substitute therefor. . . ." Paragraph (s) refers to "machinery, or replacement parts thereof." Question 2, however, interjects the category of "equipment" and it also introduces the concept of items "commonly used in or on commercial fishing vessels and in the business of commercial fishing." These are not the terms or concepts employed in the Sales and Use Tax legislation.

By specifying particular classes of exempt property, the Legislature has excluded any class not enumerated. Since "equipment" was not enumerated, it is not to be regarded as exempt unless an item of "equipment" may also happen to fall within one of the other categories.[1] Moreover, as I have just

[1] "Equipment" is often used interchangeably with "machinery." *Assessors of Brockton* v. *Brockton Olympia Realty Co.,* 322 Mass. 351. For a definition of machinery, see *Assessors of Haverhill* v. *J. J. Newberry Co.,* 330 Mass. 469, 472.

observed, the statutory exemption is not framed in terms of items "commonly used in or on commercial fishing vessels and in the business of commercial fishing." If your question was intended to imply that the exemption may apply to any item in common use in the commercial fishing industry as a whole, I must state that in my opinion the implication is too broad and is not warranted by the statute.

After careful consideration, I am of the opinion that the exemption relative to commercial fishing must rather be regarded as applying only to the process or operation of commercial fishing as distinguished from the business or industry generally. Not only is this result implicit in the use of the word "fishing" itself; it is reinforced and made practically explicit in paragraphs (r) and (s) by the introductory word "directly," which must be given significant meaning in connection with the exemption. Further, it is consistent with the rule that exemptions must be strictly construed and it makes the nature of the commercial fishing exemption consistent with that of the other exemptions in paragraphs (r) and (s), since each such exemption refers to a process or operation in relation to the various items involved. Thus, reference is made to agricultural *"production";* an industrial plant in the *"process of the manufacture of tangible personal property";* the *"operation"* of commercial radio *broadcasting* or television *"transmission";* the *"furnishing of power"* to an industrial manufacturing plant, and the *"furnishing"* of gas, water, steam or electricity when *"delivered"* to consumers through mains, lines or pipes.

Since, therefore, the exemption in respect of commercial fishing applies only to the operations and processes thereof, it follows that whether or not an item is "commonly used in or on commercial fishing vessels and in the business of commercial fishing" is not conclusive. I fully recognize the difficulty of the task of ascertaining when an item falls outside the exemption, such as when a piece of "equipment" cannot be regarded as an item of "materials," "tools" or "machinery," or when a use is indirect as distinguished from direct (as in the case of an item not used directly in the operation or process of commercial fishing, though perhaps commonly used in or on commercial fishing vessels or in the business of commercial fishing). Nonetheless, I conclude that the Legislature has defined the exemption in the manner that I have indicated, and I am unable to suggest any more precise guidelines, given the statutory language in question.

Your third and fourth questions, in effect, ask whether the State Tax Commission has correctly applied paragraphs (r) and (s) to a list of twenty-seven main items and numerous subitems. This involves a determination of fact as to the nature and function of each of the items listed, a determination which under the statute the Legislature has vested initially in the State Tax Commission. These facts are not before me, and I am unable to give you an answer as to each. I trust, however, that my answers to your first two questions will provide some assistance to those charged with making the necessary factual determinations.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 23. August 15, 1967.

Honorable Mabel A. Campbell, *Acting Director of Civil Service*

Dear Mrs. Campbell: — Your predecessor, the late W. Henry Finnegan, requested my opinion on whether the Director of Civil Service may approve the transfer of a police sergeant from one town to another town, the position in each case being the same and classified under the Civil Service Laws.

Specifically, Mr. Finnegan stated that:

> "In view of the provisions of section 20 of chapter 31 of the General Laws, I am requesting your opinion as to whether or not you believe it is within the discretion of the Director of Civil Service to approve a transfer under section 16A of chapter 31 of a Police Sergeant who has served at least one year after permanent appointment to the position of Police Sergeant in another town, if the appointing authority submits sound and sufficient reasons to show that the transfer will be for the public good."

General Laws c. 31, § 16A, in relevant part, provides:

> "Except as otherwise provided by law, any person who has been permanently appointed in accordance with the civil service law and rules, and who has actually been employed after permanent appointment for at least one year in the official or labor service, may, after application in writing to the director by the appointing authority and with the consent of the director, be transferred to another similar position, provided the appointing authority submits sound and sufficient reasons, in the opinion of the director, to show that the transfer will be for the public good."

The provision of G. L. c. 31, § 20, to which reference was also made, provides:

> "*Appointments* and *promotions* in such police and fire forces of cities and towns as are within the official service . . . shall be made only by competitive examination, except as otherwise provided in this chapter, or in the rules of the commission relative to temporary or emergency appointments. . . ." (Emphasis supplied.)

In substance, the question is whether or not a "transfer" is either an "appointment" or "promotion." The term "appointment" in G. L. c. 31, § 1 "is used to denote only the original entry into the classified civil service." *McCarthy* v. *Director of Civil Service,* 319 Mass. 124, 126. "Promotion" is defined in G. L. c. 31, § 1 as "a change from the duties of one grade to the duties of a higher grade in the same or a different class as determined by the director." The word "transfer" is not defined in the statute but it is nevertheless used as a term distinct from "appointment" and "promotion." It refers to a change of a position, after original entry into the classified civil service, not involving the performance of duties of a higher grade.

Accordingly, I am of the opinion that G. L. c. 31, § 20 does not limit the authority of the Director to consent to a transfer under G. L. c. 31, § 16A in the circumstances described. By § 16A, however, the appointing authority must submit *"sound and sufficient reasons,* in the opinion of the director, to show that the transfer will be for the *public good."*

Mr. Finnegan's letter stated that:

> "In the town in which the officials are requesting the transfer there are five permanent full-time Patrolmen and five permanent-intermittent Patrolmen who would be eligible for a competitive promotional examination."

I assume that the promotion referred to would be to the position of police sergeant. This is a consideration that should be taken into account in determining whether the proposed transfer would be "for the public good," and is a factual matter, which in the first instance, is to be decided by you.

Very truly yours,

LEVIN H. CAMPBELL, *Acting Attorney General*

Number 24. AUGUST 16, 1967.

HIS EXCELLENCY JOHN A. VOLPE, *Governor of the Commonwealth*

DEAR GOVERNOR VOLPE: — You have requested the opinion of the Attorney General regarding the utilization of gas tax receipts for the purpose of financing the construction, maintenance, and operation of a proposed multi-purpose stadium to serve as a cultural, recreational and convention center.

The funds to be used would arise as a result of the failure of persons to make claim for refund of excise taxes paid on gasoline consumed on the Massachusetts Turnpike pursuant to G. L. c. 64A, § 7. That section provides in part that:

> "Any person who shall buy any fuel on which an excise has been paid or is chargeable under this chapter, and shall consume the same in any manner except on a farm for farming purposes or in the operation of motor vehicles upon or over highways, whether or not such vehicles are registered under the provisions of section five of chapter ninety, shall be reimbursed the amount of said excise in the manner and subject to the conditions hereinafter set forth: provided, however, that any turnpike constructed by the Massachusetts Turnpike Authority in accordance with chapter three hundred and fifty-four of the acts of nineteen hundred and fifty-two, as amended, shall not be considered a highway for the purposes of this chapter until such turnpike shall have become a part of the state highway system as provided in section seventeen of said chapter three hundred and fifty-four.[1] . . . All claims for reimbursement shall be filed with the commissioner within two years from the date of purchase or invoice of fuel; . . ."

The funds unclaimed after two years are presently disposed of pursuant to G. L. 64A, § 13, which provides as follows:

> "All sums received under this chapter shall be paid into the treasury of the commonwealth and credited as follows: —
>
> (a) Ninety-eight and four-fifths per cent of the excise imposed

[1] Chapter 354 of the Acts of 1952, § 17 provides that the turnpike will become part of the state highway system when all the Authority's bonds have been paid.

by section four and all sums received as penalties forfeitures, interest, costs of suits and fines shall be credited to the Highway Fund;[2] provided that there shall be deducted therefrom all amounts allowed by the commissioner for reimbursement under sections seven and seven A, except as provided in clause (b);

(b) Whereas not less than one and one-fifth percent of the excise imposed by said section four, hereinafter called the balance, is obtained from the sale or importation of fuel used in producing or generating power for the operation of watercraft of every description, except seaplanes, said balance, after deducting all reimbursements allowed to persons who have used such fuel in producing or generating power in the operation of such watercraft, shall be credited as follows: — one-sixth to the inland fisheries and game fund established by section three A of chapter one hundred and thirty; two-sixths to the public access fund established by section seventeen of chapter twenty-one; two-sixths to the marine fisheries fund established by section two A of chapter one hundred and thirty; and one-sixth to the Recreational Boating Fund established under section sixteen of Chapter ninety B."

You have attached to your request proposed legislation which would permit the construction, maintenance and operation of a multi-purpose stadium by the Massachusetts Turnpike Authority. The proposed legislation would further amend G. L. c. 64A by providing that unclaimed gas excise tax monies attributable to travel on the Turnpike will be transferred to the Massachusetts Turnpike Authority for construction, maintenance and operation of the stadium.

Article 78 of the Amendments to the Massachusetts Constitution provides as follows:

"No revenue from fees, duties, excises or license taxes relating to registration, operation or use of vehicles *on public highways,* or to fuels used for propelling such vehicles, shall be expended for other than cost of administration of laws providing for such revenue, making of refunds and adjustments in relation thereto, payment of highway obligations, or cost of construction, reconstruction, maintenance and repair of public highways and bridges and of the enforcement of state traffic laws; *and such revenue shall be expended by the commonwealth or its counties, cities and towns for said highway purposes only* and in such manner as the general court may direct; provided, that this amendment shall not apply to revenue from any excise tax imposed in lieu of local property taxes for the privilege of registering such vehicles." (Emphasis supplied.)

In view of the restriction of Article 78 allowing the expenditure of such revenue for only highway purposes, you have asked the following questions:

"1. Is the Massachusetts Turnpike a 'public highway' within the meaning of Article 78 of the Amendments to the Massachusetts Constitution?

"2. Would the use of unrefunded gasoline tax monies as provided

[2]The Highway Fund herein referred to is created by G. L. c. 90, § 34. This section also sets forth certain authorized expenditures that can be made from the Highway Fund.

> the attached legislation constitute a violation of the letter and/or intent of Article 78?"

Our Supreme Judicial Court has indicated that the term "public highway" used in Article 78 must be given a meaning consistent with common understanding, since only in this way can the voters to whom a constitutional amendment is presented act intelligently. *Opinion of the Justices*, 324 Mass. 746. Applying this test, it is my opinion that the Massachusetts Turnpike is a public highway.

Such an interpretation conforms with early Massachusetts cases which have indicated that a turnpike is a "public highway." *Commonwealth* v. *Wilkinson,* 16 Pick. 175, 177; *Newburyport Turnpike Corporation* v. *Eastern R.R. Co.,* 23 Pick. 326, 327; *George G. Fox Co.* v. *Boston and Northern Street Railway,* 217 Mass. 140, 142; *Opinion of the Justices,* 250 Mass. 591, 596.

In *Commonwealth* v. *Wilkinson, supra,* 177, Chief Justice Shaw stated:

> "We think, that a turnpike road is a public highway, established by public authority for public use, and is to be regarded as a public easement, and not as private property. The only difference between this and a common highway is that instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals in the first instance; and the cost of construction and maintenance is reimbursed by a toll, levied by public authority for the purpose. Every traveller has the same right to use it, paying the toll established by law, as he would have to use any other public highway."

It has been suggested that the Massachusetts Turnpike is not a "public highway" on the basis of the gas tax refund statute which is previously set forth herein and which provides in part that "any turnpike constructed by the Massachusetts Turnpike Authority . . . shall not be considered a highway for the purposes of this chapter until such Turnpike shall have become a part of the state highway system. . . ." G. L. c. 64A, § 7. However, this statutory provision cannot supersede the constitutional meaning of the term "public highway" as used in the 78th Amendment. Furthermore, this provision is specifically limited "for the purpose of this chapter," and implicit in the making of this exception is recognition by the Legislature that the Turnpike would otherwise be considered a highway. Indeed, the Legislature defines the Massachusetts Turnpike as the ". . . express toll *highway* . . . as may be constructed under the provisions of this act. . . ." St. 1952, c. 354, § 4 (b).

It is therefore my opinion that the Massachusetts Turnpike is a "public highway" within the meaning of Article 78 of the Amendments to the Massachusetts Constitution and I accordingly answer your first question in the affirmative. It follows that the proposed legislation providing for the use of such unrefunded gas tax revenues for financing the construction, maintenance and operation of a multi-purpose stadium would constitute a violation of Article 78. The receipts arising from the failure of persons to make claim for refund of excise taxes paid on gasoline consumed on the Massachusetts Turnpike are "revenue from . . . excises . . . relating to . . . operation or use of vehicles on public highways or to fuels used for propelling

such vehicles . . .," and under Article 78 revenue of this nature may only be used for specified purposes none of which would include the financing of a stadium. I must therefore answer your second question in the affirmative.

Very truly yours,

LEVIN H. CAMPBELL, *Acting Attorney General*

Number 25. SEPTEMBER 8, 1967.

HONORABLE ROBERT A. MACLELLAN, *Commissioner of Savings Bank Life Insurance and President of the Trustees of the General Insurance Guaranty Fund*

DEAR COMMISSIONER MACLELLAN: — You have requested my opinion on certain questions concerning the supervisory authority of the Trustees of the General Insurance Guaranty Fund (Trustees) over the State Actuary.

You state that:

> "It is the position of the Trustees of the General Insurance Guaranty Fund, which is the governing body of the Division of Savings Bank Life Insurance, that the Trustees, not the State Actuary who is appointed by the Trustees with the consent of the Governor, have the power and authority to make Division policy decisions, including decisions which may be contrary to those made by the State Actuary. It is also the Trustees' position that the supervision and control of the work of the Division, including the work of the State Actuary, is vested in the Trustees. It is, further, the position of the Trustees that the job specifications of the Division of Personnel and Standardization relating to the State Actuary are correct and consistent with the applicable statutes.

You then ask the following questions:

> "1. Do the Trustees of the General Insurance Guaranty Fund have the power and authority to make policy decisions which may be contrary to those made by the State Actuary?
>
> As specific examples:
>
> (a) If the State Actuary prepares a new table of premium rates under Section 15 of Chapter 178, for all kinds of life insurance policies to be adopted as the uniform and exclusive premiums for all savings and insurance banks which reduces the premium rates by 90%, or by such an amount which the Trustees deem to be unsound, do the Trustees of the General Insurance Guaranty Fund, or the Deputy Commissioner acting on the instructions of the Trustees, have the power and authority to disapprove the lower rates? If not, what action may the Trustees take?
>
> (b) If the State Actuary, under Section 15, determines new formulae for large dividends (the net profits to be distributed to the holders of policies) which the Trustees conclude is not justified, do the Trustees, or the Deputy Commissioner acting on instructions of the Trustees,

have the power and authority, by disapproval, to prevent the payment of dividends under such formulae? If not, what action can the Trustees take?

(c) If in any year a savings and insurance bank requests, as provided in Section 21, that it be permitted to add to its surplus an amount in excess of 15% of its net profits, but the State Actuary refuses to approve this request for a reason which the Trustees conclude is not satisfactory, or for no reason at all, do the Trustees, or the Deputy Commissioner acting on the instructions of the Trustees, have the power and authority to overrule the State Actuary and approve the request? If not, what action can the Trustees take?

(d) If in any year the Directors of the Savings Bank Life Insurance Council make an apportionment of the Council's expenses, as provided under section 32, which is satisfactory to the Trustees as fair and equitable to the participating banks, and the State Actuary refuses to approve the apportionment for a reason which is unsatisfactory to the Trustees, or for no reason at all, do the Trustees, or the Deputy Commissioner acting on instructions of the Trustees, have the power and authority to overrule the State Actuary and approve the apportionment of the expenses of the Council as proposed by the Directors? If not, what action can the Trustees take?

"2. Is work performed by the State Actuary, work of the Division of Savings Bank Life Insurance, and therefore, under the supervision and control of the Trustees?

"3. Is the statement of job specifications for the State Actuary, on file at the Division of Personnel and Standardization, consistent with the applicable statutes?"

In order to answer these questions it is necessary to examine the background and existing statutory framework of Massachusetts savings bank life insurance.

The purpose behind the enactment of St. 1907, c. 561, the original savings bank life insurance law, was to provide persons of low income with inexpensive life insurance. The concept originated in studies of the life insurance industry made by Louis D. Brandeis between 1905 and 1907. See *Opinion of the Justices,* 345 Mass. 780, 782 (1963); Brandeis, Business - a Profession, pp. 109-197 (1914); Mason, The Brandeis Way (1938); Mason, Brandeis a Free Man's Life, pp. 157, et seq. (1946).

The Division of Savings Bank Life Insurance (the Division) is one of the three divisions within the Department of Banking and Insurance. The Division is ". . . in charge of a commissioner . . ." who is known as the Commissioner of Savings Bank Life Insurance (the Commissioner). G. L. c. 26, § 1. The Division consists ". . . of the body corporate known as the General Insurance Guaranty Fund . . ." (the Fund). G. L. c. 26, § 9. The Fund was incorporated by St. 1907, c. 561, § 14. It is managed by a board of seven trustees selected by the Governor from persons who are trustees of savings banks. G. L. c. 26, § 10.

The Trustees ". . . have general supervision and control of the work of the body corporate." G. L. c. 178, § 14. The Commissioner acts as president of the board of trustees of the Fund. G. L. c. 26, § 9.

A Deputy Commissioner is appointed by the Trustees subject to confirmation by the Governor. The Deputy Commissioner ". . . shall administer the work of the division under the direction and control of the trustees. . . ." G. L. c. 26, § 10.

The Trustees, with the approval of the Governor, appoint and may remove ". . . an insurance actuary . . . called the state actuary." The State Actuary serves within the Division. G. L. c. 26, § 11; G. L. c. 178, § 4. The Trustees also appoint a physician called the State Medical Director (G. L. c. 26, § 12) who acts as supervising physician and prescribes rules for health acceptability of applicants for insurance. G. L. c. 178, § 16.

Pursuant to G. L. c. 178, § 2, any savings bank may establish an insurance department. In order to do so, the bank must obtain the approval of the Commissioner of Banks (G. L. c. 178, § 2), and must establish certain guaranty funds or contracts (G. L. c. 178, § 3). After obtaining a license under G. L. c. 178, § 7, the bank may make and issue life policies and annuities subject to the conditions set forth in G. L. c. 178, § 6. A bank which has established an insurance department is known as a "savings and insurance bank." G. L. c. 178, § 1.

The duties of the State Actuary are set forth in detail in § 15 of G. L. c. 178. Thus, the State Actuary, with the advice of the Attorney General as to matters of legal form, is to prepare the standard and exclusive forms of policies used by savings and insurance banks. He is to prepare standard application blanks, record books and other forms used by savings and insurance banks. He prepares the standard and exclusive table of premium rates for all savings bank life insurance policies, the purchase rates for annuities, the premium rates for reinsurance, and other rates and charges for services rendered by the insurance departments of savings and insurance banks. He determines and prepares tables showing the amounts which may be loaned on savings bank insurance policies and the guaranty charges to be made by the Fund. He determines legal reserves to be held by the banks under insurance and annuity contracts, and in all other respects performs the duties of insurance actuary for the banks and the Fund. Each year the State Actuary makes a valuation of the policies of the banks and of the condition of the Fund. He determines the ratio of actual to expected mortality claims for all of the savings and insurance banks. G. L. c. 178, § 15. Under certain circumstances the State Actuary is also to determine the amount of the net profits of its insurance department which a savings and insurance bank may add to its surplus, and the amount which must be distributed to its policyholders as dividends. G. L. c. 178, § 21. He must approve the original amounts of insurance and expense guaranty funds of savings and insurance banks (G. L. c. 178, §§ 4 and 5) and the allocation among savings and insurance banks of the expenses of the Savings Bank Life Insurance Council, established by G. L. c. 178, § 32.

The supervisory power of the trustees over the Division is set forth in several parts of the General Laws. Chapter 26, § 10 provides that the ". . . deputy commissioner . . . shall administer the work of the division *under the direction and control of the trustees.*" (Emphasis supplied.) Section 9 states that the Division shall consist ". . . of the body corporate known as the Gen-

eral Insurance Guaranty Fund," and G. L. c. 178, § 14 states that the ". . . trustees . . . shall have *general supervision and control* over the body corporate." (Emphasis supplied.) General Laws c. 26, § 11 and G. L. c. 178, § 4 establish that the State Actuary serves within the Division.

When used to describe the relationship existing between public bodies and officers ". . . the words 'supervision and control' comprehend an exercise of restraint or direction, of authority over, of domination and command." *Fluet* v. *McCabe,* 299 Mass. 173, 179 (1938). It follows that in the absence of some clear statutory mandate to the contrary, the State Actuary, who serves in the Division may, like all personnel thereof, be restrained and directed by the Trustees in the performance of his duties. I can find nowhere in the governing statutes or in the legislative history of savings bank insurance any indication that the State Actuary is to be free from the control of the Trustees. See 1907 Senate Doc. No. 1, pp. 14-15 (Address of the Governor); 1907 House Doc. No. 1457 (Bill submitted by Committee on Insurance); 1907 House Doc. No. 1085, pp. 54-57 (Report of Joint Special Committee on Insurance); 1939 House Doc. No. 2124, *infra.* Neither is there any such indication in Brandeis' writings on savings bank life insurance. See papers collected in Brandeis, Business - a Profession, pp. 109-197 (1914); Brandeis, The Curse of Bigness, pp. 3-30 (1934).

Reference to the history of the savings bank life insurance law indicates that the purpose of the exhaustive statutory description of the duties of the State Actuary was to make clear that actuarial services are to be provided by the state agency rather than by the savings and insurance banks themselves. See Brandeis, Savings Bank Insurance (1906), reprinted in Brandeis, Business - a Profession, pp. 154, 173-74 (1914); Brandeis, Massachusetts' Substitute for Old-Age Pensions (1908), reprinted in Brandeis, The Curse of Bigness, pp. 25, 28-29 (1934). In my opinion, therefore, the specificity with which various duties are assigned to the State Actuary is not to be interpreted as indicating that these duties may be performed free from the supervision and control by the Trustees. To the contrary, I believe that in carrying out all of his specified duties, the Actuary remains subject to the authority of the Trustees.

General Laws c. 178, § 16, which sets forth the duties of the State Medical Director states that he ". . . shall be subject to the supervision and control of the trustees of the General Insurance Guaranty Fund. . . ." In my opinion, the absence of such a clause in G. L. c. 178, § 15 (setting forth the powers of the State Actuary) does not imply that the State Actuary is *not* to be subject to such supervision and control. Prior to St. 1947, c. 260, § 4, the Medical Director was expressly made ". . . subject to the supervision and control of the commissioner of insurance. . . ." The apparent purpose of the 1947 statute was merely to remove that exception to the general supervisory power of the trustees, by transferring this power over the Medical Director from the Commissioner of Insurance to the Trustees. G. L. c. 178, § 16; St. 1947, c. 260, § 4.

The conclusion that the State Actuary is subject to direction and restraint by the Trustees is supported by the 1939 Report of the Special Commission Relative to the Amount of Insurance to be Issued upon any One Life by Savings and Insurance Banks. 1939 House Doc. No. 2124. There the Commission, in commenting on the duties of the State Actuary, stated that ". . . the Commission is of the opinion that . . . [the State Actuary] should be under the direct supervision of the Division, and in order to maintain a su-

pervisory relationship between the Commonwealth and the issuing banks, his present status should not be disturbed." p. 17.

Relating this analysis to the questions asked in your letter of June 19, 1967, my views are as follows:

1. As the body charged with the responsibility of managing the Division of Savings Bank Life Insurance, the trustees of the General Insurance Guaranty Fund have the power and authority to make policy decisions which may be contrary to those made by the State Actuary. In each of the specific examples presented in your question the Trustees and the Deputy Commissioner have the power and authority to overrule the State Actuary.

2. The work performed by the State Actuary is a part of the work of the Division of Savings Bank Life Insurance and it is therefore under the supervision and control of the Trustees of the General Insurance Guaranty Fund.

3. You have enclosed a copy of the statement of job specifications for the State Actuary, the original of which is on file with the Division of Personnel and Standardization. This statement is consistent with applicable statutes with the exception of the following paragraph:

   "Supervision Received: Works under the general direction of Deputy Commissioner of Savings Bank Life Insurance who reviews work for compliance with provisions of the General Insurance Guaranty Fund." This paragraph should state that the Deputy Commissioner ". . . reviews work for compliance with the policies of the trustees of the General Insurance Guaranty Fund."

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 26. SEPTEMBER 8, 1967.

HONORABLE ALFRED L. FRECHETTE, M. D., *Commissioner of Public Health*

DEAR COMMISSIONER FRECHETTE: — You have asked me to answer the following question:

> "Will you kindly advise me whether or not, in your opinion, Chapter 713 of the Acts of 1966 delegated to the hearings officer the decision-making power with reference to the licensing of convalescent or nursing homes, rest homes or charitable homes for the aged."

Chapter 713 of the Acts of 1966 is entitled:

> "An Act Providing For The Appointment Of A Hearings Officer In The Department Of Public Health To Hear Certain Matters Relating To Convalescent Or Nursing Homes, Rest Homes Or Charitable Homes For The Aged, And For Other Purposes."

It provides in pertinent part as follows:

"SECTION 1. Chapter 17 of the General Laws is hereby amended by inserting after section 6A the following section: —

"*Section 6B.* The commissioner shall appoint a hearings officer who shall be an attorney and who shall not be subject to chapter thirty-one. He shall hold hearings as provided in chapter one hundred and eleven.

"SECTION 2. Section 3 of chapter 111 of General Laws, as amended by chapter 152 of the acts of 1946, is hereby further amended by striking out the last sentence and inserting in place thereof the following sentence: — Hearings of the department may be held by the commissioner, or his designee or the hearings officer if so authorized by the commissioner, or by the hearings officer as provided in section seventy-one with respect to a refusal to renew or revocation of a license of a convalescent or nursing home, rest home or charitable home for the aged.

"SECTION 3. Section 71 of said chapter 111 is hereby amended by striking out the first sentence, as appearing in section 1 of chapter 614 of the acts of 1966, and inserting in place thereof the following sentence: — The *department* shall issue for a term of two years, and may renew for a like term, a license, subject to revocation by it for cause, to any person whom it deems responsible and suitable to establish or maintain a hospital, sanatorium, infirmary maintained in a town, convalescent or nursing home, rest home or charitable home for the aged which meets the requirements of the department established in accordance with its rules and regulations, provided, however, that each convalescent or nursing home shall be inspected at least once in each year.

"SECTION 4. Said section 71 of said chapter 111 is hereby further amended by striking out the eleventh sentence, as so appearing, and inserting in place thereof the following sentence: — Upon a written request by an applicant who is aggrieved by the refusal to renew such a license, or by a holder who is aggrieved by the revocation of such a license, as the case may be, the commissioner and the council shall hold a public hearing after due notice and thereafter may modify, affirm or reverse the action of the department, provided, however, that *the department may not refuse to renew, or revoke, the license of a convalescent or nursing home, rest home or charitable home for the aged, until after a hearing before a hearings officer, and any such applicant or person so aggrieved shall have all the rights provided in chapter thirty A with respect to adjudicatory proceedings.*" (Emphasis supplied.)

The term "department" is defined in G. L. c. 17, § 1 as follows: "There shall be a department of public health, consisting of a commissioner of public health and a public health council." Section 3 of St. 1966, c. 713, quoted above, states that licenses are to be issued or renewed by "the department" and makes no reference to a hearings officer. Hence there is no express delegation of decision-making power to him. Nor does the fact that he is authorized by §§ 1 and 2 to hold hearings imply a delegation of that

power to him. See G. L. c. 30A, § 11(7); Cooper, State Administrative Law, pp. 331-338 (1965); 1 Annual Survey of Massachusetts Law, pp. 139-140 (1954).

The language of § 4 of St. 1966, c. 713 is somewhat confusing but it does not, in my opinion, either expressly or impliedly delegate decision-making power to a hearings officer. In my view, it must be read as providing for (1) an initial department *decision* after (and based upon) a *hearing* before a hearings officer, and (2) an opportunity for a party aggrieved by the initial department *decision* to obtain a second *hearing,* this time before the department itself (i.e., the Commissioner and council), which may thereupon modify, affirm or reverse its own prior decision.

In summary, then, I answer your question in the negative.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 27. SEPTEMBER 8, 1967.

HONORABLE CLEO F. JAILLET, *Commissioner of Corporations and Taxation*

DEAR COMMISSIONER JAILLET: — Your predecessor, Commissioner Guy J. Rizzotto, asked my opinion on whether a "mobile home" is a "trailer" within the meaning of § 1, subsection 26 of c. 14 of the Acts of 1966, the Sales and Use Tax Law (the Sales Tax) and thus eligible for a trade-in deduction under that subsection upon the sale of another vehicle. For the reasons set forth below I am of the opinion that if a "mobile home" meets the definition of a "trailer" in G. L. c. 90, § 1 (the Motor Vehicle Law) it qualifies for the trade-in deduction under the Sales Tax.

Section 1, subsection 26 of the Sales Tax provides in part:

> "Where a trade-in of a motor vehicle, trailer or farm tractor is received by a dealer in such vehicles holding a valid vendor's registration, upon the sale of another motor vehicle, trailer or farm tractor to a consumer, or user, the tax shall be imposed only on the difference between the sale price of the motor vehicle, trailer or farm tractor purchased and the amount allowed on the motor vehicle, trailer or farm tractor traded in on such purchase. When any such motor vehicle, trailer or farm tractor traded in is subsequently sold to a consumer or user, the tax provided for in this section shall apply. For the purpose of this subsection the term 'farm tractor' means any self-propelled vehicle designed and used primarily as a farm implement drawing plows, moving machines and other farm equipment."

Although the Sales Tax does not explicitly define the term "trailer," it refers to the definition of "trailer" found in G. L. c. 90, § 1 (quoted below). Section 1, subsection 25 of the Sales Tax states in relevant part:

> "For the purposes of this section every transfer of the registration of a motor vehicle or *trailer, as defined in section one of chapter ninety of the General Laws,* shall be presumed to be a sale at retail." (Emphasis supplied.)

The cited definition in G. L. c. 90, § 1 reads as follows:

> " 'Trailer', any vehicle or object on wheels and having no motive power of its own but which is drawn by, or used in combination with, a motor vehicle. It shall not include a pole dolly or dickey, so called, nor a pair of wheels commonly used as an implement for other purposes than transportation, nor farm machinery or implements when used in connection with the operation of a farm or estate."

In effect, the determination of whether a vehicle is a "trailer" for purposes of the Sales Tax legislation is made by applying the definition contained in G. L. c. 90, § 1. Actual registration as such under G. L. c. 90 is not a necessary requirement although I would suppose that in most instances the vehicle would be registered.

Turning now to the definition of "trailer" in G. L. c. 90 § 1, quoted above, I find that the inclusiveness of the definition is limited only by the exceptions specifically enumerated therein. I find no basis for implying any others. In particular, I find nothing in that definition which excludes vehicles simply because they may be called "mobile homes." In instances where that term has been referred to in decided cases, it has been mentioned merely as a species of trailer. Thus in *Manley* v. *Draper,* 254 N.Y.S.2d 739, 44 Misc. 2d 613 (1963), the Court observed, "The word 'trailer' . . . includes a wide variety of mobile vehicles from U-Hauls, farm and freight trailers to camp, vacation, business office and mobile home trailers." And in *City of Rutland* v. *Keiffer,* 124 Vt. 357, 205 A.2d 400 (1964), it was said,

> "The words 'mobile home' are of more recent origin [than trailer] undoubtedly because it [sic] has more sales appeal in the trade. Further, it is common knowledge that a great improvement has been made in the construction of, and equipment and facilities in, mobile house trailers. But a mobile home is nothing more or less than [an] automobile house trailer. Both are designed and built as a movable family dwelling. . . ."
> 124 Vt. at p. 361-362.

I recognize, however, that while in some circumstances a "mobile home" may be only a species of trailer, it may in other circumstances be in the nature of a fixed residence. Since the term does not have a precise definition and may at times be only a manufacturer's label, the answer to whether a particular unit is or is not a "trailer" may sometimes depend on a detailed examination of its design, function and use. In the first instance, this is a matter to be determined by the State Tax Commission as the agency charged with the administration of the Sales Tax Law. As stated in *Cleary* v. *Cardullo's Inc.,* 347 Mass. 337, 344,

> "The duty of statutory interpretation is for the courts. Nevertheless, particularly under an ambiguous statute . . ., the details of legislative policy, not spelt out in the statute, may appropriately be determined, at least in the first instance, by an agency charged with administration of the statute."

I note that former Commissioner Rizzotto, in his request for an opinion, set forth the standard the department has followed, stating:

> "The position of the Department has been that a trailer entitled to

> said deduction [Subsection 26, Section 1, Chapter 14, Acts of 1966] must be one which is customarily and ordinarily used upon the highways. A mobile home, however, although having the ability to be moved from place to place, is ordinarily and customarily used in a permanent location, with infrequent, if any, changes in location."

This statement seems to be a reasonable administrative interpretation of G. L. c. 90, § 1 in the first instance.

Of course, the foregoing standard concerns only a particular type of "mobile home," i.e., one having the ability to be moved from place to place, but ordinarily and customarily used in a permanent location, with infrequent, if any changes in location. Since the term "mobile home" is imprecise and may be no more than a manufacturer's label, not every article sold under that name will necessarily meet the Department's test. It is the true character, not the name of an article, that is decisive. Thus if an article which may be called a "mobile home" is in fact a trailer, it is eligible for the deduction.

I note also that Commissioner Rizzotto, in his request for an opinion, referred to the definition of a "mobile home" in G. L. c. 140, § 32L, and he has asked whether a "mobile home" as therein defined is a "trailer" within the meaning of § 1, subsection 26 of the Sales Tax. The definition in G. L. c. 140, § 32L, is as follows:

> "As used in sections thirty-two A to thirty-two K [relating to the licensing of recreational camps, overnight camps or cabins, motels and mobile home parks], inclusive, the words 'mobile home' shall mean a dwelling unit built on a chassis and containing complete electrical, plumbing and sanitary facilities, and designed to be installed on a temporary or permanent foundation for permanent living quarters."

By its very terms the foregoing definition is limited to the provisions of law governing the licensing of the particular places indicated and neither extends to nor is adopted by the Sales Tax. For purposes of the Sales Tax the definition would appear to be irrelevant, and I therefore find it unnecessary to consider the extent to which it differs from the definition of trailer that the Sales Tax has incorporated from G. L. c. 90. Nor do I find it necessary to consider the specific use of the terms "mobile home" or "trailer" in zoning by-laws. See *Manchester* v. *Phillips,* 343 Mass. 591, and *Brewster* v. *Sherman,* 343 Mass. 598.

In summary, then, if a vehicle is registrable (whether or not in fact registered) as a trailer within the meaning of G. L. c. 90, § 1, it is eligible for the trade-in deduction under § 1, subsection 26 of the Sales Tax. The determination of registrability is, in the first instance, in the administration of the Sales Tax, to be made by your Department, which may properly use the test set forth in Commissioner Rizzotto's letter, quoted above.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 28. SEPTEMBER 12, 1967.

HONORABLE OWEN B. KIERNAN, *Commissioner of Education*

DEAR COMMISSIONER KIERNAN: — You have requested my opinion on whether G. L. c. 39, §§ 23A-23C, the Open Meeting Law, applies to collective bargaining sessions between school committees and school employees. In my opinion it does not.

Collective bargaining with municipal employees is governed by G. L. c. 149, §§ 178G-178N, inserted by St. 1965, c. 763. Section 178I provides:

> "The municipal employer and the employee organization recognized or designated as exclusive representative of employees in an appropriate unit shall have the duty to bargain collectively. In such bargaining other than with an employee organization for school employees, the municipal employer shall be represented by the chief executive officer, whether elected or appointed, or his designated representative or representatives. In such bargaining with an employee organization for school employees, the municipal employer shall be represented by the school committee or its designated representative or representatives.
>
> "For the purposes of collective bargaining, the representative of the municipal employer and the representatives of the employees shall meet at reasonable times, including meetings appropriately related to the budget making process, and shall confer in good faith with respect to wages, hours and other conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and shall execute a written contract incorporating any agreement reached, but neither party shall be compelled to agree to a proposal or to make a concession. In the event that any part or provision of any such agreement is in conflict with any law, ordinance or by-law, such law, ordinance or by-law shall prevail so long as such conflict remains. If funds are necessary to implement such written agreement, a request for the necessary appropriation shall be submitted to the legislative body. If such request is rejected, the matter shall be returned to the parties for further bargaining. The preceding two sentences shall not apply to agreements reached by school committees in cities and towns in which the provisions of section thirty-four of chapter seventy-one are operative."

The Open Meeting Law, G. L. c. 39, § 23A, as applicable to municipalities, provides in part:

> "As used in this section and in section twenty-three B, the word 'board' shall include every board, commission, committee and sub-committee, however elected, appointed or otherwise constituted, of any district, city or town. It shall also include the governing board of every local housing, redevelopment or similar authority. All *board meetings* shall be open to the public and to the press unless the board shall vote to go into executive session. Such executive session may be held only for the purpose of discussing, deliberating or voting on those matters which by general or special statute, or federal grant-in-aid requirements cannot be made public, and those matters which if made public might ad-

versely affect the public security, the financial interest of the district, city, town or local housing authority, or the reputation of any person. . . ." (Emphasis supplied.)

After careful consideration, I have concluded that this statute does not apply to collective bargaining sessions with school employees. The decisive point is that such sessions are not "meetings" within the meaning of that term in the statute. The meetings to which the statute refers are rather those in which the internal discussions, deliberations and voting of an agency are of public concern. A collective bargaining session, on the other hand, is a meeting at which the employer and employees are engaged in a process of an interchange and analysis of each other's proposals and counterproposals. This is a different kind of process from that involved in the conduct of an agency's internal deliberations or the making of its official decisions.

The fact that G. L. c. 149, § 178I provides that "In [the] bargaining with an employee organization for school employees, the municipal employer shall be represented by the school committee or its designated representative or representatives" does not change the foregoing conclusion. It is my opinion that by making a specific reference to a school committee, the Legislature did so, not for the purpose of subjecting it to the requirements of the Open Meeting Law, but only to recognize a school committee's traditional independence in the conduct of its own affairs.

That the collective bargaining sessions are not "meetings" within the meaning of the Open Meeting Law is also evident from the second paragraph of § 23A thereof, which provides that "Except in an emergency, a notice of each board meeting shall be filed with the clerk of the municipality in which the board acts, and the notice or a copy thereof shall, at least twenty-four hours, including Saturdays but not Sundays and legal holidays, prior to such meeting, be publicly posted in the office of such clerk or on the principal official bulletin board of such municipality."

It seems clear that the scheduling of collective bargaining sessions could not be arranged with the necessary flexibility for their success if the foregoing notice requirements were applicable. Nor could such flexibility be realized by treating the sessions as "emergencies" so as to excuse compliance with such requirements. Many of the sessions, I would expect, could not be said to be "emergencies" in any true sense of that word.

Nothing in this opinion, I wish to add, should be construed as applying beyond the conduct of the bargaining sessions themselves. I express no opinion on the application of the Open Meeting Law to discussions, deliberations or votes of a school committee when not actually engaged in such sessions.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 29. SEPTEMBER 12, 1967.

HONORABLE OWEN B. KIERNAN, *Commissioner of Education*

DEAR COMMISSIONER KIERNAN: — You have asked my opinion on whether there is a violation of either G. L. c. 71, § 52 or G. L. c. 268A, the Con-

flict of Interest Law, when a resident member of a school committee in town A teaches in the *regular* school system of city B while serving as a member of a *vocational* regional school district committee for both town A and city B. The regular school system of city B is not subject to the control of the district committee. For the reasons that follow, I conclude that neither statute is violated.

You state that the Northern Berkshire Vocational Regional School District (the Regional School District) consists of the city of North Adams and certain towns, including the town of Florida; that the teacher involved is a resident and an elected member of the school committee of the town of Florida; that he also serves as an appointed member of the Regional School District Committee; and that he is also a teacher in the regular school system of the city of North Adams, a separate system that does not come under the supervision of the Regional School District School Committee.

General Laws c. 71, § 52 provides in part:

> "No member of a school committee in any town shall be eligible to the position of teacher, or superintendent of public schools therein, or in any union school or superintendency union or district in which his town participates."

A "superintendency district" is organized under G. L. c. 71, § 60, which provides in part:

> "Two or more towns may, by vote of each, form a district for the purpose of employing a superintendent of public schools therein, who shall annually be appointed by a joint committee composed of the chairman and secretary of the school committee of each of said towns."

A regional school district, however, is different from a superintendency district. The latter, as you point out in your letter, is created by legislation that originated in St. 1870, c. 183. See *Duffey* v. *School Committee of Hopkinton,* 236 Mass. 5, and *Pulvino* v. *Yarmouth,* 286 Mass. 21. A regional school district, on the other hand, is created by legislation that goes back only to St. 1949, c. 638. See now G. L. c. 71, §§ 14-16I. It is "a body politic and corporate" and is wholly different from a superintendency district. Because of the fundamental difference in the two types of districts, G. L. c. 71, § 52 cannot be regarded as encompassing the regional type, and it therefore has no application to this case. This conclusion finds further support in the fact that G. L. c. 71, § 52 was last amended in St. 1932, c. 90, seventeen years before the enactment of the regional school district statute.

In view of the foregoing conclusion, I find it unnecessary to express an opinion on the possible application of G. L. c. 71, § 52 to this case, if regional school districts should be brought within its coverage.

Further, I am of the opinion that there is no violation of the Conflict of Interest Law. I assume that as a member of the Regional School District Committee the teacher receives no compensation. Hence, I do not believe he would violate section 17(a) of the Conflict of Interest Law. I also assume that as a member of the Committee the teacher will not be acting as its attorney or agent either in prosecuting any claim against the city of North Adams or in connection with any particular matter in which the city is a party or has a direct and substantial interest. Hence, I do not believe that he would violate section 17(b) of the Conflict of Interest Law. Nor does it ap-

pear that the other provisions of that Law, in relation to municipal employees, would apply.

Finally, I find no inherent incompatibility in the teacher serving in the regular school system of North Adams and also serving as a member of the Northern Berkshire Vocational Regional School District Committee. (Cf. *Barrett* v. *Medford,* 254 Mass. 384.) As it does not appear that the Committee has any control over the regular school system of North Adams, the teacher does not by his membership on the Committee have any supervision over himself as a teacher.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 30. SEPTEMBER 12, 1967.

HONORABLE RICHARD E. MCLAUGHLIN, *Registrar of Motor Vehicles*

DEAR SIR: — By letter dated August 15, 1967 you have asked my opinion on the following two questions:

"1. Does the age requirement set forth in Chapter 682 of the Acts of 1965 apply to any future examinations for the position of Motor Vehicle Examiner, Registry of Motor Vehicles?

"2. Is the Massachusetts Commission Against Discrimination required to consider this age requirement of fifty years as set forth in Chapter 682 of the Acts of 1965 in its determination of an age restriction for this position?"

Chapter 682 of the Acts of 1965 provides in pertinent part:

"SECTION 1. The director of civil service is hereby authorized and directed to conduct an open competitive examination for motor vehicle examiner, registry of motor vehicles, at some convenient time, in his discretion, but no later than September thirtieth, nineteen hundred and sixty-five, and notwithstanding any rule to the contrary regulating the experience or age requirements of applicants for motor vehicle examiner, registry of motor vehicles, all applicants who meet all other requirements shall be eligible to take said test and shall be eligible for certification and appointment, whether or not they have two years or more of satisfactory, full-time paid experience in which the investigation of accidents involving motor vehicles was the major duty, provided they have not passed their fiftieth birthday.

"SECTION 2. Notwithstanding any law, rule or regulation to the contrary, the director of civil service shall not establish a list from the examination conducted on June twenty-sixth, nineteen hundred and sixty-five for motor vehicle examiner, registry of motor vehicles, until the time provided by law for establishment of a list for the examination provided in section one has elapsed at which time the director shall merge the results of both examinations and shall then establish a list from all the marks in the same manner as if both tests were held on the same date."

The act was passed with an emergency preamble which recited:

> "*Whereas,* The deferred operation of this act would tend to defeat its purpose, which is to correct an injustice resulting from the change in the experience or age requirements for eligibility in the taking of the motor vehicle examiner, registry of motor vehicles examination which was held on June twenty-sixth, nineteen hundred and sixty-five, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience."

It is plain that the Legislature was establishing the conditions of only a particular examination, to be given not later than September 30, 1965. This single objective appears from (A) the terms of the preamble; (b) the direction that the examination be given not later than the stated date (§ 1); (c) the requirement that the results of the examination be merged with the results of an earlier examination held on June 26, 1965; and (d) the requirement that a single list be established "in the same manner as if both tests were held on the same date." (§ 2.) It follows that c. 682 of the Acts of 1965 has no application to future examinations.

As for your second question, I must respectfully refrain from expressing an opinion, as the question relates to a possible determination by another agency, the Massachusetts Commission Against Discrimination, and should, it seems, be submitted by that agency if an opinion is desired. An Attorney General renders official opinions only on matters requiring action by a state official in relation to his own actions and decisions. My answer to your first question is, of course, pertinent to the second question.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 31. SEPTEMBER 20, 1967.

HONORABLE JOHN A. VOLPE, *Governor of the Commonwealth*

DEAR GOVERNOR VOLPE: — You have asked my opinion on whether you may delegate to the Commissioner of Administration your statutory authority to approve requests of officers and employees of the Commonwealth for out-of-state travel at public expense. I conclude that you may not do so.

The statute pertaining to such travel was enacted by c. 253 of the Acts of 1920 and is now the last sentence of G. L. c. 6, § 10. It provides:

> "No officer or employee of the commonwealth shall travel outside the commonwealth at public expense unless he has previously been authorized by the governor to leave the commonwealth, and in applying for such authorization the officer or employee shall specify the places to be visited and the probable duration of his absence."

Upon consideration of the matter, I am of the opinion that you are not authorized to make the indicated delegation. It is a settled principle that "Official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person." *Brown* v. *Newburyport,* 209 Mass. 259, 266. See *Springfield* v. *Common-*

wealth, 349 Mass. 267, 271-272. That principle seems to me to be applicable here. By requiring an officer or employee to "specify the places to be visited and the probable duration of his absence" in relation to an expenditure of public funds, the statute signifies that approval of travel is not to be a perfunctory act. It imports investigation and sanction according to sound judgment, and not a mere ministerial indorsement or ratification.

By the foregoing I do not mean to imply that without delegating your responsibility, you cannot exercise your authority with the assistance of persons whom you may appoint. That is to say, although you may not delegate your decision-making responsibility, you may nevertheless assign to other persons the mechanical and ministerial acts that may be required in the processing of the travel applications that may be submitted to you. *Restatement of Agency,* 2d, sec. 78, comment (b).

In thus concluding that you may not delegate your decision-making responsibility, I am not unaware of cases such as *Shreveport Engraving Co., Inc.* v. *United States* (5th Cir.) 143 F.2d 222, 226 (1944) sustaining a delegation of authority by the President of the United States. Such cases however involve situations where the President has been vested with broad authority over the administration of programs so large and complex that a power of delegation may fairly be implied. In the case of your approval of travel requests, however, I am of the opinion that the statute, being specific in its assignment of decision-making duties to you, does not permit you to delegate them to others.

I recognize, of course, that the burdens of the office of Governor are much greater and more time-consuming than they were in the simpler days of 1920 when the legislation under consideration was enacted. Yet its meaning is clear and, in my opinion, prevents you from delegating to the Commissioner of Administration your authority to approve travel requests thereunder.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 32. SEPTEMBER 22, 1967.

HONORABLE THEODORE W. SCHULENBERG, *Commissioner of Commerce and Development*

DEAR COMMISSIONER SCHULENBERG: — You have requested my opinion on the validity of a bid submitted to the Division of Housing in your Department to provide comprehensive public liability insurance on state-aided local housing projects. The bid was submitted on behalf of a New York insurance company, admitted to do business in Massachusetts, by a Massachusetts insurance concern, which was licensed here as a broker (i.e., authorized to represent applicants for insurance) but was not licensed here as an agent of the insurance company for which it acted in this case. That company was the lowest of three bidders for the insurance in question. No issue is raised as to the legal sufficiency of the bids submitted by the second and third companies.

After careful consideration of the matter, I am of the opinion that the bid in question was valid. There is no requirement in the General Laws that a

foreign insurance company that has been admitted to do business in Massachusetts may issue liability insurance only through a licensed agent. The provision of G. L. c. 175, § 157 requiring foreign insurance companies, admitted to do business here, to make their contracts through resident agents applies only to "contracts of insurance upon [1] lives, property or interests therein, and [2] annuity or pure endowment contracts on lives therein, and [3] contracts of suretyship with or in favor of residents [of the Commonwealth]. . . ." A contract of liability insurance, however, is not encompassed in any of the foregoing classes of contracts. Plainly, it does not come within classes [2] and [3]; nor does it come within class [1]. Liability insurance is an assumption by an insurance company of its insured's potential liability for causing damage to third persons. Vance, *Handbook on the Law of Insurance,* 3rd ed. (1951) p. 999. Class [1] insurance, on the other hand, commonly described as insurance "on" property or "on" life, provides indemnity against possible loss of something of value. Thus as stated by Chief Justice Shaw in a case involving a fire insurance policy,

> "An insurance of buildings against loss by fire, although in popular language it may be called in insurance of the estate, is in effect a contract of indemnity, with an owner, or other person having an interest in the preservation of the buildings, as mortgagee, tenant, or otherwise, to indemnify him, against any loss, which he may sustain, in case they are destroyed or damaged by fire. . . ." *Wilson* v. *Hill,* 3 Met. 66, 68.

See also *Converse* v. *Boston Safe Deposit and Trust Co.,* 315 Mass. 544, 548, 550; *Lynn Gas & Electric Co.* v. *Meriden Fire Insurance Co.,* 158 Mass. 570.

Further, I find no violation of G. L. c. 175, § 163, relative to the licensing of agents of insurance companies. Section 163 prescribes a procedure for the licensing of insurance agents. Its only terms of prohibition however are contained in a sentence that provides:

> "Whoever, *not being a duly licensed insurance broker* . . . acts as an insurance agent . . . without [a] license or during a suspension of his license, shall be punished by a fine of not less than twenty nor more than five hundred dollars." (Emphasis supplied.)

In the present situation, the representative of the low bidder, although not licensed as an agent, was, as you state, licensed as a broker. By the express exclusion just quoted, he was therefore not prohibited from acting as an agent. No other prohibition being applicable, I find, on the facts that you have presented, no impediment in the bid. If otherwise in compliance with your requirements, it may be accepted.

Very truly yours,

Elliot L. Richardson, *Attorney General*

Number 33. September 28, 1967.

Hon. Howard Whitmore, *Commissioner, Metropolitan District Commission*

Dear Commissioner Whitmore: — You have requested my opinion on whether the 52% reduction that the Metropolitan District Commission

(MDC) is required by St. 1959, c. 612, § 9* to make in the city of Boston's debt service payments toward the Metropolitan Sewerage District (the Sewerage District), "[if] . . . the Boston main drainage district has not been connected to sewers operated by the [Sewerage District]. . .," may be changed as the result of the completion in May, 1967 of only one of two planned connections.

The background of the legislation is detailed in an opinion of the Attorney General on August 28, 1961 (Report of the Attorney General for the Year Ended June 30, 1962, p. 69). The cited opinion ruled that the 52% ratio could not be changed even though inequities might be found to exist in its application. It appears, however, that the opinion was addressed to a situation where no connections of any sort had been made between the Boston Main Drainage System and the Sewerage District.

The authority of the MDC to fix the proportionate contributions of member cities and towns toward the Sewerage District is contained in G. L. c. 92, §§ 5 and 5A, appearing in St. 1959, c. 612, § 3, as amended by St. 1961, c. 230. In pertinent part § 5A reads as follows:

> "Not later than September first in the year nineteen hundred and sixty-one and in each year thereafter, the commission shall establish, as provided in section five, the proportion in which each of the cities and towns served by said system shall annually pay money to the commonwealth to meet interest and principal requirements to be borne by all cities and towns served by the metropolitan sewerage system; provided, however, that no changes shall be made in the proportions established in the year nineteen hundred and sixty except such as are occasioned by construction and connections authorized by law after January first, nineteen hundred and sixty or authorized by the commission under section two or by changes, authorized by the commission, made in a municipality's sewer connections to said system subsequent to said January first. . . ."

Section 9 of St. 1959, c. 612 provides:

> "If on any November first the Boston main drainage district has not been connected to sewers operated by the metropolitan sewerage district, fifty-two percent of the amount which would be apportioned to the city of Boston, under chapter ninety-two of the General Laws as amended by sections two, three and four of this act for interest and principal shall be divided among all other cities and towns in the sewerage district, and only such portion of the area of the city of Boston as is presently served by the metropolitan sewerage system shall be considered to be a part of the metropolitan sewerage district in the apportionment of the cost of maintenance and operation as provided in section six of chapter ninety-two of the General Laws as amended by section three of this act."

After careful consideration I am of the opinion that in the existing situation the full 52% reduction must continue to be applied to Boston's proportionate share. It appears that at the time of the enactment of St. 1959, c. 612 Boston had one section of its drainage system connected to the Sewer-

*Section 9 was not inserted in the General Laws.

age District but a second section, known as the Boston Main Drainage System, had not been connected at any point to the Sewerage District. See *Report of the Special Commission to Study the System of Sewerage Disposal and the Water System in the Metropolitan District and City of Boston,* 1959 Senate Doc. No. 595, p. 9. See St. 1951, c. 645. The statutory device that was employed to avoid charging Boston for its unconnected Main Drainage System was (1) to apportion to Boston, as to other municipalities, a fixed percentage* of the debt service of the entire Sewerage District (including the Boston Main Drainage System) as though each municipality was fully utilizing the District's facilities and then (2) to allow, as provided in § 9 quoted above, the city of Boston a 52% reduction in the apparent belief that the 52% reduction fairly took into account the as yet unconnected Boston Main Drainage System.

Nothing in § 9 expressly provides for an adjustment of the 52% factor if Boston should have made a partial connection on an apportionment date; and I am of the opinion that provision for such an adjustment cannot be implied. Pertinent to the matter is the decision of the Supreme Judicial Court in the case of *Milton* v. *Metropolitan District Commission,* 342 Mass. 222, holding that St. 1959, c. 612, § 5, 5A fixed for a period of five years the basic percentages of each municipality's contribution,* and that the town of Milton's contribution to the Sewerage System could not be reduced during that period, at the instance of the town, because of a decrease in the town's need for the Sewerage System. In that case the Court said at page 227,

> "Even if an injustice or a hardship were to result, it is not the province of this court to so interpret the language of the statute that such a result may be avoided, where, as here, the language of the statute, taken as a whole, is clear and unambiguous. [Citations] To stretch the meaning of a statute so as to adjust an alleged injustice, inequity or hardship could cause a multiplicity of interpretations as each alleged injustice, inequity or hardship arose."

The only affirmative authority of the MDC to make adjustments in a municipality's proportionate share, specified in § 9, of the debt service charges is contained in G. L. c. 92, § 5A, quoted above. Adjustments must be only "such as are [1] occasioned by construction and connections authorized by law after January first, nineteen hundred and sixty or [2] authorized by the commission under section two or [3] by changes, authorized by the commission, made in a municipality's sewer system connections to said system subsequent to said January first. . . ." In the present case none of these three conditions appears to be applicable.

I also observe that allowing Boston the full 52% reduction despite a partial connection does not necessarily result in a windfall to that city. It may be that a partial connection will not proportionately reduce the operating and maintenance charges that Boston would still have to bear for the unconnected remainder of its Main Drainage System. Certain of these charges may be constant and may remain unchanged until the full connection is made.

---

*Boston's percentage was 36.18%.

*St. 1961, c. 230 amended G. L. c. 92, § 5A, inserted by St. 1959, c. 612, § 3, by providing for an annual adjustment of the basic percentages if any of the conditions enumerated in § 5A quoted above was met.

By the foregoing I do not mean to imply, if only a minor and insubstantial connection remains to be made, that Boston would still be entitled to the reduction afforded by the 52% factor. In the present case, however, the incomplete connection does not appear to be of that character.

In summary, then, on the facts submitted, I conclude that no adjustment can yet be made in the 52% factor applicable to Boston's share.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 34. OCTOBER 4, 1967.

RICHARD M. MILLARD, *Chancellor, Board of Higher Education*

DEAR CHANCELLOR MILLARD: — You have sent me a request of the Board of Trustees of State Colleges asking for my opinion on certain legal aspects of an application by Gregory J. Cunningham to withdraw his resignation as a Midshipman at the Massachusetts Maritime Academy where he was enrolled as a member of the Class of 1968. The background of the matter, as stated in various documents accompanying the request, so far as the facts appear to be beyond dispute, is briefly as follows:

Late Saturday evening, April 15, 1967, or early Sunday morning of the next day, Midshipman Timothy F. Hayes, 2d, was injured as the result of an assault on him while on board the Academy's training ship Bay State in port during a training cruise at Freeport, Grand Bahama Island. On Sunday, the 16th, following an investigation by Lt. Commander Alan McNaughton, USNR, who listed three witnesses to the assault, Midshipman Cunningham was placed on report for "Assaulting Another Midshipman" and was given a written notice, entitled "Subj: Violations of Regulations, Class I Offense," signed by Captain Louis A. Woodland, USNR, the ship's master, stating "[1] On Sunday, 16 April 1967, you were reported for the following offense: Assaulting Another Midshipman. [2] A special Board of Officers will be convened, in accordance with Article 100.9 of Academy Regulations, on Tuesday, 18 April 1967. [3] You are notified that you may submit a written statement, or indicate that you do not so desire, in writing and [4] You are reminded that in accordance with Article 100.10 you may select an officer of the Academy staff to act as your advisor." It does not appear that Captain A. Sanford Limouze, USMS, the President of the Academy, was on the cruise. Captain John G. Stein, USMS, the Commandant of Midshipmen, was aboard. The documents submitted to me do not indicate Midshipman Cunningham's exact age, but it is plain that he is under the age of twenty-one and is probably nineteen years old.

On April 18th the Board, consisting of three members selected by Captain Woodland, convened and conducted an inquiry. Midshipman Cunningham had no counsel and was not present during the testimony of the various witnesses. Whether or not he was told by the Board that the Board would appoint "counsel" if he so desired is not entirely beyond dispute. President Limouze, in a statement to the Trustees' Committee on Student Activities, referred to below, asserts that the senior member of the Board has reported to him that the Board offered to appoint an officer to serve as counsel but that Midshipman Cunningham declined the offer. Midshipman Cunningham concedes that the Board offered to appoint someone to be his "advisor."

When called before the Board, Midshipman Cunningham submitted a paper declaring "I have no written statement to make at this time." The Board asked him if he had anything to say, whereupon he made certain statements, which the Board regarded as admissions, and the Board asked him questions.

At the conclusion of the hearing, the Board, on April 18, prepared a written report to President Limouze, stating that the Board had convened "[i]n accordance with Article 100.09" of the Academy's regulations, that it had investigated the offense and that "It was ascertained by admission and investigation that the subject Midshipman [Cunningham] did commit assault on the person of Midshipman Timothy F. Hayes, 2d, Class of 1968, on 16 April 1967." The report also stated, "It is the unanimous decision of the Board that Midshipman Gregory John Cunningham be dismissed from the Academy. The Board took into consideration the extent of the injuries sustained by Midshipman Hayes in arriving at this decision. Medical Officer's statement concerning list of injuries attached."* The report was delivered to Captain Woodland who forwarded it through Captain Stein to President Limouze by indorsement dated April 18, 1967. On the following day Captain Stein added his own indorsement, which will be referred to below.

Prior to the convening of the Board, Midshipman Cunningham had asked Lt. Commander McNaughton, his division officer, to serve as his counsel before the Board. Lt. Commander McNaughton declined. Midshipman Cunningham then asked Lt. Commander McNaughton for advice, whereupon they discussed the Academy's regulations and the possibility of Midshipman Cunningham resigning from the Academy.

On April 18 (whether before, during, or after the hearing is unclear) Midshipman Cunningham signed and delivered to someone on the ship a document reading "I hereby submit my resignation from the Massachusetts Maritime Academy." It added, "My reason for this request is: Personal." The document reached Captain Stein who indorsed it on April 19 to President Limouze. Captain Stein's previously mentioned indorsement, on the same day, of the Board's report of its hearing contained the statement, "Recommend that request for resignation be considered."

On April 22, the Bay State returned to Massachusetts, docking at Boston. The various documents were delivered to President Limouze, who indorsed on the resignation, "Resignation accepted this date. [April 22.]" No action was then taken or has since been taken on the Board's report and recommendation. Midshipman Cunningham's enrollment at the Academy thereupon terminated.

Subsequently, on July 18, 1967, as the result of a complaint by Mrs. Edward A. Cunningham, Midshipman Cunningham's mother, that her son had been "forced" to resign, the Board of Trustees of State Colleges July 18, 1967 directed its Committee on Student Activities to investigate the matter and also to report on a request by Mrs. Cunningham that her son be allowed to rescind his resignation and to be heard with counsel. The Committee thereupon requested President Limouze, on the one hand, and Mrs. Cunningham (who had then engaged counsel), on the other, to submit written statements of the matter, with written rebuttal statements, if they desired, of each other's statement in chief. Based on the original and rebuttal state-

*Not attached to this opinion.

ments, which President Limouze and Mrs. Cunningham submitted, and without interviewing any of the persons concerned, a majority of the Committee reported to the Board of Trustees that the hearing before the Board did not comport with requirements of due process in that Midshipman Cunningham had no counsel, was not afforded an opportunity to confront his accusers and to cross-examine them, and was not advised of his right to remain silent. The report also noted a "possible failure" of the Academy to comply with its own regulations respecting the appointment of the Board. On the basis of the foregoing, the Committee declared that "Midshipman Cunningham's resignation was too closely connected with the order of events to let me [the author of the Committee's report] believe that it should be allowed to stand in view of the request for rescission." The Committee then recommended to the Board of Trustees that Midshipman Cunningham "be given the right to rescind his resignation and, if exercised, to be reinstated as a Midshipman in the Academy." The foregoing report has not yet been acted on by the Board of Trustees.

Through the Chancellor of the Board of Higher Education, the Board has now asked me the following questions:

"1. Under Chapter 73 of the General Laws of the Commonwealth and the regulations of the United States Department of Commerce is the nature of the Massachusetts Maritime Academy a military or civilian institution? As such, are investigative procedures of a military or civilian nature to be expected?

"2. Have the procedures used by the Massachusetts Maritime Academy in the subject case provided adequate safeguards of the constitutional rights of the midshipman involved?

"3. Would the Board of Trustees be on safe legal ground in upholding the action of the administration of the Maritime Academy in

a. accepting the Cunningham resignation? and

b. accepting the recommendation of the Board of Inquiry that Cunningham be dismissed from the Academy?"

The province of the Attorney General, as settled by long established practice, when he is asked for a formal legal opinion by a state agency, is to deal only with the legal issues, not to endeavor to give his appraisal or personal judgment of the total situation. Accordingly, I will confine myself to the legal issues only. I will begin by describing the nature of the Academy in order that the legal issues may be viewed in the context out of which they arise.

The Massachusetts Maritime Academy is a state institution located at Buzzards Bay. Now provided for by G. L. c. 73, § 1, it was established by St. 1891, c. 402 as the Massachusetts Nautical Training School. By St. 1913, c. 224, § 1, the school's name was changed to Massachusetts Nautical School. By St. 1942 (Spec. Sess. c. 1, § 1) the institution was given its present name. Today it offers a three-year college-level course to train young men to qualify for licensing as deck and engineering officers in the merchant marine and for commissioning as ensigns in the United States Naval Reserve. It awards a Bachelor of Science degree.

Prior to 1964 the school was under the supervision of a Board of Commissioners and a superintendent. By St. 1964, c. 561, § 1 the Board was abolished and St. 1964, c. 561, § 8 placed the school under the Board of

Trustees of State Colleges, "which board shall have general management of . . . the Massachusetts Maritime Academy." St. 1964, c. 561, § 7, amending G. L. c. 73, § 1. The Board was directed "to provide and maintain the Massachusetts Maritime Academy as a nautical college for the instruction of students in the science and practice of navigation, seamanship and marine engineering, accommodations therefor on board a proper vessel at its present location and at such land facilities, including the present facilities, as the said Trustees shall designate, books, stationery, apparatus and supplies needed in the work thereof, and shall appoint and may remove necessary instructors and other employees, determine their compensation, fix the terms upon which students shall be received and instructed therein and discharged therefrom, make all regulations necessary for its management and provide from time to time for cruises. Said trustees shall establish an annual service fee for each midshipman, other than out-of-state students, in an amount not less than one hundred and fifty dollars annually for each such midshipman.

"The trustees may receive from the federal government, and use for the accommodation of the Maritime Academy, vessels detailed by the secretary of the navy." St. 1964, c. 561, § 8, amending G. L. c. 73, § 1.

Under the Federal Maritime Academy Act of 1958, 46 U.S.C. §§ 1381-1388, Congress declared that its policy to develop, encourage and maintain a merchant marine should include "assisting and cooperating with the States and Territories in the operation and maritime academies or colleges for the training of merchant marine officers." 46 U.S.C. § 1381. To effectuate this policy, the Act authorized the Secretary of Commerce to furnish to Massachusetts, as well as to other states, "a training vessel for a maritime academy or college meeting the requirements of [the Federal government]," 46 U.S.C. § 1382(b). The Secretary was also authorized to make contracts for financial assistance to state maritime academies. 46 U.S.C. § 1383. An academy's use of vessels and its right to receive financial assistance were however conditioned on the academy conforming to "such standards in [its] course [of instruction], in training facilities, . . ., and in instructors, as are established by the Secretary after consultation with superintendents of maritime academies and colleges in the United States." 46 U.S.C. § 1384(a)(2). The Secretary was also authorized to "establish such rules and regulations as may be necessary to carry out the provisions of [the Act]." 46 U.S.C. § 1387.

By regulations of the United States Maritime Administration, which is within the Department of Commerce, certain minimum standards have been established for state maritime academies and colleges. General Order 87 (rev. March 13, 1967) 46 CFR §§ 310.1-310.12. The regulations provide that "Each school shall establish a demerit system for Cadet infractions of the Schools' [sic] Rules and Regulations." § 310.10(b). "Rules and regulations for the internal organization and administration of each School will be determined under the direction of the State authority." § 310.3(b)(4). I assume that the Massachusetts Maritime Academy has entered into a standard form of financial assistance agreement with the Maritime Administration of the Department of Commerce, as prescribed by § 310.12. Article 6 of such an agreement provides that "This Agreement is subject to all the provisions of Administrative General Order 87." § 310.12.*

*The Academy's booklet on "General Information and Entrance Requirements" states, "The Academy is subject to the regulations of the Training Organization of the United States Maritime Administration."

It is, in my opinion, clear that the Massachusetts Maritime Academy is, in a legal sense, a civilian, not a military, institution. That is, its students are not an element of the armed forces of the United States. The students do, it is true, on graduation, become eligible to apply for commissions as ensigns in the United States Naval Reserves. Yet they are not, while at the Academy, members of the United States Navy or of its Reserves.

Nonetheless, it is well recognized that many of the features of a Navy institution apply to the Academy. Service at sea has traditionally demanded adherence to high standards of discipline. Officers, in particular, have been expected to meet rigorous requirements of discipline and personal conduct, since the safety of crews and ships cannot be left to the hands of men who lack the discipline and capacity to follow their superiors and to direct their subordinates. It is for this reason that the pamphlet containing the General Information and Entrance Requirements for the Academy states, "Only young men of rugged physique, determined in their desire for a seafaring life and its associated industries, and amenable to strict discipline, should apply for admission."

I turn now to the proceedings of the Board of Inquiry in Midshipman Cunningham's case. You have furnished me with a copy of "Regulations and Instructions for the Battalion of Midshipmen of Massachusetts Maritime Academy," promulgated in 1965 over the signature of the President of the Academy. Each student received a copy, Midshipman Cunningham receiving his on June 21, 1966.

The regulations appear to be patterned after those in force at the United States Merchant Marine Academy at Kings Point, New York. See *Wasson* v. *Trowbridge, Acting Secretary of Commerce,* 382 F2d 807 (2d Cir., Sept. 13, 1967). They begin with a preamble reciting:

> "Honor, integrity, loyalty to superiors, and reverence for the traditions of the Merchant Marine of the United States are fundamental characteristics and attributes of a successful Merchant Marine Officer. Any Midshipman unable to conduct himself in a manner indicating the highest standard of honesty, integrity, and manliness, is not worthy to become a licensed Merchant Marine Officer or to enjoy the privileges and receive the education and training provided by the Commonwealth, and shall be subject to separation from the Academy."

Article 100.00 provides:

> "A high standard of discipline must be maintained at the Academy. The regulations, instructions, rules and orders which control the discipline of the Academy and its corps of Midshipmen, are prescribed by the President. There must be no hesitancy or failure on the part of a Midshipman to recognize the authority delegated by the President to subordinate officers. It is considered serious misconduct for any Midshipman, alone or in concert with others, to adopt any measure — oral or written — for the purpose of violating or evading any Academy rule or regulation. No Midshipman, alone or in concert with others, shall commit any act contrary to the rules of good order or discipline, or endeavor to induce others to commit such an act."

Breaches of Academy discipline are placed in three categories, Classes I,

II and III, respectively. Class I offenses are those which may be punished by dismissal; Class II offenses are those which may result in not more than 100 demerits for each offense, and other punishment, short of dismissal. Class III offenses are the least serious and are punishable by not more than 50 demerits.

If a Class I offense is involved, certain procedural safeguards must be followed. Article 100.09 provides in part:

> "a. When the Commandant of Midshipmen classifies or concurs in classifying a deficiency as a Class I Offense, and has the approval of the President, he shall immediately serve the Midshipman concerned with a statement containing formal charges and specifications in writing and shall advise the Midshipman that he may submit a written statement in reply within 24 hours. If the Midshipman does not desire to make such a statement, he must so indicate in writing. If, however, he chooses to make a statement, it will become a part of the record in any subsequent investigation and hearing. The Commandant of Midshipmen shall also recommend to the President that a Special Board of Officers be convened, which Board shall consist of at least three Officers.
>
> "b. The Special Board of Officers shall convene no sooner than 24 hours after the Midshipman has been served with the charge and shall conduct a thorough inquiry into the facts of the case. The Midshipman and his counsel (see Article 100.10) shall appear before the Board. . . ."

The decision of the Board of Officers takes the form of a recommendation to the President of the Academy. The recommendation can be either (1) exoneration, (2) an award of demerits or (3) dismissal. (Art. 100.09(b).) If the Board recommends dismissal and the President approves, "the President will forward his recommendations to the Board of Trustees for final action." (Art. 100.09(d).) Article 100.10, entitled "Right to Counsel," provides that a midshipman who is charged with a Class I offense "shall be free to select as counsel any officer on the Academy staff willing to so serve. In the event that the midshipman is unwilling or unable to obtain such counsel, the President may appoint an officer to serve in such capacity." Article 100.10(b) provides in part that "Such counsel shall function as an advisor rather than as an advocate. He is to furnish the Midshipman with guidance so as to enable the Midshipman to present his position, truthfully and with clarity and accuracy. It is not the function of the counsel to encourage the use of any tactics or techniques of evasion so as to prevent the Board from ascertaining the truth of the matter before it."

Article 100.12 is entitled "Resignation While Under Charge of a Class I Offense." It provides, "Prior to the convening of the Special Board of Officers in the case of a Class I Offense, the Midshipman so charged may voluntarily submit his resignation. Subsequent to the convening of the Special Board, the President may refuse to accept the resignation of the Midshipman so charged."

Turning now to Midshipman Cunningham's case, in the light of the Academy's regulations that have been furnished to me, the facts establish

that the President of the Academy was not on board the Bay State when the Board convened and he did not prior to the convening of the Board approve the bringing of formal charges against Midshipman Cunningham. (Art. 100.09(a).) Nor did the President receive or act on any recommendation that a Board be convened. (Art. 100.09(a).) Finally, the President did not convene the Board nor appoint its members. Rather the Board was appointed and convened by Captain Woodland, the master of the Bay State.

Article 100.09(a) of the Academy's regulations, quoted above, states that "When the Commandant of Midshipmen classifies or concurs in classifying a deficiency as a Class I Offense, *and has the approval of the President,* he shall immediately serve the Midshipman concerned with a statement containing formal charges. . . ." (Emphasis supplied.) Article 100.09(a) also provides that "The Commandant of Midshipmen shall also recommend to the President that a Special Board of Officers be convened, which Board shall consist of at least three officers." This sentence is followed by Art. 100.09(b) which begins with the statement, "The Special Board of Officers shall convene no sooner than 24 hours after the Midshipman has been served with the charge and shall conduct a thorough inquiry into the facts of the case."

In my opinion, the foregoing provisions place on the President alone the responsibility of making the final decision as to whether formal charges shall be brought for a Class I offense and also whether a Board shall be appointed and convened to hear the matter.

Nothing in the regulations, I observe, allows the President to delegate his responsibilities in these matters to any other person. Nor, in my opinion, can any such power of delegation be implied. The decisions that the President is required to make in respect of proceedings in Class I offenses plainly contemplate and require the exercise of his personal judgment and discretion. Since a Class I offense may result in dismissal of a Midshipman from the Academy, the President's direct and independent action and judgment are essential both for the bringing of formal charges for a Class I offense and also, if an offense is so classified, for the valid appointment and convening of a Board of Officers to investigate and report on the matter. This personal participation of the President is required in order to ensure that a violation will not, without his deliberate reflection, be treated as a Class I offense, that it will be handled consistently with like matters at the Academy and that the Board of Officers who are assigned to hear the matter will be carefully selected for the major responsibility that they must discharge. The fact that an infraction may occur while the Midshipmen are on a training ship away from Buzzards Bay does not change this conclusion. The required authority, under the regulations that have been furnished to me, can be exercised only by the President.

It follows that the failure to conform to the Academy's regulations in Midshipman Cunningham's case rendered the Board's proceedings invalid as a basis for ordering his dismissal. The law is settled that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen. . . ." *Service* v. *Dulles,* 354 U.S. 363, 372. To the same effect, see *Vitarelli* v. *Seaton,* 359 U.S. 535, 539-540, 546-547. A material departure from regulations, as in the decision to bring formal charges and to appoint and convene the Board in the present case, without the personal action of President Limouze, must therefore be regarded as depriving the Board's action of any force as a basis for dismissal under the Academy's regulations.

The facts show, however, that Midshipman Cunningham's enrollment at the Academy terminated as the result of his resignation, not as the result of a dismissal. And it does not follow from the invalidity of the Board's proceedings as a basis for a dismissal that Midshipman Cunningham must now be allowed to withdraw his resignation. Certainly, on the basis of the facts before me, it cannot be said as a matter of law that he is entitled to do so. The matter is rather essentially one for the exercise of a wise, informed judgment of the Trustees, giving appropriate weight, as they must, to the determination of President Limouze in the light of his responsibility to administer the Academy fairly and firmly as an institution for the training of youths for the rigorous life of seafaring men. These youths are to follow in a great line of men "that do business in great waters." President Limouze, as the public official directly responsible for the training of these youths, may properly be regarded by the Trustees of State Colleges as having broad discretion in the handling of student discipline. Accordingly, the Trustees, if they are reasonably satisfied that the President did not exceed his discretion, may properly sustain his action. Specifically, if the Trustees are reasonably satisfied that although President Limouze did not initially approve the bringing of formal charges and although he did not appoint or convene the Board of Officers, he did, in the light of all the facts and circumstances, nevertheless treat Midshipman Cunningham fairly in accepting his resignation, the Trustees may properly decline to permit Midshipman Cunningham to withdraw it. Mere generalities, of course, cannot be the test of fairness in this regard. "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary [President Limouze] whose conduct is challenged, the balance of hurt complained of and good accomplished — these are some of the considerations that must enter into the [Trustees'] judgment." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 163. It may be that in the present case President Limouze was justifiably satisfied that Midshipman Cunningham did in fact commit the offense with which he had been charged but that concern for the youth's future, which would be marred by a record of dismissal, led the President to consent to a mode of departure from the school that would not carry a stamp of misconduct.

If, on the other hand, the Trustees, after consideration of the matter, should nevertheless conclude that Midshipman Cunningham should be permitted to withdraw his resignation, it does not, I wish to point out, follow that he must thereby be reinstated without qualification. Full reinstatement could, in my opinion, properly be conditioned on the outcome of a new hearing to be held before a properly convened Board of Officers to consider the assault charges against Midshipman Cunningham as though his enrollment in the school had not terminated.

Directing my attention now to the specific questions that the Trustees have submitted to me, my replies are as follows:

1. I believe that I have answered the first part of this question in the course of my description of the Academy. The second part of this question is extremely vague in its inquiry whether "investigative procedures of a military or civilian nature [are] to be expected [at the Academy]?" Military, no less than civilian procedures, are expected to be fair.

2. The question whether the Academy "provided adequate safeguards of the constitutional rights of [Midshipman Cunningham]" is once again extremely vague. Because of my determination that the Board of Officers was illegally convened, I find it unnecessary, however, to embark on the broad constitutional inquiry that the question suggests. The essential issue, moreover, in the present case is not the adequacy of the Academy's procedures in the conduct of the hearing by the Board of Officers but rather the action of President Limouze in accepting Midshipman Cunningham's resignation. Although the two matters may be related, it is for the Trustees, as I have already indicated, to make the final judgment in the light of all the facts and circumstances before them.

3. Question 3a has already been answered in the course of this opinion. Since the Board of Officers was illegally convened, and since in any event the President has not approved the recommendation of dismissal (Art. 100.09(d)), my answer to Question 3b is in the negative.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 35. OCTOBER 9, 1967.

GEORGE W. KILLION, *Secretary, Milk Control Commission*

DEAR MR. KILLION: — You have asked, in behalf of the Milk Control Commission, for my opinion regarding the provisions of G. L. c. 94A, § 13 (d). Chapter 94A is the Milk Control Law, and § 13 authorizes certain inspections by the Milk Control Commission and requires certain information to be submitted to the Commission by all milk dealers required to be licensed under the chapter. Section 13 (d) states:

> "The information obtained by any inspection authorized or reports required by this chapter or by similar provisions of earlier law shall be treated as *confidential* and *shall not be disclosed by any person* except as may be required in the proper administration of this chapter; provided, that the commission may use such information together with other similar information, for compilation and publication of statistics of the milk industry in this commonwealth. Such statistics shall not contain the name of, or disclose, by inference or otherwise, information obtained from the books and records of any milk dealer." (Emphasis supplied.)

You have stated in your letter:

> "Effective August 19, 1958, the Milk Control Commission issued Official Order No. G17-450, requiring milk dealers in the Greater Boston Area to file reports disclosing processing, packaging and distribution costs for such dealers' businesses. . . These reports were required by the Commission and submitted by the milk dealers under the provisions of the Milk Control Law, G. L. c. 94A, Sections 13 (b) and 13 (d).
>
> "Amendment No. 1 to Official Order G17-450, effective December 13, 1958, was issued subsequently, requiring cost reports for a later time period. All of these reports are still in the files of this agency.

> "A combined average summary of all the reports was prepared and used, in accordance with law, for statistical information at a public hearing.
>
> "On August 15, 1967, the Commission was in receipt of a letter signed by Edward B. Hanify, Attorney for H.P. Hood and Sons, Inc., and by C. Keefe Hurley, Attorney for nine other greater Boston milk dealers."

In that letter, a copy of which you have enclosed, attorneys Hanify and Hurley, "being duly authorized," purported to "waive any privilege of confidentiality" in behalf of their respective clients, named in the letter, and asked the Commission to make available for inspection and copying by each of the other's clients the cost questionnaires and supporting schedules and work sheets filed with the Commission by their own clients pursuant to the foregoing Official Order.

You then state:

> "The Commission is uncertain as to whether or not this requested information can be made available and whether or not the letter, making such request, can be treated as a waiver of the confidentiality provisions of the Milk Control Law, inasmuch as, the summary of all reports was testified to and is part of a public record with the names of the milk dealers whose reports were included in the summary. Thus, on the basis of the reports requested, there may be disclosure of the operations of other milk dealers who are not parties to the pending court action."

It is my opinion that you may not make these reports available for the requested inspection and copying. The statute states that the information submitted by the milk dealers, ". . . shall be treated as confidential and *shall not be disclosed by any person.* . . ." (Emphasis supplied.) The only exception to this bar is when a disclosure may be required "in the proper administration of this chapter," which I interpret to refer to instances when the information whould be required by the Commission itself in the discharge of its responsibilities. Nothing in the letter of Messrs. Hanify and Hurley brings their request within that situation.

I do not feel justified in assuming that the requirement of confidentiality was designed solely to protect the private interests of the individual milk dealers. If this was the only purpose, the dealers would be the only interested parties and might accordingly be entitled to waive confidentiality. The Legislature may, however, have had other reasons for the requirement. For example, it may have believed it to be undesirable for competitors to be able, in this manner, to share detailed information of this type. In any event, since the statutory prohibition is clearly expressed, and not ambiguous, I am not disposed to construe it as creating a mere personal privilege which may be waived.

I consider it significant, moreover, that the statute says not only that the information submitted by the dealers "shall be treated as confidential," but also that the information "shall not be disclosed by any person." I regard this latter provision as establishing an absolute bar to disclosure, not a qualified bar which might be waived by a particular dealer. For this reason, I find it unnecessary in the present situation to consider the possibility, alluded to in your request, that the release of the information in the reports,

when read together with data that is already a matter of public record, might indirectly divulge confidential information that dealers who have not joined in the request to the Milk Control Commission have filed with the Commission.

In conclusion, it is my opinion that you may not grant the described request.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 36. OCTOBER 10, 1967.

HONORABLE JOHN A. GAVIN, *Commissioner of Correction*

DEAR COMMISSIONER GAVIN: — You have requested my opinion on the effect of St. 1967, c. 379, amending G. L. c. 127, § 129, on the calculation of good conduct deductions in the sentences of prisoners who have been returned to correctional institutions for violation of parole. The amendment reads as follows:

> "A prisoner released on parole by the parole board, who has failed to observe all the rules of his parole and has been returned to a correctional institution for the violation of his parole, shall not receive deductions described in this section *until he has served six months following his return to the correctional institution*." (Emphasis supplied.)

Prior to the amendment, the phrase "until he has served six months following his return to the correctional institution" read: "for any of the first six months after he is returned to the correctional institution." In the case of *Allen* v. *Massachusetts,* 1967 Mass. Adv. Sh. 767, the Supreme Judicial Court held that the latter provision meant that "good conduct deductions are not to be earned during the [first six months after the prisoner is returned] but also that deductions based on the portion of the sentence, if any, remaining after the six-month period are not to be credited until the six months have elapsed." p. 770.

In its opinion (page 769, footnote 1) the Court noted that in the process of enacting the provision in question, which was inserted by St. 1965, c. 884, § 3, the Legislature had rejected an amendment which would have read as follows:

> "Notwithstanding any provisions of this section to the contrary relative to deductions from sentences, a prisoner whose parole has been revoked by the parole board and who has been returned to a correctional institution . . . for violation of his parole shall not be entitled to a certificate of discharge nor released *until he has served at least six months on said sentence from the date of his return,* provided, however, that the provisions of this paragraph shall not be construed as authorizing any prisoner to be held beyond the maximum term of imprisonment to which he was sentenced." (Emphasis supplied.)

It will be observed that this rejected amendment began, as St. 1967, c. 379 now begins, with the phrase: "until he has served. . . ."

In the *Allen* case the Court further noted that its single justice who had heard the case in the first instance had stated that if the rejected amendment had been adopted, it would have been "clearly consistent" with an "alternative interpretation" proposed in a former Attorney General's opinion on the matter, dated March 2, 1966, but not accepted by the Court. That opinion of the former Attorney General defined the "alternative interpretation" as follows:

> ". . . [I]n the event of violation of parole — good conduct deductions should not be calculated so as to authorize discharge of the prisoner during the first six months after his return to the institution. This can be accomplished by suspending the calculation of good conduct credits for the term which remains after the end of the parole period until the six month period . . . has expired. If, upon the calculation of credits at that time, the prisoner is entitled to a sufficient reduction in sentence, he may of course be discharged immediately; but he has at least suffered some penalty for having violated the conditions of his parole."

It is my opinion, in the light of the foregoing background, that the amendment added by St. 1967, c. 379 adopted the "alternative interpretation" in the former Attorney General's opinion.

On this analysis of the statute, I now turn to your questions. You ask:

> "1) In applying the new amendment, Chapter 379, Acts of 1967, does the department require the individual to serve six (6) months, unless the *expiration* of sentence is prior to that time, in confinement before applying any good conduct, or other deductions, as well as forfeitures of good time, before computing the individual's discharge date? (Emphasis in original.)
>
> "2) Is the individual entitled to have a discharge date computed after his return on revocation of parole by applying all the credits he had earned while confined prior to return to imprisonment?
>
> "3) What effect does the Commission's Bulletin 67-1 have on Chapter 379, Acts of 1967?"

As to Question 1, so far as it relates to good conduct deductions, my answer is *Yes*. Other deductions are not affected by St. 1967, c. 379. Forfeitures of good conduct time are to be reflected in computation.

As to Question 2, my answer is *Yes*. This conclusion is supported by the rejection in the Senate on June 7, 1967 of an amendment that would have added to the 1967 amendment: "No deductions under this section shall be retroactive." 1967 Senate Journal 1366, 1387.

As to Question 3, Bulletin No. 67-1 should be revised so as to delete the provision in the third paragraph that states that good conduct credits are not to be allowed for the six-month period beginning on the return of the prisoner for violation of parole. As I have indicated above, such credits are now allowable under St. 1967, c. 379 but crediting of them is suspended until the six-month period has expired.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 37. October 10, 1967.

Honorable Leo L. Laughlin, *Commissioner of Public Safety*

Dear Commissioner Laughlin: — You have asked me to determine whether certain inspectors in the Division of Inspection of the Department of Public Safety (the Department) ". . . are classified as police officers in the Commonwealth of Massachusetts."

You state that the personnel in question are state building inspectors, district engineering inspectors and state elevator inspectors, all appointed under G. L. c. 22, § 6, which provides that the Commissioner of Public Safety ". . . may appoint, transfer and remove officers, inspectors, experts, clerks and other assistants." Section 2 of c. 147 of the General Laws states that "all officers and inspectors of the department [of public safety] shall have and exercise throughout the commonwealth the powers of constables, police officers and watchmen, except as to service of civil process."

It is my opinion that state building inspectors, district engineering inspectors and state elevator inspectors appointed under G. L. c. 22, § 6 have, so far as the proper performance of their official duties may require, the powers of police officers. Whether or not in a more general sense they can, as you ask, "be classified as police officers" depends on the particular purposes for which you would so propose to classify them. There may be personnel statutes and various contexts in which categories of persons, merely because they have the powers of police officers, would not necessarily qualify for a "classification" as a police officer. Thus, without additional information I cannot answer your question in its broadest sense, viz. whether or not for every purpose the designated persons are "classified as police officers."

Very truly yours,

Elliot L. Richardson, *Attorney General*

Number 38. October 19, 1967.

Mrs. Helen C. Sullivan, *Director of Registration, Department of Civil Service and Registration*

Dear Mrs. Sullivan: — By your letter dated October 2, 1967 the Board of Registration in Veterinary Medicine has requested my opinion on whether an applicant for registration as a veterinarian, who has failed an examination for licensure in Veterinary Medicine, may, on taking a re-examination, be examined only in the subjects that he originally failed. Your letter stated:

> "The Board has felt for some time that an applicant who has passed the National Board examination, passed the State Board's practical examination and shown good grades in several subjects, should be allowed to take a re-examination in the subjects failed. Such examination to be given as soon as possible after failure of the first examination."

The subject of examinations for licensure in Veterinary Medicine is governed by the General Laws, c. 112, §§ 55 and 56, which provide in pertinent part:

§ 55. "An applicant failing to pass an examination satisfactory to the board may be re-examined upon payment of twenty-five dollars for each appearance, at such time and place as the board shall determine."

"56. "Examinations shall be in part in writing, shall be in English, and of a scientific and practical character. They *shall include* the subjects of anatomy, surgery, physiology, animal parasites, obstetrics, pathology, bacteriology, diagnosis and practice, therapeutics, pharmacology, veterinary dentistry and other subjects throught proper by the board to test the applicants' fitness to practice veterinary medicine." (Emphasis supplied.)

It is my opinion, based on the foregoing provisions, that the Board of Registration in Veterinary Medicine may not limit re-examinations to the subjects which an applicant failed in a prior examination. While the statute specifically allows re-examinations, it also prescribes the particular subjects to be included in all examinations. In view of this prescription, the Board may not lawfully limit an examination, even though it is a re-examination, to only some of these subjects.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 39. OCTOBER 23, 1967.

HONORABLE CROCKER SNOW, *Director of Aeronautics*

DEAR MR. SNOW: — You have requested my opinion on the liability of the Commonwealth for personal injuries and property damage arising from accidents caused by aircraft operated by the Massachusetts Aeronautics Commission. Your letter states:

"The Massachusetts Aeronautics Commission operates two state owned aircraft, a small twin engined airplane and a helicopter. These are flown both within and without the Commonwealth by Commission pilots who are regular state employees. They are used both for Commission business, inspecting airports, investigating accidents, etc., and for the transportation of elected and other state officials.

"It is, of course, possible that either of these aircraft could be involved in an accident which would damage the property of another, injure other people or injure the occupants or the crew of the aircraft."

In the event of such an accident, you wish to know whether or not the Commonwealth would be liable (1) for personal injuries and property damage sustained by third persons and (2) for personal injuries inflicted upon the occupants of the aircraft.

I am of the opinion that the first part of your question must be answered in the negative. "It is fundamental that the Commonwealth, along with its duly constituted public agencies, cannot be sued for the torts of its officers, agents or employees except by a clear manifestation of consent thereto by statute." *Smith* v. *Commonwealth*, 347 Mass. 453, 455-456. No such legis-

lative consent has been given for tort suits against the Commonwealth in cases arising from the operation of its aircraft or other equipment. Such suits may therefore be brought only against the operator.

This is not to say that operators of all state-owned equipment are left completely unprotected. Where a claim is made against a state employee by reason of his operation of a state-owned "motor or other vehicle," the Legislature, without actually consenting to a suit against the Commonwealth, has nonetheless afforded a considerable measure of protection to the operator. Thus, G. L. c. 12, § 3B provides that the Attorney General shall, under certain circumstances, "take over the management and defence" of a tort action brought against an officer or employee of the Commonwealth "arising out of the operation of a motor or other vehicle owned by the Commonwealth," and that the claim against him, within specified limits, "shall be paid from the state treasury. . . ." Similar provision is made in G. L. c. 12, § 3C for the settlement and satisfaction of certain claims, not involving lawsuits against a state officer or employee, "arising out of his operation of a motor vehicle or other vehicle owned by the Commonwealth. . . ."

However, the Legislature has made no provision for the assumption by the Commonwealth of the tort liabilities of its aircraft operators — under G. L. c. 12, §§ 3B and 3C or under any other statute of which I am aware. Apart from a serious question as to whether an airplane or helicopter qualifies as a "vehicle" under G. L. c. 12, §§ 3B and 3C (which need not be answered at this time), the absence of any existing appropriation of funds for damages caused by aircraft means that no payment of such damages may be made under those statutes in any event. Funds may be paid from the state treasury under § 3B only "from such appropriation as may be made by the general court for the purposes of this section . . ." and under § 3C only "from such appropriation as may be made therefor. . . ." The only such appropriation presently in effect has been made "for the settlement of certain claims, as provided by law, on account of damages by *cars* owned by the commonwealth and operated by state employees. . . ." (Emphasis supplied.) St. 1967, c. 414, § 2, Item 0802-01. Even if airplanes and helicopters were to be regarded as "vehicles" for purposes of G. L. c. 12, §§ 3B and 3C, it is clear that they are not "cars" and therefore not within the scope of the appropriation item. Thus, no payments may be made under §§ 3B and 3C on account of accidents involving Commonwealth aircraft.

I therefore conclude that the Commonwealth is not financially liable under existing legislation, either directly or indirectly, to third persons for personal injuries or property damage caused by Commonwealth aircraft. Any such liability would rest upon the operator of the aircraft (subject of course to any outside insurance arrangements which may be in effect).

In answer to the second part of your question, I invite your attention to G. L. c. 152 (the Workmen's Compensation Act), §§ 69-75 of which require the Commonwealth to compensate certain classes of state employees "who receive injuries arising out of and in the course of their employment. . . ." G. L. c. 152, § 69. Whether or not a particular occupant of an aircraft is covered by workmen's compensation, of course, involves a determination of fact, and can best be resolved through informal discussions with members of my staff.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 40. October 26, 1967.

Dr. Richard W. Hale, Jr., *Secretary, Records Conservation Board*

Dear Doctor Hale: — Acting on behalf of the Records Conservation Board, you have requested my opinion on certain legal aspects of a plan to microfilm and then destroy certified copies of purchase orders submitted to vendors by various state agencies. The certified copies are filed with the Comptroller's Division pursuant to G. L. c. 7, § 14, which requires that "all departments, offices, commissions and institutions authorized to make contracts under which money may be payable from the treasury shall file with the comptroller, before payment, certified copies thereof." When the certified copies are filed, the Comptroller's Division causes public funds to be encumbered for the required payments.

Your letter states that the Comptroller's Division, in order to save storage space and to increase efficiency, wishes to institute the practice of microfilming its copies of these purchase orders as they are recieved and destroying them immediately after the microfilm reproductions have been checked. With reference to this proposal you have asked, in substance, the following questions:

1. May the Records Conservation Board authorize the Comptroller's Division to destroy its certified copies of purchase orders in the regular course of business, immediately following their reproduction on microfilm?

2. Would such microfilm reproductions be admissible in evidence in a judicial or administrative proceeding to the same extent as the certified copies under G. L. c. 233, § 79E?

Question 1

In answer to Question 1, I am of the opinion that the Records Conservation Board has sufficient power to authorize the Comptroller's Division to destroy its copies of purchase orders in the manner proposed. General Laws c. 30, § 42 provides in part as follows:

> ". . . [The records conservation] board, after consultation with the chairman of any board or commission or the head of any department or institution or a person designated by such chairman or head may, either by its own motion or on the request of said chairman or head, sell or destroy, from time to time, all records in accordance with disposal schedules which shall have been submitted to said board and either approved or modified by said board. Until such action shall have been taken all records shall remain the property of the Commonwealth. . . ."

It seems clear that these documents are "records" within the meaning of the above-quoted provision of G. L. c. 30, § 42, since the following definition of that term appears in the same section:

> "As used in this section, the word 'records' shall mean all books, papers, maps, photographs or other recorded information, including public records as defined in section seven of chapter four, regardless of physical form or characteristics, created or *received by any agency of the commonwealth* or by any political

subdivision thereof, *in pursuance of law* or in connection with the transaction of its duties." (Emphasis supplied.)

Since, as previously stated, certified copies of purchase orders are "received" by the Comptroller's Division "in pursuance of" G. L. c. 7, § 14, they are "records" as defined in G. L. c. 30, § 42. Hence, their destruction may be authorized by the Records Conservation Board under that section unless their preservation is required by some other statute.

Your letter suggests the possibility that the power to authorize the destruction of these records may be limited by G. L. c. 233, § 79E, which provides:

> "If any business, institution, member of a profession or calling, *or any department or agency of government*, in the regular course of business or activity, has kept or recorded any memorandum, writing entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, shall be as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction shall be likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of the court. The introduction of a reproduced record, enlargement or facsimile, shall not preclude admission of the original." (Emphasis supplied.)

To be sure, the first sentence of § 79E is cast in terms of the power to destroy records which have been reproduced, and the exceptions for a record "held in a custodial or fiduciary capacity" and for a record whose "preservation is required by law" might be taken as imposing a restriction on the powers of the Records Conservation Board with respect to documents falling into those categories. However, I do not believe this to be the case. In my opinion § 79E does nothing more than state a rule of evidence, and neither sanctions nor inhibits the destruction of any record *per se*. Thus, while this statute might well determine the *advisability* of destroying a particular record, it does not affect the *power* to do so.

It is therefore my opinion that if the Comptroller's Division microfilms the certified copies of purchase orders issued by state agencies as they are received by the Division, the Records Conservation Board may authorize the immediate destruction of the certified copies.

Question 2

As indicated in my answer to Question 1, the future admissibility in evidence of microfilm reproductions of the records under consideration could properly be a decisive factor in the deliberations of the Records Conservation Board regarding their proposed destruction. The issue raised in Question 2, then, is this: Assuming that a certified copy of a particular purchase

order would be admissible in a given proceeding, would a microfilm reproduction of the certified copy be admissible in lieu thereof?

Under G. L. c. 233, § 79E, quoted above, a microfilm of such a record, prepared in the regular course of business, is admissible in evidence to the same extent as the original* unless the original is "held in a custodial or fiduciary capacity or unless its preservation is required by law." Taken literally, every one of these restrictions would seem to describe the records which the Comptroller's Division proposes to reproduce and thereby to deprive the reproductions of the benefits of § 79E. Thus, they can be said to be held in a "custodial" capacity, since the Comptroller's Division plainly has custody of them. They are also held in what amounts to a "fiduciary" capacity, for all public officers are fiduciaries and all their public duties are performed in a fiduciary capacity. Moreover, the preservation of these records is "required by law" in that they may not be destroyed without the permission of the Records Conservation Board.

Still, I am of the opinion that the exceptions to the admissibility rule of § 79E were not intended to apply to records of this kind. If these exceptions were given the broad interpretation suggested in the preceding paragraph, every public document of every description would fall within all three and no reproduction of any such document could ever be admitted in evidence under § 79E. This could not have been the intention of the Legislature, for the statute makes reference in the same sentence to the records of "any department or agency of government. . . ." Such an interpretation, moreover, is contradicted by the titles of the act by which § 79E was inserted in the General Laws in 1952 and those by which it was amended in 1955 and 1962: "An Act Relative to the Admissibility in Evidence of Business *and Public Records*" (St. 1952, c. 120; St. 1955, c. 125); "An Act Relative to the Admissibility in Evidence of Certain Reproductions of Business *and Public Records*" (St. 1962, c. 90). Indeed, the very purpose of the most recent amendment to § 79E (St. 1965, c. 661), as stated in the Special Report of the Commissioner of Administration with reference to the bill on which the amendment was based, was to facilitate the destruction of public records. 1965 House Doc. No. 4077.

It follows that a more restrictive interpretation must be adopted for the statutory language, "unless held in a custodial or fiduciary capacity or unless its preservation is required by law." Generally speaking, I think that the first of these "unless" clauses has reference to a "custodial" or "fiduciary" duty other than that owed by an employee to his employer. Public records are, by definition, the property of the government, and the "custodial" or "fiduciary" duty of a government oficial for their safekeeping runs only to the government and to the general public. This is to be contrasted with the situation in which records of private persons are entrusted to a government official by their owner. The documents which the Comptroller's Division seeks to reproduce and destroy are the property of the Commonwealth, and its responsibility for them is a purely public one. Hence, I do not regard these records as "held in a custodial or fiduciary capacity" for purposes of G. L. c. 233, § 79E.

---

*The word "original" as used in G. L. c. 233, § 79E, is somewhat ambiguous, since, in the present context, it could refer either to the purchase order form actually delivered to the vendor or to the certified copy thereof filed with the Comptroller's Division. However, the statute would make little sense if the former interpretation were adopted. I therefore conclude, from a reading of the statute as a whole, that the word "original" merely refers to the "memorandum, writing entry, print, representation or combination thereof" which is reproduced in accordance with § 79E.

Nor do I think that any serious obstacle is presented by the second of these limiting clauses: "unless its preservation is required by law." While the preservation of such records is required until the Records Conservation Board has authorized their destruction, there appears to be no law requiring their preservation thereafter.

It is therefore my opinion that microfilm reproductions of the certified copies of state-agency purchase orders filed with the Comptroller's Division, prepared in the regular course of Business as the orders are received, would be admissible in a judicial or administrative proceeding to the same extent as the certified copies themselves, under G. L. c. 233, § 79E. I would emphasize, however, that such reproductions could be admitted in evidence in a particular proceeding only if the certified copies themselves could be so admitted, which, of course, would depend on various other rules of evidence and on the circumstances under which their admission is sought.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 41. OCTOBER 26, 1967.

HON. HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission*

DEAR COMMISSIONER WHITMORE: — You have requested my opinion as to the power of the Metropolitan District Commission (MDC) to sell or lease certain land under its control to a private corporation. The land in question is located on the Veterans of Foreign Wars Parkway in West Roxbury and forms a part of a larger tract which was acquired by the Commonwealth through an order of taking adopted by the Department of Public Works (DPW) in 1931. The taking was made pursuant to St. 1930, c. 420, §§ 4 and 6, whereby the DPW was "directed to lay out and construct" what is now the Veterans of Foreign Wars Parkway, and authorized to acquire land therefor by eminent domain. Control of this land was transferred by the DPW to the MDC in 1933 in accordance with St. 1930, c. 420, § 18, which provided for such a transfer upon the completion of construction of the Parkway.

Your office has informed me that certain of the land so transferred, abutting upon the Parkway, is not needed for the purposes thereof and is now surplus. You therefore seek my opinion on whether the MDC may sell the surplus land to a private corporation, and, if not, whether it may lease the same. Since I am of the opinion that the MDC, subject to the concurrence of the Park Commissioners of the City of Boston, has the power to sell the land, your question about leasing it requires no answer.

The power of the MDC to sell certain land under its control is conferred by G. L. c. 92, § 85:

> "The [metropolitan district] commission, with the concurrence of the park commissioners, if any, in the town where the property is situated, may sell at public or private sale any portion of the lands or rights in land *the title to which has been taken or received or acquired and paid for by it for the purposes set forth in sections thirty-three and thirty-five,* and may, with the concurrence of such park commissioners, execute a deed thereof, with or

> without covenants of title and warranty, all in the name and behalf of the commonwealth, to the purchaser, his heirs and assigns, and deposit said deed with the state treasurer, together with a certificate of the terms of sale and price paid or agreed to be paid at said sale, and, upon receipt of said price and upon the terms agreed in said deed, he shall deliver the deed to said purchaser. . . ." (Emphasis supplied.)

While it is not immediately apparent that land acquired by the MDC under St. 1930, c. 420 falls within the description contained in G. L. c. 92, § 85, a careful examination of the latter statute convinces me that such is the case and that land so acquired may be conveyed in accordance with § 85.

There can be little doubt that the land in question was "acquired . . . for the purposes set forth in sections thirty-three and thirth-five" of G. L. c. 92. The second of the cited sections authorizes the MDC to "connect any way, park or other public open space with any part of the towns of the metropolitan parks district under its jurisdiction by suitable roadways or boulevards," and to "construct and maintain along, across, upon or over lands acquired for such boulevards or for reservations, a suitable roadway or boulevard." The land under consideration, though not acquired *under* G. L. c. 92, § 35, was plainly acquired *for the purposes set forth* in that section: the construction of "a parkway or boulevard" connecting certain public ways in Boston and Brookline (both of which municipalities are within the Metropolitan Parks District). St. 1930, c. 420, § 4. Moreover, the lands to be transferred by the DPW to the MDC are characterized in St. 1930, c. 420, § 18, as "parkways and/or boulevards. . . ."

It is less clear that we are dealing with "land the title to which has been taken or received or acquired and paid for by [the MDC] . . . ." Strictly speaking, the MDC never acquired *title* to this land but only *control* over it; nor did the MDC actually *pay for* it, since all land damage payments were presumably made before the MDC became involved. Thus, it might at first seem that the powers under G. L. c. 92, § 85 are exercisable by the MDC only with respect to land directly acquired by it, without the intervention of any other state agency. But even in this more typical situation the MDC itself never acquires title to any land. Here, as in the case of the land acquired under St. 1930, c. 420, it is the *Commonwealth* which acquires and retains title, with the MDC or DPW merely acting as its representative and custodian in the transaction. It is significant that G. L. c. 92, § 85 provides that a deed that the MDC may give under its provisions is to be given "in the name and behalf of the commonwealth. . . ." Likewise, there is no such thing as land which is "paid for" by the MDC; it is the *Commonwealth* which pays for such land, with the State Treasurer — not the MDC or DPW — acting as its disbursing agent. Again, it is significant that G. L. c. 92, § 85 provides that a deed given by the MDC under the statute is to be deposited "with the state treasurer. . . ." It follows that a literal interpretation of G. L. c. 92, § 85 would exclude all land from its application and render the section a nullity. If the section is to have any meaning, a more liberal interpretation must be adopted.

Accordingly, I think that the clause defining the land to which G. L. c. 92, § 85 applies must be construed as if it read: *"land under the control of the MDC* the title to which has been taken or received or acquired and paid for by *the commonwealth*. . . ." The land in question falls within this description. Though it was for a brief period under DPW control, this was

merely a temporary expedient to facilitate construction of the Parkway, and can hardly be regarded as distinguishing this land in any significant way from other boulevard land under MDC control. Another possible distinction lies in the fact that this land was, pursuant to St. 1930, c. 420, § 10, paid for in part by the Commonwealth and in part by the municipalities of the Metropolitan Parks District. However, § 13 of the 1930 statute provided that the municipal share of the cost "shall, in the first instance, be paid by the commonwealth." In any event, the payment requirement of G. L. c. 92, § 85 was designed to exclude land acquired by gift or devise. See Op. Atty. Gen., February 27, 1946, p. 90. I do not believe that the Legislature intended any more than that.

It is therefore my opinion that the MDC, with the concurrence of the Boston Park Commissioners, may sell surplus land acquired on the Veterans of Foreign Wars Parkway under St. 1930, c. 420 to a private corporation in accordance with G. L. c. 92, § 85.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 42. OCTOBER 26, 1967.

HONORABLE RICHARD W. MCLAUGHLIN, *Registrar of Motor Vehicles*

DEAR REGISTRAR MCLAUGHLIN: — You have asked me to interpret certain provisions of G. L. c. 90, § 24, concerning periods of time during which no new license or right to operate a motor vehicle may be issued to a person whose license or right to operate has been revoked after conviction of a motor vehicle violation.

Section 24 (2) (a) of G. L. c. 90 provides criminal penalties for reckless driving; driving to endanger; driving on a bet or wager; racing or driving for the purpose of making a record; leaving the scene of an accident after causing injury to a person or damage to property without making certain information known; allowing a license to operate to be used by another; falsifying an application for a license or registration; and using a motor vehicle without authority. Section 24 (2) (b) provides for revocation by the registrar of the license or right to operate of any person convicted of a violation of § 24 (2) (a). Section 24 (2) (c) reads as follows:

> "The registrar, after having revoked the license or right to operate of any person under the preceding paragraph of this section, in his discretion may issue a new license or reinstate the right to operate to him, if the prosecution of such person in the superior court has terminated in favor of the defendant, or, after an investigation or upon hearing, may issue a new license or reinstate the right to operate to a person convicted in any court of the violation of any provision of paragraph (a) of subdivision (2) of this section; *provided, that no new license or right to operate shall be issued* by the registrar to any person convicted of going away without stopping and making known his name, residence, and the register number of his motor vehicle after having, while operating such vehicle upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees, knowingly collided with or

otherwise caused injury to any person, or to any person convicted of using a motor vehicle knowing that such use is unauthorized, or to any person adjudged a delinquent child by reason thereof under the provisions of section fifty-eight B of chapter one hundred and nineteen, until one year after the date of his original conviction or adjudication if for a first offense or until two years after the date of any subsequent conviction or adjudication, or *to any person convicted of violating any other provision of paragraph (a) of subdivision (2) of this section until sixty days after the date of his original conviction if for a first offense, or one year after the date of any subsequent conviction within a period of three years.* But the registrar, after investigation, may at any time rescind the revocation of a license or right to operate revoked because of a conviction of operating a motor vehicle upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees, negligently so that the lives or safety of the public might be endangered." (Emphasis supplied.)

Your question, relating to the emphasized portion of G. L. c. 90, § 24 (2) (c) is whether the phrase ". . . any subsequent conviction . . ." is confined to a conviction for the same kind of act as that involved in the first conviction or whether it includes a conviction for any of the acts enumerated in Section 24 (2) (a), other than leaving the scene of an accident after causing injury to a person or using a motor vehicle without authority, hereinafter called "the excepted offenses," which are dealt with in the clause immediately preceding the emphasized provision beginning with the words: "to any person convicted of . . . ."

In my opinion the "subsequent conviction" need not be for the same kind of offense as that involved in the first conviction. I note that the various acts, other than the excepted offenses, encompassed by Section 24 (2) (a) are treated therein as a single class, all being part of a single series of motor vehicle convictions carrying the same punishment. Similarly, in Section 24 (2) (c) the Legislature grouped the various offenses in a single series, all being united, without differentiation, in the general reference to "any other provision of paragraph (a) of subdivision (2) of this section . . . ." Although differences do, of course, exist among the acts that constitute the various offenses within the series, these differences are, in my opinion, not sufficient to prevent "any subsequent conviction" from referring to different offenses within the same series. The common character and unified treatment of all such offenses are, in my view, more significant than the details of the particular distinctions among them.

I therefore answer your question by stating that in my opinion the phrase "any subsequent conviction," to which you refer in Section 24 (c) (2) is not limited to a conviction for the identical kind of offense as that involved in the first conviction but rather includes any of the various offenses enumerated in the same series as that on which the subsequent conviction is based.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 43. October 27, 1967.

Dr. Owen B. Kiernan, *Commissioner of Education*

Dear Dr. Kiernan: — In your letter of September 20, 1967, you have requested my opinion on whether you as Commissioner of Education have the authority under G. L. c. 74, § 7 to approve the admission, at the thirteenth and fourteenth grade level, of a high school graduate to a vocational school (or the taking of courses therein at that level) when the school is located in a town in which the student does not reside. You further ask whether this approval would require you to assess the student's tuition and transportation costs to the town of the student's residence as provided in G. L. c. 74, § 8.

I have been further informed that the particular vocational school gives classes at both the high school level and the higher thirteenth and fourteenth grade level.

A former Attorney General had occasion to render an informal opinion on the responsibility, as between two towns, for payment of tuition when a high school graduate of one town was admitted, at the high school level, to a vocational school in another town. Op. Atty. Gen. October 28, 1960, page 70. That opinion held that, *assuming* that the Commissioner of Education approved the admission under G. L. c. 74, § 7, the town of the student's residence must, under G. L. c. 74, § 9, pay for his tuition. (The decision did not have occasion to consider particular circumstances of the giving of the Commissioner's approval.)

Your present request raises a different issue, namely, whether the Commissioner has the authority to approve the admission of a high school graduate to the post-high school level, namely, the thirteenth or fourteenth grade level (or the taking of courses at that level) in another town's vocational school.

G. L. c. 74, § 7 reads as follows:

> "Residents of towns in the commonwealth not maintaining approved independent distributive occupations, industrial, agricultural, household arts and practical nurse training schools offering the type of education desired, or children placed in such a town by the commissioner of public welfare or by the trustees of the Massachusetts training schools, may, upon the approval of the commissioner under the direction of the state board, be admitted to a school in another town. In making his decision, the commissioner under the direction of the state board shall take into consideration the opportunities for free vocational training where the applicant resides, the financial status of such place, the age, sex, preparation, aptitude and previous record of the applicant, and other relevant circumstances."

No language in this section, or in any other related provision, indicates any legislative intent to distinguish between residents who are high school graduates and those who are not. Nor is there any language in either G. L. c. 74, § 1 (which contains statutory definitions applicable to vocational education) or § 7 which would warrant a distinction being made between admission to the twelfth grade and admission to the thirteenth grade.

My answer to your first question, then, assuming that town of the stu-

dent's residence does not maintain a vocational school offering the type of education desired is that the Commissioner, under the direction of the Board of Education, has the power under G. L. c. 74, § 7 to approve the application in question.

This being the case, the provisions of G. L. c. 74, § 8 and § 8A clearly apply:

Section 8

"A town where a person resides who is admitted to the school of another town under section seven shall pay a tuition fee to be fixed by commissioner under the direction of the state board, and in default of payment shall be liable therefor in contract to such other town."

Section 8A

"A town where a person resides who is admitted to a day school in another town under section seven, shall, through its school committee, when necessary, provide for the transportation of such person, and shall, subject to appropriation be entitled to state reimbursement from the tax on income to the extent of fifty per cent of the amount so expended; . . . provided, further, that no transportation shall be provided for, or reimbursement made on account of, any pupil who resides less than one and one half miles from the school which he attends."

Under these statutes the town of the student's residence must pay for tuition, if the student's application is approved under Section 7, and must further pay for transportation costs (50% of which will be reimbursed by the Commonwealth under Section 8A) assuming the student lives more than one and one half miles from the school.

I wish to point out, however, that this opinion should not be construed as indicating in any way that the Commissioner of the Board of Education is *required* to approve an application made under G. L. c. 74, § 7. Section 7 is discretionary, not mandatory, and provides that "in making his decision, the commissioner, under the direction of the state board shall take into consideration the opportunities for free vocational training where the applicant resides, the financial status of such place, the age, sex, preparation, aptitude and previous record of the applicant, and other relevant circumstances."

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 44. OCTOBER 30, 1967.

HONORABLE EDWARD J. RIBBS, *Commissioner of Public Works*

DEAR COMMISSIONER RIBBS: — You have requested my opinion whether St. 1967, c. 535 affects the letting of contracts for the demolition of buildings taken by eminent domain incident to the construction of highways. You have also asked whether a demolition contractor doing work in excess of $50,000 must be prequalified under G. L. c. 29, § 8B.

As for your first question, I begin by noting that G. L. c. 149, § 44A, which St. 1967, c. 535 amends, was inserted into the General Laws by St. 1939, c. 480. Applicable to contracts for "the construction, reconstruction, alteration, remodeling, repair or demolition of any public building," within certain estimated costs, the act established particular procedures to ensure fair competition among bidders for such contracts. Subsequent amendments made various changes in these procedures but the words "public building" remained intact until the enactment of St. 1967, c. 535. That act deleted the word "public."

Contracts for highway construction have been governed by G. L. c. 30, § 39M, inserted by St. 1963, c. 842, § 1, which applies to contracts "for the construction, reconstruction, alteration, remodeling or repair of any public work . . . ." Subsection (a) of § 39M excludes from its application "the award of any contract subject to the provisions of sections forty-four A to forty-four L, inclusive, of chapter one hundred and forty-nine and every such contract shall continue to be awarded as provided therein." Your letter infers that your Department has not previously regarded this last provision as excluding contracts for the demolition of public buildings incident to highway construction.

It is my opinion that the correct method of determining the relationship of G. L. c. 149, § 44A and G. L. c. 30, § 39M, so far as the demolition of buildings in connection with roadbuilding is concerned, is to ascertain whether the contractor's obligation to perform the demolition work is (1) only an incidental provision of a larger contract to build a road, or is instead (2) the subject of a separate contract for demolition only, even though the demolition under the separate contract may be incidental to a road building *project* (as distinguished from a *contract* to build a road). The application of G. L. c. 30, § 39M does not depend on whether the buildings to be demolished pursuant to incidental provisions of a roadbuilding contract are public or private. And the application of G. L. c. 149, § 44A does not depend on whether the buildings to be demolished under a demolition contract are being removed as part of a roadbuilding project. The decisive test in each case is rather the essential nature of the particular contract: (1) roadbuilding, with demolition as an incidental feature; or (2) demolition only.

Prior to the 1967 amendment of G. L. c. 30, § 39M, the term "public building" therein implied that there existed a possible distinction between public and private buildings, unless perhaps all buildings owned by the Commonwealth could be regarded at "public," whatever their particular use might be. The 1967 amendment appears to have been designed simply to eliminate any doubts that may have existed in this regard. I might add, moreover, since a memorandum that accompanied your letter touches on the problem, that for purposes of applying the dollar limitation of $5,000 in contracts of the Commonwealth under the foregoing provision, the total contract price, not the unit prices for demolishing particular buildings, is controlling.

In summary, my answer to your first question is that St. 1967, c. 535 made only a minor clarifying amendment to G. L. c. 149, § 44A and made no significant change in the relationship of that provision to G. L. c. 30, § 39M, as I have defined that relationship.

I turn now to your question as to whether a demolition contractor doing

work under a contract for more than $50,000 has to be "prequalified" under the provisions of G. L. c. 29, § 8B. That section requires, among other things, that "any person proposing to bid on any work, *excepting the construction, reconstruction, repair or alteration of buildings,* to be awarded by the department of public works" shall submit a sworn statement of his qualifications to do the work. The Department then rates the bidder according to the class and aggregate amount of work that he is eligible to perform. No filing is required if the aggregate amount of the work of a bidder with the Department, including the amount of his proposal, is less than $50,000.

It will be noticed that the provision quoted just above does not exempt the *demolition* of buildings. It follows that if a bidder on a contract for the demolition of a building passes the $50,000 level, he must comply with the requirements of G. L. c. 29, § 8B.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 45. NOVEMBER 3, 1967.

HONORABLE RICHARD E. MCLAUGHLIN, *Registrar of Motor Vehicles*

DEAR REGISTRAR MCLAUGHLIN: — In two separate letters dated August 21, 1967 you have asked for my opinion whether certain records must be made available for the inspection of any person during reasonable business hours. Public records are defined in G. L. c. 4, § 7, twenty-sixth, as:

> ". . . any written or printed book or paper . . . of the commonwealth . . . which is the property thereof, and in or on which any entry has been made or is required to be made by law, or which any officer or employee of the commonwealth . . . has received or is required to receive for filing . . . ."

Under G. L. c. 66, § 10, public records must be open to public inspection during reasonable business hours.

First, you ask whether abstracts of court records forwarded to the Registrar by all courts of the Commonwealth pursuant to G. L. c. 90, § 27 must be open to public inspection. General Laws c. 90, § 27 provides:

> "A full record shall be kept by every court of every case in which a person is charged with a violation of any statute, by-law, ordinance or regulation relating to the operation or control of motor vehicles . . . and an abstract of such record shall be sent forthwith by the court to the registrar. Said abstracts shall be made upon forms prepared by the registrar, and shall include all necessary information as to the parties to the case, the nature of the offence, the date of the hearing, the plea, the judgment and the result; and every such abstract shall be certified by the clerk of the court as a true abstract of the record of the court. The registrar shall keep such records in his main office . . . ."

It is my conclusion that these abstracts of court records are public records within the meaning of G. L. c. 4, § 7, twenty-sixth. The courts are required to send the abstracts to the Registrar on forms he provides and they must be

kept on file at his main office. The abstracts are plainly records the Registrar "is required to receive for filing" and although useful in the operation of his office, are not limited to that purpose. Since they may also be useful to the general public, I regard them as open to public inspection under G. L. c. 66, § 10. See *Lord* v. *Registrar of Motor Vehicles,* 347 Mass. 608, 611. Support for this conclusion is found in the requirement of G. L. c. 90, § 27, quoted above, requiring the abstracts to be kept in the Registrar's main office, as distinguished, it seems, from local offices. Further, since the court records themselves appear to be open to public inspection in courthouses, the abstracts of the records in the hands of the Registrar should not be denied to the public.

I do not believe that the legislative history of G. L. c. 90, § 27 requires a different result. G. L. c. 90, § 27 (as amended through St. 1953, c. 570, § 3) provided:

> "The registrar shall keep such records [court abstracts] in his main office, *and they shall be open to the inspection of any person during reasonable business hours.*" (Emphasis supplied.)

St. 1961, c. 592, § 1 (entitled "An Act Relative to Summonses for Violations of the Motor Vehicles Laws, Requiring Filing Thereof and Providing for an Audit System in Connection Therewith") completely changed c. 90, § 27. The main purpose of the change was to attempt to establish a "no fix" system of issuing traffic citations. While St. 1961, c. 592, § 1 did incorporate the record keeping provisions of the prior law, it deleted the phrase, "they shall be open to the inspection of any person during reasonable business hours" and it relegated the record keeping provisions to a minor part thereof.

St. 1962, c. 700 amended the section, again making certain minor changes not here relevant. St. 1962, c. 789 (the current law) changed the section completely, adopting the prior G. L. c. 90, § 27 (as amended through St. 1953, c. 570, § 3), with one important exception that I have already noted, namely, the deletion of the phrase requiring that court records be made open to public inspection. The provisions for a "no fix" system of issuing traffic citations were changed significantly and made a part of a new chapter, G. L. c. 90C.

It is my opinion that the enactment in 1962 of the present version without the phrase, "they shall be open to the inspection of any person during reasonable business hours," does not manifest a legislative intention to keep court abstracts on file in the registry confidential. Compare *Mardman* v. *Collector of Taxes of North Adams,* 317 Mass. 439, 442-445. I reach this conclusion in the light of the positive mandate of G. L. c. 66, § 10 and the fact that the deletion was only a minor part of a complete statutory revision. It may be that in the light of judicial interpretation (see *Lord* v. *Registrar of Motor Vehicles,* 347 Mass. 608,) the phrase was thought to be superfluous.

Second, you ask whether cancellation notices of motor vehicle liability policies sent to the Registrar pursuant to G. L. c. 175, § 113A must be open to public inspection. General Laws c. 175, § 113A provides in part that neither the insurer nor the insured may cancel a motor vehicle liability policy,

> ". . . unless written notice thereof is given by the party proposing cancellation to the other party giving the specific reason or rea-

> sons for such cancellation and to the registrar of motor vehicles in such form as he may prescribe . . . ."

General Laws c. 90, § 34H provides in part that upon receipt of such notice the Registrar,

> "shall revoke the registration of such motor vehicle on the effective date of the cancellation as specified in such notice unless not later than two days prior to such effective date the registrar shall have received a new certificate covering the same motor vehicle. The registrar shall, forthwith upon receiving written notice in conformity with said section one hundred and thirteen A from an insurance or surety company purporting to cancel such a policy or bond issued or executed by it, give written notice to the owner of the motor vehicle covered by said policy or bond that the registration thereof will be revoked as of the final effective date of the cancellation as specified in the notice given by such company in case the owner does not file a complaint . . . that he is aggrieved by the issue of such notice, or as specified in an order of the board of appeal on motor vehicle liability policies and bonds affirming such cancellation . . . in case the owner does not claim an appeal from such order, or as specified in a decree of the superior court or a justice thereof affirming such cancellation on such appeal, or as specified in such a decree ordering a cancellation of such a policy or bond after its reinstatement by said board of appeal, unless not later than two days prior to such effective date as finally specified the registrar shall have received a new certificate covering the same motor vehicle."

Thus, written notice of cancellation of a motor vehicle policy *must* be sent to the Registrar before cancellation is valid, and presumably the Registrar must keep the notice in the files at least until the insured exhausts his appeal rights under G. L. c. 175, § 113D or until the registration is revoked.

In my opinion your question is similar to that before the court in *Lord* v. *Registrar of Motor Vehicles,* 347 Mass. 608. In that case it was held that accident reports which were required to be sent to the Registrar under G. L. c. 90, § 26 on a form approved by him were "public records." As in this case, the statute as it then read* did not specifically provide that the reports must be kept on file or that they were to be open to public inspection. The court nevertheless concluded that the reports were public records "because they are reports which the registrar 'is required to receive for filing,' " (Id. at 611) and because there were public policy reasons in support of disclosure. Although the policy reasons in the present case might not be as urgent as in *Lord,* I believe that there are significant reasons for public disclosure here. For example, if a person is injured in an automobile accident and the insurer of the person causing the accident claims that the insurance had been canceled, it would be important for the accident victim to determine if there was sufficient notice of cancellation. See, e.g., *Greenberg* v. *Flaherty,* 306 Mass. 95, in which the notice was found to be insufficient.

I have examined the sample copies of notices of cancellation which you have provided. They state the name and address of the insured and the insurer, the policy number, the registration number of the car insured, the

*Although since amended, the statute has, so far as material herein, been changed back to its original form. See St. 1965, c. 664.

effective date and the reasons for cancellation. G. L. c. 90, § 341 requires the registrar to furnish upon request the name of the insurance company and the registrant of a particular motor vehicle. If it is in the public interest to require such disclosure, it must also be in the public interest to permit disclosure of information that would indicate whether the insurance is still in force. The fact that the notice of cancellation also contains the reasons for cancellation and may apply to noncompulsory as well as compulsory coverage does not require a different result. Nothing in the notice indicates the amount of coverage.

Accordingly, in answer to your second question, I conclude that a written notice of cancellation of a motor vehicle liability policy is a report that the Registrar "is required to receive for filing" and therefore open to public inspection under G. L. c. 66, § 10.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 46. NOVEMBER 3, 1967.

HONORABLE L. L. LAUGHLIN, *Commissioner, Department of Public Safety*

DEAR COMMISSIONER LAUGHLIN: — You have requested my opinion about the proper interpretation of G. L. c. 262, § 53C, as amended by St. 1967 c. 286, which provides:

> "Any police officer, on duty at night or on vacation, furlough or on a day off, who attends as a witness for the commonwealth in a criminal case pending in a district court, including the municipal court of the city of Boston, or any juvenile court, or the superior court, may, in lieu of the witness fee to which he would otherwise be entitled under section fifty-three, be granted such compensatory time off as shall be equal to the time during which he was in attendance at such court, but in no event shall less than three hours compensatory time off be granted him or, if such additional time off cannot be given because of personnel shortage or other cause, he shall, in lieu of said witness fee, be entitled to additional pay for the time during which he was in attendance at such court, but in no event shall he receive less than three hours additional pay."

According to your letter, the Director of Accounts interprets this statute as forbidding the payment of any witness fees to police officers in criminal cases, and has notified at least one county treasurer that all such payments are to cease as of August 22, 1967. Your letter indicates that detective lieutenant inspectors of your Department are being denied witness fees as a result of this directive, and you seek my advice as to the legality of this procedure.

In my opinion G. L. c. 262, § 53C does not apply to witness fees of detective lieutenant inspectors in your Department or to other state police officers. While the statute speaks of "any police officer" who fulfills certain conditions, it must be read, I believe, as containing an implied exception for *state* police officers.

The principal statute whereby police officers are entitled to witness fees is G. L. c. 262, § 53, which provides that "any police officer, . . . on duty at night, on vacation, furlough or on a day off, who attends as a witness in a criminal case pending in a district court, including the municipal court of the city of Boston, or in a juvenile court, including Boston juvenile court, shall be allowed a witness fee . . . ." Thus, the scope of § 53 appears to be identical to that of § 53C. This is underscored by an almost word-for-word identity of language in the opening portions of the two sections. Moreover, § 53C provides that the compensatory time off or additional pay which may be granted to a "police officer" thereunder shall be "in lieu of the witness fee to which he would otherwise be entitled *under section fifty-three* . . . ." (Emphasis supplied.)

A state police officer, however, is not entitled to a witness fee under § 53. Despite the seemingly all-inclusive wording of that section ("any police officer"), special provision is made in G. L. c. 262, § 53B for the payment of witness fees to "any officer of the division of state police . . . ." The circumstances under which a state police officer is entitled to a witness fee pursuant to § 53B differ in certain respects from those set forth in §§ 53 and 53C. These factors led a former Attorney General to the conclusion that § 53 does not apply to state police officers. See Report of the Attorney General for the year ending June 30, 1959, p. 42. Nothing has since occured to change the correctness of that ruling. Since the application of § 53C can be no broader than that of § 53, it follows that § 53C does not apply to state police officers.

I am therefore of the opinion that detective lieutenant inspectors and other state police officers in your Department cannot properly be denied witness fees by reason of G. L. c. 262, § 53C.

Your question, of course, is a rather specialized one, and is answered, I believe, by the conclusion stated above. This conclusion, however, does not answer the numerous inquiries about G. L. c. 262, § 53C which this Office has received from municipal police officers and local officials. While it is not customary for an Attorney General to issue opinions on matters that do not directly concern the responsibilities of state agencies, the diversity of interpretation being given the statute has created a problem of state-wide importance. I have therefore decided to go beyond the question you have raised and present my views on other controversial aspects of G. L. c. 262, § 53C. It is my hope that these views will bring about consistent application of the statute throughout the Commonwealth.

FIRST, the statute does not require any police officer to waive any witness fee, or authorize any court or public official to require him to do so, but leaves this to the decision of the individual officer himself. As previously indicated, the circumstances under which a police officer (other than a state police officer) is entitled to a witness fee are detailed in G. L. c. 262, § 53, and are identical to the circumstances under which he may be granted compensatory time off or additional pay in lieu of a witness fee pursuant to G. L. c. 262, § 53C. Thus, if § 53C were interpreted as denying an officer his witness fee or as authorizing such denial, § 53 would be largely vitiated. The only reference in § 53C to § 53 is the phrase "in lieu of the witness fee to which he would otherwise be entitled under section fifty-three . . . ." I do not think that such a casual reference to the earlier section can properly be read as amending or repealing it. Hence, I conclude that the officer's right to his witness fee remains unimpaired.

SECOND, an officer who accepts a witness fee for appearing in court on a particular day is ineligible to receive either compensatory time off or additional pay for that appearance. Section 53C provides that an officer may receive the benefits described therein "in lieu of" his witness fee but not otherwise.

THIRD, the statute does not necessarily require any police department to grant compensatory time off or additional pay to its officers in lieu of witness fees. Section 53C says that a police officer qualifying thereunder *"may* . . . be granted such compensatory time off . . . ." (Emphasis supplied.) The use of the word "may" convinces me that the Legislature intended the statute to be permissive rather than mandatory. To be sure, § 53C goes on to provide that if compensatory time off cannot be given, the officer "shall . . . be entitled to additional pay . . . ." This apparent contradiction between the two clauses, in my opinion, must be resolved by reading the "shall be entitled" clause as operative only after the department's election to invoke the "may be granted" clause. That is, *if* the officer qualifies under § 53C, and *if* his police department awards the compensatory time off which "may . . . be granted" thereunder to officers waiving their witness fees, and *if* such time off cannot be given in a particular case, then and only then the officer "shall . . . be entitled to additional pay . . . ."

FOURTH, an officer who waives a witness fee for appearing in court on a particular day is entitled to compensatory time off or additional pay if he is eligible under the statute and if ordinances, by-laws, rules, regulations or orders so provide. For example, if an officer qualifying under § 53C has been induced to waive the fee by the existence of a lawful regulation issued by the chief of his police department providing that the statutory benefits are to be granted to an officer so doing, the officer thereby acquires a legal right to time off or additional pay, as the case may be. He is not, however, entitled to choose between compensatory time off and additional pay. Section 53C provides for additional pay instead of compensatory time off only "if such time off cannot be given because of personnel shortage or other cause . . . ." Any decision that such time off cannot be given must necessarily be made by the police department or by higher authority, rather than by the individual officer.

FIFTH, the amount of compensatory time off or additional pay granted to a police officer under the statute is measured by the time during which he was in court, but must be equal to at least three hours' time or pay, as the case may be. Thus, if the officer is given time off, such time off shall be equal to the time spent in court or three hours, whichever is greater; and if he is given additional pay, he shall be paid for the time he spent in court or three hours, whichever is greater.

SIXTH, the statute applies in every municipality of the Commonwealth, but its implementation depends on local action. When § 53C was inserted in the General Laws by St. 1955 c. 223, § 1, the following provision appeared in § 2 of the same Act:

> "This act shall take full effect in a city having a Plan E form of city charter by the affirmative vote of a majority of the members of the city council, in other cities by vote of the city council, subject to the provisions of its charter, and in a town by vote of the voters voting thereon at a town meeting, but not otherwise."

While § 2 of the 1955 Act was not expressly repealed by the 1967 amend-

ing legislation, it relates only to "this act" (i.e., St. 1955 c. 223) and not to the 1967 statute (St. 1967 c. 286) whereby § 53C was stricken from the General Laws and reinserted in a new form. Thus, St. 1955 c. 223, § 2 has no application to § 53C in its present form and may for all practical purposes be treated as repealed. See *Attorney General* v. *Goldberg,* 330 Mass. 291. This is not to say that the benefits of § 53C *must* be granted in every municipality, but only that they *may* be granted without the action of the city council or town meeting which was required by § 2 of the 1955 statute.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 47. NOVEMBER 7, 1967.

THE HONORABLE CLEO F. JAILLET, *Commissioner, Department of Corporations and Taxation*

DEAR COMMISSIONER JAILLET: — You have asked me to interpret certain provisions of the General Laws concerning municipal finances.

You state that:

> "At a special town meeting held on May 22, 1967 by the town of Abington, the warrant included Article 14 which reads as follows:
>
> > 'To see if the Town will vote to construct a swimming area, complete with all necessary sanitary facilities, at Island Grove Park and Pond in the 'Cove', so called, and borrow, transfer from available funds and/or raise and appropriate Fifty Thousand ($50,000.00) Dollars to the Conservation Fund, to be expended therefrom by the Conservation Commission for the purposes of this Article.'
>
> "The vote adopted by the town meeting under this article was as follows:
>
> > 'Voted, to construct a swimming area, complete with all the necessary sanitary facilities, at Island Grove Park and Pond in the 'Cove', so called, and that we raise and appropriate Five Thousand ($5,000.00) Dollars and borrow, for a period of four years the sum of Forty-five Thousand ($45,000.00) Dollars; said sums to the Conservation Fund, to be expended by the Conservation Commission for the purposes of the Article.'
>
> "The town clerk has certified that there was a standing vote of 430 'Yeas' and 77 'Nays.' "

You further state that town notes prepared by the Town Treasurer of Abington pursuant to authority of the aforesaid vote have been submitted to the Director of Accounts in the Bureau of Accounts within your Department for certification; and under G. L. c. 44, § 24, the Director of Accounts must, before certifying the notes, ascertain if the laws relating to municipal indebtedness have been complied with, and whether the proceeds of the notes are to be used for the purpose specified in the vote authorizing the loan.

You have enclosed a brochure which gives a short description of the proposed development. It will consist of a swimming area and associated facilities in a small cove on Island Grove Pond in Island Grove Park, which is owned by the Town of Abington. An earth dike will be constructed between the swimming area, which will have a surface area of about 43,000 square feet, and the remainder of the pond. The swimming area will be excavated and filled with clear sand, and water will then be pumped into it from a nearby well. A bath house and sanitary facilities will also be constructed.

You have requested my opinion on the following questions:

> "1. Is this project, as voted by the town meeting, 'to construct a swimming area,' and as further described in the aforementioned brochure, a swimming pool within the meaning of Clause (2B) of Section 7 of Chapter 44.
>
> "2. If your answer to Question No. 1 is in the negative, is the vote adopted under Article 14 in proper form to allow incurring of debt under any statutory provision and, if so, what statute and in what amount.
>
> "3. If your answer to either Question No. 1 or Question No. 2 is in the affirmative, may the proceeds from such a loan be mingled in the conservation fund with moneys appropriated under the aforementioned Clause (51) of Section 5 of Chapter 40."

Section 5 of Chapter 40 of the General Laws sets forth the purposes for which a town may appropriate money. Subsection 25A authorizes appropriations "For acquiring land for, and the establishment, maintenance and operation of bathing beaches and swimming pools for recreation and physical exercise . . . ." Section 7 of Chapter 44 states that within the debt limit set by G. L. c. 44, § 10, cities and towns may borrow money for certain purposes and for specified periods of time. Among the permitted purposes [Subsection 2B] is ". . . the construction of an outdoor swimming pool on land owned by the city or town . . . ."

Your first question asks whether the proposed development is a "swimming pool" within the last quoted subsection. On the basis of the facts that you have submitted, I am of the opinion that one could reasonably say that the development will be a "swimming pool." Although the feature most commonly associated with such a facility is an artificially constructed tank, it is my opinion that the term is not necessarily so limited. In my view a "swimming pool" may also include any compact and artificially constructed swimming area, such as that proposed in Abington, which is bounded by a closed perimeter and is filled by water supplied from an outside source.

In your request for my opinion, you state that no question is raised as to the construction of the bath house, its original equipment, and other equipment for the project.

In view of my foregoing answer to your first question, no answer to your second question is required. As for your third question, I turn to G. L. c. 40, § 5, subsection 51, to which your question refers. That subsection authorizes a city or town to appropriate money "[f]or the establishment and maintenance of a conservation commission." Subsection 51 also provides that a city or town may appropriate money in any year to a conservation fund of which the treasurer shall be custodian. After prescribing how the

fund is to be invested, subsection 51 concludes by stating, "Monies in the fund may be expended by said commission for any purpose, other than a taking by eminent domain, authorized by section eight C." This last cited section [of chapter 40] authorizes a city or town to establish a conservation commission "for the promotion and development of the natural resources and for the protection of watershed resources of said city or town." It also defines in some detail the composition, powers, and duties of such a commission. Among its powers is the power to acquire "such land or water . . . as may be necessary to acquire, maintain, improve, protect, [and] limit the future use of or otherwise conserve and properly utilize open spaces and other land and water areas . . . ."

Although the question is not free from doubt, I am of the opinion that the proposed Abington swimming pool may properly be regarded as a project which the Conservation Commission may execute under the foregoing powers granted to it by G. L. c. 40, § 8C. Accordingly, I answer your third question: *Yes*.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 48. NOVEMBER 13, 1967.

DR. MARTIN J. LYDON, *President*

DEAR DR. LYDON: — You have requested my opinion as to the validity of Article 3 of the bylaws adopted by the Board of Trustees of Lowell Technological Institute. This article reads as follows:

> *"Article 3. Meetings:* Regular meetings of the Board of Trustees shall be held at the order of the Chairman of the Board and shall be held at least once during each of the four quarters of the year. Special meetings may be called at other times by the Clerk upon order of the Chairman or any three members of the Board, or as otherwise provided by law.
>
> "Notices giving the time and place of any meeting shall be mailed to each member at least seven calendar days before the date of said meeting.
>
> *"Five members present at any meeting shall constitute a quorum for the transaction of any business."* (Emphasis supplied.)

More specifically, you ask whether G. L. c. 4, § 6, paragraph 5, or any other provision of law, requires that official acts of the Board of Trustees shall be based upon a majority vote of the full Board of seventeen Trustees appointed under G. L. c. 15, § 24, or whether its statutory authority may instead be exercised by a majority of a quorum of five established by its bylaws.

General Laws Chapter 4, Section 6 provides:

> "In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same statute:
>
> * * *
>
> ". . . Fifth, words purporting to give a joint authority to, or direct

any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons."

I am of the opinion that this provision has been rendered inapplicable to the Board of Trustees of Lowell Technological Institute by G. L. c. 75A, § 7 which, in relevant part, reads: *"Notwithstanding any other provision of law to the contrary*, except as herein provided, the trustees may adopt, amend, or repeal such rules and regulations for the government of the institute, for the management, control and administration of its affairs, for its faculty, students and employees, *and for the regulation of their own body,* as they may deem necessary, and may impose reasonable penalties for the violation of such rules and regulations." (Emphasis supplied.)

In the light of the foregoing provision, which I regard as displacing G. L. c. 4, § 6, paragraph 5, in relation to the Board of Trustees of Lowell Technological Institute, I am of the opinion that the quorum provisions of the bylaw in question are valid.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 49. NOVEMBER 14, 1967.

MRS. MABEL A. CAMPBELL, *Acting Director of Civil Service*

DEAR MRS. CAMPBELL: — You have requested my opinion as to the power of the Director of the Division of Employment Security to appoint a "confidential secretary" under G. L. c. 30, § 7, which provides:

> "Each officer, board and commission having supervision and control of an executive or administrative department, including the commissioner of administration, the comptroller, the purchasing agent, the budget director, and the director of personnel and standardization, each commissioner of the department of banking and insurance, the state superintendent of buildings, the alcoholic beverages control commission and the state racing commission, but not including the several boards serving in the division of registration of the department of civil service and registration, may appoint and remove a person to serve as a confidential secretary. Such appointment shall be in accordance with the provisions of sections forty-five to fifty, inclusive, of this chapter and shall be exempt from the provisions of chapter thirty-one."

Your letter calls attention to my opinion of June 19, 1967 (66/67 A. G. No. 122), in which I advised the then Director of Civil Service "that the powers conferred in G. L. c. 30, § 7 have at all times been exercisable only by the heads of the twenty state departments authorized by the 66th Amendment [to the Massachusetts Constitution] and by the other agency heads enumerated in § 7." Since the Director of the Division of Employment Security does not fall into either of these categories, you state that you are unable to reconcile this conclusion with an opinion issued in 1949 by the then Attorney General, Francis E. Kelly, advising the Director of the Division of Employment Security that he might lawfully appoint a "confidential secretary" under G. L. c. 30, § 7. Report of the Attorney General for the Year Ending June 30, 1949, p. 75.

The agency for which a "confidential secretary" was sought when I rendered the opinion of June 19, 1967 was Lowell Technological Institute rather than the Division of Employment Security. It was therefore unnecessary at that time for me to adopt any position with respect to the 1949 ruling and I so stated. Now that the question is squarely raised, I am constrained to advise you that I cannot concur in the 1949 result.

In thus advising you that the Director of the Division of Employment Security does not share in the powers conferred upon department heads by G. L. c. 30, § 7, I would emphasize that I am by no means foreclosing the possibility that he may have equivalent powers under some other statute. In all probability there are some state agencies which, though not qualifying under § 7, could appoint what amounts to a "confidential secretary" under their own enabling legislation. The question of whether the Division of Employment Security is such an agency can, of course, be definitively answered only after a study of the many statutes concerning that Division.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 50. NOVEMBER 14, 1967.

HONORABLE JOHN J. DRONEY, *District Attorney for the Northern District*

DEAR DISTRICT ATTORNEY DRONEY: — You have requested my opinion on the following questions relative to the powers of local police:

"1. Can local (city or town) police investigate crimes on state-owned property?

"2. If local police are investigating a crime not committed on state property, may local police, in pursuance of their investigation, enter the state property and talk with persons on the state property, whether personnel or patients, or must the State Police take over every phase of an investigation if entry on state property is necessary?

"3. If State Police must control all investigations on state property, can local police patrol or direct traffic on highways such as Route 93, Route 2, and Route 128?

"4. If State owned property requires State Police investigation, does this mean that anytime accidents, crimes or other emergencies occur on state owned property, such as highways and hospitals, that the state police must be called and that local police can do nothing?"

So far as your questions concern "investigation," I observe that we are dealing with a term of broad scope. It includes formal searches pursuant to a warrant as well as informal inquiries and questioning of victims of crimes and the witnesses thereto. See *Opinions of the Justices,* 328 Mass. 663, 666.

Further, I observe that at common law, the power of a police officer to make an arrest without a warrant is territorially limited, stopping at the

boundaries of the governmental unit by which he was appointed, unless under the doctrine of "fresh pursuit" he is engaged in the continuous pursuit of a felon into another jurisdiction. 5 Am. Jur. 2d Arrest, secs. 50-51; 4 Wharton's Criminal Procedure (1957 ed.) sec. 1614. I regard this common law rule for felonies to be the law of Massachusetts. Chapter 263 of the Acts of 1967, inserting § 98A into G. L. c. 41, has extended it to municipal police officers "on fresh and continued pursuit" of an offender "in any other city or town for *any offence* committed in his presence within his jurisdiction for which he would have the right to arrest within his jurisdiction without a warrant." (Emphasis supplied.)

When executing a warrant of arrest or commitment, however, a police officer's power is state-wide. *Commonwealth* v. *Martin,* 98 Mass. 4. G. L. c. 279, § 38. G. L. c. 41, §§ 95 and 98. And when requisitioned by officials of another municipality under G. L. c. 41, § 99, police officers also have extra-territorial powers. See also the Civil Defense Act, G. L. c. 33 (App.), § 13-11, St. 1950, c. 639, § 11, as amended.

Your questions go beyond the foregoing cases since they refer to situations, such as investigations, respecting which no warrant or official process has been issued.

In the light of the foregoing general principles, I now turn to your questions.

Questions 1 and 2: Local police officers have no *greater* powers at common law to enter state-controlled property than they have to enter land privately controlled. A recent statement of their common law powers with respect to entry on private property was contained in the case of *Thurlow* v. *Crossman,* 336 Mass. 248, 250, where the Court said:

> "Lawful entry may be made 'to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger' [citation], to prevent the spread of fire [citation], and to make arrests [citation]. A police officer who enters upon private premises in good faith in the performance of his official duty to protect life and property and to preserve the peace is not a trespasser."

Nothing in the foregoing statement authorizes a police officer to make an unauthorized entry for the purpose of investigation only. He may, however, make an entry for that or any other lawful purpose to the extent that the person in control of the premises consents to the entry.

On the facts as you present them, it appears that state officials have denied municipal police officers the right to enter state property to interview persons there concerning offenses committed outside the premises. Under these circumstances, it is my opinion that access may be denied. This conclusion is consistent with an Attorney General's opinion in 1949. (Report of the Attorney General for the Year Ending June 30, 1949, p. 45.).

It does not follow that "the State Police [must] take over every phase of an investigation if entry on State property is necessary." Whether or not the State Police "take over" is up to the appropriate State officials. There is nothing to prevent the appropriate State officials and local police authorities from entering into mutually satisfactory arrangements permitting the conducting of investigations on State property.

Question 3: My answer is *Yes.* Under G. L. c. 81, § 19, a municipality

"shall have police jurisdiction over all state highways within its limits." See G. L. c. 4, § 7, and *Commonwealth* v. *Therberge,* 231 Mass. 386, 390. If the State Police are, however, actually exercising control at a particular time over a particular portion of a state highway, their control would be paramount in the unlikely event of any question.

Question 4: This question presents several situtions — "accidents, crimes, or other emergencies . . . on state owned property, such as highways and hospitals . . . ." As for crimes on highways, I refer you to my answer to Question 3. As for crimes committed on other state property, I refer you to my answer to Questions 1 and 2. As for accidents or emergencies, I again refer you to my answer to Questions 1 and 2 and particularly to the statement quoted from *Thurlow* v. *Crossman.* I also call your attention to that part of G. L. c. 41, § 98 which authorizes local police to "enter any building to suppress a riot or breach of peace therein;" and to make arrests in connection therewith. Although there is no judicial decision interpreting the quoted provision, I am of the opinion that its reference to "any building" may well include state-controlled as well as privately controlled premises. That this conclusion is a correct statement of the law is supported by the quotation from *Thurlow* v. *Crossman,* cited above, indicating the historic authority and responsibility of police officers to preserve the peace.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 51. NOVEMBER 16, 1967.

HON. HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission*

DEAR COMMISSIONER WHITMORE: — You have asked for my opinion on whether two wells which the Town of Wellesley desires to drive within fifty feet of the Charles River and about two miles away from the nearest existing well field in the town are subject to the provisions of G. L. c. 92; § 16. That section which originated in c. 488, § 23 of the Acts of 1895, known as the Metropolitan Water Supply Act, states in relevant part:

> "No town, except Hingham and Hull, any part of which is within ten miles of the state house, or water company owning a water pipe system in any such town shall, except in case of emergency, use for domestic purposes water from *any source* not now [1895] used by it except as provided in this chapter." (Emphasis supplied.)

It is undisputed that a part of Wellesley is within ten miles of the State House. No claim is made that an emergency exists. It appears that the water from the proposed wells is to be used for domestic purposes.

The application of G. L. c. 92, § 16 to Wellesley must be judged with reference to c. 166 of the Acts of 1883, "An Act to Supply the Town of Wellesley with Water." That act authorized Wellesley to "supply itself and its inhabitants with water for the extinguishment of fires, and for domestic and other purposes." (Sec. 1.) It also authorized the town,

> "for the purposes aforesaid, [to] take, by purchase or otherwise, and hold, the water of Charles River within the limits of or where

> it borders on said town, and of Longfellow's Pond, so called, within the limits of said town, and the water rights, connected with any such *water sources*." (Emphasis supplied.) Sec. 2.

An engineering report which accompanied your request for my opinion indicates that the water for the proposed new wells comes from underground waters that will probably originate in the Charles River watershed. It does not appear that any other body of water will be involved.[1]

The engineering report also indicates that since the enactment of the Metropolitan Water Supply Act in 1895, Wellesley has driven several wells close to wells which existed prior to that year. As already stated, however, the proposed new wells will be about two miles away from any existing well, although they will, it seems, be in the Charles River drainage area.

I will assume that the term "sources" in the 1883 statute included not only water taken directly from the Charles River but also ground waters connected with it. See *Bailey* v. *Woburn,* 126 Mass. 416, 418; *Smith* v. *Stoughton,* 185 Mass. 329, 332-333. And I will also assume that the wells driven by the town since 1895 may properly be regarded as free of the restrictions of G. L. c. 92, § 16. However, the proposed new wells are, in my opinion, subject to them and cannot be regarded as mere improvements of an existing source used in the year 1895.

I base this conclusion on what I consider to be the fair interpretation and underlying purposes of the Metropolitan Water Supply Act. That Act established a comprehensive system of water supply for cities and towns within the Metropolitan Water District. Designed "to provide . . . a sufficient supply of pure water" for the municipalities in the District, it established the Metropolitan Water Board (§ 1), since merged into the Metropolitan District Commission; authorized the Board to regulate the flow of certain waters (§ 4), to take land by eminent domain (§ 5), to construct storage reservoirs (§ 6), to construct buildings, roads, and aqueducts (§ 9), and to build waterworks (§ 12). The Act also authorized a loan of twenty-seven million dollars to carry out its purposes.

The District was originally composed of fourteen cities and towns, not including Wellesley, and has since been enlarged to include twenty municipalities, still not including Wellesley. This enlargement occurred as the result of a provision in § 3 of the 1895 Act (now, as amended, G. L. c. 92, § 10) which authorized the Board to admit other municipalities to the District.

It is, in my opinion, clear that the 1895 Act was designed to establish a unified and ultimately, perhaps, an exclusive system of water supply for municipalities, any parts of which were within ten miles of the State House. Continuation of the use of certain existing local sources was to be permitted but any enlargement was made subject to the requirements of § 23 (now G. L. c. 92, § 16) quoted above. This restriction appears to have been intended to enable the District to become the paramount supplier of water for all the communities and to encourage any community not already a member of the District to become a member, if it desired to expand its existing facilities. In this manner, it appears, the water supply for the general area could be handled according to a single plan rather than according to the separate and uncoordinated plans of the different localities therein.

[1]Hence, St. 1897, c. 102, relative to the water of Rosemary Brook and Longefellow's Pond, and St. 1961, c. 459, relative to use by Wellesley of land in Needham, for water supply purposes, have no application.

In the light of this background and without attempting to formulate a more precise definition of the term "source," as used in the 1895 statute, it is my opinion that the water for the proposed wells, which are, as stated, about two miles from the nearest well field, cannot in any true sense, be regarded as a water "source" used by the Town of Wellesley in the year 1895. Hence, the driving of these wells is subject to the provisions of G. L. c. 92, § 16.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 52. NOVEMBER 20, 1967.

HONORABLE KENNETH R. FOX, *Chairman, Board of Trustees*

DEAR MR. FOX: — You have asked for my opinion concerning the power of the Board of Trustees of State Colleges to establish a general policy terminating the services of state college presidents when they reach their sixty-fifth birthday. Specifically, you have posed three questions:

"1. . . . [D]oes the Board of Trustees have the power, express or implied, to require the presidents of the colleges under its jurisdiction to retire from the presidency and from state service on the date on which they reach age sixty-five or at the end of the academic year in which they reach this age?

"2. Does the Board of Trustees of State Colleges have the power, express or implied, under Chapter 73, Section 16, to require the presidents of the colleges under its jurisdiction to retire from the presidency at age sixty-five and to assign such persons to other professional duties?

"3. If the answer to question 2 is in the affirmative, would the Board be required to keep such persons in 'other professional duties' until the mandatory retirement age for state employees as indicated in Chapter 32, Section 1?"

By virtue of G. L. c. 73, § 16, inserted by § 15 of c. 642 of the Acts of 1963, "An Act Further Regulating the Administration of the State Colleges of the Commonwealth," a president of a State College is regarded as a member of the "professional staff" thereof, as defined in the foregoing section (as distinguished from the "nonprofessional staff" as defined in the same section) since he is employed for "administration" of the college that he heads. He is elected by the Board of Trustees of State Colleges, and like other members of the professional staff is, under G. L. c. 73, § 16, subject to the "complete authority" of the Board with respect to "election or appointment of the professional staff including terms, conditions and period of employment, compensation, promotion, classification and reclassification, transfer, demotion and dismissal . . . ."

Despite the foregoing "complete authority" of the Board, a protective provision is nevertheless applicable. Thus § 17 of St. 1963, c. 642 (not inserted in the General Laws) provides that nothing in the act should be "construed to deny to any employee [in a state college] employed prior to the effective date of this act [July 1, 1963] any of his vested or contractual rights as a state employee."

The protection of vested and contractual rights afforded by the foregoing provision was continued by §§ 44 and 45 (neither of which was inserted in the General Laws) of c. 572 of the Acts of 1965, a more comprehensive statute, entitled "An Act to Improve and Extend the Educational Facilities in the Commonwealth." Section 44, although it stated that the professional staff of the State Colleges "shall serve at the pleasure" of the Board of Trustees, went on to provide that "the tenure of office of any member of such staff on the effective date of this act shall not be impaired." Section 45, as amended by c. 356 of the Acts of 1966, not inserted in the General Laws, preserved the "seniority, tenure, retirement, or other rights of any permanent civil service employee [of a State College] or veteran covered by section nine A of chapter 30 [the Veteran's Tenure Act] of the General Laws, . . . employed on the effective date of this act . . . ." Since neither the 1965 act nor the 1966 amendment diminished any protection already afforded by the 1963 legislation, all vested or contractual rights of a state employee on the effective date of the 1963 act, namely, July 1, 1963, have since remained unimpaired.

It does not appear from the information which you have submitted whether any of the presidents of our state colleges held civil service tenure on July 1, 1963. I will, therefore, assume, for the purpose of this opinion, that none of the presidents held such tenure. The information does, however, indicate that one or more of the presidents may have had tenure on that date under the Veteran's Tenure Act. These officials are in my opinion entitled to its protection. To the extent that this conclusion may differ from views expressed in an opinion of a former Attorney General dated January 13, 1967, I am constrained not to follow the earlier opinion.

Applying the foregoing principles to your questions, my answers are as follows:

Question 1. Yes, except for presidents who on January 1, 1963 had tenure under the Veteran's Tenure Act. Mandatory retirement of holders of such tenure is subject to that Act.

Question 2. Yes, except that a president who held tenure under the Veteran's Tenure Act on January 1, 1963 may be assigned to other duties only in accordance with the provisions thereof (G. L. c. 30, § 9A), as modified by c. 356 of the Acts of 1966. The latter statute authorizes a transfer of an employee, in order to "staff" a State college, provided that (1) the employee is transferred to another position in his employing unit (in this case the college where the president serves); (2) his salary is not reduced as the result of the transfer; and (3) his salary grade is not raised as the result of the transfer without the approval of the Director of Civil Service and the Director of Personnel and Standardization.

Question 3. As for presidents who did not have tenure under the Veteran's Tenure Act on July 1, 1963, the Board of Trustees is not required to keep a president in "other professional duties" until he reaches the mandatory retirement age under G. L. c. 32, § 7. The provision in G. L. c. 73, § 16, which gives to employees of state colleges "the same privileges and benefits of other employees of the Commonwealth such as retirement benefits . . ." does not, in my opinion, restrict the "complete authority" given to the Trustees, under the same section quoted above in this opinion, over the employment of members of the professional staff. If the Trustees elect to exercise this authority so as to require a president to retire, then he will, of

course, be entitled to the retirement benefits that have been accrued to him. In view of my answer to your first question, no answer is required to your third question so far as it may relate to holders of veteran's tenure.

Finally, if any of the presidents held civil service tenure on July 1, 1963, further qualifications of my answers may be required.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 53: DECEMBER 6, 1967.

HONORABLE MILTON GREENBLATT, M. D., *Commissioner of Mental Health*

DEAR DOCTOR GREENBLATT: — You have requested my opinion on whether, in light of the enactment of c. 735 of the Acts of 1966, "An Act Establishing a Comprehensive Program of Mental Health and Mental Retardation Services," the Department of Mental Health may still avail itself of financial assistance and establish clinics at facilities provided by cooperating incorporated private agencies. Chapter 735 replaced c. 19 of the General Laws with a new c. 19 and it also repealed and amended several sections of G. L. c. 123. You state that the Department "construes the new Act . . . as not preventing these cooperative community services from continuing, provided they do not conflict with the powers and duties of any Area Board . . . ."

It is my opinion that the Department of Mental Health may still avail itself of financial assistance and establish clinics at facilities provided by cooperating incorporated private agencies, and I am therefore in agreement with your construction of c. 735 in this respect.

Prior to the enactment of c. 735, G. L. c. 123, § 13A specifically provided that clinics might be established in collaboration with private agencies. Section 13A authorized the Division of Mental Hygiene to:

> "establish, foster and develop out-patient clinics. Said clinics may be established in collaboration with public schools, private schools, or other agencies providing co-operative or complementary facilities to the state clinics . . . ."

Section 13A was repealed by c. 735, inasmuch as the Division of Mental Hygiene was abolished as a mandatory division of the Department of Mental Health, and the Commissioner now has the discretionary authority to "establish such divisions in the department as he deems appropriate from time to time."

Although the provisions inserted by c. 735 do not confer on the Department of Mental Health the powers previously conferred by § 13A on the Division of Mental Hygiene in so many words, it is nevertheless my opinion that they contain adequate authority for collaboration with private agencies in the establishment of clinics. The revised G. L. c. 19 makes several references to private facilities and provides that the Department shall have general supervision of all such facilities for mentally ill or mentally retarded persons. Under G. L. c. 19, § 1, supervision of "comprehensive centers and clinics" is also conferred upon the Department, and, more importantly, the Department is authorized "subject to appropriation" to "further develop ad-

ditional state hospitals, state schools, comprehensive centers and clinics, or other mental health facilities under commonwealth operation . . . ." This latter grant of authority is, in my opinion, sufficiently broad to encompass the establishment of clinics in collaboration with cooperating incorporated private agencies, and the authority is not diminished by the fact that the clinics are established with the use of private funds and no appropriation may be necessary. The words "subject to appropriation" should be read as only requiring an appropriation prior to the establishment of clinics where funds are needed and are not otherwise available.

Finally, it is important to note that c. 735 did not affect in any way G. L. c. 40, § 5(40C). That sub-paragraph authorizes the expenditure of municipal funds:

> "For providing co-operative or complementary facilities to out-patient clinics established or to be established in accordance with the provisions of chapter nineteen, *in co-operation with the department of mental health and other agencies collaborating with said department* . . . ." (Emphasis supplied.)

In conclusion, the Department of Mental Health may still avail itself of financial assistance and establish clinics at facilities provided by cooperating incorporated private agencies. On the facts presented, no problem appears to arise with respect to the 46th Amendment to the Massachusetts Constitution, the so-called Anti-Aid Amendment.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 54. DECEMBER 8, 1967.

HONORABLE LEO L. LAUGHLIN, *Commissioner of Public Safety*

DEAR COMMISSIONER LAUGHLIN: — You have requested my opinion as to who is the "head of the fire department" of the City of Malden within the meaning of G. L. c. 148, § 4. Specifically, you have asked to whom may "the State Fire Marshal delegate the authority vested in him by G. L. c. 148, § 4, to the Fire Commissioner or to the Chief of Department?"

General Laws c. 148, § 4 provides as follows:

> "The marshal, an inspector, *the head of the fire department,* or any person to whom the marshal or *the head of the fire department* may delegate the authority, may, in the performance of the duties imposed by this chapter, or in furtherance of the purpose of any provision of any law, ordinance or by-law relating to the subject matter of this chapter, or of any rule or regulation of the board of fire prevention regulations, established under section fourteen of chapter twenty-two, in this chapter referred to as the board, or any order of the marshal or *head of the fire department,* enter at any reasonable hour any building or other premises, or any ship or vessel, to make inspection or investigation, without being held or deemed to be guilty of trespass.
>
> "The marshal or *the head of a fire department* to whom he may delegate authority, shall make an inspection every three months

> of institutions as defined in section one of chapter one hundred and forty-three, licensed by and under the supervision of the department of public health, or licensed by the department of public welfare, and shall make a report of such inspection to each such department on forms submitted to the marshal by such department for this purpose. Said marshal or such *head of a fire department* shall also make an inspection every three months of the premises specified in innholder's licenses issued under chapter one hundred and forty." (Emphasis supplied.)

Because the Marshal is permitted to delegate to "any person" the authority given him under the first paragraph of § 4, it is clear that the question you ask relates to the delegation of the powers conferred on the Marshal by the second paragraph. As to these, it is necessary to determine who the "head" of Malden Fire Department is within the meaning of § 4.

General Laws c. 148, § 1 defines the term "head of the fire department" as follows:

> " 'Head of the fire department', *the chief executive officer* of the fire department in a city, town or fire district having such an officer, *otherwise the fire commissioner,* board of fire commissioners or fire engineers, or commissioner of public safety; and, in towns not having a fire department, the chief engineer, if any, otherwise the chairman of the board of selectmen." (Emphasis supplied.)

From the wording of the statutory definition, it is clear that in any fire department having a "chief executive officer," that officer is considered to be the "head of the fire department."

This conclusion is supported by an examination of the historical development of the definition of "head of the fire department" in c. 148. This term originated in St. 1914, c. 795, § 1, which provided:

> "The words 'heads of fire departments', as used in this act, mean the fire commissioner or board of fire commissioners in those cities in the metropolitan district that have such an official or officials; the commissioner of public safety in Cambridge; the chief executive officer of the fire department of each of the other cities and towns within the metropolitan district, and the chief executive officer of the fire department of any fire district now existing or hereafter created in any one or more of said cities or towns."

This definition was revised by Acts of 1930, c. 399, § 1, as follows:

> " 'Head of the fire department', the fire commissioner, board of fire commissioners or fire engineers, or commissioner of public safety in those cities and towns having such an officer or officers; the chief executive officer of the fire department of each other city, town or fire district; and, in towns not having a fire department, the chief engineer, if any, otherwise the chairman of the board of selectmen."

Both the original definition in 1914 and the revised definition in 1930 indicate that the term "fire commissioner" did not necessarily encompass the term "chief executive officer." Each definition contemplated that a single

fire department, depending on its internal structure, could have a different person in each position, and that in such a case the fire commissioner, rather than the "chief executive officer," would be deemed to be the "head of the fire department."

By Acts of 1945, c. 470 the Legislature revised the definition of "head of the fire department" to its present form in G. L. c. 148, § 1, quoted earlier in this opinion, designating "the chief executive officer" as the "head of the fire department" even though a municipality or district may also have a fire commissioner or board of fire commissioners or fire engineers.

In order to ascertain who is the "head of the fire department" of Malden, it is therefore necessary to determine whether the department has a "chief executive officer." I am of the opinion that it does and that person designated as the "Chief of the Department" is that person.

The statutory basis for the organization of the Malden Fire Department is found in St. 1892, c. 182, a special act applicable to Malden, creating a board of three fire commissioners and directing them to establish a fire department. This act was followed by St. 1908, c. 93, which abolished Malden's three-man board and vested their powers and duties in a single fire commissioner. St. 1892, c. 182, § 1 provided in part:

> "The board of fire engineers constituted and appointed by said board of fire commissioners, or the chief or head of the fire department constituted and appointed by said board in case no board of fire engineers shall be constituted by said board, shall have and exercise all the powers and be subject to all the duties which have been conferred or imposed by law upon boards of fire engineers or the chief or head of fire departments, or which may hereafter be so conferred or imposed by law."

Paraphrasing this language (but reflecting the substitution by St. 1908, c. 93, of a single fire commissioner for the earlier board of fire commissioners), § 53 of the 1908 Revised Ordinances of Malden provides in part:

> "The Board of Fire Engineers constituted and appointed by said Fire Commissioner, or the Chief or head of the Fire Department constituted and appointed by said Commissioner, in case no board of Fire Engineers shall be constituted by said Commissioner, shall have and exercise all the powers and be subject to all the duties which have been conferred or imposed by law upon boards of fire engineers or the Chief or head of fire departments, or which may hereafter be so conferred or imposed by law."

Both the statute and the ordinance contemplated that the Fire Commissioner would appoint either a board of fire engineers or a chief and that the board or chief so appointed will "have and exercise all the powers and be subject to all the duties which have been conferred or imposed by law upon . . . heads of fire departments, or which may hereafter be so conferred or imposed by law."

The 1956 Rules and Regulations of the Malden Fire Department, which I understand are still in effect, show that the Fire Commissioner has not constituted a Board of Fire Engineers, but has constituted an officer designated as the "Chief of the Department," and has vested in him the comprehensive powers and duties which would normally appertain to a "chief executive officer." The Chief of the Department is stated to be "the channel of

all communication between the Commissioner and the department . . . ." (Rule 3, § 1; see also Rule 21, § 24.) He "shall be responsible to the Commissioner for the proper performance of all duties of the members of the Department, for the proper care and use of all property and equipment and that all orders, rules and regulations are strictly enforced" [sic]. (Rule 3, § 2.) He is given extensive disciplinary control over all members of the Department, including authority to suspend members, subject to review by the Commissioner (Rule 3, § 4). He appoints the Station Commanders, subject to approval by the Commissioner, and receives their reports concerning the status of the men and equipment under their immediate control (Rule 5, §§ 1, 4 and 6). While the Commissioner promulgates the formal Rules and regulations of the Department, the Chief is empowered to issue orders binding on the entire Department, subject to approval by the Commissioner (Rule 3, § 7). When present at fires, he directly commands the entire Department (Rule 3, § 5).

A careful reading of the Rules and Regulations leads me to the conclusion that the Chief of the Malden Fire Department is vested with the powers and responsibilities which ordinarily pertain to the chief executive officer of any organization. He is clearly the chief officer responsible for executing the day-to-day operation of the Department and the rules, regulations and policies of the Fire Commissioner.

The fact that the Chief is subordinate to the Fire Commissioner within the Malden Fire Department does not alter this conclusion. It is, in my opinion, clear that the present definition of "head of the fire department" in G. L. c. 148, § 1 presupposes that for the limited purpose of applying the definition a "head" of a fire department may actually be such a subordinate official.

I should add that nothing in this conclusion should be construed as in any way derogating from the authority and responsibilities of the Fire Commissioner and his paramount supervisory power, within the Malden Fire Department, over the Chief and the Department itself. See *Dooling* v. *Fire Commissioner of Malden,* 309 Mass. 156.

In summary, then, it is my conclusion for the limited purpose of applying the definition of "head of the fire department" in G. L. c. 148, § 1 to the Malden Fire Department, the Chief of the Department is that person.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 55. DECEMBER 21, 1967.

HONORABLE ROBERT Q. CRANE, *Treasurer and Receiver General Chairman, State Board of Retirement*

DEAR MR. TREASURER: — As Chairman of the State Board of Retirement, you have requested my opinion on whether a veteran[1] who has been employed as an air technician by the Massachusetts Air National Guard for more than thirty years is eligible for retirement under G. L. c. 32, § 58. You state that the veteran cites c. 606 of the Acts of 1963 as "qualifying"

[1]As used in this opinion, "veteran" means a person who qualifies as such under the definition contained in G. L. c. 32, § 1 (see *Weiner* v. *Boston,* 342 Mass. 67, 71) and G. L. c. 4, § 7 (43).

him for such retirement. You ask, in effect, whether a person so employed must be otherwise qualified as a state employee or whether employment as a caretaker or air technician only is a sufficient basis for qualification. It is my opinion that a veteran who has been employed as an air technician by the Massachusetts Air National Guard for more than thirty years is eligible for retirement under G. L. c. 32, § 58, but this opinion is not based solely on c. 606 of the Acts of 1963.

The question posed in your request requires a brief review of the several applicable statutory provisions. The most important provision is G. L. c. 32, § 58, which establishes a special retirement provision for veterans, separate and distinct from the provisions applicable to members of the State Employees' Retirement System. It states:

> "A veteran who has been in the service of the commonwealth, or of any county, city, town or district or any housing authority, for a total period of thirty years in the aggregate, shall, at his own request, with the approval of the retiring authority, be retired from active service . . . ."

The section does not define the phrase "in the service of the commonwealth," which, for our purposes, is central to a resolution of your question.

Apparently assuming that service as an air technician or caretaker with the Massachusetts National Guard was not regarded as employment by the Commonwealth, at least for service prior to July 1, 1939, the Legislature in 1963 enacted c. 606 of the Acts of 1963. That chapter (not inserted in the General Laws) provides:

> "Not withstanding the provisions of any general or special law to the contrary, any person who is now a member of the state retirement system and who was employed by the Massachusetts National Guard as a caretaker or air technician prior to July first, nineteen hundred and thirty-nine, shall be considered to have been employed by the commonwealth prior to said date, and shall be subject to the provisions of sections fifty-six to fifty-nine,[2] inclusive, of chapter thirty-two of the General Laws, and may, if otherwise eligible, be retired under said sections."

Although c. 606 indicates that employment as a caretaker or air technician by the Massachusetts National Guard prior to July 1, 1939 shall be considered as employment by the Commonwealth prior to that date, the Chapter does not answer the question of how service as an air technician or caretaker *after* that date is to be treated. We must look elsewhere for the answer.

My investigation discloses that in 1947, former Attorney General Barnes ruled that certain personnel, including caretakers of the National Guard, under the jurisdiction of the Adjutant General were not eligible to be members of the State Employees' Retirement System since they were paid directly by the Federal government. The Attorney General stated:

> "The holders of the foregoing positions who are paid directly by the Federal Government are not eligible for membership in the Retirement System, *irrespective of the fact that they may be*

[2]G. L. c. 32, §§ 56-59 relate to the retirement of veterans.

> *in the employ of the Commonwealth.*" (Emphasis supplied.) Report of the Attorney General for the Year Ending June 30, 1948, pp. 35-36.

It is important to note that Attorney General Barnes declared, without extended discussion, that personnel employed in a civilian capacity by the Massachusetts National Guard "may be in the employ of the Commonwealth." Although the Attorney General's opinion did not directly address itself to the question now before me, his reference to the status of civilian personnel of the National Guard should not pass unnoticed.

In 1950, the General Court made certain amendments to the laws governing the State Employees' Retirement System. Membership in the system was broadened to include air technicians and caretakers of the Massachusetts National Guard, previously excluded, because, as stated in the opinion of Attorney General Barnes, they were paid directly by the Federal Government. This extension was accomplished by the enactment of § 1 of c. 600 of the Acts of 1950 (amending G. L. c. 32, § 1) which redefined the word "Employee" to include caretakers and air technicians employed by the Massachusetts National Guard. By § 3 of c. 600 (not inserted in the General Laws), the Legislature provided that "Every person in the employ of the commonwealth on the effective date of this act [i.e. July 11, 1950] who comes within the meaning of 'Employee', as defined in section one of this act, shall become a member of the state employees' retirement system as of said effective date . . . ."

I realize, of course, that the definitions contained in G. L. c. 32, § 1 apply, in terms, only to §§ 1 to 28 of the chapter, the sections which concern the State Employees' Retirement System. They do not specifically apply to §§ 52 to 60 of the chapter, because those latter sections treat veterans separately from members of the State Employees' Retirement System. In the latter sections, the test of eligibility for retirement (at the State level) is framed in terms of the veteran having been "in the service of the commonwealth" (G. L. c. 32, § 58) rather than having been an "employee." Yet, there is no reason to infer an intent on the part of the Legislature to confer the status of an "employee" on air technicians and caretakers for some purposes but not for others. If air technicians and caretakers are "employees" and are "in the employ of the commonwealth" for purposes of membership in the State Employees' Retirement System, then it seems logical and consistent to treat them as "employees" and "in the service of the commonwealth" for purposes of the special retirement provisions applicable to veterans, namely, G. L. c. 32, §§ 52 to 60. I therefore conclude that veterans who have served as air technicians or caretakers in the Massachusetts National Guard may be retired under G. L. c. 32, § 58, provided they have the requisite length of service and are in active service at the time of retirement. See *Weiner* v. *Boston,* 342 Mass. 67, 71.

This conclusion is supported by a decision of the Supreme Court of the United States in 1965 in the case of *Maryland* v. *United States,* 381 U.S. 41. Although that case arose under the Federal Tort Claims Act, the principles enunciated therein are equally applicable to other questions involving the status of the National Guard's personnel. The Court held that civilian employees of a National Guard are employees of the states and not of the Federal Government. In the course of its decision, the Court stated, at pp. 49-50:

> "Civilian caretakers are treated as state employees for purposes of the Social Security Act, for state retirement funds, and under the regulations issued by the Department of the Air Force. As early as 1920 the Comptroller of the Treasury ruled that a civilian caretaker was not a federal employee entitled to the annual leave provisions applicable to the War Department, an opinion that was reiterated in 1941 by the Comptroller General and that reflects the consistent position of the Department of Defense."

It has long been the law, the Court observed, that military personnel of the National Guard are not considered to be federal employees. Civilian employees should not be considered differently, the Court added, even though they are

> "paid with federal funds and must observe federal requirements in order to maintain their positions. Although they are employed to maintain federal property, it is property for which the States are responsible, and its maintenance is for the purpose of keeping the state militia in a ready status."
> 381 U.S. 41 (p. 48).

I therefore conclude, on the basis both of the Court's decision in 1965 and my analysis of other related Massachusetts statutes, that employment as a caretaker or air technician of the Massachusetts National Guard constitutes being "in the service of the commonwealth" for the purposes of G. L. c. 32, § 58. Weighed against the considerations discussed above, I regard the insertion of July 1, 1939 in c. 606 as insufficient to indicate a legislative intent to restrict the benefits that, apart from its provisions, were otherwise available to veterans.

In summary, then, service as a caretaker of the National Guard for more than thirty years satisfies the requirement of G. L. c. 32, § 58 that a veteran have been "in the service of the commonwealth" for that period.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 56. DECEMBER 26, 1967.

HONORABLE MABEL A. CAMPBELL, *Acting Director of Civil Service*

DEAR MRS. CAMPBELL: — You have asked my opinion as to whether positions in the Construction Division of the Metropolitan District Commission (MDC) are exempt from the Civil Service Law and Rules. It is my opinion that they are exempt.

Your question arises out of the manner in which the Construction Division was established in the MDC in the year 1947. Chapter 583 of the Acts of that year abolished the Metropolitan District Water Supply Commission (the Water Supply Commission) which had been established by Chapter 375 of the Acts of 1926, and provided in § 1 that:

> "[A]ll its [the Water Supply Commission's] functions, rights, powers, duties, obligations and properties are hereby transferred to and shall hereafter be exercised, performed and held by the metropolitan district commission, which shall be its lawful successor . . . . [S]aid metropolitan district commission, to the ex-

tent that funds have been made available, shall construct all water and sewerage system projects now under construction by said metropolitan district water supply commission, and those authorized for future construction by said commission. All funds subject to expenditure by said metropolitan district water supply commission are hereby made available to said metropolitan district commission for the same purposes. All existing contracts and obligations of said metropolitan district water supply commission shall remain in full force and effect and shall be assumed and performed by said metropolitan district commission, and all orders, rules and regulations heretofore made by said metropolitan district water supply commission shall remain effective until duly revoked or modified by said metropolitan district commission."

Chapter 375 of the Acts of 1926, which had established the Water Supply Commission, provided in part in § 2:

"The commission may appoint and in its discretion remove such engineering, legal, clerical and other assistants as it may deem necessary to carry on the work herein authorized, and may fix their compensation in accordance with such rules and regulations as the commission may establish and as shall be approved by the governor and council. Such appointments shall not be subject to classification under sections forty-five to fifty, inclusive, or chapter thirty of the General Laws, and chapter thirty-one [the Civil Service Law] of the General Laws shall not apply to removals, and, in accordance with such regulations as the commission may establish and as shall be approved by the governor and council, any appointment, including that of the chief engineer, may be wholly exempt from said chapter thirty-one. Upon request of the commission, the division of civil service shall hold special examinations."

When c. 583 of the Acts of 1947, quoted earlier in this opinion, transferred the Water Supply Commission to the MDC, it transferred the agency intact without impairing any of its powers or attributes. Although the Water Supply Commission's existence as a separate agency was merged into that of the MDC, its identity was effectively preserved by § 2 of c. 583, which, in my judgment, carried over all the attributes of the Water Supply Commission to the Division of Construction, established by § 2, within the MDC. Section 2 provided:

"Except as provided in section three,[1] all of the persons employed on the effective date of this act by the metropolitan district water supply commission shall be transferred as temporary non-civil service employees, without loss of any rights, to a division of construction which the commissioner of the metropolitan district commission is hereby authorized and directed to establish under said commission; and the persons so transferred shall not be subject to the provisions of chapter thirty-one of the General Laws, or the rules made thereunder."

I do not regard the foregoing provision preserving the non-civil service status of the transferred employees as impliedly subjecting future employ-

[1]Section 3 provided, "The tenure of office of the commissioner and associate commissioners of the metropolitan district water supply commission shall cease and determine on [June 30, 1947]."

ees, who are not expressly mentioned, to the Civil Service Law. On the contrary, the comprehensive provisions of § 1 of the 1947 statute, which designated the MDC as the successor of the Water Supply Commission, with all the latter's attributes, when read with § 2 of the same statute, establishing the Construction Division of the MDC, convey a sufficiently clear legislative intent that the provisions exempting from the Civil Service Law the removal of the Commission's personnel and the provisions authorizing the adoption of regulations exempting therefrom all appointments continued in force and were applicable to appointments thereafter made by the MDC of employees in its newly established Construction Division.

Rule 4 of the Water Supply Commission, adopted in 1926, stated that "All appointments shall be wholly exempt from Chapter 31 of the General Laws," Section 1 of c. 583 of the Acts of 1947, quoted earlier in this opinion, stated that "all orders, rules and regulations heretofore made by said metropolitan district water supply commission shall remain effective until duly revoked or modified by said metropolitan district commission." It appears that the MDC has not revoked or modified Rule 4. It follows, in my opinion, that Rule 4 is still in force.

The provision in § 2 of c. 583 of the Acts of 1947 transferring existing employees of the Water Supply Commission to the Construction Division is not inconsistent with this result. Section 2 was, in my judgment, simply an aspect of the larger scheme to continue the Commission as an intact element of the MDC. See *Report of the Attorney General for the Year Ending June 30, 1948,* p. 69, determining that although the act of transfer of the existing employees of the Water Supply Commission did not expressly deal with the question whether the Division of Personnel and Standardization had authority over their continued employment, the former provisions of the 1926 statute exempting employment within the Water Supply Commission nevertheless continued to apply.[2]

In summary then, it is my opinion that none of the positions in the Construction Division of the MDC are subject to the Civil Service Law and the rules thereunder.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 57. DECEMBER 29, 1967.

HONORABLE MILTON GREENBLATT, M.D., *Commissioner of Mental Health*

DEAR COMMISSIONER GREENBLATT: — You have asked for my opinion regarding the legality of certain payments out of the subsidiary account 03 in your department's budget. You have submitted three questions and have given illustrations of the situations to which the questions relate. You ask:

"1. May this Department pay out of its subsidiary account 03 a full time or part time employee of another Department or Division of the Commonwealth for services rendered as enumerated in the 03 account?

"EXAMPLE: May we use the services of a full time or part

[2]Unlike the situation that was the subject of an opinion of the Attorney General in his Annual Report for the Year Ending June 30, 1951, p. 53, we are not in the present situation dealing with the effect of a subsequently enacted statute.

time social worker employed by the Department of Public Welfare to do a social service study pertaining to Medical Assistance at the Medfield State Hospital, an institution in the Department of Mental Health, and remunerate said individual from our subsidiary account '03'?

"2. May this Department pay out of its subsidiary account 03 a full time or part time employee of this Department for services rendered as enumerated in the 03 account?

"EXAMPLE: May a physician employed as Assistant to the Commissioner of Mental Health conduct physical examinations at the Medfield State Hospital, and be remunerated from subsidiary account '03'?

"3. May a full time or part time employee of this Department be paid for services rendered to another Department of the Commonwealth?

"EXAMPLE: May a social worker employed by the Department of Mental Health provide services as a social worker for the Department of Public Welfare and be reimbursed by that Department from its subsidiary account '03'?"

The 03 account to which you have referred is one of the subsidiary accounts approved by the Joint Committee on Ways and Means under G. L. c. 29, § 27[1] to enable the primary fiscal control agencies, namely, the Budget Bureau and the Comptroller, to control and account for expenditures from the appropriation accounts for the several departments, boards, commission, institutions and other agencies of the Commonwealth. Pursuant to § 27, the Committee files with the Budget Director and Comptroller schedules detailing the assignment of appropriations among subsidiary accounts. While G. L. c. 29, § 29 gives the Budget Director broad power to transfer funds from one subsidiary account to another within the same appropriation account, this power is generally made subject to restrictions contained within appropriation acts (see, e.g., St. 1965, c. 824, § 15; St. 1966, c. 411, § 15; and St. 1967, c. 414, § 15) and such transfers among subsidiary accounts are required to be reported forthwith to the Comptroller, in order that he may effectively exercise his supervisory control over the disbursement of funds appropriated, and to the Committee.

Three of the subsidiary accounts which have been established under the authority of G. L. c. 29, § 27 relate to personnel services.

The 01 account is entitled "01 Salaries, Permanent Positions" and covers "All regular compensations . . . to those in permanent approved positions in the regular authorized list of positions in departments or in the quota for institutions, whether the incumbent holding the position is on a permanent, provisional or temporary appointment." The 02 account is entitled "02 Salaries, Other" and covers "All regular compensation to those in temporary positions, and all overtime." Finally, the 03 account to which you have re-

[1] G. L. c. 29, § 27 reads in part as follows:
"Appropriations by the general court, and any allotments by the governor, shall be expended only in the amounts prescribed in the subsidiary accounts, if any, established for the several appropriation accounts in schedules established by, and on file with, the joint committee on ways and means. Said committee, as soon as may be after the general appropriation bill or any other appropriation bill has the force of law conformably to the constitution, shall file with the comptroller and with the budget director, a certified copy of the schedules aforesaid which relate thereto."

ferred is entitled "03 Services — Non-Employees" and covers "All services and related expenses conforming to [certain] conditions rendered or incurred by non-employees, except contractual services classified under any other subsidiary account."[2]

In an opinion dated July 6, 1967, I examined the general criteria which must be met before a state employee may, under a statute authorizing the employment of consultants, be compensated as a consultant for extra services that he may render to the Commonwealth.[3] These criteria are applicable to the questions and examples you have put to me.

Each of your questions involves the construction which has been or should be given to the word "Non-Employees" in the title and description of the 03 subsidiary account. These words, and the accompanying language describing the accounts, were formulated by the Comptroller and the Budget Director, and approved by the Joint Committee on Ways and Means. They are administered and enforced by the Budget Director and the Comptroller. The classifications of the subsidiary accounts are thus in the nature of administrative regulations rather than laws; and, accordingly, the construction given by these officials is controlling, provided, of course, that their construction is reasonable and does not violate any provision of law.

An inquiry into the practice followed by these officials has disclosed that they have not construed the word "Non-Employees" so as to prohibit persons who are paid as state employees from an 01 or 02 subsidiary account from also receiving additional compensation for extra services from an 03 subsidiary account. Furthermore, these officials have regarded it as immaterial whether the employee receives additional compensation from the 03 account of his own or of some other department.

Rather, the officials concerned have adopted a practice which permits a person who is paid from an 01 or 02 account to be compensated for extra services from an 03 subsidiary account provided the extra services are of such a nature that they could not be considered to be within the scope of the employment for which he is being paid from an 01 or 02 account.

As I have said, the foregoing matters are within the discretion of the officials concerned, and I know of nothing illegal or improper with the practices outlined above, which I understand presently to be in effect. Accordingly, it would appear that the fact that the intended recipients of compensation under an 03 account are already employees of the Commonwealth does not require negative answers to your questions. This is true even as re-

[2]The descriptions of these accounts are contained in Form BB541, entitled, "Subsidiary Accounts and Expenditure Control Numbers for Budgetary Control," approved by the Joint Committee on Ways and Means on January 12, 1965, and printed in October, 1966.

[3]See Opinion of the Attorney General 67/68 No. 2. This opinion discusses certain conditions absent which a salaried state employee may not be compensated for extra services as a consultant (i.e., under an 03 subsidiary account). For example, extra compensation under 03 may not be paid unless the extra services are performed outside the employee's normal working hours; nor may such payment be made if the extra services are required to be performed as part of the employee's salaried duties. Furthermore, the extra compensation may not be of such a character that it would violate G. L. c. 30, § 21, by providing in effect two salaries; and it must also be shown that no employee is available to perform the services as part of his regular duties.

In addition to these criteria, which relate to state officers or employees desiring additional compensation under an 03 subsidiary account, there are other general limitations applicable to 03 compensation which are described in Form BB541. For example, clerks, typists and stenographers may not be paid under the 03 subsidiary account; nor may services be compensated under 03 unless they are for a limited, specified period of time. Both the earlier opinion and this opinion, of course, are concerned with the special problems involving 03 compensation for persons who are already state officers or employees.

gards the second question, where the intended recipient is to be given additional compensation from the 03 account of the same department that pays him from an 01 or 02 account for his regular employment. Rather, in each such case, the employee may be eligible to receive compensation from an 03 account, provided that his services satisfy in all respects the restrictive criteria previously discussed. I would suggest that if you require further clarification of these matters that you communicate directly with the Budget Bureau and the Comptroller.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 58. JANUARY 3, 1968.

MR. FRANCIS X. GUINDON, *Director, Division of State Colleges*

DEAR MR. GUINDON: — You have requested my opinion as to whether G. L. c. 79A, § 2 applies to the proposed acquisition of certain land for the Massachusetts Maritime Academy. The land in question consists of some 74 adjoining lots located at Taylor's Point in Bourne, Massachusetts. There are cottages on 54 of these lots, more than five of which are occupied by owners or tenants throughout the year. The land is to be acquired pursuant to St. 1967, c. 682, § 2, Item 8068-16, whereby $600,000 was appropriated to the Massachusetts Maritime Academy "For the acquisition of certain land, or land with buildings thereon, for the development of the academy, by purchase or by eminent domain under chapter seventy-nine of the General Laws . . . ."

The provision of G. L. c. 79A, § 2 to which your inquiry is directed is as follows:

> "No acquisition which shall involve the displacement of occupants of more than five dwelling units . . . shall be made unless and until the bureau [of relocation] has qualified a relocation advisory agency to give relocation assistance to the occupants to be displaced."

The word "acquisition" is defined for purposes of the foregoing provision as "a taking of real property by eminent domain or through purchase by an agency, public or private, authorized to take land by eminent domain, for a purpose for which such real property might have been taken by eminent domain." G. L. c. 79A, § 1. The term "dwelling unit" is defined as "a room, suite of rooms, apartment or house occupied as a single residential unit by one or more persons." *Ibid.*

Thus, if the taking or purchase of the 74 lots were treated as a single "acquisition" of property, G. L. c. 79A, § 2 would clearly apply. In your letter, however, you say "that in the purchase or taking of the said 74 lots that each acquisition is separate and distinct from each of the others," and "that in purchasing or taking from any of the owners of said 74 lots there will *not* be a displacement of more than five dwelling units . . . ."

After careful consideration, I am obliged to say that I cannot agree with this contention. In Item 8068-16 of St. 1967, c. 682, § 2, the Legislature made a single appropriation for the "acquisition" of this land in its entirety to serve a single purpose (i.e., "the development of the academy"). The

Legislature must, of course, have contemplated the possibility that the acquisition authorized might involve parcels owned by different people, and hence a multiplicity of conveyances. By the same token, I do not read Item 8068-16 as imposing any limitation on the number of separate orders of taking by eminent domain which the Academy might choose to adopt in acquiring the property. Regardless of the mechanics employed by the Academy, the acquisition contemplated, being authorized by a single legislative enactment for a single purpose, and consisting of the assembling of what will become a single, unified parcel of land, should not be regarded as a series of separate "acquisitions" — either for purposes of Item 8068-16 or for purposes of G. L. c. 79A, § 2.

The latter statute was enacted in order to facilitate the relocation of persons displaced by the acquisition of their land for public purposes. The problem of relocation is particularly acute where several homes are swept away by a single public project. It was presumably for this reason that the Legislature confined the application of § 2 to cases involving "more than five dwelling units . . . ." The problem at which § 2 is aimed is in no way alleviated by the use of separate deeds or separate orders of taking in acquiring the various dwelling units, and I do not think that the Legislature intended the application of § 2 to turn on any such fortuitous circumstance.

It is therefore my opinion that the proposed acquisition of Taylor's Point is subject to the provisions of G. L. c. 79A, § 2.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 59. JANUARY 4, 1968.

DR. RICHARD M. MILLARD, *Chancellor, Board of Higher Education*

DEAR CHANCELLOR MILLARD: — The Board of Higher Education has requested my opinion as to whether, in the light of G. L. c. 151C, known as the Fair Educational Practices Act, the University of Massachusetts may make a racial census of its enrolled students in order to obtain data requested by the Department of Health, Education and Welfare (HEW) of the Federal government. The Department of HEW has requested the University to complete and file a report form entitled "Compliance Report of Institutions of Higher Education Under Title VI of the Civil Rights Act of 1964." Accompanying the report was a memorandum from the Director of the Office of Civil Rights in the Department of HEW stating, "The information is required pursuant to section 80.6(b) of this Department Regulation (45 CFR 80) and similar provisions of the Regulations of other Federal agencies."

The cited regulation is entitled, "Nondiscrimination in Federally-Assisted Programs of the Department of Health, Education and Welfare — Effectuation of Title VI of the Civil Rights Act of 1964." Its stated purpose is that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health, Education and Welfare." (45 CFR 80.1.)

Section 80.6(b) of the regulation states:

> "Each recipient [in this case the University of Massachusetts] shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part."

The report form has one section which asks a series of questions about students enrolled in the 1967 fall term. Separate boxes are provided on the form for the number of "White," "Negro" and "Other" students in various categories: students enrolled in the fall term 1967; students residing in college-owned housing; and students receiving athletic scholarships.

The memorandum which accompanied the report form states that since this report is the first such report required, estimated figures will be acceptable in lieu of an actual count. The implication is plain, however, that estimates will not be favorably regarded in the future.

Turning now to your specific questions, you ask:

"1. May the University of Massachusetts require and solicit information, to be in writing, from the individual students of the University as to their race, their color and their national origin solely in order to meet the informational requirements of the Federal Government?

"2. If the answer to Question No. 1 is in the affirmative, which Administrative Office of the University shall maintain such written records and what general conditions should govern the use and custody of such records to avoid violating the intent of C. 151 C of the Massachusetts General Laws."

I find nothing in the Massachusetts Fair Educational Practices Act, G. L. c. 151C, which would prohibit the University from requiring and soliciting the indicated information from its enrolled students. The prohibition of § 2(c) of the Act against an educational institution making an inquiry about race, religion, color or national origin applies only to inquiries "of a person seeking admission." I find no prohibition in the Act against making such an inquiry of enrolled students to supply the information required by the Department of HEW on its report form. I would assume, of course, that the purpose of the inquiry will be explained to the students.

It is significant that our Supreme Judicial Court, in sustaining the power of the Commissioner of Education to make a racial census of local public schools under G. L. c. 69, § 1, stated, "Section 2 (c) has no application to a general official statistical inquiry of this type." *School Committee of New Bedford* v. *Commissioner of Education,* 349 Mass. 410, 417.

Your second question presents issues which I regard as coming within the administrative jurisdiction and judgment of the University. No issue under G. L. c. 151C appears to be raised. I desire, however, to call your attention to the following provision (45 CFR 80.6(d)) of the Department of HEW's regulations:

> "Each recipient [in this case the University of Massachusetts]

shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program under which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part."

I trust that the foregoing adequately responds to your questions.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 60. JANUARY 8, 1968.

HON. HOWARD WHITMORE, JR., *Commissioner, Metropolitan District Commission*

DEAR COMMISSIONER WHITMORE: — You have asked my opinion on the interpretation that should be given to a certain contract executed by the Metropolitan District Commission ("MDC") and the City of Chicopee ("City") relative to supplying the City with water. The contract was executed on August 26, 1948 (superseding an earlier contract dated December 26, 1947) pursuant to authority given by G. L. c. 92, § 10(3), as amended by St. 1947, c. 575, § 1, which permits the MDC to sell MDC water to municipalities which are not members of the Metropolitan Water System. An examination of the correspondence that you and the City have furnished me indicates that the City and the MDC differ on whether, on the one hand, the contract required only that the facilities originally constructed by the MDC should have a carrying capacity of about 23 million gallons daily, or, on the other hand, the contract required the MDC to supply an indeterminate amount of water and to construct facilities therefor from time to time as the water supply needs of the City demanded. In my judgment, the first interpretation is the correct one.

Paragraph 1 of the contract provided:

> "The said Commission agrees to construct a pressure aqueduct with a carrying capacity of not less than 23 million gallons of water daily and such other works as are necessary, or desirable, to meet the present and future requirements of such water supply to said City from Quabbin Reservoir to the Chicopee-Ludlow city line, and will maintain said aqueduct and appurtenances and furnish said City with its water supply from Quabbin Reservoir through a distribution reservoir in Ludlow with a flow line at Elevation 425 (Boston City Base) a usable depth of 20 feet and a usable capacity of approximately 23 million gallons, and by a means of a thirty-six (36)-inch water main from this reservoir to the Chicopee city line."

Paragraph 1 also required the MDC to reserve in the distribution reservoir, for the City's use, an average full day's supply of water.

By paragraph 2 of the contract the City agreed to construct at its expense

a 36-inch pipeline from the Chicopee-Ludlow city line. Paragraph 3 set forth a schedule of charges to be made by the MDC to the City, depending on the average daily quantity of water supplied each year. Paragraph 4 stated that "this agreement shall continue for a period of fifty years after the water is first furnished to said City; provided, however, that the City shall have the right of extension for such periods of time and at such terms as shall be mutually agreed upon by the Commission and the City." In paragraph 5 the Commission agreed "to begin the construction . . . within a reasonable time after the execution of this agreement . . . and to make every reasonable effort to make water available in quantities desired under the agreement by December 31, 1949 . . . ."

You state that the MDC has expended $3,983,000 to construct the Chicopee Valley Aqueduct system from Winsor Dam of the Quabbin Reservoir to the Chicopee city line. Section 4 of c. 575 of the Acts of 1947 had authorized the MDC to make this expenditure upon certification by the MDC to the Governor and Council "that satisfactory agreements have been made to supply an aggregate population of not less than forty thousand in the valley of the Chicopee river and its tributaries . . . ." You state that the population of the City was about 45,000 in 1948 and is now about 58,000.

It appears from the correspondence that the existing aqueduct is now operating at nearly full capacity. To expand it to meet the presently anticipated increase in the City's water requirements would require substantial additional construction which could include a second pipe line, the cost of which is estimated at $4,500,000.

I do not construe the contract as requiring the MDC to construct additional facilities. The reasonable interpretation of the contract is rather that the extent of the MDC's obligation to construct facilities was only to build in the first instance a system with a capacity of about 23 million gallons. It is undisputed that the original system had this capacity.

That this was the limit of the MDC's obligation is, in my judgment, sufficiently expressed in paragraph 1 of the contract, quoted above in this opinion. In that paragraph the MDC agreed "to construct *a* pressure aqueduct with a carrying capacity of not less than 23 million gallons of water daily and such other works as are necessary, or desirable, to meet the present and future requirements of such water supply to said city . . . ." (Emphasis supplied.) I regard this clause as contemplating only one project, the scope of which would be determined by the then existing requirements and the *then reasonably foreseeable* future requirements of the City for its water supply. The clause which reads, "to meet the present and future requirements of such water supply" cannot, in my judgment, be reasonably interpreted as imposing an open-ended obligation on the MDC to furnish whatever water the City might at some future time require.[1]

That the foregoing interpretation is the correct one finds support in the more specific provisions of paragraph 1. These provisions, also quoted earlier in this opinion, specify that the MDC will "furnish said City with its water supply from Quabbin Reservoir through a distribution reservoir in Ludlow with a flow line at Elevation 425 (Boston City Base) a usable depth of 20 feet *and a usable capacity of approximately 23 million gallons*, and by means of a thirty-six (36)-inch water main from this reservoir to the Chico-

[1] It may be that this clause should not even be regarded as imposing an obligation, but should be viewed as merely describing the purpose for which the aqueduct was to be built.

pee city line." (Emphasis supplied.) The foregoing particularization of the elements and capacity of the water supply system indicates that the parties to the contract contemplated only a system of the capacity described.

In summary then, I am of the opinion that, with respect to carrying capacity, the contract required only that the facilities originally constructed should have a capacity of about 23 million gallons daily, and that the MDC assumed no obligation to expand the facilities thereafter.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 61. JANUARY 16, 1968.

HONORABLE HUGH MORTON, *Chairman, Civil Service Commission, Division of Civil Service*

DEAR COMMISSIONER MORTON: — You have requested my opinion as to the power of the Civil Service Commission to reappoint an Acting Director of Civil Service who has already served in that capacity for a period of six months.

Your letter indicates that on July 21, 1967, the Commission appointed an Acting Director of Civil Service to fill the vacancy created by the death of the Director. This appointment was made pursuant to G. L. c. 13, § 2, whereunder the Commission, in the event of such a vacancy, "may appoint an acting director *for not more than six months*." (Emphasis supplied.) I infer from your letter that the appointment was made for the full six-month period allowed by the statute and, hence, that it will expire on January 20, 1968. You wish to know whether the Acting Director's appointment as such may be continued for an additional period, not exceeding six months, if no permanent Director has been appointed by January 20.

It is my opinion that the appointment of the Acting Director may not be so extended. I interpret G. L. c. 13, § 2 as imposing a six-month limit not merely on the term for which an Acting Director may be initially appointed, but on the total period during which an Acting Director may be named to fill a particular vacancy in the office of Director.

Under G. L. c. 13, § 2, the power to appoint a permanent Director, like the power to appoint an Acting Director, is vested in the Civil Service Commission. Thus, if § 2 were read as authorizing successive six-month appointments of an Acting Director, the Commission could, it would seem, treat these appointing powers as alternatives and, if it chose, perpetuate an Acting Director in office indefinitely.

I do not think that the Legislature intended to provide the Commission with such alternative methods of securing performance of the functions of the Director. Section 2 provides that a permanent Director *shall* be appointed by the commission," whereas "the commission *may* appoint an acting director for not more than six months." (Emphasis supplied.) Read together, these provisions impose an affirmative duty upon the Commission to appoint a permanent Director and permit the appointment of an Acting Director only as a temporary measure ("for not more than six month") to allow time for the Commission to select a new permanent Director.

This conclusion is borne out by an examination of other provisions of G.

L. c. 13, § 2 and related statutes. The Director is "the executive and administrative head" of the Division of Civil Service. G. L. c. 13, § 2. He has broad powers in the administration and enforcement of the civil service laws, many of which may be exercised without regard to the wishes of the Commission. G. L. c. 31, §§ 2A, 10. See *Moore* v. *Civil Service Commission,* 333 Mass. 430. Because of the importance and sensitivity of this position, G. L. c. 13, § 2 requires that any permanent Director appointed by the Commission "shall be a person familiar with the principles and experienced in the methods and practice of personnel administration." In addition, § 2 establishes a detailed procedure for selection of the Director should the Commission "in its discretion restrict appointments . . . to persons passing a competitive examination . . . ." According to this procedure, the selection of the Director is made through an examining committee of three experts in the field of personnel administration. These statutory qualifications and selection procedures reflect a clear legislative recognition of the need for a highly qualified person as permanent Director.

There are, on the other hand, no statutory standards of expertise or selection procedures for an Acting Director. To permit the contemplated extension of the Acting Director's appointment would therefore be tantamount to reading those standards and procedures out of the statute. This could hardly have been the legislative intention. Rather, the absence of statutory detail on the selection of an Acting Director suggests that the General Court regarded this position as a mere "stop gap," to permit the continued operation of the civil service system while a qualified permanent Director is being sought. Accordingly, I conclude that the time limitation on the appointment of an Acting Director represents a legislative determination that six months should afford the Commission sufficient time to complete the selection process involved in obtaining a new permanent Director.

It is therefore my opinion that the appointment of an Acting Director of Civil Service may not be extended beyond the six-month period prescribed in G. L. c. 13, § 2.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 62. JANUARY 16, 1968.

HONORABLE JOHN F. X. DAVOREN, *Secretary of the Commonwealth*

DEAR SIR: — You have asked my opinion on certain questions relating to your powers and duties in respect to the approval of the use of an electronic voting system by the town of Belchertown under the provisions of c. 564 of the Acts of 1967, amending G. L. c. 54 so as to permit the use of electronic voting systems.

You state that the use of the system, approval of which is requested by the town, would involve the counting of the ballots outside the limits of the town in a computer in the neighboring (but not adjacent) town of South Hadley, and you ask, in effect, if you may legally and constitutionally approve the use of a system which involves the counting of ballots outside the territorial boundaries of the town.

Chapter 564 of the Acts of 1967 is entitled "An Act authorizing the use

of electronic voting systems in primaries, preliminary elections and elections." It amends G. L. c. 54 to provide for the designation of tabulation centers, where the ballots are to be counted (§ 5 inserting § 33F in G. L. c. 54) and provides that "Sealed and locked ballot or card carrying cases shall be under the constant control and supervision of the precinct warden and clerk and accompanied by police guard during the transportation of said ballot or card carrying cases to the tabulation center, *within or outside* the municipality." (Emphasis supplied.) (§ 14 inserting § 105A in G. L. c. 54.)

It is in relation to this provision that you ask:

"1. Could the ballots cast by the voters of the town of Belchertown at the coming town election be constitutionally counted outside the geographical limits of the town?

"2. Could ballots cast by the voters of Belchertown at a state or presidential primary or state election be constitutionally counted at a computer center outside the town?

"3. What powers, if any, would the election officers of Belchertown, appointed by the town's selectmen, retain outside of the town?

"4. What jurisdiction would the police officers of Belchertown have concerning custody of the ballots and the enforcing of the lawful commands of the warden and clerk at a computer center beyond the boundaries of Belchertown?"

Since the Constitution of the Commonwealth is more explicit in its requirements as to elections for state officers than it is for town officers, I will consider your second question first.

The Constitution, Part 2, c. 1, § 2, Art. 2, provides that votes for state senators shall be cast at town meetings and shall be sorted and counted "in open town meeting." It also provides that votes for Governor shall be cast at town meetings and that "the town clerk . . . shall, in open town meeting, sort and count the votes . . . ." Pt. 2, c. 2, § 1, Art. 3. Like provisions apply to the return of votes for the election of the Lieutenant Governor, Councillors, Secretary, Treasurer, Auditor and Attorney General. Pt. 2, c. 2, § 2, Art. 1; Arts. 16 and 17 of the Amendments.

The original provisions requiring the sorting and counting of votes in open town meeting have never been specifically repealed since their adoption in 1780, although the time of the election, the length of terms of office and the qualifications of voters have been changed by amendment from time to time.

While the original Constitution did not specifically provide that town meetings must be held within the territorial limits of the towns, this was the established practice in 1780 when the Constitution was adopted. Within the framework of this accepted practice, the Legislature in 1785 passed the first general legislation regulating town government by providing that town meetings should be held "at such . . . place, *in the same town* as the selectmen shall order." (Emphasis supplied.) Acts of 1785, c. 75, § 5. Whether this legislation was actually required under the original Constitution need not be determined in view of the adoption in 1885 of the 29th Amendment which for the first time authorized the division of towns into voting precincts and authorized the Legislature to provide "more than one place of public meeting *within the limits of each town* for the election of officers un-

der the Constitution and to provide the manner of calling, holding and conducting such meetings. All provisions of the existing Constitution inconsistent with the provisions herein contained are hereby annulled." (Emphasis supplied.)

As you point out in your request for my opinion, Attorney General Edward J. McCormack, Jr. ruled in 1961 that the 29th Amendment forbids the holding of a town meeting for election purposes outside a town's territorial limits. *Report of the Attorney General for the Year Ending June 30, 1962,* p. 27. The only point which is raised by your question which was not involved in that opinion is whether the counting of the vote is such an integral part of the meeting that it must also take place within the town. In my opinion, it must.

The requirements of the Constitution that votes for the election of Senators, the Governor, Lieutenant Governor, Councillors, Secretary, Treasurer, Auditor and Attorney General shall be sorted and counted in open meeting implies that the sorting and counting of the votes for election to these offices must also take place within the town, since the meeting itself must take place there.

So far as your question relates to state or presidential primaries, these are not specifically covered by the Constitution. However, G. L. c. 53, § 24 requires that "Primaries shall be subject to all laws relating to elections and corrupt practices so far as applicable and except as otherwise provided in this chapter and in chapters 54, 55 and 56."

I find nothing in G. L. Chapters 53, 54, 55 or 56 which indicates that primaries are to be treated differently from elections in respect to the procedures governing the counting of votes. It is therefore my opinion that computer counting of the votes in state and presidential primaries should be conducted in the same manner as is required in counting the votes for elected state officers. This conclusion is strengthened by considerations discussed below relating to town elections.

I now turn to your first question: whether votes at the coming election of the town of Belchertown may constitutionally be counted outside the town.

The opinion of Attorney General McCormack cited above determined that the prohibition against holding town meetings outside a town applied not only to meetings to elect constitutional officers but also to meetings to elect town officials. *Report of the Attorney General for the Year Ending June 30, 1962,* p. 27. I concur with this conclusion. Town government and town meetings are ancient institutions in this Commonwealth. Although not mentioned in the early charters, town government began informally soon after the arrival of the colonists in the 1630's. Zimmerman, The Massachusetts Town Meeting, p. 6 (1967). The first meetings were held weekly or monthly, as shown by the early town records. *Id.* p. 7. However, the designation of officers and the method of their election varied from town to town. *Id.* p. 9. Eventually, general practices developed, leading to the adoption of c. 28 of the Province Laws of 1692, which recited:

> "Whereas it has been a continued practice and custome in the several towns [within] this province annually to choose selectmen . . . and other town officers . . ., be it further . . . enacted . . . that the freeholders and other inhabitants of each town . . . shall . . . in the month of March annually meet and convene together . . .

> and by the major vote of such assembly, choose . . . a town clerk . . . constables, surveyors of highways, tythingmen, fence viewers, clerks of the market, sealers of leather, and other ordinary town officers."

When the Constitution of the Commonwealth was adopted in 1780, it did not attempt to define the details of town government, as it did in the case of state government. Nevertheless, it is implicit in that instrument that the main features of town government, developed over the preceding century and a half, were to be constitutionally protected.

Recognition of this implication is found in an *Opinion of the Justices,* 229 Mass. 601, 607, which stated:

> "This form of local government, [by town meeting] was the fibre of our institutions when the Constitution was adopted. It is implied whenever the word 'town' is used in that instrument. It was held in profound esteem and was guarded with jealous care."

The foregoing Opinion of the Justices goes on to quote with approval a description of established town meeting procedures rendered by Lemuel Shaw, afterwards Chief Justice, in which he lists as one of the duties of the inhabitants of a town their meeting together "for the purpose of giving their votes for town, county, State, and United States officers." Shaw is quoted further as stating, "But the Constitution provides that the inhabitants shall meet and the votes be given in open town meeting; that the vote shall be counted, sorted and declared in open town meeting, in which the selectmen shall preside . . . ." The Justices concluded that, "*The town is the unit for voting purposes recognized by the Constitution . . . .*" (Emphasis supplied.) *Opinion of the Justices, supra,* 608-9.

That the main features of town meeting government have always been regarded as constitutionally protected is well illustrated by the fact that it was thought necessary in 1820 to amend the Constitution to enable the Legislature to establish city governments. (Art. 2 of the Amendments.) That amendment first permitted the Legislature "to prescribe the manner of calling and holding public meetings of the inhabitants, in wards or otherwise for the election of officers under the constitution, and the manner of returning the votes given at such meetings" provided the town had at least 12,000 inhabitants, and then only on application and with the consent of the town, given in town meeting.

The implied constitutional protection of the established method of town elections is further illustrated by the fact that when towns increased to a point where all the voters could not be accommodated in one voting place, it was thought necessary in 1885 to adopt the 29th Amendment, authorizing the Legislature to provide "more than one place of public meeting *within the limits of each town* for the election of officers under the Constitution, and to prescribe the manner of calling, holding and conducting such meetings." (Emphasis supplied.)

It is important to note that both Amendments 2 and 29 refer specifically only to election of officers "under the Constitution." Yet, until their adoption, all elections in a town, both for local and state officers, were conducted in one place, and after their adoption, cities and towns conducted their respective municipal elections in the same voting units as they conducted elections for state offices.

When voting machines were introduced, a question arose as to the constitutionality of their use in the election of Representatives. Pt. 2, c. 1, § 3, Art. 3. *Nichols* v. *Election Commissioners,* 196 Mass. 410, held them to be unconstitutional. As a result of this decision, the 38th Amendment to the Constitution was adopted in 1911 to provide:

> "Voting machines or other mechanical devices for voting may be used at all elections under such regulations as may be prescribed by law: *provided, however,* that the right of secret voting shall be preserved."

I find nothing in this Amendment which can be regarded as displacing the long-established requirement that the counting of the results of an election is to be performed within the town. The general practice since the adoption of the Amendment has in fact been to tabulate votes within the municipality where the votes are cast.

It is, I believe, clear as was indicated in Attorney General McCormack's prior opinion, *supra,* that the essential procedures of town meeting government have never comprehended the holding of meetings for election of town, county, state or federal officers outside the particular town; and it seems equally clear that the sorting, counting and declaring of the ballots for town and county, as well as for state officers, at such local meetings held for election purposes have always occurred, as Lemuel Shaw stated, "in open town meeting," being regarded as integral parts of the election process held within the town.

Since, therefore, our Supreme Judicial Court has consistently held that the main features of town government, as it was then known, were embedded in our Constitution when it was adopted and may not be deviated from except by constitutional amendment, and since one of these main features has been the holding of elections for town, county, state and federal officers, and counting the votes, in open town meeting held within the limits of the town, I am of the opinion that the ballots cast by the voters of the town of Belchertown at the coming town election may not constitutionally be counted outside the geographical limits of the town. Hence, the words "or outside" [the municipality] in § 14 of c. 564 of the Acts of 1967, inserting § 105A in G. L. c. 54, are, in my opinion, violative of the present Constitution of the Commonwealth and should be disregarded by you in carrying out your duties under the Act.

In coming to my conclusion that computers may not be employed outside the town involved, I am not unmindful of the recent adoption of Article 89 of the Constitution, the so-called "Home Rule" amendment, annulling Article 2 of the Amendments and substituting a new Article 2. Nothing in this new amendment, however, evinces an intention to grant to the Legislature or to municipalities any power to change the provisions of the Constitution relating to elections generally that they did not already have. In fact, § 7 of the amendment specifically forbids cities and towns to regulate elections generally.

Since in my view, ballots cast by the voters of the town may not be constitutionally counted outside the geographic limits of the town, it is not necessary to answer your questions about the powers of police and election officers outside the town.

Very truly yours,

Elliot L. Richardson, *Attorney General*

Number 63. JANUARY 18, 1968.

HONORABLE EDWARD J. RIBBS, *Commissioner of Public Works*

DEAR SIR: — You have asked my opinion on whether a certain Federally aided contract for the construction of a section of Interstate Route 291 in Springfield prohibits the contractor from using on the project steel milled and fabricated in Canada. The question arises because of a doubt over whether a Standard Specification incorporating G. L. c. 7, § 22, clause 17, has been rendered inapplicable by a Special Provision in the contract. After careful consideration of the matter, I am of the opinion that the Standard Specification controls.

General Laws c. 7, § 22 provides that the Commissioner of Administration shall, subject to the approval of the Governor and Council, make rules and regulations governing the manner of purchasing supplies, equipment and other property for all State agencies except when the purchases are for legislative or military purposes. The statute requires, however, that certain rules and regulations must be adopted, among them a provision for

> "A preference in the purchase of supplies and materials, *other considerations being equal,* in favor, first, of supplies and materials manufactured and sold within the commonwealth, with a proviso that the state purchasing agent may, where practicable, allow a further preference in favor of such supplies and materials manufactured and sold in those cities and towns within the commonwealth in which the ratio of unemployment to the total labor force, as determined by the division of employment security, is in excess of five and nine tenths per cent, and second, of supplies and materials manufactured and sold elsewhere within the United States." (Clause 17.) (Emphasis supplied.)

By G. L. c. 7, § 23A, rules and regulations adopted under the foregoing clause 17 "shall, so far as may be approved by the governor and council, apply to the purchase by contractors of supplies and materials in the execution of any contract to which the commonwealth is a party for the execution, reconstruction or repair of any public work; and there shall be inserted in any such contract a stipulation to that effect."

It appears that rules incorporating clause 17 have been adopted; and it also appears that, consistently with these rules, the Department of Public Works in its Standard Specifications for Highways and Bridges, 1965 Edition, (the so-called "Green Book") has included the following clauses, which are the third and fourth clauses in Article 41 of the Green Book:

> "Chapter 7, Section 22, Clause 17, of the General Laws, as amended, shall apply to the purchase by the Contractor of supplies and materials to be used in the execution of this contract.
>
> "The rules referred to [the rules of the Commissioner of Administration] require a preference in the purchase of supplies and materials, *other considerations being equal,* in favor first, of supplies and materials manufactured and sold within the Commonwealth, and second, of supplies and materials manufactured and sold within the United States . . . ." (Emphasis supplied.)

The contract in question, No. 12420, in its "Instructions to Bidders" stat-

ed that the " 'General Requirements and Covenants', under Division I of the 1965 Standard Specifications for Highways and Bridges, shall constitute the 'Instructions to Bidders.' " (It appears to be undisputed that Article 41 is in Division I.) The contract provided in clause 2 of its formal statement of the parties' obligations that the contractor was to perform the work "in strict conformity with the provisions herein contained and of the Notice to Contractors, Proposal and Special Provisions hereto attached, and the Standard Specifications for Highways and Bridges adopted by the Commissioners of Public Works under date of August 4, 1965, on file at the office of said Department of Public Works at Boston, and with the plans referred to therein. All said plans, Standard Specifications, Special Provisions, Notice to Contractors and Proposal are hereby specifically made a part of this contract as fully and in the same effect as if the same had been set forth at length herein."

Among the Special Provisions referred to was the following:

> *"NON-RESTRICTION UPON SOURCE OF MATERIALS.* (Superseding Par. 3 & 4 of Article 41) (Reference: Part II — Regulations and Standards of Bureau of Public Records, Chapter 1, Part I — Administration of Federal Aid for Highways. Par. 1.19)
>
> 'No requirement shall be imposed and no procedure shall be enforced by any State in connection with a project which may operate (a) to require the use or provide a price differential in favor of articles or materials produced within the State, or otherwise to prohibit, restrict or discriminate against the use of articles or materials shipped from or prepared, made or produced in any State, territory or possession of the United States; or (b) to prohibit, restrict or otherwise discriminate against the use of articles or materials of foreign origin to any greater extent than is permissible under policies of the Department of Commerce [Transportation] as evidenced by requirements and procedures prescribed by the Administrator [now the Director of Public Roads. P.L. 89-670, § 3(f) (4)] to carry out such policies.' "

The foregoing clause is taken verbatim from section 1.19 of the Regulations and Standards of the Bureau of Public Roads in the Department of Transportation, 23 CFR 1.19, originally promulgated by the Secretary of Commerce on May 11, 1960 in the Federal Register, 25 F.R. 4162, and effective upon publication. 23 CFR 1.38.[1] It appears, however, from certain documents which accompanied your request for my opinion that although certain requirements or procedures have been published to carry out pertinent policies of the Department of Commerce (as the Department of Transportation's predecessor in this respect) regarding articles or materials of foreign origin, these requirements and procedures have never been put into effect.

I turn now to your first question:

> "Does the Special Provision on page 2 of the enclosed contract #12420 entitled 'NON-RESTRICTION UPON SOURCE OF MATERIALS (Superseding paragraphs 3 and 4 of Article 41'

[1] Upon the establishment of the Department of Transportation and the transfer thereto of the Bureau of Public Roads from the Department of Commerce, these Regulations and Standards were continued in force. P.L. 89-670, §§ 6(a) (1), 12(a) and (b).

prevail over Article 41 of the Standard Specifications of 1965 containing the statutory requirements of Chapter 7, Section 22, Clause 17 of the General Laws?"

In my opinion, the essential issue in the present situation is not whether the Special Provision should "prevail over" Article 41 of the Standard Specifications. Clearly, it would prevail if the Director of Public Roads had issued effective requirements and procedures to carry out the policies of the Department of Transportation, since a special provision in a contract will control a general provision touching the same subject. *Richard Clothing Mfg. Company* v. *Gutstein-Tuck, Inc.*, 328 Mass. 386, 390. Here, however, the central question is different. It is whether in the absence of effective Federal requirements and procedures the Special Provision be regarded as rendering the Standard Specifications ineffective, with the result that there would be neither a Federal nor State provision to apply.

The Special Provision merely states that "No requirement shall be imposed and no procedure shall be enforced by any State in connection with a project which may operate . . . (b) to prohibit, restrict or otherwise discriminate against the use of articles or materials of foreign origin *to any greater extent than is permissible* under policies of the Department of Commerce [Transporation] as evidenced by requirements and procedures prescribed by the Administrator [now the Director of Public Roads] to carry out such policies." (Emphasis supplied.) No such effective requirements and procedures having been prescribed, there is no Federal restriction on the operation of applicable State requirements. This means that in the present situation paragraphs 3 and 4 of Article 41 continue in full force and effect.

I have not overlooked the following language in the Special Provision: "Superseding Par. 3 & 4 of Article 41." This phrase must, in my judgment, be read together with the Special Provision itself, which, as I have indicated, displaces the Standard Specifications only to the extent that the Director of Public Roads has prescribed effective requirements and procedures respecting the use of articles or materials of foreign origin. Yet as already stated, it appears that no such requirements or procedures have been made effective.

In summary, then, I answer your first question by stating that Article 41 of the Standard Specifications applies to this contract.[2]

You have also asked the following two additional questions:

"Do the invitation to bid, the special provisions of the contract and the Standard Specifications of 1965 incorporated therein preclude the Contractor from bidding and using steel manufactured (milled) in Montreal, Canada?

"Do the invitation to bid, the special provisions of the Contract and the Standard Specifications of 1965 incorporated therein preclude the Contractor from bidding and using steel manufactured (milled) in the United States and fabricated in Montreal, Canada?"

General Laws c. 7, § 22, clause 17 requires only that a *"preference"* be given, *"other considerations being equal,"* first, to "supplies and materials manufactured and sold within the commonwealth," and, second, to "materi-

[2]No issue has been raised as to the constitutionality of clause 17 under the United States Constitution.

als and supplies manufactured and sold elsewhere within the United States." What other considerations may be relevant and whether such considerations are "equal" depend on particular facts which have not been supplied.[3] The contract thus does not necessarily preclude the use of Canadian steel, whether (1) milled in Canada or (2) milled in the United States and fabricated in Canada.

With regard to a possible distinction between milling and fabrication, I find that without more particular information as to the proportions that the milling and fabrication each bear to the end product or the total purchase price, I am not in a position to draw any conclusion as to the possible significance of the milling and fabrication being done in different places.

I trust that the foregoing responds to your questions.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 64. JANUARY 24, 1968.

HONORABLE EDWARD J. RIBBS, *Commissioner of Public Works*

DEAR COMMISSIONER RIBBS: — You have requested my opinion as to whether funds raised by bonds issued by the state treasurer under St. 1967, c. 616 ("An Act Relative to the Accelerated Highway Program") may be used to reimburse municipalities for consultant fees paid for the establishment of school zones.

The 1967 Act authorizes your Department and the Metropolitan District Commission to expend $300,000,000 for various highway projects (§§ 1-6), and provides that these expenditures shall be met by an appropriation of $188,000,000 from the Highway Fund (§ 7) and by the issuance of bonds in the aggregate amount of $112,000,000 (§ 11). Under § 6 of the Act, your Department is required to allocate $3,000,000 "for the establishment of school zones by cities and towns . . . ."

In a memorandum attached to your letter, the Traffic Engineer of your Department reports that the Boston Traffic Department has advised him that its shortage of engineering personnel would necessitate its hiring a consultant in order to make the surveys required for the establishment of school zones in the City of Boston. The Traffic Engineer's memorandum continues:

> "This office has reservations in this matter of consultant fees for School Zones, since this is a Bond Issue item which seems to have a legislative intent to accomplish the maximum number of safety device installations for the protection of school children considering the amount of money allotted and the number of schools in the commonwealth. Conceivably, the Department could be criticized by the legislature, should consultant project charges for Boston, or any other large city, amount to possibly thousands of dollars and thus result in a considerable reduction in the number of School Zones installed.
>
> "Would consultant fees for School Zones be an acceptable charge against

[3]See, generally, *Pacella* v. *Metropolitan District Commission*, 339 Mass. 338, 348; Report of the Attorney General for the Year Ending June 30, 1956, p. 44; Report of the Attorney General for the Year Ending June 30, 1963, p. 157.

the Bond Issue in view of what appears to be the legislative intent for the use of the money allotted?"

Whether such consultant services shall be reimbursed from 1967 bond-issue funds has, in my opinion, been left by the Legislature within the sound administrative discretion of your Department. The statute neither prevents nor requires such reimbursement. Under St. 1967, c. 616, § 6, funds for the establishment of school zones are allocated by your Department "[p]ursuant to the provisions of section one of this act . . . ." Section 1 of the 1967 Act contains a general authorization for your Department to expend funds for a variety of highway projects, and lists among these projects "traffic studies, including the establishment of school zones . . . ." This authorization applies to all funds made available under the 1967 Act, whether by appropriation or by bond issue.

The second paragraph of § 1 of the 1967 Act provides that "[f]unds authorized in this section shall [with exceptions not here relevant] be subject to the provisions of . . . [St. 1956, c. 718, § 9]." Section 9 of the 1956 Act ("An Act Providing for an Accelerated Highway Program") defines the types of authorized expenditures as follows:

> "The cost of the work authorized in section one shall include all project payments, property damages, *expenses for consultants and engineering services, including traffic studies*, and for all legal and other technical and expert services, and incidental expenses in connection with the projects herein authorized." (Emphasis supplied.)

Since the above-quoted provision of the 1956 Act is incorporated by reference in the 1967 Act, I conclude that your Department may, if it deems wise, use bond-issue funds available under St. 1967, c. 616 to reimburse municipalities for consultant fees paid by them to establish school zones.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 65. JANUARY 30, 1968.

HONORABLE C. EUGENE FARNAM, *Commissioner of Insurance, Department of Banking and Insurance*

DEAR COMMISSIONER FARNAM: — You have requested my opinion as to whether the Health, Welfare and Retirement Trust Funds Board may appoint State Senator Vite J. Pigaga to the position of Director of that Board. Your question arises principally because of Article 65 of the Amendments to the Massachusetts Constitution:

> *"No person elected to the general court shall during the term for which he was elected be appointed to any office created or the emoluments whereof are increased during such term,* nor receive additional salary or compensation for service upon any recess committee or commission except a committee appointed to examine a general revision of the statutes of the commonwealth when

submitted to the general court for adoption." (Emphasis supplied.)

In your letter you state:

> "Senator Pigaga has served in the Massachusetts Legislature since 1959. During this time, the Legislature on several occasions voted for general across the board pay raises to all classified State Employees. However, none of these pay raises have been voted on during Senator Pigaga's most recent term beginning January 1967.
>
> "The legislation creating this position was passed in 1958, and no legislation varying the salary of this position has been passed since said date, other than the across the board pay raises aforementioned. In 1967, this position was taken out of Civil Service, but this did not affect the salary.
>
> "Incidentally, it is our understanding that Senator Pigaga intends to resign from the Legislature upon his appointment as Director of the Health, Welfare and Retirement Trust Funds Board."

On the basis of these facts, you wish to know whether the 65th Amendment would prevent the proposed appointment. You also seek my opinion "as to whether or not there is any provision of law [other than the 65th Amendment] which would prevent the Board from appointing Senator Pigaga to this position . . . ."

In my opinion, on the facts presented, the 65th Amendment does not prohibit Senator Pigaga's appointment as Director of your Board. The prohibition of the 65th Amendment applies only to the appointment of a legislator "during the term for which he was elected" to an office which was created or whose emoluments were increased "during such term . . . ." I interpret the word "term" as referring only to a particular elective term in the General Court, rather than to a legislator's entire period of service in that body. The 65th Amendment was approved and ratified by the people in 1918, upon its submission by the 1917-1919 Constitutional Convention. Prior to its adoption an almost identical prohibition on appointments of legislators had been imposed by statute. R. L. c. 3, § 21; Pub. Sts. c. 2, § 33; G. S. c. 2, § 23; St. 1857, c. 191. Attorney General Knowlton expressed the opinion in 1896 that the phrase "the term for which he is elected" in Pub. Sts. c. 2, § 33 applied only to a single elective term of office. 1 Atty. Gen., p. 347. This view was reaffirmed in an unpublished opinion to the Governor by Attorney General Swift dated May 14, 1912, and by an opinion of Attorney General Boynton in 1914 (4 Atty. Gen., p. 238) — the latter two opinions being rendered with reference to R. L. c. 3, § 21. In a 1939 advisory opinion, the Justices of the Supreme Judicial Court intimated a similar interpretation of that phrase as appearing in the 65th Amendment. 302 Mass. 605, 623.

Under this interpretation, the 65th Amendment would prevent Senator Pigaga's appointment only to an "office created or the emoluments whereof are increased" during his present elective term — that is, the two-year term beginning in January, 1967. From the facts you present, it appears that the position of Director of your Board was created long before that term began. The same is true of the various pay raises referred to in your letter. While

the position of Director was removed from the civil service system during the Senator's present term (St. 1967, c. 780, § 8, amending G. L. c. 31, § 5*), I do not think that this can be regarded as an increase in the "emoluments" of office. The only incidents of the office of Director affected by the 1967 amendment were certain tenure features and other benefits and protections afforded the holder of a civil service position. Assuming (without deciding) that these were "emoluments" of the office, the 1967 amendment eliminated them; it did not increase them. I therefore conclude that Senator Pigaga's appointment as Director of your Board would not violate the 65th Amendment.

As to your remaining question — whether such appointment would violate any other provision of law — I can only answer by saying that, on the basis of the facts you present, no statute has come to my attention which would be violated thereby. (I assume, as stated in your letter, that Senator Pigaga intends to resign from the Legislature upon his appointment as Director.)

I would, however, call your attention to the following provision in G. L. c. 23, § 10F, under which the appointment of a Director is to be made: "The board shall not appoint or employ any person who is an officer or committee member of a political party." In the event that Senator Pigaga holds any such political office, it would be necessary for him to resign the same to make himself eligible for his proposed appointment by your Board.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 66. FEBRUARY 6, 1968.

MRS. HELEN C. SULLIVAN, *Director of Registration, Department of Civil Service and Registration*

DEAR MRS. SULLIVAN: — You have requested my opinion as to the eligibility of the public accountant member of the Board of Public Accountancy to serve as chairman of that Board.

Under G. L. c. 13, § 33, the Board of Public Accountancy consists of five members appointed by the Governor from the accounting profession, four of whom are required to be certified public accountants and one of whom is required to be a public accountant who is registered as such but not certified. General Laws c. 13, § 34 provides that the Board shall annually elect its chairman.

I am of the opinion that there is no legal obstacle to the election of the public accountant member as chairman of the Board. General Laws c. 13, § 34 simply directs the Board to elect a chairman "from its members." The statute does not distinguish in this respect between the four members who are certified public accountants and the one member who is not.

In arriving at this conclusion I am not unmindful of the following provision of G. L. c. 13, § 33:

"In any matter exclusively concerning or dealing with a certi-

*"No rule made by the [civil service] commission shall apply to the selection or appointment of . . . "Director of health, welfare and retirement trust funds board."

fied public accountant, only the members of the board who are certified public accountants shall act; in all other matters the full board shall act."

It has been suggested that this provision would present practical difficulties which would disqualify a public accountant from serving as the chairman. However, any practical difficulties of that nature would not affect the legality of his election, but would rather be a factor that the members of the Board might wish to consider in electing a chairman.

I therefore advise you that the public accountant is legally eligible to serve as chairman of the Board of Public Accountancy, should its members choose to elect him.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 67. FEBRUARY 9, 1968.

HIS EXCELLENCY JOHN A. VOLPE, *Governor of the Commonwealth*

YOUR EXCELLENCY: — You have requested my opinion as to whether the advice and consent of the Executive Council must be obtained for your appointment of a person to fill a vacancy in the office of sheriff.

General Laws c. 54, § 142 provides in part:

> "Upon a vacancy in the office of . . . sheriff, the governor *with the advice and consent of the council* may appoint some person thereto until a . . . sheriff is qualified." (Emphasis supplied.)

However, St. 1964, c. 740, § 3 provides in part:

> "Subject to section two of this act [not here pertinent] and except as required by the constitution of the commonwealth, so much of each provision of the General Laws . . . as requires the advice and consent of the council to any appointment in the executive department . . . is hereby repealed."

The requirement that an appointment to fill a vacancy in the office of sheriff is to be made "with the advice and consent of the council" is therefore eliminated if the office is in the executive department unless such advice and consent is "required by the constitution of the commonwealth . . . ."

The term "executive department" is defined as follows in Section 1 of the 1964 statute:

> "As used in this act, the phrase 'executive department' shall include, without limitation, all departments, divisions, boards, bureaus, commissions, institutions, councils and *offices* of state government and *of county government*, and any instrumentality or agency within or under any of the foregoing, whether or not serving under the governor or under the governor and council, and any independent authority, district, commission, instrumentality or agency, *but expressly excluding therefrom the legislative and judicial departments and any instrumentality or agency of a city or town.*" (Emphasis supplied.)

The position of sheriff is a county office and in my judgment is within the executive department as defined above. His duties include the service and execution of process (G. L. c. 37, § 11), the preservation of the peace (G. L. c. 37, § 13), attendance at sessions of the Supreme Judicial and Superior Courts (G. L. c. 37, § 16) and the supervision of county jails and houses of correction (G. L. c. 126, § 16) — all of which are functions of an executive character, rather than legislative or judicial. The majority of a sheriff's functions can be performed either in person or by deputies. The fact that some of the duties of his office are closely related to the courts does not make him a judicial officer. See *Commonwealth* v. *Connolly,* 308 Mass. 481, 490.

Nor, in my opinion, does the Constitution of the Commonwealth require Council approval for the appointment of a sheriff. The Constitution does require that appointments of "judicial officers" must be submitted to the Council (Pt. 2, c. 2, § 1, Art. IX). As recently as last May, the Supreme Judicial Court, in upholding the action of a county retirement board in removing a deputy sheriff from office, rejected a contention by the deputy that since sheriffs and their deputies are required to attend sessions of the Superior Court, they are to be regarded as judicial officers and thus outside the removal jurisdiction of an executive agency. The Court said:

> "As the plaintiff [the deputy sheriff] concedes in his brief, there is a distinction between 'judicial officers whose sole function is to determine rights and duties . . . [and]* another class of officers to carry into effect the decisions and decrees made by the courts.' The latter class of officer is certainly not a 'judicial officer' within the meaning of Part 2, c. 2, § 1, art. 9, . . . of the Massachusetts Constitution . . . ." *Burnside* v. *Bristol County Board of Retirement,* 1967 Mass. Adv. Sh. 779, 780.

The foregoing statement applies as fully to sheriffs as to their deputies. I therefore conclude that a sheriff is not a "judicial officer" within the meaning of the above-cited provision of the Massachusetts Constitution.

It is therefore my opinion that St. 1964, c. 740, § 3 applies to appointments to the office of sheriff, and that you may accordingly appoint an individual to fill a vacancy in that office without the advice and consent of the Executive Council.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 68. FEBRUARY 15, 1968.

MR. J. WILLIAM BELANGER, *Director, Division of Employment Security*

DEAR MR. BELANGER: — You have asked my opinion on whether you may lawfully comply with a request of the Civil Rights Commission of the United States Department of Justice that you disclose to the Commission certain records of the Division of Employment Security. You state that the Commission desires to obtain from the Division a list of employers. "Against this list," you state, "it [the Commission] would review the data on job referrals and placements in order to ascertain whether there might be

*Brackets in original

a possibility of discrimination against minority groups." It appears from an enclosure with your letter that the information is sought in connection with investigations being made by the Department of Justice under Title VII of the Civil Rights Act of 1964.

It is my opinion that you may lawfully make the requested disclosure. Indeed, in my view you are required to do so. Your authority and duty in this regard are derived from the Commonwealth's acceptance in 1935 (St. 1935, c. 479, § 6) of the Wagner-Peyser Act enacted by Congress in 1933. (48 Stat. 113, 29 U.S.C. § 49, et seq.) This act established a bureau known as the United States Employment Service (29 U.S.C. § 49), which was given the responsibility, among other things, of assisting in the establishment and maintenance of systems of public employment offices in the several states (29 U.S.C. § 49b). Provision was made for the granting of Federal funds "in such amounts as the Secretary [of Labor] determines to be necessary for the proper and efficient administration of [the] public employment offices" which the States themselves might establish (29 U.S.C. § 49d). To be eligible for a grant, however, a State was required to accept the Act (29 U.S.C. § 49c), as Massachusetts has done, and to "designate or authorize the erection of a State agency vested with all powers necessary to cooperate with the United States Employment Service . . . ." (29 U.S.C. § 49c.)

The same act in which the Commonwealth of Massachusetts accepted the Wagner-Peyser Act established in the Division of Employment Security, "subject to the supervision and control of the Director of Employment Security, a [bureau] of public employment offices," and designated it as "the state agency for co-operation with the United States Employment Service under . . . the Wagner-Peyser Act, . . . [to] have all the powers of such an agency as specified in said act." St. 1935, c. 479, § 4, inserting, among other provisions, G.L. c. 23, § 9I. (Amendments indicated by brackets.)

The Wagner-Peyser Act authorized the Federal agency head, now the Secretary of Labor, "to make such rules and regulations as may be necessary to carry out the provisions of [the Act]." (29 U.S.C. § 49k.) Under this authority, the Secretary has promulgated regulations which are now found in 20 CFR, Chapter V. These regulations include a requirement, which I assume has been met in this case, that each State will "[s]ubmit a statement that the State agency will adhere to the basic standards set forth as United States Employment Service policies and policies of the Secretary of Labor in the Employment Security Manual, and will maintain an organization and procedures necessary to carry out effectively such policies." 20 CFR 603.4(a).

The "Policies of the United States Employment Service" are set forth in 20 CFR Part 604, and include the following:

> "§ 604.16 Disclosure of information
>
> It is the policy of the United States Employment Service to permit disclosure of information from the files and records of the employment service:
>
> . . . . .
>
> (f) To all governmental authorities, such as antidiscrimination and fair employment practice authorities, whose functions will aid the Employment Service in carrying out an amplified and

more effective placement service, including information relating to fair employment practices."

The Employment Security Manual, referred to above in 20 CFR 603.4(a) contains a like provision. Part II, § 0501F. In addition the Manual provides in part:

> "The disclosure of information obtained in the course of the regular operation of the employment service system to National, State, or local governmental agencies, including information relating to fair employment practices, is 'necessary for the proper and efficient administration of the public employment offices' as that term is used in the Wagner-Peyser Act . . . .
>
> "Fair employment practice and antidiscrimination authorities, through their activities, help the Employment Service to perform its placement functions more effectively. Such authorities, whether established by legislation or by executive action of duly constituted officials on national, State, or local government levels, are governmental authorities within the meaning of the policy. State employment security agencies, therefore, as a matter of proper and efficient administration of their public employment offices, shall disclose to these authorities information concerning employers' job orders containing discriminatory specifications with respect to such nonperformance factors as race, color, creed, or national origin . . . In addition, other kinds of information which have been obtained in the course of regular operation of the employment service system shall be furnished to these agencies upon their request . . . ."

Having accepted the Wagner-Peyser Act and having bound itself to adhere to the policies of the United States Employment Service in its administration of the Act, the Commonwealth, and the Division of Employment Security as its representative, are, in my judgment, committed to comply with the foregoing provisions of the Employment Security Manual. The Civil Rights Commission clearly is the kind of "antidiscrimination authorit[y]" to which the Division must make disclosure.

Nothing in G. L. c. 151A, § 46 diminishes or qualifies the Division's obligations in this regard. Section 46 provides that information secured pursuant to c. 151A, which pertains to employment security, "shall be confidential and for the exclusive use and information of the division in the discharge of its duties hereunder." Section 46 provides, with certain exceptions not here relevant, that such information shall not be admissible in any proceeding, and it also states that "Whoever, except with authority of the director or pursuant to his rules and regulations, *or as otherwise required or authorized by law,* shall disclose the same, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than six months, or both; provided that nothing herein shall be construed to prevent the director from complying with the provisions of section sixty-four . . . ." (Emphasis supplied.) (Section 64 authorizes disclosure of specific kinds of information to Federal authorities. We need not decide, however, whether the information requested in the present situation comes within the particular items described, since your authority and duty to disclose the information does not depend on that section.)

For the reasons already stated, I am of the opinion that your obligations

under the Wagner-Peyser Act bring the request within the quoted clause in § 46 relative to disclosure when "required or authorized by law." This conclusion is strengthened by the fact that § 46 was enacted in 1935 as part of the same legislation (St. 1935, c. 479) by which the Commonwealth accepted by the Wagner-Peyser Act. I believe that the Legislature intended all sections of the statute to be construed consistently with the Commonwealth's obligations to the Federal government inhering in the acceptance of the Act.

In summary, then, I advise you that you are both authorized and required to make the requested disclosure to the Civil Rights Commission.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 69. FEBRUARY 23, 1968.

HON. ROBERT L. YASI, *Chairman, Water Resources Commission*

DEAR MR. YASI: — You have requested my opinion as to whether a permit must be obtained from the Division of Water Pollution Control under G. L. c. 21, § 43 (inserted by St. 1966, c. 685, § 1) for the construction of an extension to feed an existing sewerage system which now discharges into the waters of the Commonwealth.

General Laws c. 21, § 43, so far as material, provides:

> "No person shall make or permit a *new outlet for the discharge of sewage* or industrial waste or wastes, or the effluent therefrom, *into any of the waters of the commonwealth* . . . without first obtaining a permit, which the director [of the division of water pollution control] is hereby authorized to issue subject to such conditions as he may deem necessary to insure compliance with the standards established for the waters affected. Whoever violates this section may be enjoined from continuing such violation, as provided in section forty-four." (Emphasis supplied.)

The issue raised is whether the point at which the sewer extension empties into the sewer system — as distinguished from the point at which the system empties into a watercourse — is an "outlet for the discharge of sewage . . . into any of the waters of the commonwealth . . . ." I am of the opinion that it is.

The word "outlet" is commonly understood as referring broadly to "a means of exit or escape." *Webster's Third International Dictionary* (1964), p. 1602. Since no contrary intention appears, I conclude that this is the sense in which the word is used in G. L. c. 21, § 43. See G. L. c. 4, § 6, cl. Third. Thus, the point of connection between the extension and the sewerage system is just as much an "outlet for the discharge of sewage" as the point of connection between the sewerage system and the watercourse.

Likewise, both types of outlets have the effect of discharging sewage "into . . . the waters of the commonwealth" — the only difference being that sewage from the extension reaches those waters *indirectly*. There is nothing in the language of § 43 to restrict its application to outlets discharging sewage *directly* into the waters of the Commonwealth, and, in my opinion, no reason to infer that any such restricted meaning was intended.

Indeed, the purpose of § 43 would be largely frustrated if its application were confined to outlets emptying directly into Commonwealth waters. Section 43 is a part of the so-called "Massachusetts Clean Waters Act" (G. L. c. 21, § 50), enacted by St. 1966, c. 685 in order to establish the legal machinery for ridding our waters of pollution. The Act creates the Division of Water Pollution Control to administer its provisions. G. L. c. 21, § 26. One of the Division's principal responsibilities is to "[a]dopt standards of water quality which shall be applicable to the various waters or portions of waters of the commonwealth, and a plan for the implementation and enforcement of the standards so adopted for the various waters." G. L. c. 21, § 27(4). The purpose of G. L. c. 21, § 43 is, by its own terms, "to insure compliance with the standards established for the waters affected." The extension of an existing sewer system can produce as much of a pollution problem as the construction of an additional outlet between the system and a waterway. Thus, the Division of Water Pollution can "insure compliance" with its water-quality standards only if both types of outlets are subject to the restrictions of § 43.

It is therefore my opinion that where a sewerage system discharges sewage into the waters of the Commonwealth, no extension of that system may be constructed without a permit from the Division of Water Pollution Control under G. L. c. 21, § 43.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 70. February 26, 1968.

HONORABLE C. ELIOT SANDS, *Commissioner of Probation*

DEAR MR. SANDS: — As Commissioner of Probation, you have requested my opinion on the following questions:

"(1) Does the Committee on Probation have the authority to bar or limit political acitivity by persons who continue to hold their positions as probation officers?

"(2) Does the Commissioner of Probation have such authority?

"(3) If the answer to either of the questions above is in the affirmative, what steps are necessary to require the resignation or discharge of a probation officer who persists in political activity from which he has been barred in accord with an appropriately promulgated regulation on the subject?"

Accompanying your request is a draft of a regulation which you propose to submit to the Committee on Probation. A copy is annexed to this opinion.

At the outset, there may perhaps be an issue whether the term "political activity," by itself, has a sufficiently definite meaning to describe the proscribed conduct. *Cf. Commonwealth* v. *McCarthy,* 281 Mass. 253, 259 (1932). However, since I answer question 1 in the negative, and since I also answer question 2 in the negative (so far as the latter question relates to a general prohibition), it is unnecessary to decide whether "political activity," standing alone, has the required definiteness for an enforceable standard.

Two objectives, not always reconcilable, are of primary concern in any consideration of the problem of political activities of public employees. As stated in the recent report to the President and the Congress by the Commission on Political Activity of Government Personnel (Arthur S. Flemming, Chairman),

> "*First,* a democratic society depends for strength and vitality upon broadly based citizen participation in the political processes of the Nation, and governments are responsible for granting their citizens the constitutional rights of free speech and association.
>
> "*Second,* to assure the honest, impartial, and efficient transaction of the public's business, a democratic society equally needs a government that functions with a permanent system of employment under which persons are hired, paid, promoted, and dismissed on the basis of merit rather than political favoritism."

In Massachusetts certain limitations on political activities have been established by the Legislature and are now found in G. L. c. 55, §§ 11, 13 and 15. These sections bar certain appointive state and local employees from soliciting campaign funds and from making certain political contributions. Also relevant is G. L. c. 268A, § 23, the Code of Ethics, which would bar misuse of an employee's official position for political purposes. Violation of the Code may subject an employee to administrative discipline. See *Board of Selectmen of Avon* v. *Linder,* Mass. Adv. Sh. (1967) 909.

The powers of the Committee on Probation are contained in G. L. c. 276, § 99A, which provides, among other things, that the Committee shall "consult with the commissioner of probation as to standards of probation work throughout the commonwealth" and, "in consultation with the commissioner on probation, shall establish and promulgate standards for the appointment of probation officers . . . ." The same section also authorizes the Committee, upon recommendation of the Commissioner, to "recommend to any court of the commonwealth disciplinary action, including removal or discharge for cause, with regard to any probation officer appointed by said court, and if no action is taken by said court within thirty days, the committee on probation may take or require such action as it deems best."

The powers and duties of the Commissioner are contained in G. L. c. 276, § 99, which provides in part:

> "The commissioner . . . shall establish standards for probation work throughout the commonwealth, including methods and procedures of investigation, and shall establish and promulgate rules concerning supervision, casework, record keeping, accounting and caseload in all courts, subject to the approval of the committee on probation . . . ."

In addition, G. L. c. 276, § 98 provides that the Commissioner "shall have executive control and supervision of the probation service."

With respect to the Committee on Probation, it is my opinion that the Committee, in the exercise of its original jurisdiction, is not authorized to impose a bar on political activity. The Committee's statutory authority to "establish and promulgate standards for the appointment of probation officers" does not extend to the promulgation of standards governing the man-

ner of performance of a probation officer's work *after he has been appointed*. It follows that the Committee has no original authority to impose either a general or a limited bar on political activities.

As for the Commissioner, it is my opinion that his statutory authority to "establish standards of probation work . . . [to] establish and promulgate rules concerning supervision, casework, record keeping, accounting and caseload . . . [and to exercise] executive control and supervision of the probation service" is restricted to the formulation of standards and rules which directly relate to probation work itself and the public's confidence in the manner in which it is performed. All political activity does not necessarily bear that direct relationship. *Particular kinds* of political activities may, however, be prohibited by the Commissioner where they would seriously threaten the quality of probation work or the public's confidence therein.

Drawing the line between particular permitted and prohibited political activities is beyond the scope of this opinion. Yet since you have submitted with your request a draft regulation, it would, I believe, be appropriate for me to comment on it so as to furnish you with a general guide in this important matter. In my judgment the draft regulation goes further than I think permissible. It seeks, among other things, to prohibit a probation officer from being "an active candidate either at a party primary or at a general election in campaigns involving issues on local or other governmental levels." I believe that this restriction would be too broad for the Commissioner, under his present authority, to impose. Although such a limitation by him could perhaps, under some supposed set of circumstances, be regarded as having justification, I believe that more explicit authority from the Legislature is required to impose it.

The draft regulation also requires a probation officer to obtain the approval of the Commissioner of Probation as a condition of being a candidate for election to a Library Board, Board of Public Welfare, Board of Selectmen, and certain other local bodies. If the candidacy is disapproved, the probation officer is given a right of appeal to the Committee on Probation. Here again, I believe that more explicit authority from the Legislature is required for the proposed regulation. Moreover, this portion of the proposed regulation fails to prescribe the standards which the Commissioner and Cojmmittee would be expected to apply in making their decisions.

I make the further observation that apart from the adoption of any regulation, whether broad or limited, a probation officer whose political activities result in a neglect of his duties as a probation officer or otherwise conflict with the performance of his responsibilities would be subject to appropriate disciplinary proceedings, including removal or discharge, under G. L. c. 276, § 99A.

Turning to your third question, it is my opinion that an answer should be given only in relation to the circumstances of a particular case, rather than in general terms. If such a case should arise, I would be pleased to consider the matter at that time.

Finally, I wish to state that my views expressed in this opinion apply primarily to probation officers. It may be that because of the nature of the work of other classes of public employees or because of statutes not generally applicable, stricter — or perhaps less strict — limitations on political activity by them would be appropriate and permissible. See *McAuliffe* v. *New Bedford,* 155 Mass. 216, 218 (note). However, a comprehensive evaluation

of political activities by all classes of public employees is outside the scope of this opinion.

In summary then,

(1) I answer your first question in the negative, so far as it relates to original authority of the Committee, as distinguished from its authority to approve regulations promulgated by the Commissioner.

(2) I answer your second question in the negative so far as it relates to a general prohibition on political activity. With regard to specific prohibitions, I am of the opinion that there is a zone of permissible prohibitions. Definition of the limits of that zone should be made, at least in the first instance, by the Commissioner, as the person who is most familiar with the problems involved. Under G. L. c. 276, § 99, such prohibitions within the indicated zone are subject to the approval of the Committee on Probation.

(3) Your third question does not require an answer at this time.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Draft of a regulation which is to be proposed to Committee on Probation.

> A probation officer, while so employed, shall not be an active candidate either at a party primary or at a general election in campaigns involving issues on local or other governmental levels. If probation officers, while so employed, seek elected membership to a Library Board, Board of Public Welfare, Board of Selectmen, Board of Health, School Committee, or other similar civic body, when, under the circumstances such participation in civic affairs by members of the probation service would be desirable, such probation officers must bring the individual case to the attention of the Commissioner of Probation for his consideration in advance of filing candidacy in the election involved. The Commissioner has discretion to approve or disapprove such candidacy; in the event that the Commissioner disapproves, the probation officer who feels himself aggrieved by such disapproval may ask for a final determination by the Committee on Probation. If a probation officer, while so employed, becomes a candidate for office contrary to the determination of the Commissioner, or, of the Committee on Probation on appeal, he must resign. Failure to resign under such circumstances shall be construed as cause for dismissal under General Laws, Chapter 276, Section 99A.

Number 71. MARCH 12, 1968.

DR. JOHN W. LEDERLE, *President, University of Massachusetts*

DEAR DOCTOR LEDERLE: — You have requested my opinion as to whether the Board of Trustees of the University of Massachusetts, acting on behalf of the Commonwealth, has the power to take land in the City of Worcester by eminent domain, as a site for the University of Massachusetts Medical School.

While no power of eminent domain is conferred upon the Trustees by the General Laws, you call attention to St. 1965, c. 847 and St. 1967, c. 276, as

possible sources of this power with respect to the land in Worcester required for the Medical School. These are essentially appropriation statutes, to provide funds for the planning, development and construction of the School. According to your letter, "[i]t may be assumed that of the funds thus appropriated an amount is available sufficient to pay the damages incurred by any person in consequence of a taking of land in said city for such purpose."

I am of the opinion that the statutes referred to do give the Trustees power to acquire the land in question by eminent domain. Under § 2 of the 1965 statute, $1,750,000 was appropriated to the University "[f]or the acquisition of certain land in the city of Worcester for a site for the medical school, or land with buildings thereon, by purchase *or by eminent domain under chapter seventy-nine of the General Laws"* and for related purposes. (Emphasis supplied.) Section 2 of the 1967 statute, whereby $45,000,000 was appropriated to the University, contains the same language.

It may be contended that these statutes did no more than appropriate funds for the purposes stated therein, and that the granting of the power of eminent domain requires separate legislation to that effect. I would not agree with that contention. Statutory draftsmanship could, of course, confine the scope of appropriation acts to fiscal matters and could grant other powers such as that of eminent domain by separate legislation. However, an appropriation act is just as much a part of our laws as any other statute, and there is nothing to prevent the General Court from combining an appropriation of funds with a grant of land-taking power in a single piece of legislation, if it chooses to do so. See *Yont* v. *Secretary of the Commonwealth,* 275 Mass. 365, 369.

The question is always one of legislative intent. To be sure, statutes in derogation of private property rights "must be construed with reasonable strictness . . . ." *Burnham* v. *Beverly,* 309 Mass. 388, 389. But it is equally well established that the power of eminent domain can be conferred by necessary implication as well as by express language. *Id.* at pp. 392-395. While there is no statute providing that the Trustees "shall have the power of eminent domain," I regard this as the necessary implication of the appropriations quoted above. Otherwise, the quoted provisions would be largely meaningless.

An examination of other provisions of these appropriation acts supports this conclusion. For example, each of them contains an emergency preamble, "to provide funds *immediately"* for the School. (Emphasis supplied.) There would be no point in appropriating so many millions of dollars on an emergency basis if further legislation were required for their expenditure. The emergency preamble inserted in the 1967 statute, moreover, declared that such funds were "immediately" needed "for the planning, development *and construction"* of the School. (Emphasis supplied.) It must have been obvious to the Legislature that no such "construction" could occur until the site had been acquired.

It is therefore my opinion that St. 1965, c. 847 and St. 1967, c. 276 were intended to, and do, confer power upon the Trustees of the University to take the land referred to therein by eminent domain on behalf of the Commonwealth, as a site for the University's Medical School.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 72. April 11, 1968.

Dr. Edward R. Willett, *Chairman, Consumers' Council*

Dear Doctor Willett: — You have requested my opinion on the following questions:

"1. Can a city or town, pursuant to G. L. c. 166 or otherwise, grant a franchise, license, or permit exclusive or otherwise, to a privately held Cable Antennae Television (CATV) company for the installation and operation of a Cable Antennae Television (CATV) system?

"2. Does a municipality have any power to regulate rates for Cable Antennae Television (CATV) as a condition of granting a franchise, license, or permit?

"3. Does a municipality have a right to share in the profits or receipts of the operation of a Cable Antennae Television (CATV) system when it has granted a franchise, license, or permit to a privately held Cable Antennae Television (CATV) company?

"4. Can the Department of Public Utilities, under existing laws, exercise regulation over CATV systems?"

Your letter describes CATV systems and their operations in Massachusetts as follows:

> "A CATV system may be described as a facility which receives and amplifies the signals broadcast by one or more television stations and redistributes such signals by wire or cable to the homes or places of business or subscribing members of the public for a fee.
>
> "The heart of a CATV system is the network which connects the antennas and head-end equipment of the CATV operator with the homes of his subscribers. This network which is made up of coaxial cables, provides in effect, a private radio and T.V. spectrum which can be employed to relay signals entering the system at any point for a vast number of purposes.
>
> "There are 28 municipalities now being served by community antenna systems in Massachusetts. Twenty-one municipalities have issued permits where systems have not yet started construction. Three municipalities have systems that are currently under construction. Many cities and towns have informed the Council that they have several applications from different companies pending before them.
>
> "While the so-called franchises or permits heretofore granted by local cities and towns to CATV companies vary considerably in many respects, it has become apparent that the only statutory legal authority being cited by cities and towns in awarding the franchises or permits is General Laws, Chapter 166, Section 21 and 25. Using those sections as authority, the municipalities have been in many instances awarding franchises reserving themselves a percentage of the annual gross receipts, charging license fees, etc. In addition, some municipalities have included restrictions on

> the rates to be charged for the services. The Council is concerned about the existing powers of cities and towns to award permits under the conditions which have been included in many of the so-called franchises or contracts. In making its determination and recommendations the Council believes it necessary to clarify the existing powers of cities and towns in regard to such franchises."

You have submitted to me certain typical permits, agreements and ordinances from various communities in the Commonwealth. Common to all of them is a grant of a license to construct and maintain certain lines on and under public ways and places. In addition to the grant, one or more of the instruments that you have furnished to me require the licensee to maintain the lines in safe condition, to indemnify the municipality from all claims for damages resulting from the construction or operation of the lines, to carry a specified minimum number of television channels, to serve all users without discrimination, and to serve municipal or charitable institutions without charge. In one permit there is established a fixed fee for connection to each residential user. Each permit is granted for a period of time ranging from three years to perpetuity. One permit also provides that the permit is exclusive and that the municipality will not issue any like grant to any other licensee. Several permits require annual payments from the licensee to the municipality. Some payments are set at a percentage (3%, 10.15%) of the gross receipts; another payment includes a minimum annual sum of $1500 plus $52 for each mile that the licensee's facilities occupy in the municipality.

Your first question is framed in broad terms, which do not specify the particular provisions, other than the grant of an exclusive right, which may be included in any particular "franchise, license, or permit." Nor does your first question specify the details of any particular CATV system. I can accordingly answer this question only in very general terms.

So far as any permit merely grants the licensee the right to lay its television lines under and across public ways or places, G. L. c. 166, §§ 21 and 25 authorize a municipality to make such a grant. Section 21 provides:

> "A company incorporated for . . . transmission of television signals, whether by electricity or otherwise, . . . may, under this chapter, construct lines for such transmission upon, along, under and across the public ways and, subject to chapter ninety-one, across and under any waters in the commonwealth, by the erection or construction of the poles, piers, abutments, conduits and other fixtures, except bridges, which may be necessary to sustain or protect the wires of its lines; but such company shall not incommode the public use of public ways or endanger or interrupt navigation."

Section 25 provides:

> "The selectmen may, within their towns, permit telegraph, telephone or television lines to be laid under any public way or place, and may establish reasonable regulations for the erection and maintenance of all lines for the transmission of intelligence by telegraph, telephone or television, or for the transmission of electricity for light, or for heat or power except for the use of street railway companies, by every person having authority to place such structures in or under public ways or places, including all

> lines owned or used by said towns. Regulations established by a city hereunder shall be made by ordinance."

The authorization in the latter section to "establish reasonable regulations" relates, it should be noted, only to "the erection and maintenance" of the lines. It does *not* extend to the general operations of the licensee or the type of service that the licensee is to furnish to the public. In particular, it does not provide, expressly or impliedly, for the regulation of rates, or for municipal participation in the revenues of the licensee. In my judgment, therefore, the grant of authority in section 25 to establish regulations is confined to regulations for the protection of public ways and places against unreasonable impairment or interference and the protection of the municipality and the public against loss or damage resulting from the installation, use or maintenance of the licensee's lines.

Your first question, as indeed all your questions, must be considered not only with reference to sections 21 and 25 of chapter 166 but also with reference to the so-called Home Rule Amendment to the Massachusetts Constitution. That Amendment, Article 89 of the Amendments, was adopted in 1966 and provided in section 6:

> "Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city or town, whether or not it has adopted a charter pursuant to section three."

It does not appear, however, that any of the permits that you have submitted to me as typical of town permits were granted pursuant to any by-law adopted under section 6. Therefore, authority for *those* permits cannot be based on the Home Rule Amendment; and in the absence of any existing applicable town by-law, I cannot usefully speculate on whether a town could, acting under the Home Rule Amendment, enlarge its powers beyond those set forth in G. L. c. 166, §§ 21 and 25.[1]

I conclude, therefore, in answer to your first question that G. L. c. 166, §§ 21 and 25, confer upon towns and cities only very limited powers, of the nature described above; and that except for those powers, the towns and cities have no additional powers which they may legally exercise with respect to granting CATV franchises, licenses and permits other than such powers, if any, as they may invoke by proper action under the Home Rule Amendment.

I next consider your second question, relative to municipal authority to regulate CATV rates. For the reasons already stated, G. L. c. 166, §§ 21 and 25 do not authorize such regulation. And, since action under the Home Rule Amendment does not appear to have been taken by any town, it would

[1] No court in any jurisdiction has yet, to my knowledge, undertaken to define the scope and sweep of the powers conferred upon localities by language like that in section 6 of the Home Rule Amendment. Prior to adoption of the Amendment in 1966, no town or city of the Commonwealth could have acted in respect of the matters set forth in your questions except to the extent that authority to do so could be derived from specific enactments of the General Court. To what extent such matters as CATV regulation can now be handled by localities without further legislation is a difficult question, and one that it is impossible to deal with other than case by case, taking into account the applicable by-law or ordinance and agreements involved, and the charter of the particular locality.

be inappropriate for me to speculate on whether, and to what extent, a town by a properly drawn by-law could regulate CATV rates. With respect to cities, and the possible application of the Home Rule Amendment, it is impossible to state a generalized conclusion. Your second question could only be answered after detailed examination of a city's charter and the particular rate regulations adopted by the city.

Turning now to your third question, which asks whether a municipality has "a right to share in the profits or receipts" of a CATV system, my answer is in the negative. No such right is contained in G. L. c. 166, §§ 21 and 25, nor can any such right be found in the Home Rule Amendment. In fact, I regard that Amendment as forbidding any such participation. Section 7 of the Amendment provides in part:

> "Nothing in this article shall be deemed to grant to any city or town the power . . . (2) to levy, assess and collect taxes . . . ."

A tax need not be designated as such in so many words. "The real character of [a] monetary exaction is the determining factor." *Eaton, Crane & Pike Co.* v. *Commonwealth,* 237 Mass. 523, 528. Further, it should be noted that in respect of municipal authority to assess taxes, the Home Rule Amendment is only declaratory of the limitations in pre-existing law. "Cities and towns have no inherent power to levy taxes. They can exercise only those powers to tax which have been detegated to them by the General Court as the representative of the Commonwealth." *Duffy* v. *Treasurer & Receiver General,* 234 Mass. 42, 47. *Board of Assessors of Quincy* v. *Cunningham Foundation,* 305 Mass. 411, 415.

With these principles in mind, I now turn to the question whether a municipality may require payments from a CATV licensee. It has been established that "under a power to regulate, the requirement to take out a license is free from legal objection, and where a license is lawfully required, a small fee may be imposed, designed not for revenue, but to cover reasonable expenses incident to the enforcement of the rule." *Warburton* v. *Quincy,* 309 Mass. 111, 115-116. When, however, a license fee exceeds this permitted limit, it will be regarded as a tax, and unless otherwise authorized will be held to be invalid. *Commonwealth* v. *Stodder,* 2 Cush. 562, 571-572. Questions of fact will arise in each case in the determination of whether the fee is a reasonable expense incident to enforcement of a regulation, on the one hand, or is a tax, on the other.

In those CATV licenses that you have submitted to me wherein the licensee is required to pay a periodic sum to the municipality, there is nothing to indicate that the payments are required merely to cover the expense of regulation. In those permits wherein the payment is simply a percentage of the licensee's gross receipts, there is plainly no indication that the expense of regulation bears a direct and proportional relationship to the gross receipts. In the city ordinance, referred to above, which requires a fixed payment for each mile of line in the municipality, there is perhaps a faint indication of the necessary relationship between the payment and the expense of regulation, yet the particular ordinance denominates the payment as a tax, "in lieu of all other city taxes, for the privilege of using public thoroughfares of the [city] for the purpose of carrying out this agreement." It follows that the payment, being in fact a tax, is beyond the authority of the city to require.

Your fourth question asks whether the Department of Public Utilities

may, under its present authority, regulate CATV systems. There being no statute that authorizes direct regulation, the Department, in my judgment, has no such authority, except to the extent perhaps that a CATV system may be a part of an activity such as a telephone or telegraph service that is already and independently subject to the Department's jurisdiction. Possibly, also, the Department may have a measure of indirect jurisdiction through supervision of the rates that a telephone company may charge a CATV system for use of the telephone company's poles and equipment. Without a full factual record before me, however, I believe it advisable not to speculate at this time as to whether such jurisdiction in fact exists, and I intimate no opinion in that regard. See generally "Federal, State and Local Regulation of CATV — After You, Alphonse," Comment, 29 Univ. of Pittsburgh Law Review No. 1, Oct. 1967, pp. 109, 114-118.

Finally, although your request did not touch on the matter, I have considered the question whether the Federal Communications Commission (FCC) has attempted to exercise jurisdiction over local CATV systems. It appears that the FCC has adopted certain requirements relative to a system's obligation to carry local signals and has placed certain restrictions on duplicating local programs and bringing in distant signals. (Second Report and Order, 31 Fed. Reg. 4540, 4548-4562, March 17, 1966). It does not appear, however, that the FCC has yet asserted jurisdiction over state or local franchising, or state or local regulation of rates, service or transmission facilities. I note that litigation over the FCC's jurisdiction, within its asserted domain, is now pending in two cases before the United States Supreme Court and is awaiting decision. *United States* v. *Southwestern Cable Co.*, cert. granted October 23, 1967, 389 U.S. 911, argued March 12-13, 1968 (36 U.S.L. Week 3364); *Midwestern Television, Inc.* v. *Southwestern Cable Co.*, cert. granted and the case argued on the same dates as the first case.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 73. APRIL 12, 1968.

HONORABLE JOHN A. GAVIN, *Commissioner of Correction*

DEAR COMMISSIONER GAVIN: — You have asked my opinion as to whether Massachusetts may under its agreement with Rhode Island, executed on June 8, 1964 pursuant to the New England Interstate Corrections Compact (the Compact) (St. 1962, c. 753), receive at the Massachusetts Correctional Institution, Framingham, female prisoners in confinement in Rhode Island while awaiting trial. See *Opinion of the Justices,* 344 Mass. 770, and R. I. Pub. Laws, 1960, c. 90, §§ 1-4.

It appears from certain supplemental information which accompanied your request that the average population of the Women's Prison in Rhode Island is about seventeen persons daily, of whom about eight are awaiting trial. Because of this small number of prisoners, the per capita cost of caring for them is high and there is lack of an adequate staff and facilities for proper rehabilitation of those who are serving sentences. In consequence, Rhode Island desires to close its Women's Prison and to transfer all its prisoners in the Women's Prison to the Massachusetts Correctional Institution, Framingham. You have indicated that you can "very easily" handle all the prisoners who would be transferred under this procedure.

After careful consideration of the matter, I conclude that the Compact permits the transfer of those prisoners who are awaiting trial in Rhode Island.

Article I of the Compact states its "Purpose and Policy," declaring:

> "The party states, desiring by common action to fully utilize and improve their institutional facilities and provide adequate programs for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society and effecting economics in capital expenditures and operational costs. The purpose of this compact is to provide for the mutual development and execution of such programs of co-operation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources."

Article X of the Compact states that "The provisions of this compact shall be liberally construed. . . ."

Although the main purpose of the Compact is to deal with prisoners who have been confined as the result of a sentence of a court upon a determination of guilt, the Compact is nevertheless, in my judgment, not restricted to prisoners of that class. The Compact recognizes that confinement can also result from a "commitment" as distinguished from a "conviction." Thus Article II(b) defines the "Sending state" as the state "in which conviction or court commitment was had." And Article II(c) defines the "Receiving state" as the state "to which an inmate is sent for confinement other than a state in which conviction or court commitment was had." Further, the definition of "Inmate" in Article II(d) makes a distinction between mere confinement and confinement under a sentence, describing an "Inmate" as "a male or female offender who is committed, under sentence to or confined in a penal or correctional institution except county houses of correction and jails."[1] I recognize that the word "offender" in the foregoing definition may suggest that the prisoner has been found to have actually violated the law. Yet taken together with the other elements of the definition and the other provisions of the Compact, this conclusion is, in my judgment, not required. To give it such a restricted interpretation would, for example, exclude persons who have been committed to correctional institutions for the mentally ill. Article II(e), however, which defines an "Institution," includes in that term a "penal or correctional facility . . . for the mentally ill or mentally defective." And in view of the broad purpose of the Compact, the term "commitment" does not, in my judgment, stop there, but rather extends to prisoners in confinement while awaiting trial.

Additional support for this conclusion can be found in Article IV(a) which provides that authorities of a sending state may transfer an inmate to the receiving state "in order to provide adequate quarters and care of [or?][2] an appropriate program of rehabilitation or treatment." The apparently in-

[1]The exception of inmates in "county houses of correction and jails" appears only in the Massachusetts version of the Compact. See *Opinion of the Justices*, 344 Mass. 770, 776-778, and R. I. Pub. Laws, 1960, c. 90, Article II(d).

[2]The Rhode Island version of the Compact uses "or." R. I. Pub. Laws, 1960, c. 90, Article IV(a).

tended use of the disjunctive in the foregoing provision is some indication that merely seeking "adequate quarters and care" for an inmate would be a sufficient reason for invoking the Compact.

I therefore conclude that transfers of prisoners awaiting trial in Rhode Island may be effected under the Compact. In reaching this conclusion, I note that in Rhode Island, unlike Massachusetts, persons awaiting trial are not confined in county houses of correction and jails, all such institutions having been eliminated in that state. See General Laws of Rhode Island, Title 13-2-5. Thus the language in the Massachusetts version of the Compact excluding from its coverage offenders confined in those institutions is not applicable to the transfers and does not prevent them.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 74. APRIL 17, 1968.

MR. WILLIAM C. MAIERS, *Clerk, House of Representatives*

DEAR SIR: — By an order adopted December 28, 1967, the House of Representatives requested my opinion on the following question:

> "Does section 8 of Article LXXXIX [89] of the Amendments to the Constitution of the Commonwealth, which authorizes the general court to act in relation to cities and towns by special law only on a petition filed by or approved by the voters or town meeting of a town with respect to a law relating to that city or town, require in the case of House, No. 5350 of 1967 that the petition be filed by or approved by the voters or the town meeting of the towns of Windsor, Hinsdale and Dalton in view of the fact that said bill authorizes the taking by eminent domain by the city of Pittsfield of lands and easements in said towns?"

While House No. 5350 of 1967 is now moot, its subject matter was referred to a special committee to report during the current session, and in consequence an answer to the question propounded will be of current value to your honorable body. I therefore submit the following opinion.

House No. 5350 is a bill authorizing the city of Pittsfield to take by eminent domain, purchase or otherwise, or divert and hold, the waters of Westfield and Hume brooks and tributaries in the town of Windsor and to take or purchase such lands, rights of way, and easements in the towns of Windsor, Dalton and Hinsdale as may be necessary for collecting, storing, protecting the purity of, and conveying such waters to Pittsfield for the purpose of increasing its water supply. (Sec. 1.) Pittsfield is specifically required and authorized to construct a reservoir in the town of Windsor to impound "at least seven hundred and sixty million gallons" of water and whatever conduits and works, including dams, that may be necessary to filter and convey the water through the above-named towns to Pittsfield.

Prior to the adoption of Article 89 of the Amendments (the "Home-Rule Amendment") there would have been no question of the power of the Legislature to pass the measure without the consent of the municipalities affected. Many similar pieces of legislation are, in fact, now in effect in the Commonwealth. Article 89, however, made a fundamental change in the power

of the Legislature to legislate for municipalities. Section 1 of Article 89 provides in pertinent part:

> "It is the intention of this article . . . to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article."

Section 8 of Article 89 provides in pertinent part:

> "The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor; (3) to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns or cities and towns, or established with other than existing city or town boundaries, for any general or special public purpose or purposes, and to grant to these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or (4) solely for the incorporation or dissolution of cities or towns as corporate entities, alteration of city or town boundaries, and merger or consolidation of cities and towns, or any of these matters."

In my opinion, House No. 5350 is a bill "in relation to" the City of Pittsfield and also "in relation to" the towns of Windsor, Hinsdale and Dalton, and it is also a "special" bill within the meaning of the foregoing amendment. Therefore, it can only be enacted in its present form in accordance with the procedures set forth in clauses (1) and (2) of Section 8 of Article 89.

In determining that House No. 5350 is an act "in relation to" each of the four named communities, I note that an ample supply of fresh water is one of the most precious of natural resources. A city or town is empowered by the General Laws to establish and maintain within its own borders a water supply or a water distributing system, or both; and a town may take land and water rights within its borders "not already appropriated for purposes of public water supply . . . ." G. L. c. 40, §§ 39A, 39B. The present bill would diminish the local sovereignty of Windsor over its own water supply, and would, though to a lesser extent, diminish the sovereignty of Dalton and Hinsdale with respect to the establishment of water distributing systems within their respective territories. These resources and rights of the three towns would be transferred to the control of the neighboring community of Pittsfield. Thus it is my belief that House No. 5350, rather clearly, is legislation "in relation to" each of the four named communities.

As the bill is "in relation to" each of the communities, it must be enacted under the procedures set forth in clauses (1) or (2) unless it can be said to be a "general" law that applies "alike to all . . . cities and towns, or to a class of not fewer than two . . . ." In the cases of Pittsfield and Windsor, the

bill quite obviously does not apply "alike" to the two communities. Pittsfield is empowered to "take," or "divert and hold," the waters of two named streams and tributaries "in the town of Windsor." This power relates specifically and solely to designated activities by Pittsfield in Windsor. Thus the procedures for enactment of special laws apply in the case of both Pittsfield and Windsor. See 8th Report of the Special Commission on Implementation of the Municipal Home Rule Amendment, 1967 Senate Doc. No. 1547, pp. 35-36.

The situation is perhaps less clear in the cases of the towns of Hinsdale and Dalton. Since Pittsfield's powers in both Hinsdale and Dalton are limited to taking or purchasing lands, rights of way, and easements for, in essence, piping water from Windsor to Pittsfield, it might be argued that these powers are conferred by a "general" law applicable to a class of not fewer than two. But I do not believe that the granting of eminent domain powers in these two named towns to Pittsfield, as part of a special plan to provide Pittsfield with water from Windsor, can be said to be a "general" law within the meaning of Section 8 of Article 89. I read Section 8 as requiring not only that a law apply to "a class of not fewer than two," but that the law be "general" in nature. The adjective "General" connotes a law which applies uniformly to all municipalities within a class, and indicates that there must be some statewide concern which justifies separating that class of municipalities from all other municipalities. While in some instances it may not be easy to distinguish "general" from "special" laws, and although a law applicable only to several specifically named municipalities may not necessarily always be a "special" law, I am of the opinion, for the reasons already stated, that the measure in question here should be regarded as such.

In reaching the conclusions set forth in this opinion I have, of course, been mindful of the necessity for a workable solution to the water needs of the Commonwealth's urban areas. The General Court can deal with particular cases through special legislation if all of the cities and towns in relation to which it proposes to act request such action in accordance with Section 8, clause (1) of Article 89. Should some communities unreasonably refuse to share their resources with others, special laws can nevertheless be enacted to deal with those cases if the Governor so recommends and the General Court approves by a two-thirds vote of both branches. (Article 89, Section 8, clause 2.)

Alternatively, Section 8 of the Home Rule Amendment provides two additional methods which the General Court may choose to utilize in dealing with such a problem. The Legislature may pass general legislation to deal with those questions on a uniform basis throughout the state. Alternatively, the Legislature may choose to create a regional entity for the purpose of furnishing water to a particular metropolitan area.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 75. MAY 3, 1968.

HONORABLE LEO L. LAUGHLIN, *Commissioner of Public Safety*

DEAR COMMISSIONER LAUGHLIN: — You have requested my opinion as to

whether you may appoint employees of the Industrial School for Girls at Lancaster, Massachusetts, as special police officers.

Your authority, if any, to make such appointments arises from G. L. c. 147, § 10G, whereby you "may at the request of an officer of a college, university or other educational institution appoint employees of such college, university or other institution as special police officers." I infer from your letter that such a request has been made on behalf of the Industrial School for Girls. The only question, then, is whether the Industrial School qualifies as an "educational institution" for purposes of § 10G.

The Industrial School for Girls is a public institution operated under the supervision of the Division of Youth Service. G. L. c. 120, § 2. Under G. L. c. 120, § 4A, the Division of Youth Service is made responsible for "all wayward and delinquent children and habitual truants, habitual absentees and habitual school offenders committed to the commonwealth . . ." The inmates of the Industrial School are girls falling into the foregoing categories. General Laws c. 120, § 4 provides that "the purpose . . . of all education, employment, training, discipline, recreation and other activities carried on" in this and other institutions under the Division of Youth Service "shall be to restore and build up the self-respect and self-reliance of the children lodged therein and to qualify them for good citizenship and honorable employment."

As to the actual character of the Industrial School, the Division of Youth Service has provided the following facts: there are ordinarily approximately 100 inmates, the great majority of whom are between the ages of thirteen and seventeen; almost all of these girls are there by reason of civil (rather than criminal) proceedings; the School offers formal education from grade one to grade ten, and the great majority of the girls are required to attend these classes; the permanent staff of the School includes a principal, six certified institutional teachers and two vocational training instructors; the girls live in cottages, to which they are assigned on the basis of age; the individual rooms in these cottages are kept unlocked at all times, but the cottages themselves are locked at night; the institution as a whole is not walled in.

On the basis of these facts, I am of the opinion that the Industrial School is an "educational institution" for purposes of G. L. c. 147, § 10G. While it may also be characterized as a correctional institution in some respects, I do not think its purposes and functions need be *exclusively* educational to qualify under § 10G. The fact that such a substantial proportion of the Industrial School's activities is focused upon the formal and vocational education of its charges — most of whom are within the age group which is subject to the Massachusetts compulsory education requirements (G. L. c. 76, § 1) — is sufficient, I believe, to make it an "educational institution."

Moreover, G. L. c. 120, § 2 gives the Division of Youth Service jurisdiction over not only the Industrial School and other named institutions, but also "all other institutions, *except correctional institutions of the commonwealth* [emphasis supplied], supported by the commonwealth for the custody, diagnosis, care and training" of certain classes of children. The language of the exception (which was inserted in § 2 by St. 1955, c. 770, § 4) suggests that the Legislature has regarded the Industrial School as something other than a correctional institution. The same assumption as to the nature of the institutions under the jurisdiction of the Youth Service Board underlies an Opinion of the Attorney General issued on April 20, 1949, to the

effect that the Youth Service Board was not authorized to transfer children under its care to the Massachusetts Reformatory for Women at Framingham, on the ground that the latter is "a penal institution . . . a prison." See *Report of the Attorney General for the Year Ending June 30, 1949,* pp. 68, 70.

It is therefore my opinion that you may, pursuant to G. L. c. 147, § 10G, appoint employees of the Industrial School for Girls at Lancaster as special police officers.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 76. MAY 10, 1968.

MR. JOSEPH LEO DRISCOLL, *President, Southeastern Massachusetts Technological Institute.*

DEAR PRESIDENT DRISCOLL: — In your letter of May 8, 1968, you have asked whether a certain publicly displayed painting by a freshman art student on a wooden door constitutes a violation of G. L. c. 264, § 5, a criminal statute.

The facts as stated in your letter may be summarized as follows: The door was painted in response to an art class assignment to design a flag or banner for any country, group, organization or family *as it might appear in the year 2000*. The painting contained, on one side, 13 alternating red and white horizontal stripes and, in the upper left-hand corner, a rectangular field of blue. Superimposed on the blue field was a white swastika. There were no stars. On the reverse side of the door the number "101" was painted. The freshman who produced this work has asserted that it "is his personal expression as to the possible appearance of a flag of the United States in the year 2000." He also said that the number "101" is symbolic of the torture chamber described in the novel "1984" by George Orwell. The door was hung by students against a second floor balcony wall in the lobby of the Institution so that only the side with the stripes, blue field, and swastika was visible. Subsequently it was removed by school authorities.

General Laws c. 264, § 5 is a penal statute. Its violation may be punished by a fine of up to $100 or imprisonment for not more than one year, or both. Its provisions are directed against whoever "publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States . . . ., or whoever *displays* such flag or *any representation thereof upon which are words, figures, advertisements or designs* . . . . Words figures, advertisements or designs attached to, or directly or indirectly connected with, such flag or any representation thereof in such manner that such flag or its representation is used to attract attention to or advertise such words, figures, advertisements or designs, shall for the purpose of this section be deemed to be upon such flag . . . ." (Emphasis supplied.)

I am of the opinion, after a careful reading of the above statute, that the conduct you have described does not constitute a violation.

It is well established in our law that a statute which is "penal in nature . . . is not to be enlarged beyond its plain import, and as a general rule is strictly construed." *Commonwealth* v. *Hayden,* 211 Mass. 296, 297. In other words, no matter how ill-advised and tasteless the conduct in question, it does not violate G. L. c. 264, § 5, unless it is plainly prohibited by the language of the statute.

The facts, which are apparently undisputed, are that the painting is an imagined representation of this nation's flag as *it might be* at the end of this century. The painting clearly does not represent our flag as it now exists, since the stars are omitted. Thus we do not have, as required by the words of the statute, *a flag of the United States* upon which are words, figures, advertisements or designs. Rather we have a painting of an imaginary flag that somewhat resembles, but in at least one material respect differs from our own.

A contrary interpretation of G. L. c. 264, § 5, as it applies to this situation, would raise serious questions under the First and Fourteenth Amendments to the Constitution of the United States and Article XVI of the Declaration of Rights in the Massachusetts Constitution.

In rendering this opinion I certainly do not suggest you and the other officials at the Institute have exceeded your authority in refusing to permit students to hang this painted door in the lobby of the Institute, nor do I in any way indicate approval of this object. You have broad discretion to control the display of paintings and other objects on Institute property. I rule only, on the facts presented in your letter, that there is no basis for criminal prosecution under G. L. c. 264, § 5.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 77. MAY 10, 1968.

HONORABLE LEO L. LAUGHLIN, *Commissioner of Public Safety*

DEAR COMMISSIONER LAUGHLIN: — You have requested my opinion as to the eligibility of a certain member of the Uniformed Branch of the State Police to compete in a promotional examination scheduled for May 11, 1968.

You state in your letter:

> "In compliance with Chapter 22, Section 9 0 of the General Laws, the Commissioner of Public Safety must post in Special Orders a notice calling for an examination specifying a final date for filing, which shall be not less than thirty days from the date of notice.
>
> "On February 1, 1968, said notice was posted for the examination to the rank of Sergeant, the final filing date being March 1, 1968. Coincidently, a member of the Uniformed Branch, with the rank of Corporal, was suspended from duty as the result of disciplinary action for a total of thirty days. The suspension commenced February 1, 1968 and ran through March 1, 1968, the same dates as the filing period. The officer returned to duty on March 2, 1968.

"Rule 10.99 of the Rules and Regulations for the Government of the Massachusetts State Police (Uniformed Branch) states as follows: 'Any member of the Uniformed Branch under suspension must turn in his badge and other State Police property and equipment before leaving his station. He shall be deprived of all State Police powers and privileges and must not represent himself as a member of the Uniformed Branch.'

"As a result of the above Rule, an administrative determination was made to deny the officer's application for promotion to the rank of Sergeant. It has since been requested that this administrative determination be reevaluated and in light of same I would like to have the following questions resolved:

(a) Does the Commissioner of Public Safety have the authority to administratively determine a candidate's eligibility for promotion?

(b) Is an officer who was suspended during the entire filing period eligible to file an application even though State Police Rules and Regulations specifically states, '*He shall be deprived of all State Police powers and privileges and must not represent himself as a member of the Uniformed Branch*'?

(c) Is it within the power of the Commissioner of Public Safety to allow this candidate to take the examination conditionally, pending your ruling and without waiving either the officer's or the Department's rights in any possible future action?"

For convenience, I shall begin with question (b). As to that question, my opinion is that the filing of an application for promotion is not among the "State Police powers and privileges" denied a suspended officer by Rule 10.99, and hence, that he is not rendered ineligible to apply for promotion by reason of his suspension during the application period.

The rejection of this officer's application would affect far more than his "powers and privileges" exercisable during the period of his suspension — since it would effectively deny him the opportunity to obtain promotion for a period of time thereafter. In a sense, then, his suspension would have significant post-suspension effects. This runs counter to the concept of a suspension as only "a temporary withdrawal or cessation from public work . . . ." *Mayor of Newton* v. *Civil Service Commission,* 333 Mass. 340, 343. *Bois* v. *Mayor of Fall River,* 257 Mass. 471, 472. I am therefore unwilling to interpret the general reference to "State Police powers and privileges" in Rule 10.99 as having such far-reaching consequences. Former Attorney General Edward T. Martin has ruled that an officer under suspension continues to be a member of the State Police for purposes of the Testimonial Dinner Law. Op. Atty. Gen. No. 66/67-95. Indeed, the Rule itself recognizes that such an officer remains a "member" of the State Police for some purposes: "Any *member* of the Uniformed Branch under suspension . . . ." (Emphasis supplied.) I think that one of the incidents of such continuing membership is the opportunity to apply for promotion.

Moreover, a regulation denying an otherwise qualified officer in the Uniformed Branch an opportunity to apply for promotion while under suspen-

sion would, in my opinion, be invalid. The standards and procedures for promotions in the Uniformed Branch are set out in considerable detail in G. L. c. 22, §§ 9 0 - 9Q. Section 9 0 authorizes you to "promote members of the uniformed branch . . . who are eligible for promotion . . . ." The same section and those following specify various criteria for such eligibility. Nowhere in these sections is there any provision for the addition of further promotional prerequisites through regulations of the Commissioner. In fact, § 9 0 provides for an examination which is "open to *all* candidates who have completed not less than one year of service in the next subordinate grade . . . ." (Emphasis supplied.) I conclude from this that the Commissioner has no authority, through regulations or otherwise, to impose further requirements as to eligibility for promotion.

This conclusion is borne out by G. L. c. 22, § 9A, under which Rule 10.99 was adopted. That section provides that the rulemaking power of the Commissioner shall be "subject to the provisions of sections 9 0 to nine Q, inclusive . . . ." The quoted clause was inserted in § 9A by the same Act which inserted §§ 9 0 - 9Q in the General Laws; namely, St. 1965, c. 785, entitled "An Act Establishing the Procedure for Promotions Within the Uniformed Branch of the Division of State Police in the Department of Public Safety." The whole thrust of the 1965 Act, which was the subject of much debate, numerous drafts and a lengthy report of the Legislative Research Bureau (1965 Senate Doc. No. 1140), was to subject promotions to legislative control. Such control, at least in so far as it relates to standards of eligibility, was, I think, intended to be exclusive.

It is therefore my opinion that the officer in question was not, by reason of his suspension, precluded from applying to take the promotional examination scheduled for May 11, 1968.

Question (a) has already been answered to a large extent in my reply to question (b). For the reasons stated above, I am of the opinion that you may determine administratively whether a candidate for promotion meets the criteria for eligibility established by G. L. c. 22, §§ 9 0 - 9Q, but that you have no authority to impose eligibility requirements beyond those prescribed by statute.

In view of my answers to questions (a) and (b), I believe it unnecessary to respond to question (c).

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 78. MAY 27, 1968.

HONORABLE LEO L. LAUGHLIN, *Commissioner of Public Safety*

DEAR SIR: — You have requested my opinion as to the jurisdiction of the Department of Public Safety over the construction by the Boston Gas Company of an above-ground tank of more than 10,000 gallons capacity to hold 290,000 barrels of liquified natural gas (LNG) on a tract at Commercial Point, Dorchester. Specifically, you ask whether the Department of Public Safety or the Department of Public Utilities has jurisdiction over the construction of the tank.

The various documents that have been submitted to me indicate the facts

to be as follows. For some years, the Boston Gas Company has maintained a large gas holder on a 36-acre tract at Commercial Point for the storage of gas for heating and illuminating purposes. In order to meet the public's increased demands for gas, the Company now proposes to construct on the tract an LNG plant which will include the new tank as a replacement for the existing gas holder. By a supercooling process the plant will liquify the gas into LNG, which will then be stored in the tank until the gas is needed by the Company's customers. At that time the LNG will be reconverted to its original gaseous state, or regassified, and distributed to the users.

On May 16, 1967, the Company petitioned the Department of Public Utilities under § 6 of c. 665 of the Acts of 1956, as amended, to exempt the tract from Boston zoning restrictions so as to permit the construction of the plant and to issue an order under G. L. c. 164, § 105A approving the manner in which, and the pressures at which, gas would be stored, transported and distributed. D.P.U. No. 15513. After a public hearing held on June 6, 1967, at which no one appeared in opposition, the DPU, on July 20, 1967, determined that the construction of the LNG plant was "reasonably necessary for the convenience and welfare of the public," ordered that an exemption from the zoning restrictions of the City of Boston be granted and further ordered that the DPU "finds that the manner in which and pressures to which gas is to be stored at, transported to and distributed from the proposed liquified natural gas processing and storage plant are proper and appropriate in the circumstances, and are hereby approved." In making its decision the DPU stated that "The proposed LNG plant will be designed and constructed in accordance with this Department's Regulations Covering Liquified Natural Gas (LNG) Plants and Storage, Section II of D.P.U. Order No. 11725-C [with a "temporary minor exception" which would be removed "no later than November 1, 1970" and which in the meantime "would pose no safety problems" to the nearest building]. Construction of the tank has since begun under the foregoing order.

General Laws c. 164, § 76 provides that the DPU "shall have the general supervision of all gas and electric companies and shall make all necessary examination and inquiries and keep itself informed as to the condition of the respective properties owned by such corporations and the manner in which they are conducted with reference to the safety and convenience of the public, and as to their compliance with the provisions of law and the orders, directions and requirements of the department."

General Laws c. 164, § 105A, inserted by St. 1932, c. 119, provides in pertinent part:

> "Authority to regulate and control the storage, transportation and distribution of gas and the pressure under which these operations may respectively be carried on is hereby vested in the department [of Public Utilities]."

Other sections of G. L. c. 164 deal with other phases of the jurisdiction of the DPU over gas companies. There are provisions relative to inspection of records (§ 80), forms of books and accounts (§§ 81, 82), annual returns (§§ 83, 84), rights of users of gas (§§ 92-92A), rates and charges (§§ 94 and 94F), quality of gas (§ 106), inspection of gas by the DPU (§ 109), and use, testing, replacement and examination of meters (§§ 112-123).

It was, in my judgment, the intent of the Legislature to vest in the DPU comprehensive jurisdiction, at the State level, over gas companies and their operations. Consonant with that intention is the provision in G. L. c. 164, § 105A, cited above, wherein the DPU is given authority "to regulate and control the *storage*, transportation and distribution of gas . . . ." (Emphasis supplied.) Conferring regulatory jurisdiction on the DPU over the storage of gas as well as over the transportation and distribution thereof and "the pressure under which these operations may respectively be carried on" indicates that the Legislature intended to establish, at the State level, a single regulatory authority for the operations of gas companies. Risks to the public are obviously created by the equipment and facilities used for the storage as well as for the transportation and distribution of gas, yet § 105A would indicate that no distinction was intended to be made in the DPU's responsibilities for regulating these three activities.

The provisions of G. L. c. 148, § 37 do not alter this conclusion. That section provides in pertinent part:

> "No person shall construct, maintain or use any tank or container of more than ten thousand gallons' capacity, for the storage of any fluid other than water, unless the same is located underground, without first securing a permit therefor from the commissioner [of Public Safety]."

Although the word "fluid" in its proper sense includes both gasses and liquids (Webster's Third International Dictionary, 1964), its use in § 37 is, in my judgment, confined to liquids only. This conclusion follows from the use of "gallons" in § 37 as the unit of measure of a "fluid." A gallon is a unit of liquid measure and is inapplicable to gasses, which in their gaseous state are measured in terms of cubic feet.

It is most unlikely that the Legislature intended the jurisdiction of the DPU over the storage of gas to depend on whether it was gaseous or liquefied. First, it appears that LNG was commercially unknown in 1932, when G. L. c. 164, § 105A was enacted. Further, G. L. c. 148, § 37 and the terms "gallons" and "fluid" originated in St. 1919, c. 303, and it is reasonably clear that LNG was wholly unknown at that earlier date.

A determination of the jurisdiction over the storage of LNG must, therefore, be made in the light of the fact that neither in 1919 nor in 1932, when the statutes in question were enacted, was LNG a substance which was specifically considered by the Legislature. Yet as between the two statutes, it is my opinion that the later enacted statute should prevail. This result is consistent with the proposition that the Legislature intended the DPU to have comprehensive jurisdiction, at the state level, over the operations of gas companies and it recognizes the fact that the Legislature in vesting such jurisdiction in the DPU could fairly have intended that such jurisdiction should apply not only to such operations in the light of gas technology as it existed in 1932 but also as it might develop thereafter. This result is also consistent with the rule that a later enacted statute which specifically deals with a given matter will prevail over an earlier statute that can be regarded as being applicable only in a general way. See *Richard Clothing Manufacturing Co.* v. *Gutstein-Tuck, Inc.*, 328 Mass. 386, 390. In short then it is my conclusion that the jurisdiction of the DPU over the tank is exclusive at the state level.

This opinion should be regarded as concerned only with the jurisdiction of state agencies. Whether or not the City of Boston may have certain supplemental regulatory or other jurisdiction is a matter to which I have not addressed myself and on which I do not intimate any opinion.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 79. MAY 28, 1968.

HIS EXCELLENCY JOHN A. VOLPE, *Governor of the Commonwealth*

DEAR GOVERNOR VOLPE: — You have requested my opinion on your jurisdiction under G. L. c. 161A, § 5(g) relative to approving a plan of the Massachusetts Bay Transportation Authority (MBTA) concerning transportation facilities in Mattapan. You ask me to specify, *first,* the conditions precedent for the exercise of your approval powers and, *second,* the scope of your authority under these powers.

You state that on February 29, 1968 the MBTA Advisory Board approved an MBTA plan relating to transportation facilities in Mattapan[1] and that on March 29, the Metropolitan Area Planning Council notified the MBTA that the plan "was not based upon the plans and programs adopted by the Public Works Commission." On April 3, the Public Works Commission voted that the plan ". . . in so far as Public Works Commission is concerned meets the requirements of [G. L. c. 161A, § 5(g)]." Both the Metropolitan Area Planning Council and the Massachusetts Department of Commerce and Development have stated that no consultation occurred between them and the MBTA. The Town of Milton has filed a petition in the Suffolk Superior Court to prevent the MBTA from proceeding with its planned project.

The pertinent statutory provisions were enacted by c. 563 of the Acts of 1964. Section 1 of the Act inserted § 3A into G. L. c. 16, which created in the Department of Public Works a Bureau of Transportation Planning and Development and designated the Bureau as "the principal source of transportation planning in the commonwealth . . . [to] be responsible for the continual preparation of comprehensive and co-ordinated transportation plans and programs for submission to and adoption by the [Public Works] commission and for such review or consideration by other governmental agencies as may be required by law or deemed appropriate by the commission."

Section 18 of c. 563 of the Acts of 1964 established the MBTA by inserting c. 161A into the General Laws. Section 5(g) of c. 161A establishes a procedure for preparing, revising and obtaining approval of MBTA pro-

[1]The MBTA has described the plan as a "revision" of the MBTA "Master Program" and submitted the plan to the MBTA Advisory Board pursuant to G. L. c. 161A, § 5 (g), set forth below.

grams for mass transportation.[2] Under the procedure, the MBTA is to "prepare and from time to time revise its program for mass transportation." The program "shall be based upon transportation plans and programs adopted by the public works commission pursuant to section three A of chapter sixteen" (see above) and is to be prepared "in consultation with" various other agencies. The proposed program is then "subject to the approval of the [MBTA] advisory board." If "within thirty days following such approval any such agency shall advise the authority in writing that the program is not based on the transportation plans and programs adopted by the said commission, the program shall be subject to the approval of the governor."

Under the terms of the statute, I am of the opinion that your authority arises upon the advisory board's approval of an MBTA program or revision thereof, and the timely filing with the MBTA by either the Department of Commerce and Development, the Metropolitan Area Planning Council, or any other concerned federal or state agency, of a written notice that the program or revision is not based on the transportation plans and programs of the Public Works Commission. While the statute provides for consultation between the MBTA and these agencies, it does not state that your authority to consider the program or revision is predicated upon adequate consultation, or upon any factors other than the ones outlined above.

I turn now to the scope of your approval power once the matter comes before you. The provisions of § 5(g) are somewhat unclear in this regard, stating merely that if within thirty days following the Advisory Board's approval of the MBTA program a consultative agency notifies the MBTA in writing "that the program is not based on the transportation plans and programs adopted by the said [public works] commission, the program shall be subject to the approval of the governor."

Because a consultative agency can invoke your power only if it alleges the program is not "based on" the Public Works Commission's plans and programs, it can be argued that your authority is limited to resolving that single point (and indeed, in your discretion, you may decide so to limit it). However, I do not believe that the statute should be read as relegating the Chief Executive of the Commonwealth to a role more appropriate for a subordinate agency head or hearing officer. Considering your constitutional position and the absence of any direct statutory limitation, I believe that the Legislature intended you, in granting or withholding your approval, to take into account any and all factors that you deem relevant to the public interest and the legislative purpose. Thus I am of the opinion that your approval authority is a discretionary executive power which you may exercise as you deem most appropriate.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

[2] "(g) The Authority shall prepare and from time to time revise its program for mass transportation within the area constituting the authority. Such program shall be based upon transportation plans and programs adopted by the public works commission pursuant to section three A of chapter sixteen, shall be prepared in consultation with the department of commerce and development, the metropolitan area planning council, and such other agencies of the commonwealth or of the federal government as may be concerned with the said program, and shall be subject to the approval of the advisory board; provided, however, that if within thirty days following such approval any such agency shall advise the authority in writing that the program is not based on the transportation plans and programs adopted by the said commission, the program shall be subject to the approval of the governor. The said program shall include a long-range plan for the construction, reconstruction or alteration of facilities for mass transportation within the area constituting the authority together with a schedule for the implementation of such construction plan and comprehensive financial estimates of costs and revenues, and shall, so far as practicable, meet the criteria established by any federal law authorizing federal assistance to preserve, maintain, assist, improve, extend or build local metropolitan or regional mass transportation facilities or systems."

Number 80. June 20, 1968.

Honorable Edward J. Ribbs, *Commissioner, Department of Public Works*

Dear Commissioner Ribbs: — You have requested my opinion as to whether the Department of Public Works is authorized by G. L. c. 90, § 33B, inserted by St. 1967, c. 519, to reimburse cities and towns for engineering costs incurred in connection with the installation of traffic control devices at high-accident locations.

I have been advised by the Traffic Engineer of your Department that the "engineering costs" about which you inquire are the costs of designing the devices, and that these are costs actually incurred by the municipalities, through the use of their own engineering facilities or those of private firms under contract to them, and do not include the salaries or expenses of any personnel of your Department.

On the basis of this interpretation of your question, I answer it in the affirmative. General Laws chapter 90, section 33B provides in relevant part as follows:

> "The state treasurer is hereby authorized to reimburse cities and towns for not more than three quarters of the *cost of installing* suitable traffic control devices at high-accident locations within their territorial limits, in accordance with the following procedure:
>
> "The department [of public works] shall define high-accident locations and shall establish standards, rules and regulations, and shall determine final allocation of funds to the cities and towns. The amount to be paid by the treasurer to each such city and town shall be based upon certification to the treasurer by said department of the amount due such city or town. Payments in the amounts so certified shall be made by the treasurer out of the Highway Fund, and shall be in addition to any other funds allocated to the several cities and towns for the improvement, maintenance, repair or construction of highways. Federal funds may be substituted for the commonwealth's share whenever such funds are available." (Emphasis supplied.)

The Budget for the 1968-1969 Fiscal Year includes an appropriation of $1,000,000 from the Highway Fund (St. 1968, c. 380, § 2, Item 6034-0003) "[f]or reimbursing cities and towns for the commonwealth's share of the *cost of installation* of traffic control devices at high-accident locations." (Emphasis supplied.)

The title of St. 1967, c. 519, whereby G. L. c. 90, § 33B was inserted in the General Laws, indicates that its purpose was the broad one of "providing for assistance to cities and towns in order to eliminate accidents at high-accident locations." This is confirmed by the Message of the Governor by which this legislation was submitted to the General Court as Appendix F. See 1967 House Doc. No. 4466, p. 10. The reference to "the cost of installing suitable traffic control devices" in § 33B is also broad, and the terms of the appropriation quoted above indicate that it was intended to implement § 33B to the fullest extent possible with the funds thereby made available. It is obvious that traffic control devices will not "eliminate accidents at high-accident locations" unless they are planned and designed to

meet the particular needs of each specific location. Such engineering functions are an integral part of the proper "installation" of these devices, and I think that the Legislature intended to include them as such.

It is therefore my opinion that once the necessary funds become available to your Department under Item 6034-0003 of the 1968-1969 Budget, they may be used to reimburse cities and towns for engineering costs incurred by them in the installation of traffic control devices at high-accident locations. I would add, however, that this view is restricted to engineering costs incurred by the cities and towns themselves, and that I express no opinion as to any costs which may be incurred by your Department or its personnel in connection with these projects.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 81. JUNE 24, 1968.

HONORABLE WILLIAM C. MAIERS, *Clerk, House of Representatives*

DEAR MR. MAIERS: — By letter dated May 23, 1968, you have transmitted to me a copy of an order of the House requesting an opinion on the following question:

> "Would House Bill 4579, entitled 'An Act prohibiting the monitoring of employees in manufacturing establishments' if passed, violate any provision of the Constitution of the Commonwealth or of the United States?"

The bill to which the order refers provides:

> "Any employer who subjects any person employed by him to a monitor system or monitoring device or a closed circuit television in a manufacturing establishment, without the express permission of the employee, or causes, directly or indirectly, any such employee to be monitored, shall be punished by a fine of not more than two hundred dollars."

I note that the bill provides for criminal penalties for violation of its provisions. It is of course axiomatic that criminal statutes must not be so vague as to violate due process of law. As stated in *Commonwealth* v. *Slome,* 321 Mass. 713, 715:

> "A statute creating a crime must be sufficiently definite in specifying the conduct that is commanded or inhibited so that a man of ordinary intelligence may be able to ascertain whether any act or omission of his, as the case may be, will come within the sweep of the statute. It must fix with a reasonable degree of definiteness what it requires or prohibits. It should furnish a definite standard as a guide to determine what it denounces and condemns. A citizen is entitled to protection from prosecution unless the statute on its face penalizes the particular conduct with which he is charged. One ought not to be compelled to speculate at his peril as to whether a statute permits or prohibits any action which he proposes to take. If the standard of guilt prescribed by a statute is so variable, vague or uncertain that it is useless as a measure of criminal liability, then the statute must be struck down."

This rule was applied in the *Opinion of the Justices to the House of Representatives,* 1967 Mass. Adv. Sh. 1353, wherein the Justices of the Supreme Judicial Court declared that a proposed bill which would have prohibited the transmission or communication of racing information was unconstitutional for vagueness. In that Opinion, at page 1358, the Justices also quoted *Connally* v. *General Construction Co.,* 269 U. S. 385, 391, wherein the United States Supreme Court said:

> "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The foregoing principle has been consistently applied by the Supreme Judicial Court and the United States Supreme Court. *McQuade* v. *New York Central Railroad,* 320 Mass. 35, 40; *Commonwealth* v. *Carpenter,* 325 Mass. 519, 521; *Jaquith* v. *Commonwealth,* 331 Mass. 439, 441-442; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445; *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453; *Winters* v. *New York,* 333 U. S. 507, 515-516. By contrast, for an example of a case which decided that the principle had not been violated, see *Commonwealth* v. *Brask,* 1968 Mass. Adv. Sh. 881, which upheld a city ordinance prohibiting the unlicensed keeping of a "junk automobile" in an open area.

In this age of technological progress and complex production, the range of devices and procedures which might be regarded as "monitoring device[s]" or "monitor system[s]" has an indefinite extent. Production controls, quality controls, time clocks to record employee attendance, mechanical and electronic counters, and even personal supervision by plant foremen might be construed as "monitoring device[s]" or "monitor system[s]." The kinds of employer action that might be regarded as "indirectly" causing an employee to be monitored have a like indefinite extent.

The bill requires employers to determine, at their peril, what constitutes a "monitor system" or "monitoring device" and what conduct "indirectly" causes monitoring. If an employer should guess incorrectly and does not have "the express permission of the employee," he is subject to a fine of up to two hundred dollars. Yet the statute provides the employer with no definite standards to guide him. In my opinion, therefore, the bill, insofar as it refers to a "monitor system," a "monitoring device," or "causes, directly or indirectly, any such employee to be monitored" is so variable, vague, and uncertain that it would deny due process of law. I conclude that the bill, if passed, would be unconstitutional under Article 12, Part I of the Massachusetts Constitution and the Fourteenth Amendment of the United States Constitution.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

Number 82. JUNE 24, 1968.

HONORABLE ROBERT L. YASI, *Commissioner, Water Resources Commission*

DEAR COMMISSIONER YASI: — You have requested my opinion as to whether the Division of Water Pollution Control may, under the Massachusetts Clean Waters Act (G. L. c. 21, §§ 21-50), authorize a grant of Com-

monwealth funds to a municipality for the construction of a waste treatment facility to serve an industry therein.

Your letter states:

"A significant portion of the water pollution problems in Massachusetts is associated with the discharge of industrial wastes throughout the Commonwealth. It is anticipated that many of these industrial plants will tie in to municipal systems where favorably geographically located and where the wastes are amenable to mixing with domestic sewage. Nevertheless, there are many large wet process industries in the State located in smaller communities that have serious water pollution problems that may not receive the benefit of a low-cost solution by joining municipal systems that are found in the larger metropolitan communities.

"Under the present Federal Water Pollution Control Administration grant program, a community may receive a Federal grant to construct a waste treatment facility to serve only industrial wastes if the community owns the land, is a taxing authority, and operates the facility.

"The policy of this Division has been to conform to these requirements and we have adopted the following guidelines for communities interested in constructing a joint or separate facility to serve industry. The Division will consider a State grant application in instances:

1. Where the treatment facility constitutes an integral unit in an overall regional or municipal sewerage program;
2. Where there is an approved comprehensive engineering report considering the industrial waste problems in conjunction with the municipal problem;
3. Where the town, city or district owns the land for the treatment facility or facilities, is a taxing authority, and agrees to finance the construction and construct and operate the facility or facilities; and
4. The results from a water quality standpoint would be more beneficial from separately constructed facilities.

"Under the provisions of the Massachusetts Clean Waters Act, Massachusetts has adopted Water Quality Standards which have been approved by the Secretary of the Interior thus making the State eligible for the maximum percentages of Federal Grants to the State. Requirements for these maximum percentages under the Federal Act are two-fold:

1. The State must pay 25 percent of the estimated reasonable costs of *all* projects for which Federal grants from the yearly allocations are made, and;
2. The State must have enforceable water quality standards.

"Thus, it may be interpreted that to continue our program of maximizing Federal grant contributions, general adherence to the Federal policy appears to be necessary."

I am of the opinion that the Division of Water Pollution Control ("Division") may authorize a grant to a municipality under the circumstances described in your letter, assuming compliance by the municipality with its charter and other applicable laws in the construction of the facility. General Laws c. 21, § 28 provides for the establishment of water pollution abatement districts within the Commonwealth. Under G. L. c. 21, § 30A, the Division, with the approval of the Water Resources Commission, may authorize a municipality "to apply for and accept and receive financial assistance from the commonwealth under sections thirty-one and thirty-three, for a project or projects designated, in the same manner, to the same extent, and subject to the same conditions as if such [municipality] were a water pollution abatement district . . . ." The state grants with which you are concerned are those authorized by the second of the two sections referred to in the provision just quoted, G. L. c. 21, § 33:

> "After a plan [for abatement of water pollution] has been approved by the division, the division shall, in accordance with criteria used by the division in determining the priority of projects for federal financial assistance, authorize and direct the district to apply for a grant or grants by the United States government *applicable to the capital outlay costs of facilities* included in the project or projects contained in the district's approved plan. If a grant anticipated from the United States government is conditioned on a matching grant by the commonwealth, the commonwealth, in authorizing the district's application, may undertake to provide a grant to the extent of funds available or to be made available therefor as hereinafter provided of whatever per cent of the capital outlay costs is required to satisfy the condition that the anticipated federal grant be matched." (Emphasis supplied.)

The word "facilities," as used in the foregoing statute and elsewhere in the Clean Waters Act, is defined by G. L. c. 21, § 30 to

> "include facilities for the purpose of treating neutralizing, or stabilizing sewage *and such industrial and other wastes* as are disposed of by means of the facilities, including treatment or disposal plants, the necessary intercepting, outfall and outlet sewers, pumping stations integral to such facilities and sewers, equipment and furnishings thereof and their appurtenances." (Emphasis supplied.)

Reading these statutes together, I conclude that they contemplate the use of state funds by municipalities for waste treatment facilities devoted exclusively to the disposal of industrial waste. There is nothing in the Clean Waters Act to suggest that every facility constructed with state funds need be of a general-purpose type. Indeed, the specific reference to "industrial" wastes in the above-quoted definition of "facilities" in G. L. c. 21, § 30 suggests an intention to single out industrial waste as a particular target for legislative attack.

Under G. L. c. 21, § 32, moreover, the plan which a water pollution abatement district (and hence, a municipality) files with the Division as a condition precedent to receiving state aid "shall include detail as to the sources of pollution within the district" and "the means by which . . . such pollution is to be abated . . . ." If, as in the cases described in your letter, the "sources of pollution" are one or more industrial plants within the mun-

icipality and the means of abatement is a waste treatment facility adapted to the processing of such industrial waste, the denial of funds might leave serious gaps in the anti-pollution program of the Commonwealth. I do not think the Legislature intended to circumscribe the availability of Commonwealth funds in any such arbitrary manner.

For these reasons I conclude that the Division of Water Pollution Control may, with the approval of the Water Resources Commission and subject to the conditions imposed by G. L. c. 21, §§ 30A-33 and other applicable provisions of law, authorize a grant of Commonwealth funds to a municipality for the construction of a waste treatment facility to serve an industry therein.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

INDEX TO OPINIONS