The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1975

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

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The Commonwealth of Massachusetts

Boston, December 3, 1975

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, 1975.

Respectfully submitted,
FRANCIS X. BELLOTTI
Attorney General

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

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Francis V. Hanify

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Chief Clerk
Russell F. Landrigan

Assistant Chief Clerk
Edward J. White

[1]Appointed February 1975
[2]Appointed March 1975
[3]Appointed April 1975
[4]Appointed May 1975
[5]Appointed June 1975
[6]Terminated February 1975
[7]Terminated March 1975
[8]Terminated April 1975
[9]Terminated May 1975
[10]Terminated June 1975

STATEMENT OF APPROPRIATIONS AND EXPENDITURES FOR THE PERIOD JULY 1, 1974 - JUNE 30, 1975

APPROPRIATIONS

0810-0000	Administration	$3,510,696.68
0810-0014	Public Utilities: Expense Authorized by c. 1224-1973	250,000.00
0810-0100	L.E.A.A. Hard Cash Match Funds	25,000.00
0810-6610	Trust Fund Settlements	84,560.83
0810-6613	Consumer Protection Research and Pilot Program	4,191.92
0810-6614	Organized Crime Investigation Training and Preliminary Design of Technical Assistance	575.20
0810-6615	Organized Crime: Law Enforcement Training	46.03
0810-6616	Drug Training, Manual and Technical Assistance	2,457.89
0810-6617	Organized Crime Unit Phase 2: Retrieval and Dissemination System	39.45
0810-6618	Training and Reference Materials	19,415.08
0810-6619	Organized Crime Unit	9,322.80
0810-6620	Drug Intelligence Information System	654.16
0810-6621	Criminal Appellate Program	57,931.83
0810-6622	Prosecution Management Study	4,000.00
0810-6623	WIN Public Service Employment Program	9,266.85
0810-6624	Organized Crime Unit	134,895.27
0810-6625	Drug Intelligence Information System	62,215.00
0810-6626	Appellate Legal Services	22,500.00
0810-6701	Dexter Nursing Home Case	344.95
0810-6702	Pine Grove Mobil Homes	35,569.05
0810-6703	Miami Vacations Inc. D.B.A. Resort Hotel Associations	1,000.00
0811-6614	Attorney General Trust Fund	219.30
0821-0100	Claims — Damages by State Owned Cars	200,000.00
		$4,434,902.29

The Commonwealth of Massachusetts

INTRODUCTION

My first Annual Report as Attorney General of the Commonwealth of Massachusetts, as required by General Laws, Chapters 30 and 32, encompasses the fiscal year from July 1, 1974 to June 30, 1975.

Upon taking office on January 15, 1975, my first priority was to professionalize and reorganize the Department of the Attorney General. All assistant attorneys general now must work full-time. The use of special assistant attorneys general has been diminished appreciably. I have hired professionals of diverse background and viewpoints with expertise in their given fields. The staff has been reduced by twenty percent. At the same time, programs have been established with local colleges and law schools where students work part-time for course credit or as volunteers, saving the taxpayers money, while helping the professional staff, who have profited from the students' hard work as well as their contagious enthusiasm.

The Department of the Attorney General has been reorganized into four bureaus and eighteen divisions. Separate sections have been established to deal with the areas of Women's Rights, Privacy, and Affirmative Litigation. We have begun to build a professional law library in the Department of the Attorney General. Finally, plans are being made to consolidate physically the entire Department by moving to the new McCormack State Office Building.

During my first six months in office, this Department's accomplishments have not been limited to organizational and personnel matters. A full description of the accomplishments and activities of the Department is set forth in the remainder of this report.

The major accomplishments of the office include the substantial reduction of the backlog of requests for Attorney General's opinions. Important opinions were issued discussing the registration of lobbyists, the revealing of names of persons who have failed to file campaign statements and the impoundment of state funds.

The Civil Bureau, through its efforts in collecting unpaid employer taxes, unpaid rents on state owned property, unclaimed bankbooks, and money owed to the Commonwealth because of automobile accidents, college loans, and charges for care in state hospitals, etc., as well as through its efforts in prosecuting fraudulent unemployed claims, recovered over $1,868,000 for the Commonwealth.

The Criminal Bureau obtained indictments against nursing home operators allegedly committing large scale welfare fraud, and started an investigation into alleged campaign law violations by various officials of the Boston Fire Department.

The Governmental Bureau defended before the United States Supreme Court the Commonwealth's mandatory retirement statute for uniformed state police officers and successfully defended against constitutional attack Department of Welfare policy changes necessitated by this year's fiscal crisis. The Affirmative Litigation Division of the Governmental Bureau initiated lawsuits challenging the license fees on oil imposed by the President, and seeking a return of income taxes collected by New Hampshire from Massachusetts residents.

The Public Protection Bureau has initiated proceedings to stop unfair and deceptive advertising practices, to enforce lead paint laws, and to protect consumers dealing with vocational schools, mobile homes and health spas. In addition, the Environmental Protection Division of the Public Protection Bureau has challenged the EPA permit issued to the MDC for its discharge into the Charles River, closed down the Bridgewater dump, and preliminarily enjoined the draining and filling of a two thousand acre wetland in Plymouth County.

I have tried to build a diverse staff to present me all sides of issues. In addition, I have made every effort to leave my office at least one-half day each week to meet with the people and hear their views. I have tried to assure that all decisions made by this Department be carefully considered under the law and considerate of the needs and desires of the people of the Commonwealth. The one thing I have insisted on is taking personal responsibility for all decisions, both popular and unpopular, made by this office. I look forward to continuing to serve as the Attorney General of this Commonwealth.

I. CIVIL BUREAU

Contracts Division

The work of the Contracts Division is generally divided into three areas: (a) Litigation, (b) Advice and counsel to state agencies, and (c) Contract review.

A. *Litigation*

The Division represents state officers and agencies at all stages of litigation involving contracts.

Chapter 258 of the General Laws is, for the most part, the controlling statute. Essentially, it is mandatory that all actions against the Commonwealth be brought in Suffolk County if the amount claimed exceeds $2,000.00. The cases are tried without a jury and, almost universally, are referred to a master for hearing.

At present, there are 235 active cases in the Division. Forty-one cases were closed out this year.

These cases involve state highway, building or public work construction claims. Most of these cases involve contract or specification interpretation and entail extensive preparation and investigation. Discov-

ery, principally depositions and interrogatories, are mandated on all cases. Consultation with engineers and architects is routine in every instance. Trials are frequently lengthy, because of the complexity of issues and the number of parties involved.

The general economic picture has generated litigation in contesting the award of contracts, resulting in many more allegations of failure to meet public bidding requirements. There has been an increase in suits in which preliminary injunctive relief is sought.

The Contracts Division has intensified its opposition to the issuance of preliminary, or temporary, injunctive relief against the Commonwealth, its agencies and officers. The allowance of such relief would delay normal contract procedure and would result in increased costs.

To date, we have succeeded in defeating all attempts at securing injunctive relief.

B. *Advice and Counsel to State Agencies*

Every day, the Division receives requests for assistance from state agencies and officials. Their problems involve formation of contracts, performance of contracts, bidding procedures, bid protests, contract interpretation, and a myriad of other matters.

The economy has also had its effect on bids and bidding procedures in the State Purchasing Agent's office. All materials, supplies, and equipment purchased by the state (except military and legislative) must be advertised, bid, and awarded by the Purchasing Agent. We receive, each week, new requests for assistance in purchasing matters. Economic conditions have heightened competition. Members of the Division counsel the Purchasing Agent and his staff, interpret regulations, and attend formal protest hearings.

We also have an equivalent relationship with the Department of Public Works, Metropolitan District Commission, Bureau of Building Construction, Group Insurance Commission, Secretary of Transportation, Regional Community Colleges, Data Processing Bureau, Mental Health, Youth Services, and Water Resources.

C. *Contract Review*

We review all state contracts, leases, and bonds submitted to us by state agencies. During the fiscal year we approved as to form a total of 3,864 such contracts. In 371 cases, we rejected the documents and approved them when the deficiencies were eliminated.

All contracts are logged in and out and a detailed record is kept.

The monthly count for the fiscal year was:

July, 1974	397
August	416
September	280
October	244
November	366
December	215

January, 1975	196
February	404
March	144
April	235
May	367
June	600
	3,864

Contracts are assigned to the attorneys in rotation. The average contract is approved within forty-eight hours of its arrival in the Division.

Eminent Domain Division

The major function of the Eminent Domain Division is the representation of the Commonwealth in the defense of petitions for the assessment of damages resulting from land takings by eminent domain. The Commonwealth acquires land for a variety of purposes, including rights of way for roads, land for State Colleges, land for recreation and park purposes, land for flood control and land for easements. The Division deals primarily with the Department of Public Works, the Metropolitan District Commission, the Department of Environmental Affairs, the State Colleges and the University of Massachusetts.

Chapter 79 of the General Laws prescribes the procedure for eminent domain proceedings. Under Chapter 79, when property is taken, the taking agency makes an offer of settlement known as a Pro Tanto, which makes available to the owners an amount the taking agency feels is fair and reasonable, but reserves to the owners the right to proceed through the courts to recover more money. In years past, during the road building boom of the fifties and sixties, land damage matters caused congestion in the civil sessions of the Superior Court. Special land damage sessions were set up to accommodate the trial of these cases and it was the practice to refer cases to auditors for their findings. The auditor system was not entirely satisfactory because too many cases previously tried to auditors were retried to juries. In 1973, the Legislature passed Section 22 of Chapter 79 which provides for the trial of land damage matters before a judge in the Superior Court jury waived session in the first instance. Either party may reserve their right to jury trial by so filing within ten days of a judge's finding. A trial by jury may be had first only if both parties file waivers of their right to a trial before a judge. The statute also requires the court to make subsidiary findings of fact when the case is heard before a judge.

It has been the practice of our Division to try all our matters in accord with Section 22 before a Justice in a jury waived session. We have found, in most instances, it is not necessary to retry the case because the findings usually contain a clear statement of subsidiary facts which support the decision. Section 22 appears to be a vast improvement over the auditor system and a means of reducing the number of land damage cases requiring a jury trial.

The Eminent Domain Division, with the assistance of an administrator on loan or on detail from the Department of Public Works, also collects rent in occupied buildings situated on parcels taken by eminent domain.

The Division consists of a Chief, ten trial attorneys, five secretaries, three investigators, one legal engineer, one rent administrator and one administrative clerk. In addition to the trial of land damage matters, the Division has the responsibility of reviewing petitions to register land filed in the Land Court to determine whether the Commonwealth or any of its agencies or departments has, or may have, an interest which may be affected by the petition.

Rental agreements, contracts, deeds and documents relating to land under the control of any of the state's departments or agencies find their way to the Eminent Domain Division to be approved as to form. It is also the function of the Division to make itself available for consultation and the rendering of advice in connection with the Commonwealth's problems relating to land.

July 1, 1974 through June 31, 1975	
Rental Receipts	$106,385.00
Land Court cases received	149
Land Court cases closed or withdrawn	146
Land Damage cases closed by trial or settlement	165
Cases pending July 1, 1975	
Land Damage cases	885
Land Court cases	184
Rent cases	478
TOTAL:	1,547

Employment Security Division

The Employment Security Division works closely with the Massachusetts Division of Employment Security. It prosecutes employers who are delinquent in paying employment security taxes and employees who file and collect on fraudulent claims for unemployment benefits. The vigorous prosecutions made by this Division have resulted in the recovery of substantial sums of money for the Commonwealth.

During the fiscal year ending June 30, 1975, 1,535 cases were handled by this Division. 1,149 cases were on hand at the start of the year and 389 new cases were received during the year, of which 96 were employer tax cases, 283 were fraudulent claims cases, 2 were appeals to the Supreme Judicial Court, and 8 were court actions brought by or against the Director.

312 cases were closed during the fiscal year, of which 152 were employer tax cases, 156 were fraudulent claims cases, and 4 were court actions brought by or against the Director of D.E.S., leaving a balance of 1,223 cases on hand at the end of the fiscal year. Monies collected to-

taled $396,527.88 from employer tax cases and $174,550.50 from the fraudulent claims cases, making a total recovery of $571,078.38 for the Commonwealth.

The Division is charged with the duty of pursuing those individuals found not complying with the Employment Security Law. During this fiscal year the Division waged an energetic and forceful program in handling all cases referred to the Division for criminal prosecution. At the same time, the Attorney General's office has maintained a policy of giving the erring individual, corporation or business entity every opportunity to make settlement out of court. Concentrated office conferences were conducted with the principals involved to determine whether or not criminal proceedings should be initiated. During this fiscal year the Division brought 160 complaints against 123 employers, involving 1,112 counts of tax evasion and totaling $852,126.91 in monies due the Commonwealth. 77 complaints involving 1,302 counts of larceny were brought against 77 individuals found collecting unemployment benefits under fraudulent claims totaling $92,015.99 in monies taken from the Commonwealth. In addition, 1 complaint involving assault and battery brought by a Division of Employment Security employee against an individual claiming unemployment benefits was represented by this Division; 1 complaint was brought as a criminal matter involving collusion between an employee of the Division of Employment Security and an individual claiming benefits, in which 4 counts of forgery, 4 counts of uttering, and 1 count of larceny were brought against an employee of the Division of Employment Security.

At this time, the Employment Security Division is handling 2 actions pending in the Massachusetts Supreme Judicial Court. *De Cordova and Dana Museum and Park* vs. *Director, D.E.S.* raises the question of whether or not the staff of the school should be included within the coverage of M.G.L. c.151A, (the Employment Security Law), while *Ellen E. Keough* vs. *Director, D.E.S.* raises the question of whether an individual was available for work under Section 24 (b) of M.G.L., c. 151A, (the Employment Security Law) and thus available for unemployment benefits. Also pending in various courts of the Commonwealth, including the United States District Court are the following 10 actions brought against the Director of the Division of Employment Security:

Robert Calef vs. *Eileen Lovett, Review Examiner and John Crosier, Director*
Refer to Gerald Harrison case.

Raymond P. Cox vs. *Nancy B. Beecher, et al and John Crosier, D.E.S.*
Petitioner contends he should have been appointed manager of the Worcester D.E.S. office. We are awaiting hearing on a motion to dismiss.

Maria De Jesus vs. *John D. Crosier, Director*
Assigned to Administrative Division.

Velia T. DiCesare, et al v. *John D. Crosier, et al, D.E.S.*
Assigned to Administrative Division.

Minnie S. Green PPA, Randolph E. Green vs. *Commonwealth of Massachusetts, D.E.S.*
Petitioners contend that their unemployment benefits were terminated in violation of the 14th Amendment's due process clause. The Division responds that the interviews given the claimants in the processing of their claims satisfy all due process requirements.

Gerald Harrison, et al vs. *A. Buchyn, et al, D.E.S. and Richard C. Gilliland, D.E.S.*
Petitioner contends that a Board of Review decision, upholding on different grounds a D.E.S. decision to cut off petitioner's benefits, violates his 14th Amendment due process right to notice. The Division responds that upon an appeal to the Board of Review all issues in the matter are open and the hearing is not limited to the issue upon which the matter was initially decided and of which the petitioner has been notified.

Linguistic Systems, Inc. vs. *Richard C. Gilliland, D.E.S. and Harold J. Kearns, D.E.S. and Board of Review, D.E.S. and William F. Nicholson, D.E.S.*
Petitioner asks the Court to order the Director to give a copy of the transcript of a hearing held on June 18, 1973. We permitted them to make a recording of our record. No further action has been taken in the case which is still pending in court.

Malinda Malone vs. *Richard C. Gilliland, D.E.S. and Thalia Felton, D.E.S.*
Same issues involved as in Minnie S. Green case.

Massachusetts Bar Association and Berge C. Tashjian vs. *Weaver Associates, Inc. and Francis Perfetto and Richard C. Gilliland, D.E.S., and Mary B. Newman, Exec. Office of Manpower Affairs*
Petitioner contends that only attorneys be allowed to represent parties in proceedings under Ch. 151A. The statute reads "agent or counsel." The Division as yet has not determined its position.

Cambridge and Somerville Legal Services, Inc. vs. *Massachusetts Division of Employment Security and John Crosier, D.E.S.*
Petitioner seeks to reverse their own decision to pay contributions to the Division under Sec. 14A of Ch. 151A. Had they elected the alternative reimbursements, they would have saved approximately $2,500. The Division contends that such an election may not be reversed.

During the month of December 1975, this Division brought approximately 55 criminal complaints against individuals found fraudulently collecting unemployment benefits while employed under the C.E.T.A. program (Comprehensive Employment Training Act), charging them with larceny of some $45,000. At present, trials are being held in these matters.

Industrial Accidents Division

The Industrial Accidents Division serves as legal counsel to the Commonwealth in all workmen's compensation cases involving state employees. Pursuant to G.L. c.152, §69A, the Attorney General must approve all payments of compensation benefits and disbursements for related medical and hospital expenses in compensable cases. In contested cases this Division represents the Commonwealth before the Industrial Accident Board and in appellate matters before the Superior Court and the Supreme Judicial Court.

There were 9,639 First Reports of Injury filed during the last fiscal year for state employees with the Division of Industrial Accidents, an increase of 149 over the previous fiscal year. Of the lost time disability cases, this Division reviewed and approved 1,407 new claims for compensation, and 120 claims for resumption of compensation. In addition to the foregoing, the Division worked on and disposed of 88 claims by lump sum agreements and 39 by payments without prejudice.

This Division appeared for the Commonwealth on 610 formal assignments at the Industrial Accident Board and in the Courts on Appellate matters. In addition to evaluating new cases, this Division continually reviews the accepted cases, that is those cases which require weekly payments of compensation, and brings them up-to-date medically for further evaluation and determination before a Member of the Industrial Accident Board.

Total disbursements by the Commonwealth for state employees' industrial accident claims, including accepted cases, Board and Court decisions and lump sum settlements, for the period July 1, 1974 to June 30, 1975, were as follows:

General Appropriation	
(Appropriated to the Division of Industrial Accidents)	
Incapacity Compensation	$2,865,176.02
Medical Expenses	884,806.33
Total Disbursements	$3,749,982.35
Metropolitan District Commission	
(Appropriated to M. D. C.)	
Incapacity Compensation	$306,032.18
Medical Expenses	88,288.23
Total Disbursements	$394,320.41

In its capacity as custodian of the second injury fund under Section 65 of Chapter 152, as most recently amended by Chapter 855 of the Acts of 1973, the Division represents the Commonwealth before the Industrial Accident Board in petitions filed by insurers and self-insurers for reimbursement out of this fund (now referred to as the "second injury fund").

In accordance with the provisions of the statute, insurers and self-insurers are required to make payments into this account in fatal industrial injury cases. This Division has the responsibility for enforcing this obligation requiring the staff to appear before the Industrial Accident Board in such cases, and for meeting with insurers' counsel to adjust, usually by negotiation, payments in cases where the issue of liability has been in question or compromised.

At the end of this fiscal year the General Fund (Section 65 Fund) showed an unencumbered balance of $881,775.13. There were receipts to this fund in the amount of $165,558.51, and payments made out of the fund in the amount of $214,002.22.

Pursuant to Section 11A (Acts of 1950, C.639, as amended), the Chief of this Division represents the Attorney General as a sitting member of the Civil Defense Claims Board. This involved reviewing and acting upon claims awarding compensation to unpaid civil defense volunteers who were injured while in the course of their volunteer duties.

This Division also represents the Industrial Accident Rehabilitation Board. When an insurer refuses to pay for rehabilitative training for an injured employee this Division presents the case to the Industrial Accident Board on behalf of the Industrial Accident Rehabilitation Board.

Public Charities Division

There are four attorneys and five clerks on the staff of the Public Charities Division.

During the fiscal period 1974-1975, this Division reviewed the following matters relating to trusts and estates in which there is either a general or specific charitable interest:

Trustee Accounts	1,728
Probate of Wills	691
Executor Accounts	397
Administrators and Miscellaneous	91
Other General Petitions, Miscellaneous	658
	3,565

There were a total of 82 estates in Public Administration matters which escheated a total of $198,676.46 to the Commonwealth during the fiscal period of July 1, 1974 through June 30, 1975.

Annual reports under General Laws, C.12, §8F totalled 4,812 and were recorded and filed. Seven hundred and sixty-three organizations applied for Certificates of Registration to solicit funds from the public.

The Division handled a number of petitions for reformation of or for instructions relating to charitable trusts under wills. Many petitions were generated by the Federal Tax Reform Act upon charitable foundations, which requires them to distribute a percentage of their investment return or be subject to a tax on undistributed income. In the *Urann Foundation*

case we assented to a judgment which allowed the Foundation to distribute shares of United Cape Cod Cranberry Co. to avoid the tax on undistributed income. We took the same position for the same reason in the reformation petitions of the *Charles A. King* will, the *Robert Henry Life* trust for educational benefits, and the *Jennie Sears McShane* trust for the benefit of the residents of Barnstable.

This Division assented to several petitions to increase the income of life beneficiaries under the doctrine of the *Kahn* decision. These cases included among others the *Samuel A. Vanner Trust*, the Trust under the will of *Melitta Coutelle* and the Trust under the will of *Annie E. Hardie*. For the *Madeline Gould Boyles* trust, among others, the Attorney General assented to judgments with the prior assent of the income beneficiary reforming trust instruments to create uni-trusts and annuity trusts to preserve intact charitable remainder deductions of Federal Estate Tax Returns.

Many dissolutions of charitable corporations along with an appropriate cy-pres of the charities' assets were decreed by the Supreme Judicial Court. The *Cambridge Junior College* was dissolved with its assets distributed to other educational institutions. The *East Boston Unitarian Society* was dissolved with its assets distributed to the *Unitarian Universalist Association, Wright Home for Young Women*. Among other dissolutions were *The Association for the Work of Mercy in the Diocese of Massachusetts* and the *Robinson Genealogical Society*.

In a case involving the Trust under the will of *Emily Terry Mabon*, with *Smith College* the income beneficiary, the Attorney General assented to a judgment whereby the entire principal of the trust was turned over to Smith College as an endowment fund, income to be used for scholarships for worthy and needy students.

In the *Charles F. Bacon* case, the Attorney General successfully supported before the Probate and Supreme Judicial Court the Salvation Army's claim to the remainder of a trust.

Torts, Claims and Collections Division

This Division is divided into three sections: (1) Torts, (2) Collections and (3) Violent Crimes.

The Torts section defends all officers and employees of the several state agencies against whom tort claims or actions may be brought. The Commonwealth is also defended in those actions involving statutory liability.

These tort cases involve motor vehicle accidents, road defects, assault and battery, false imprisonment, libel and slander, malpractice, etc. The number of claims or actions received for fiscal 1974-1975 are not available in their entirety but from April, 1975 to June 30, 1975 there were 219 tort claims received and files opened thereon.

The amount paid to claimants on tort cases between July 1, 1974 and June 30, 1975 was $179,329.44.

The Collections section has the responsibility of collecting on behalf of the Commonwealth sums of money owed to the Commonwealth because of automobile accidents, college loans, charges for care in state hospitals, etc. Recovery on unclaimed bank books under the provision of G.L. c.168, §31 also comes within the province of the Collections Division.

A fiscal report of the Collections Division follows.

The number of claims under the Violent Crime Act, G.L. c.258A and the number of awards continue to increase. The number of claims received during fiscal 1974-1975 are not totally available, but from April 1, 1975 to June 30, 1975 we received 159 claims.

In fiscal year 1974-1975 the Treasurer received 213 awards from the various district courts and paid 198 of these awards which totalled $987,997.41.

The following is a table reflecting the Collections Division's work:

Departments	*Amount Collected*	*# of Claims Processed*
Mental Health	$120,443.45	27
Public Health	201,834.75	288
Public Works	83,124.01	158
Metropolitan Dist. Commission	7,890.03	35
Education	9,076.29	145
State College	6,515.43	107
Secretary of State	612.00	11
Corrections Department	325.03	6
Youth Services	168.62	3
Public Welfare	71.76	6
Dept. of Agriculture	1,400.00	1
Administration and Finance	7,979.53	2
Industrial Acc. Division	33,555.65	22
Corporations and Taxation	980.98	2
Treasury Department	615.00	3
Retirement Board	122.83	1
Natural Resources	114.23	4
Public Safety	1,713.57	6
State Racing Commission	2,545.00	1
Massachusetts State Lottery Commission	1,500.00	1
TOTALS	$480,588.16	829
Collected Fiscal Year, July 1, 1974 to June 30, 1975 — Unclaimed Bank Books		
PROBATE COURT	$230,824.50	
	$711,412.60	

NOTE: 446 - Number of completed claims
1,390 - Number of claims referred to Collections Section by the various departments of the Commonwealth
1,953 - Number of claims disposed of as being uncollectable

II. CRIMINAL BUREAU

For the first half of fiscal 1974-1975, the Criminal Division operated on three levels of specification: Trials, Appeals and Organized Crime. In January of 1975, these sections along with the Drug Abuse Division were re-organized into the Criminal Bureau.

The Trial Section, whose primary function is directed towards the investigation and prosecution of criminal activities within the Commonwealth, instituted a number of inquiries into matters of wide-spread concern among law enforcement authorities. In a continuing effort to combat welfare frauds, indictments were obtained for larceny against a corporation which managed nursing homes. It is alleged that this corporation submitted false representations to the Nursing Home Rate Setting Commission which led to increased rates. In a related matter, investigations by attorneys from the Bureau led to the resignations of two Rate Setting commissioners, in one instance, because of a conflict of interest and in the other, because of the lending of money at a usurious rate. Finally, two individuals were convicted in the District Court for larceny from the Commonwealth totaling over forty thousand dollars. Both cases involved a similar scheme of double billing, i.e., to the Commonwealth and to patients at various nursing homes. The defendants each received a suspended sentence, were placed on probation, fined, and ordered to pay restitution.

As indicated by last year's report, state detectives and investigator units assigned to the Bureau have examined irregularities in certain banking institutions. As a result of this inquiry, embezzlement schemes have been uncovered which disclose that millions of dollars have been siphoned off from accounts at a Brighton Savings Bank. Various officials of that bank have now been tried and convicted for their participation on a scheme involving collateral loans for which there was in fact no collateral. In one instance a five year sentence to M.C.I. Concord was imposed. The cases are now on appeal.

Also in the white collar crime area, Bureau attorneys were responsible for indictments against two state health inspectors for accepting bribes, a former employee of I.B.M. for conspiracy to violate the Massachusetts Trade Secrets Acts, and the operators of a halfway house for fraudulently negotiating approximately five thousand dollars of welfare checks for welfare recipients no longer living at their house.

Toward the end of the fiscal year investigations were begun into alleged violations of the campaign laws by various officials of the Boston Fire Department. A presentation to the Suffolk County Grand Jury is anticipated.

The Organized Crime Section continued to be involved in the collection and dissemination of intelligence information and in the investigation and prosecution of criminal offenses committed by members of organized crime. Under a federal grant, a Technical Assistance Center is maintained which is a central repository for highly sophisticated equipment to be used in combating organized crime. This equipment has been

made available to local police departments and district attorneys for use in investigations. In connection with this program, the Organized Crime Section has conducted an Organized Crime Training Program for local police held at the Massachusetts State Police Academy in Framingham.

The Appellate Section continued this year to handle the very high case load which has resulted from the explosion of litigation in the criminal law field. The bulk of these cases consisted of either civil rights suits by residents of the Commonwealth's correctional institutions or post-conviction claims made in state and federal courts by persons convicted of criminal activity. Appellate Section attorneys also appeared in a number of interlocutory appeals and petitions for the exercise of the Supreme Judicial Court's superintendency power.

The prison civil rights suits consisted of claims for injunctive relief and damages against correctional officials. Noteworthy among them was a suit in the United States District Court which may result in substantial alterations to the physical plant at the Massachusetts Correctional Institution at Bridgewater. Another suit, in the state court, may produce a different method of providing protective custody to those residents of the correctional system who are unable to associate with the general population. The Appellate Section continued to enjoy a high degree of success in defending these civil rights suits; to date, no monetary damages have been awarded against any correctional official. The Appellate Section continues to advise the Department of Corrections concerning the requirements of decisions rendered by the United States Supreme Court and by the Massachusetts Supreme Judicial Court.

The Appellate Section handles post-conviction cases which were initially prosecuted by the several District Attorneys, as well as the Attorney General. Noteworthy among them were the so-called "small loans cases," which were tried in 1967-1969. A decision favorable to the Commonwealth has been secured in the United States Court of Appeals and it may be that these cases can be finally laid to rest. A major murder case, implicating organized crime figures, which was tried in 1968, is also progressing in the United States District Court, and a decision is expected shortly.

The Appellate Section represented the Commonwealth before the United States Supreme Court in a case involving the constitutionality of the Massachusetts two-tier criminal trial system. Attorneys from the Appellate Section argued successfully that the Court did not have jurisdiction to consider this matter. The Appellate Section also persuaded the Supreme Court to grant the Commonwealth's petition for certiorari in a case dealing with the obligations of a trial judge to inquire of potential jurors concerning racial prejudice. The High Court's ruling in this matter will determine whether several defendants convicted of serious crimes in the Superior Court will have to be retried. The case is scheduled for argument in the fall.

Appellate Section attorneys have continued to perform the many other duties required of them on a routine basis. For example, they ad-

vise the Governor as to the adequacy of demands for the return of fugitives from justice — both those whom Massachusetts seeks to have returned from other states and those whom other states seek to have returned from Massachusetts. Appellate Section attorneys prepare for the use of police officers throughout the Commonwealth an annual summary of changes made in the criminal law. They furnish advice concerning the securing of arrest and search warrants, and assist in the preparation of various legal documents needed for these matters.

The Drug Abuse Division has three primary functions: the operation of the Drug Education Seminars which are outlined below, the Drug Intelligence Unit for which there is a detailed description attached, and the speaker program which we have greatly expanded during 1975.

The Division has several people who are available for speaking engagements. Many requests for speakers are received from various segments of the community, i.e. civil groups, school systems, and professional organizations. The majority of these requests entail commitments during the evening hours, and quite often members of the Drug Abuse Division spend fifteen to twenty hours a week of their own time fulfilling these obligations.

The Attorney General's Drug Education Seminar is a two-week program. It is geared primarily for police but also serves other professionals working in drug-related fields.

During 1975 the Drug Abuse Division held ten two-week seminars throughout the Commonwealth from which approximately three hundred and fifty persons graduated. These seminars were held in conjunction with Massachusetts State Colleges, all of whom agreed to award three college credits to those graduating from the course.

We have been most fortunate in obtaining the services of experts in various drug-related fields. These individuals have agreed to donate their time to lecture and hold discussion groups on a number of topics relating to drug abuse. These individuals are from a wide range of agencies and institutions, including the Mayor's Office, the Treasury Department, United States Customs Bureau, the Department of Public Safety, the Department of Mental Health, the Drug Enforcement Administration, Boston Police Department, representatives from a number of hospitals and detoxification units, and counselors from several drug rehabilitation programs and halfway houses.

These lectures and discussions cover many areas, such as the psychological, pharmocological and social aspects of drug abuse, current legislation affecting this area, present state and federal statutes, informant development, search and seizure, organized crime involvement, local drug problems, and the treatment and rehabilitation of drug-dependent persons as well as different preventative techniques.

The schools at which the Drug Abuse Division has held seminars during 1975 and a sample schedule of this course follows:

Berkshire Community College
Northeastern Essex Community College

Massachusetts Maritime Academy
Quinsigamond Community College
Framingham State College
Quincy Junior College
Greenfield Community College
Fitchburg State College
Holyoke Community College
Massasoit Community College
Bunker Hill Community College

ATTORNEY GENERAL FRANCIS X. BELLOTTI'S DRUG ABUSE SEMINAR

MASSASOIT COMMUNITY COLLEGE IN CONJUNCTION WITH BROCKTON POLICE ACADEMY

DEC. 8-19, 1975

MONDAY, DECEMBER 8

9-9:30	Welcome & Registration	
9:30-11:00	History of Drug Traffic	Kevin Boyle
11-12:00	Chapter 111B-New Approach to Public Drunkeness	Bruce Tywon Assistant A.G.
12:00-1:00	Lunch	
1-2:30	Alcoholism Intervention and Detoxification	David Mulligan, Director Alcoholism Intervention Center
2:30-4:00	Undercover Operations	Andre Lavoie, Mass. State Police

TUESDAY, DECEMBER 9

9-12:00	Alcoholism	James Logan, Director, Madeline Murphy, Exec. Sec. – Mayor's Trouble Employees Program
12-1:00	Lunch	
1-4:00	Police Practices & Techniques	Lt. Edward Connolly Boston P.D.

WEDNESDAY, DECEMBER 10

9-11:00	Enforcement Problems — Handling Informants	Corpl. Francis G. Lounsbury Mass. State Police
11-12:00	Emergency Room Procedures	Dr. Stam, Head of Emergency, Cardinal Cushing Hospital
12-1:00	Lunch	
1-4:00	Values Clarification — Theory and Techniques	John Mahoney, Social Health Coord., Quincy Public Schools

THURSDAY, DECEMBER 11

9-12:00	Probable Cause — Search & Seizure Recent Supreme Court Decisions	Bernard Manning Assistant A.G.

12-1:00	Lunch	
1-4:00	Controlled Substance Act Drug Intelligence Unit	Brian F. Gilligan, Assistant A.G., Chief, Drug Abuse Division

MONDAY, DECEMBER 15

9-10:00	Local Drug Problems	Sgt. John DeBassio Brockton P.D.
10-12:00	Mental Health — Drug Abuse Review & Projections	Dr. David Swenson Psychiatrist, Dept. of Mental Health
12:00-1:00	Lunch	
1-4:00	Marijuana & Hashish: Identification, Sources, Use & Qualities; Heroin	Anna Finnerty, Senior Chemist U.S. Customs

TUESDAY, DECEMBER 16

9-12:00	Amphetamines & Barbituates, LSD History, Effects, & Current Status	Anna Finnerty
12-1:00	Lunch	
1-2:30	Court Procedure — Presentation of Evidence	Richard Rafferty Assistant A.G.
2:30-4:00	Handling of Weapons In Relation To Drug Arrests	Special Agent Thomas Horan Alcohol, Tobacco & Firearms Bur.

WEDNESDAY, DECEMBER 17

9-12:00	Techniques, Attitudes & Philosophy of Drug treatment	Rev. Henry Kane Mayors Coord. Council on Drug Abuse
12-1:00	Lunch	
1-2:30	School Drug Policy — Prevailing Regulations & Attitudes	Attorney Ernest DeSimone Drug Abuse Division
2:30-4:00	Drug Rehabilitation — Survival House	Counselor Linda Stice

THURSDAY, DECEMBER 18

9:00-10:30	Diversion Investigation Unit	Capt. James Halloran Mass. State Police
10:30-11:00	Examination	
11:30-12:00	Critique	
12:30	Graduation	

The Drug Intelligence Unit has been in operation since April of 1975. However, from April through June it was not functioning fully, having only two officers assigned to it during that particular period.

As of July 1, 1975 the Unit will be in complete operation with seven police officers assigned to it full-time. Corporal Francis Lounsbury, the Director of the Drug Intelligence Unit, has divided the Commonwealth into seven areas comprised of two hundred and three cities and towns. Each agent covers one designated area and makes a personal visit to each department in the area at least once every two weeks.

The Unit has adopted a very complex filing system based on one developed by the Michigan State Police, which is known as MIN, the Michigan Intelligence Network. This system includes filing of suspects by name, alias, associates, hang-outs, and locales. It also involves the filing of registration and telephone numbers, physical descriptions and occupations. The office staff notifies by mail all departments and agencies concerning up-to-date information in their areas.

Since the Unit's inception the agents have contacted and/or cultivated many informants who have supplied them with valuable information regarding both the illegal traffic of narcotics and other criminal activities.

A toll free WATS line has been installed and is utilized by police officers and citizens calling anonymously with information regarding narcotic traffic.

The Drug Intelligence Unit is contacted daily by local, state and other enforcement agencies requesting information on suspected drug traffic and dealers. We also offer them aid ranging from assisting in investigations to legal advice in the preparation of affidavits in support of search warrants. An average of ten to twenty of these requests are received daily.

The information and assistance supplied by the field agents of the Drug Intelligence Unit have resulted in approximately eighty arrests and the confiscation of narcotics with a street value of nearly seven hundred thousand dollars.

III. GOVERNMENT BUREAU

Under the new administration, the function of several divisions were brought together as a new bureau, the Government Bureau. Included are the Administrative Division, Opinions of the Attorney General, By-Laws, as well as a new Affirmative Litigation Division created in the latter part of the fiscal year.

The Administrative Division continues to be responsible for defending the Commonwealth and its various agencies in defensive litigation, State and Federal, involving issues of public, administrative, and constitutional law. This defensive litigation continues to increase in volume. The Division defended more than 700 new lawsuits during the year, a greater number than ever before. This litigation spans a broad range of government activity. For example, it included defense of (1) The Department of Administration and Finance, in cases challenging state fiscal and personnel policies, (2) the Civil Service Commission in its adjudication of personnel disputes in state and municipal employment, (3) the Department of Public Utilities' rate determinations, (4) the Governor's exercises of executive authority, (5) the Department of Public Welfare, whose changes in policies and programs have been subjected to an unprecedented number of broad class action challenges during the year, (6) the Rate Setting Commission's rate determinations, covering public reimbursement for nursing homes and hospitals participating in the fed-

eral Medicaid program, and (7) the Department of Corporations and Taxation, when its enforcement of the tax laws are subjected to challenge by affected taxpayers. The breadth of this responsibility inevitably brings the Division into important areas of economic and social concern, with scores of cases each year raising public questions substantially affecting the state and its citizens.

Examples of such litigation during the year include a defense of the state's mandatory retirement statute for uniformed State Police officers. This case is now before the United States Supreme Court for decision, and whatever its final outcome, the case will affect all mandatory retirement laws throughout the country. Defending the statute against a claim of age discrimination, the Division's lawyers argued that mandatory retirement laws, together with their related pension provisions, are a rational and humane means for preserving efficiency in state employment while at the same time rewarding those who have served the state for many years.

The Division devoted substantial resources to a defense of the various changes in the Department of Public Welfare policy necessitated by the fiscal crisis that occurred during the year. Each of the spending cuts, whether occasioned through regulation or action by the Legislature, prompted a legal challenge in either federal or state court. Each of these challenges involved a class action, usually raising constitutional questions of equal protection and due process. In every one of the class actions brought, the court ultimately held in favor of the Department of Public Welfare, upholding the change in policy.

The Division was also successful in defending a number of groundbreaking regulatory acions taken by recently appointed Commissioners of various agencies. For example, the Commissioner of Banks was challenged in court during the year for requiring that all major banks submit information that would assist in determining the extent to which the practice of redlining (refusing to give mortgages in disfavored geographical areas) was occurring in various urban areas. The Division's lawyers successfully thwarted an attempt by the banks to enjoin this new directive, and ultimately the Division helped negotiate a settlement favorable to the Commissioner.

The Division has continued to carry on the dual function of representing all 26 boards of registration in various professions in court litigation, while at the same time advising the boards in their conduct of adjuciatory proceedings for the discipline of members of the profession. Because these boards of registration have no legal staff of their own, this daily process of advice and assistance consumes a significant part of the Division's resources. The Division is currently in the process of developing a set of rules of procedure, so that the proceedings before all boards may be made uniform. This project also includes the preparation of an extensive manual illustrating the use of the rules, together with a set of model forms for use by the boards.

During the year, the Division undertook a program of administrative improvement designed to modernize its operation. In addition, extensive

law files and form files were established to permit lawyers to retrieve papers from past litigation more easily for use in current cases. Part of this administrative project involved liquidation of a backlog of cases, numbering more than a thousand, some of them dating back many years.

An important new facet of the Division is its sponsorship of an Attorney General's Law Clinic in cooperation with Boston College Law School. Under this program, 15 law students receive substantial academic credit for participating in the litigation of the Division, supervised by a member of the Boston College Law faculty and lawyers within the Division. This program includes a series of seminars on various phases of the lawyering process.

A key effort in the Government Bureau during the year involved the reorganization of the process of preparing opinions of the Attorney General. Efforts were undertaken to eliminate the backlog of opinion requests, promulgate guidelines outlining the appropriate occasions for opinions, and shorten the period of response to new opinion requests. During the latter part of the fiscal year, lawyers in the Bureau succeeded, through a crash effort, in sharply reducing the backlog of 120 general opinion requests awaiting answer, some of them since 1970. In reviewing these requests, it was determined that many were sought by state agencies without their having first sought the assistance of lawyers in the executive branch. Many of the requests involved minor questions not requiring the formal opinion of the Attorney General. Consequently, all state agencies have been informed that opinion requests must raise significant questions of law and must be accompanied, where possible, by a legal memorandum outlining the views of the legal office of the agency making the request. It is hoped that with these efforts the number of opinions can be decreased, the promptness of reply thereby improved, and the quality of the opinions maintained at a consistently high level.

During the entire fiscal year, 76 official opinions were rendered. All other opinion requests were either returned without answer or disposed of by some other means short of a formal opinion. Among the more significant opinions was a request by the Secretary of State concerning the registration of lobbyists. The opinion clarifies those persons covered by the new registration statute. The Attorney General also found that the statute did not require that voluntary associations divulge their entire membership lists, since such a requirement would violate both the United States and Massachusetts Constitutions.

An opinion was rendered to the Director of Campaign and Political Finance dealing with the question of whether the release of the names of persons who had failed to file campaign reports would be lawful. This opinion required a balancing of the privacy rights of individuals with the public's right to such information. The Attorney General determined that the release of these names would not violate principles of fundamental fairness to the named individuals.

Another opinion involved an issue of impoundment of state funds. The Attorney General responded to a request by the House of Representatives, concluding that the Secretary of Manpower Affairs could not refuse to expend funds which had been appropriated by the General Court for the express purpose of prompting tourism. This opinion underscores the importance of the separation of powers between the executive and legislative branches.

The Bureau devoted substantial resources to a zone of activities falling between litigation and formal opinion writing. This involves day to day advice to various state agencies and public officials with the objective of resolving legal problems before they reach the stage of a formal controversy requiring either litigation or an Attorney General's opinion. In this regard, the lawyers in the Bureau have spent a substantial amount of time with the Departments of Public Welfare and Mental Health. The Welfare Department is responsible for the largest single part of the state budget, and the Mental Health Department is the single largest state employer and is responsible as well for maintenance of a number of public hospital facilities.

The By-Laws Division is responsible for reviewing all newly-enacted municipal by-laws to determine whether they conform with statutory and constitutional limitations. During the year approximately 1,800 by-law submissions were reviewed, with a roughly equal division in number between general by-laws and zoning by-laws. In each of these two categories about five percent of the submissions were disapproved for non-conformance with various legal requirements, the primary defect being a failure to follow statutorily mandated procedures in the adoption of the by-law. Another five percent of the submissions were disapproved in part. In this situation the objectionable language in the by-law is deleted, and the remaining part of the by-law approved. The topics that consistently raised difficult questions of law during the year were (1) building moratoriums on multi-family housing, (2) dog leash laws, and (3) by-laws prohibiting consumption of alcoholic beverages in public.

The Affirmative Litigation Division was created in an effort to assure that substantial resources were allocated to initiating litigation raising social and fiscal issues important to the Commonwealth. The first such lawsuit challenged the imposition of massive license fees by the President on imported oil. These fees affected Massachusetts and other Northeastern states far more than any other area in the country. The Attorney General prevailed before the District of Columbia Circuit Court of Appeals in its argument that the President lacked authority to impose these license fees, and the case is currently before the United States Supreme Court. The outcome of this case will ultimately involve billions of dollars that have been collected by the federal government through the license fee system.

Other litigation initiated by the Affirmative Litigation Division includes an original action in the United States Supreme Court, together with the States of Maine and Vermont, seeking a return of income taxes collected by New Hampshire under a statute declared unconstitutional

by the United States Supreme Court in March of 1975. Because Massachusetts provided a tax credit to its citizens who had paid the New Hampshire tax, the Commonwealth argued to the Supreme Court that New Hampshire should return to Massachusetts all taxes improperly collected from Massachusetts residents working in New Hampshire.

IV. PUBLIC PROTECTION BUREAU

The Public Protection Bureau was one of four Bureaus established within the Department of the Attorney General on January 15, 1975. The Public Protection Bureau includes the Environmental Protection, the Consumer Protection and the Civil Rights Divisions. In the past, each of these Divisions had operated autonomously. By including these particular Divisions in one Bureau, the Attorney General made a substantial commitment to these areas, ensured, to the extent possible, that their efforts were coordinated, and that each was an integral part of the affirmative litigation program of the Attorney General.

In large measure, this Bureau is unique and experimental since it is designed to function as a public interest law firm on behalf of the citizens of the Commonwealth and is the only Bureau or effort of its kind in any Attorney General's office in this country.

The activities of the Divisions within the Bureau are set forth hereinafter.

Civil Rights Division

JANUARY 15 - JULY 30, 1975

Since January 15, the Civil Rights Division has been engaged in an attempt to broaden, restructure and define its scope and functions. As part of the Public Protection Bureau, the Division has engaged in three major kinds of activities in approximately ten substantive areas. In addition to litigation, the Division has been involved in substantial non-litigation activity such as coordinating the law enforcement effort in Phase II of the Boston School Desegregation case and major administrative and legislative privacy initiatives.

In general, the Civil Rights Division provides representation to state agencies in enforcement and affirmative action proceedings, and engages in independent activity in civil rights areas including education, privacy, employment, women's rights, health, voting, housing, public accommodations and criminal justice. The Division also has affiliations at the staff level with the Criminal History Systems Board, the Security and Privacy Council and the Governor's Commission on the Civil Rights of the Developmentally Disabled.

The staff of the Division consists of a Division Chief and three staff attorneys, one of whom specializes in privacy matters and one of whom specializes in Women's Rights. This staff was not fully in place until April 1.

The activities of the Division are set forth in detail in the liting which follows as Appendix A. In this narrative, the object will merely be to summarize and highlight some of the more important or illustrative aspects of those activities.

The Division presently has 44 cases in litigation. The majority of these are cases referred by the Massachusetts Commission Against Discrimination for enforcement, or involve representation of a state agency such as the Department of Education. They include important and significant cases such as the following:

Representing the Board of Education in the remedial phase of the Boston School Desegregation case.

Representing the Board of Education in further enforcement proceedings in the Springfield Racial Imbalance case.

Representing the Civil Service Commission in the remedial phase of the so-called police and firefighters' employment discrimination suits.

Initiating the first suit addressing the visitation rights of juvenile migrant workers in work camps.

Representing two state agencies — the Department of Mental Health and the Department of Youth Services — faced with major "conditions" suits.

Representing the MCAD in several cases raising novel and important procedural issues relative to its operations.

Of 43 cases in active litigation as of July 30, 1975, the topical breakdown was as follows:

Education	8	Migrant Workers	1
Women's Rights	10	Corrections	1
Employment	10	Health	1
Housing	6	Miscellaneous	5
Privacy	1		

In terms of non-litigation activity, the Division has been involved in the following kinds of matters:

overseeing the law enforcement and prosecutorial functions in Phase Two of the Boston School Case.

establishing a Women's Rights Office and developing liaisons with public and private groups.

developing an affirmative action plan for the Department and reviewing the civil rights aspects of cases in which other parts of the Department are involved.

regulating the collection of personal information by the public and private sectors on individual citizens through legislation, opinions, testimony and advisory critiques prepared by this Division for the Attorney General.

Finally, the Division has, in a short period of time, made substantial efforts to explore areas in which affirmative action — litigation or otherwise — by the Attorney General would be most appropriate and

have the most impact. Some of the areas being studied, investigated or acted upon include the following:

employment practices regarding women of insurance and publishing companies.

compliance by employers with state laws limiting requests for criminal history information on application forms.

possible abuses or civil rights violations in human experimentation and drug research programs.

the provision of service, credit or loan practices of several major companies or institutions to determine if there are "red-line" patterns or practices.

the role of the Attorney General in criminal justice systems reform efforts.

CIVIL RIGHTS DIVISION

APPENDIX

LIST OF ACTIVITIES
JANUARY 15 - JULY 30, 1975

I. LITIGATION

EDUCATION		
Board of Education v. Springfield	Litigation	SJC
Morgan v. Kerrigan	Enforcement	Fed. Dist. Ct.
O'Dea v. Board of Education	On Appeal	First Circuit
Kelley v. Board of Education	In Litigation	Fed. Dist. Ct.
Francis Chaisson v. School Committee	In Litigation	Fed. Dist. Ct.
Rosalie Chaisson v. School Committee	In Litigation	Fed. Dist. Ct.
Operation Exodus	" " (Spec. AAG)	Suffolk
Clooney v. MCAD	" "	Middlesex
WOMEN'S RIGHTS		
Brief Originals v. MCAD	On Appeal	SJC
Wheelock College v. MCAD	In Litigation	Suffolk
Mass. Gas & Elec. v. MCAD	" "	"
Putnam v. Boston	Consent Degree	"
Beth Israel v. MCAD	Stipulation	"
Pentucket v. MCAD	In Litigation	Essex
Smith College v. MCAD	Stipulation	Hampshire
LEE v. MCAD	"	Middlesex
Flanagan v. Department of Corrections	In Ligitation (Gov. Bur.)	Plymouth
Grass Instruments v. MCAD	Stipulation	Suffolk
N.E. National Bank v. MCAD	In Ligitation	Suffolk

EMPLOYMENT		
NAACP v. Beecher	Consent Decree	Fed. Dist. Ct.
Castro v. Beecher	" "	" "
Scherer v. Boston	" "	Suffolk
DeJesus v. Crozier	In Litigation	"
Jackson v. Sargent	" "	"
Electric Corp. of America v. MCAD	" "	Middlesex
Essex County Newspapers v. MCAD	" "	Essex
Construction Industries v. Salvucci	" "	Suffolk
Liberty Mutual v. Stone	" " (Gov. Bur.)	SJC
DOC v. Waltham	Administrative Proceeding	MCAD
HOUSING		
220 Beacon Realty v. MCAD	In Litigation	Suffolk
Keating v. MCAD	Awaiting Execution	Norfolk
Benedetti v. MCAD	In Litigation	Hampden
Meyers v. MCAD	" "	Suffolk
Camb. Housing Authority v. MCAD	" "	Middlesex
E.T.C. v. Parker	" "	Housing
PRIVACY		
DiGrazia v. Tucker J.	On Appeal	SJC
MIGRANT WORKERS		
Consolidated Cigar v. Dept. of Public Health	In Litigation	Hampden
CORRECTIONS		
Inmates v. Dukakis	In Litigation	Fed. Dist. Ct.
Rogers v. Macht	" "	" "
MISCELLANEOUS		
Liberty Mutual v. MCAD	On Appeal	Ct. of Appeals
Holden v. MCAD	In Litigation	Fed. Dist. Ct.
MCAD v. MBTA	Stipulation	Suffolk
Rousseau v. Commonwealth	Dismissed	Fed. Dist. Ct.
Rousseau v. Commonwealth	On Appeal	Appeals Ct.
King v. Commonwealth	In Litigation	Fed. Dist. Ct.

III. NON-LITIGATION ACTIVITIES

EDUCATION

Phase II — Operation Safety

—Oversee all law enforcement and prosecutorial functions involved in Phase II.

WOMEN'S RIGHTS

—Approximately 75 women's interest groups were notified of our office's existence.

—Liaison with several individuals involved in RAPE.

—Organizational meetings of the ERA coalition.

—Working with Secretary of State and CLUM relative to joint communiques to city and town clerks on change of name related problems.

Women in criminal justice system — grant proposal for pre-trial detention; planning panel for conference for employers relative to female ex-offenders.

Established review cycle on legislation with CLUM Subcommittee.

B. Rouse appointed to Governor's Commission on EPA

Participation in hearings on 622 Regulations and recommendations to Department of Education

EMPLOYMENT

Development of affirmative action plan in and for the Department of the Attorney General.

Advisory Opinions on

Treatment of minorities during civil service layoffs.

Affirmative Action requirement in school construction contracts.

PRIVACY

Attorney General's testimony on Fair Information Practices Legislation

Assisting in developing Fair Information Practices Regulations

Attorney General's letter opposing confidentiality provisions of Title XX

Promotion of Criminal Justice Information System and working out agreement with the Board and courts.

Advisory Opinions on

Non-requirement of social security number for CETA applicants; permissibility of Manpower Affairs seeing Welfare and DES records.

Propriety of DYS loaning historical records to Harvard.

Making public compliance with election expenditure reporting

Whether clerk of court records are CORI.

Whether Massachusetts Rehabilitation Commission records are available to recipients.

Participation on the Boards of:

Records Conservation Board
Security and Privacy Council
Criminal History Systems Board

III. AFFIRMATIVE ACTION ACTIVITIES

EDUCATION

Study of Truancy Law and meetings with Commissioner of Education relating to Phase II.

Research and investigation of private academies relating to Phase II.

WOMEN'S RIGHTS

Liberty Mutual Insurance v. *Wetzel* — Amicus Brief in U.S. Supreme Court with seven states joining us to favor inclusion of pregnancy-related disabilities in income protection plans.

Pursuing admission of women to Mass. Maritime Academy.

Publishing/Insurance/Banks — Investigating and drafting complaints.

EMPLOYMENT

Developed and distributed model application forms for compliance with C. 151B s. 4(9) and 151C s. 2(f) which limit criminal history information requests.

CORRECTIONS

Investigated of certain DYS Treatment Programs regarding alleged violation of civil rights of children placed there.

PRIVACY

Letter to Governor informing him that Privacy Act of 1974 precluded mandatory collection of Social Security Number. Registrar of Motor Vehicles has changed policy and has issued public notices.

Legislation

Fair Information Practices — for Legislative Privacy Commission

Revisions for Privacy Law

CORI Revisions for Security and Privacy Council

Child Abuse Amendments — for Department of Public Health — Enacted as St. 1975, c. 528

Amendments to Ch. 278 — part enacted

Bank and Telephone Records

Credit Amendments

School Records Amendments

Federal Criminal Records Legislation

Fair Credit Reporting Act — Working with Consumer — 93A letter to Filene's to the effect that shoplifting reports from Protection Services, Inc. cannot be used without notice.

PUBLIC ACCOMMODATIONS

G.E. Redlining — Worked with Consumer Division to draft a complaint; GE acknowledged it did not service in the redlined area; consent decree is being drafted.

MCAD v. *Private Club* — Suspension of liquor license being sought

HEALTH

Schools & Drugs — Reviewed law, met with Department of Public Health; met with Springfield people; plan redraft of regulations.

Experimentation — Reviewed law, investigated XYZ Project; PLAN TASK FORCE.

Psychosurgery Regulations — Testified at Department of Mental Health on regulations.

DEVELOPMENTALLY DISABLED

—Representative Payee System studied, met with Health, Education and Welfare; interviewed potential plaintiffs.

—Zoning — searching for means to overcome zoning prohibition to new residences.

Consumer Protection Division

During the past six months, the direction of the Consumer Protection Division of the Department of the Attorney General has been redefined to reflect the philosophy that the limited resources of this office should be used for the maximum impact state-wide. Our efforts have involved and will continue to focus on bringing significant cases affecting large numbers of consumers statewide. In order to implement this philosophy, we have reorganized both our complaint handling and litigation sections. With regard to litigation, the major task has been establishing an organized and systematic approach to enforcing the consumer laws of the Commonwealth.

We started by hiring 13 full time lawyers, whose sole responsibility is the maintenance of consumer protection litigation. We have worked with local groups to assist them in resolving complaints of residents. This has allowed us to reduce the amount of time we spend directly in complaint resolution.

In implementing our systematic approach to consumer problems, we have identified major areas of consumer problems and developed an ongoing program in each of them. To date, we have taken legal action in over eighty (80) matters. All of these actions deal with patterns and practices which affect a significant number of consumers.

A list of all legal actions taken by the Consumer Protection Division since January 22nd follows. As well as the matters listed on the attached list, we have engaged in the following activities:

Lead Paint Poisoning — Sponsored a conference and established a continuing program in this area — working with state and federally funded programs.

Food — Surveyed major food chains in the Greater Boston area in regard to compliance with unit pricing, availability of advertised specials and pricing of items. Subpoenaed records of two food industries.

Trailer Parks — Reviewed rules and regulations of 197 trailer parks in the Commonwealth.

Unfair and Deceptive Advertising — Established a procedure for monitoring most of the major newspapers in the Commonwealth for deceptive advertising. Initiated proceedings to eliminate deceptive use of list prices in selected areas and the misuse of the term "wholesale" to describe retail prices and the fraudulent use of "close out" sales — establishment of a continuing survey of major discount and department stores to check whether advertised specials are available in adequate quantity.

Consumer Complaint Handling — Sponsored a conference, established relationships with 12 consumer groups throughout the state. Visited communities to encourage establishment of new groups (several of these will be getting off the ground soon). Established practice of holding monthly meetings for the groups.

CONSUMER COMPLAINT HANDLING

In keeping with this Department's philosophy that this office is most effective when it files lawsuits which have widespread impact, neighborhood offices have been closed and we have devised a complaint handling system which utilizes a minimum of paid staff. We rely upon volunteers and local community groups. We have visited various parts of the state to encourage local groups to handle consumer complaints and are hopeful that eventually every part of the state will be covered in this manner. We offer these groups education, training, and back-up litigation. Until every part of the state is covered, we will continue to handle complaints in those areas where groups are not in existence.

COMPLAINTS HANDLED BY THE ATTORNEY GENERAL'S OFFICE

Volume — Since January 15, 1975, we have logged in approximately 6,500 consumer complaints. Approximately 70% of all valid complaints are closed out to the consumers' satisfaction.

Staffing — Since January, the complaints have been handled by a total of eighty (80) volunteers and students. The program is administered by two full time staff members.

System — After it has been determined that a complaint will be handled by this office, it is logged in. The consumer is notified within 2-3 days that we have received the complaint. About 15% of the complaints are part of a continuing investigation. The other 85% are assigned to a volunteer within 3-4 weeks. This waiting period has been cut from 9-10 weeks.

CONSUMER PROTECTION DIVISION
SUITS FILED BY CONSUMER PROTECTION
SUBSEQUENT TO FEBRUARY 1, 1975

LEAD PAINT		
H & F Realty Maurice Feldman Leonard Harrington	Consent Judgment	Bristol
Gloucester Dispatch Inc. James V. Montagnio	Consent Judgment	Essex

TICKET AGENCIES		
Sheldon Cohen d/b/a Out of Town Ticket Agency Out of Town Newspaper, Inc. d/b/a Out of Town Ticket Agency	Consent Judgment	Suffolk
Alfred Valenti d/b/a Valenti Ticket Agency	Consent Judgment	Suffolk
Seven's Inc. Hub Ticket Agency	Consent Judgment	Suffolk
Tyson Ticket Agency Inc.	Consent Judgment	Suffolk
APARTMENT RENTAL SERVICES		
Apex Apartment Rentals	Consent Judgment	Suffolk
Mass. Rentals, Inc. d/b/a Citywide City R.E. E-Z Rentals	In Litigation	Suffolk
AUTO		
Dante Gregorie d/b/a United Auto Buyers	In Litigation	Suffolk
Bob Brest Buick	In Litigation	Essex
Joseph Fiori's d/b/a Joe Fiori's Auto Sales	Final Judgment	Essex
SCHOOLS		
New England School of Culinary Arts and Career Training, Inc. Marie Bonello individually and as officer of Corp.	Consent Judgment	Middlesex
Fashion Signatures	In Litigation	Norfolk
Framingham Civil Service School, Inc.	Consent Judgment After Contempt Trial	Middlesex
Career Academy	In Litigation	Suffolk
E.C.P.I.	In Litigation/Petition for intervention before FTC	Worcester
LaSalle Extension Univ.	Consent Judgment	Suffolk
MOBILE HOMES		
Irene MacDonald Glen Mobile Home Park	In Litigation	
Melvin LaVallee Alma Mobile Home Park	In Litigation	Hampden
Stanley Trzcinski Kitchen Brook Mobile Home Park	In Litigation	Berkshire
Milton Spencer Chieftain Mobile Home Park	In Litigation	Berkshire

Ronald C. Filkins	In Litigation	Berkshire
Ted's Mobile Home Park		
Court Realty, Inc.	Stipulation of	Plymouth
Beacon Trailer Sales	Dismissal	
Allyn & Grace Ayotte		Worcester
White House Mobile Home	Dismissed Without Prejudice	
REAL ESTATE		
R. MacDonald & Co., Inc.	Consent Judgment	Middlesex
d/b/a Macondonald Real Estate		
Murphy & Murphy	Consent Judgment	Middlesex/Cambridg
Drive In Real Estate		
CoOrdinator, Inc.	Consent Judgment	Middlesex
d/b/a Co-Ree Real Estate		
Woods Real Estate	"	Norfolk
A. Simeone, Inc. Realtors	"	Middlesex
Delta Realty Co., Inc.	Consent Judgment	Middlesex
John L. Feodoroff d/b/a	"	Suffolk
Feodoroff Agency		
Anthony M. Ozella, Inc.	"	
Louis Consigli	"	
d/b/a Countryside Realty	"	
John Harcovitz	"	Norfolk
d/b/a John Harkey, Realtor		
Gei-Ger Real Estate Inc.	"	Middlesex
d/b/a Cape Real Estate		
Parkwood Estate Realty	"	Suffolk
Nathan Gass d/b/a	"	Suffolk
Allen Realty		
Vazza Properties	In Litigation	
John W. Keith Builder	Consent Judgment	Suffolk
Andrew J. Lane	Consent Judgment	Middlesex
Marshfield Real-Estate	"	Suffolk
HEALTH SPAS		
Allen Keene	In S.J.C.	Suffolk
International Health Spa		
MISC.		
Edward R. Lamusta		
LaMusta's Auto Service	Consent Judgment	Worcester
Daylight Dairy Products	Consent Judgment	Hampden
Paul Bunyan Fences	Contempt Petition	Middlesex
H. Hill & Sons, Inc.	In Litigation	Worcester
J-Z Enterprises	In Litigation	Worcester
Jack's Radio & T.V.	In Litigation	Essex
Kenneth Ryan d/b/a	Consent Judgment	Plymouth
Mass. Business & Professional		
Directory		

Sell Enterprises, Inc. John Williamson Robert Bondy	In Litigation	Suffolk

SUITS FILED PREVIOUSLY — STILL IN LITIGATION

POOLS

Associated Pools	In Litigation	Norfolk
Apex Pools or Glamour Pools or Venetian Pools (Edward Kerker)	Motion for Speedy Trial	Suffolk
Paul J. Woods Pools	In Litigation	Norfolk
William J. Dineen	In Litigation	Plymouth
All Seasons Recreational Pools	In Litigation	Norfolk

ADMINISTRATIVE ACTION

Federal Communications Commission — Petition to ban drug advertising on television before 9:00 P.M. The petition was filed with 17 other states.

Division of Occupational Education — Opposition to licensing to New England Tractor Trailer.

Board of Registration of Real Estate Brokers — Proceeding to revoke license of principals in Mass. Rentals.

Board of Registration of Employment Agencies — Opposition to licensing of Casseopeio Modeling Agency.

Federal Trade Commission — Motions to intervene in Proceedings involving New England Tractor Trailer and ECPI.

BANKRUPTCY

Land Auction Bureau — Appearances in Chapter 11 proceedings.

UTILITY CASES

A. Rate Cases — Entered and Completed

Boston Edison Interim	$47 Million
Boston Edison	$70 Million
Boston Gas Interim Case	$2,653,799
Western Mass. Interim	$11,000,000
Haverhill Interim	$796,000
Haverhill Case — Discovery Completed	$1,317,799
New Bedford	$13,394,000
New England Telephone	$210 Million
Cambridge Electric	$3,767,000
Mass. Electric — Cross examination completed	$22,800,000
Cases Entered:	
Baystate Gas — Discovery completed	$6,350,000
Boston Gas	$16,700,000
Western Mass Electric	$17,501,000
Monthly Fuel adjustment hearings	

B. Affirmative Actions

Application to Recover $700,000.00 in rebates from the Brockton Edison Company

Preparing Telephone Regulations and hearing regarding these Regulations. No regulations now exist for the telephone industry.

Petition to amend Procedural Rules of the DPU, which primarily concerns the filing of the prepared testimony with the rate filing.

Establishing a new Standard Fuel Clause.

Representing Attorney General — Rate Structure Case

Petition to amend Billing and Termination Regulations of DPU to include municipals.

Petition to audit Lowell Gas Co.'s transactions with its affiliates.

The first appearance by Attorney General before the Insurance Commission (Thus far, automobile rate case) $400 Million

Writing regulations for the Plant Siting Commission

Hearings on whether companies overcharge consumers through the fuel clause.

Environmental Protection Division

I. DESCRIPTION OF CASES BY CATEGORIES AND SUMMARY OF DISPOSITION

A. CASES BY CATEGORY

1. AIR POLLUTION

These cases are referred from the Department of Environmental Quality Engineering for violation of the State Air Pollution Regulations. The most frequent violations of the Regulations at the present time seem to be incinerators. The statutory authority is M.G.L. c.111, §42.

2. WATER POLLUTION

These cases are generally either for violation of discharge permits issued jointly by the State Division of Water Pollution Control and the United States Environmental Protection Agency, or for recovering the costs of cleaning up oil spills. The statutory authority is M.G.L. c.21, §§26-53 ("Clean Waters Act").

3. WETLANDS PROTECTION

These fall into two categories (1) cases involving the permit program for altering of wetlands under M.G.L. c.131, §40 and (2) cases challenging the development restrictions which the State is authorized to impose on inland and coastal wetlands pursuant to M.G.L. c.131, §40A and M.G.L. c.130, §150. They are referred from the Wetlands Section of the Department of Environmental Quality Engineering or generated by us from citizen complaints.

4. SOLID WASTE
These cases derive from M.G.L. c.111, §150A which regulates the manner in which refuse may be disposed of, and the sanitary landfill regulations promulgated thereunder. They come from the Department of Environmental Quality Engineering, Bureau of Community Sanitation.

5. BILLBOARDS
These cases come under M.G.L. c.93, §§29-33, which regulates and restricts outdoor advertising and authorizes a permit program. Most of these are defenses to petitions for judicial review from decisions of the Outdoor Advertising Board.

B. DISPOSITION OF EPD CASES IN FY 75
(January 1, 1975 thru June 30, 1975)

Between January 1st and June 30th this Division closed the following number of cases in each category:

Air	30
Water	42
Wetlands	26
Solid Waste	7
Billboard	1
Miscellaneous	0
TOTAL	106

As of June 30th, the following number of cases remained active in this office in each category:

Air	36
Water	30
Wetlands	88
Solid Waste	21
Billboard	33
Miscellaneous	0
TOTAL	208

II. EPD CASES OF PARTICULAR IMPORTANCE

A. AIR

Bicknell vs. *City of Boston*
This Division is presently preparing for the first air pollution case to be litigated in the Commonwealth. The Defendant's incinerator has been one of the largest uncontrolled sources of air contaminants in the State for a number of years.

B. WATER

Attorney General vs. *U.S. Environmental Protection Agency*
This suit has been brought in the Court of Appeals to challenge the EPA permit issued to the MDC for its discharge into the Charles River and the Boston Harbor. If we are successful in our efforts, the

result could mean cleaner water for the Charles River and Boston Harbor by 1984, which is some thirty years in advance of the date presently planned by the MDC.

C. OIL SPILLS

In FY75 (January 1, 1975 thru June 30, 1975) this Division was able to recover fifty-one thousand seven hundred sixty-eight dollars and fifty-three cents ($51,768.53) by way of settlement. This figure represents one hundred percent recovery of money actually expended by and owed to the State for its efforts in cleaning up oil spills in prior years.

D. WETLANDS

Commonwealth vs. *Cumberland Farms, Inc.*

In this case the Division obtained preliminary relief enjoining Cumberland Farms, Inc. from draining and filling a two thousand acre wetland in the Towns of Middleboro, Halifax and Plympton in Plymouth County, known as Great Cedar Swamp. In order to reach that result we gained an important, narrowing, interpretation of the "agricultural exemption" to the Wetlands Protection Act.

E. SOLID WASTE

Bicknell vs. *Town of Bridgewater*

In what we believe was the first Summary Judgment granted in an enforcement action by a State Agency, this Division closed down a dump that had been a thorn in the State's side for more than five (5) years. That particular landfill had been covered by various news media as a symbol of local intransigence and the result was a substantial boost to the regulatory program state-wide.

F. NON-CATEGORICAL CASES

Nuclear Power

Boston Edison et al, Pilgrim Nuclear Generating Station – Unit #2

This Division got the Board of the Nuclear Regulatory Commission to order a total rewriting of the Environmental Impact Statement, especially on the need for power, after application for Unit #3 of this project was withdrawn. This Division also presented expert testimony on (1) the need for power; (2) energy conservation potentials, (3) coal as an alternative to nuclear power, (4) garbage recycling as an alternative to nuclear power, and (5) the impact of theft of nuclear materials and sabotage of plants.

As a result of the active presence of this Division, the applicants are required to do a decent study of the need for power in this region, which shows substantially less growth than Edison had projected and continues to project.

Montague Nuclear Power Plant (proposed)

We appear in this case before the Nuclear Regulatory Commission and have prepared a motion to continue the hearing for several years, based upon a postponement of the project by the company.

Federal Power Commission/Connecticut River Case
This Division plans to represent the fishery agencies of all the states in the Connecticut River Basin in proceedings before the Federal Power Commission. It is noteworthy that the case has been pending since 1969 and was brought out of the closet and into trial by this Division. If this Division succeeds in restoring the Atlantic Salmon and American Shad to the Connecticut River, the River Basin States will have an increase of revenue of approximately five million dollars annually. Formal proceedings should take place sometime in the fall.

Number 1. July 2, 1974

Honorable Gregory R. Anrig
Commissioner of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Commissioner Anrig:

You have asked for my opinion concerning the power of the Massachusetts Board of Education to issue regulations under a statute concerning public education when that law does not specifically authorize the Board to issue regulations.

In particular you have focused on the question of issuing regulations or guidelines under St. 1971, c. 622, G. L. c. 76, § 5 and § 16, which reads as follows:

§ 5. *Place of Attendance; discrimination*

"Every child shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No child shall be excluded from or discrminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion or national origin."

and

§ 16. *Children Excluded from School; remedies*

"The parent, guardian or custodian of a child refused admission to or excluded from the public schools or from the advantages, privileges and courses of study of such public schools shall on application be furnished by the school committee with a written statement of the reasons therefor, and thereafter, if the refusal to admit or exclusion was unlawful, such child may recover from the town in tort, and may examine any member of the committee or any other officer of the town, upon interrogatories."

In deciding whether regulations may be promulgated under the anti-discrimination law, G. L. c. 76, §§ 5 and 16, it must be noted that neither section explicitly authorizes the Board to issue regulations nor

do they explicitly grant the Board the power to enforce the sections. Under these circumstances, then, may the Board issue regulations providing for the implementation of Chapter 622?

The answer to this question preliminarily depends on an analysis of the scope of the Board's powers and duties under the law. Under G. L. c. 15, § 1G, the Board is empowered to "support, serve and plan general education in the public schools" (par. 1); to provide "centralized, state wide, long-range planning" (par. 4) and a "center for the development, evaluation, and adaptation of educational innovations" in public schools (par. 5); and to "establish minimum educational standards" for required public school courses (par. 14). Under G. L. c. 15, § 1F, the Board is empowered to appoint the Commissioner of Education, who is the "chief state school officer for elementary and secondary education", and to establish divisions in the areas of curriculum and instruction, administration and personnel, research and development, school facilities, and others.

In addition to the assignment of functions and duties to the Board outlined above, the Board is authorized to collect and maintain information relevant to its work. G. L. c. 15, § 1G. The many other delegations of power to the Board need not be discussed here, other than to point to two highly pertinent provisions. General Laws, c. 15, § 1G specifically charges the Board with the duty of seeing that school committees comply with the laws concerning public schools:

> "The board shall see to it that all school committees comply with all laws relating to the operation of the public schools and in the event of noncompliance the commissioner of education shall refer all such cases to the attorney general of the commonwealth for appropriate action to obtain compliance." (Par. 20).

and:

> "The board may withhold state and federal funds from school committees which fail to comply with the provisions of law relative to the operation of the public schools or any regulation of said board authorized in this section." (Par. 18).

In light of the functions, powers and duties of the Board as set forth above, may the Board issue regulations providing for the implementation of Chapter 622?

It has long been the law in this Commonwealth that:

> "Where a grant of power is expressly conferred by statute upon an administrative officer or board or where a specific duty is imposed upon them, they in the absence of some statutory limitation have authority to employ all ordinary means reasonably necessary for the full exercise of the power and for the faithful performance of the duty. *Fluet* v. *McCabe*, 299 Mass. 173. *George A. Fuller Co.* v. *Commonwealth*, 303 Mass. 216. *Attorney General* v. *Trustees of Boston Elevated Railway*, 319 Mass. 642, 655.

> *Scannell* v. *State Ballot Law Commission*, 324 Mass. 494. But an administrative board or officer has no authority to promulgate rules and regulations which are in conflict with the statutes or exceed the authority conferred by the statutes by which such board or office was created. . . ." *Bureau of Old Age Assistance of Natick* v. *Commissioner of Public Welfare*, 326 Mass. 121, 124 (1950).

Even prior to the adoption of the State Administrative Procedure Act, G. L. c. 30A, it was recognized that

> "The well established general rule is that when a general power is given or duty enjoined, every particular power, necessary for the exercise of the one, or the performance of the other, is given by implication." *Fluet* v. *McCabe*, 299 Mass. 173, 178 (1938).

Thus, in *Lynch* v. *Commissioner of Education*, 317 Mass. 73 (1944), the Court upheld a Department of Education rule charging tuition at state teachers colleges although there was no statute specifically authorizing the charging of tuition. The *Lynch* court noted that:

> "it is well established that when a general power is given all authority necessarily incidental to carry out the power is given by implication." 317 Mass. at 79.

The court found that the Department was authorized to charge tuition by a statutory scheme giving it "general management" of state teachers colleges.

The breadth of incidental administrative authority to perform a statutory duty is indicated by language in later cases. In *Scannell* v. *State Ballot Law Commission*, 324 Mass. 494, 501 (1949), the Court stated:

> "A statutory grant of power may be general or particular. An express grant carries with it by implication all incidental authority required for the full and efficient exercise of the power conferred. The Legislature need not enumerate nor specify, definitely and precisely, each and every ancillary act that may be involved in the discharge of an official duty. It is enough for the Legislature to impose the duty to be performed within a prescribed field for a designated end, leaving to the board's discretion the selection of the appropriate methods and means and the other administrative details to be employed in accomplishing the statutory purpose."

Thus, the law of this Commonwealth recognizes that "[w]hen a general power is given, all authority necessary to carry it out is inferred by implication." *Multi-Line Insurance Rating Bureau* v. *Commissioner of Insurance*, 357 Mass. 19, 22 (1970).

In addition to this rationale for incidental administrative authority, which would, of course, include power to promulgate regulations, the law has pointed to another rationale. Administrative regulations provide an interpretation of the meaning of statutes which is given significance by the courts. As was said in *Cleary* v. *Cardullo's, Inc.*, 347 Mass. 337, 343-44 (1964):

> "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."

and

> "The best proof, of course, of a consistent administrative interpretation is the administrative body's regulations, or its published written decisions or interpretations."

See also, *Board of Assessors of Holyoke* v. *State Tax Commission*, 355 Mass. 223, 243-44 (1969).

Both of these rationales have been used to justify administrative authority in the Commissioner and the Board of Education where the statutes did not specifically provide that authority. In *School Committee of New Bedford* v. *Commissioner of Education*, 349 Mass. 410 (1965), the school committee of New Bedford sought a declaratory judgment that it was not required to take a racial census as the Commissioner directed it to do. The Court upheld the Commissioner's exercise of administrative authority, saying, at 349 Mass. at 414, that:

> "The enumeration and grant of the commissioner's powers and duties in G. L. c. 69 by implication give to him a substantial range of incidental authority to do in an ordinary and reasonable manner those things required for the efficient exercise of the powers and the satisfactory performance of the duties. See *Lynch* v. *Commissioner of Education*, 317 Mass. 73, 79-80; *Scannell* v. *State Ballot Law Commission*, 324 Mass. 494, 501-502; *Bureau of Old Age Assistance* v. *Commissioner of Public Welfare*, 326 Mass. 121, 124."

In *School Committee of City of Springfield* v. *Board of Education*, Adv. Sh. 1543, 1564 (1972), the Court suggested to the Board that it promulgate regulations under the Racial Imbalance Law, which statute does not expressly provide for regulations, as an aid in interpretation:

> "While the board must make its own independent determination whether a plan satisfied c. 71, § 37D, we suggest for the guidance of school committees that the board set forth beforehand how it interprets, and intends to apply, the requirements of the statute. The means of accomplishing this object are found in G. L. c. 30A, §§ 1(2), (5), 2, 3, which establish rule-making procedures applicable to all but a few of the administrative agencies of State government. See also G. L. c. 30A, § 8 (advisory rulings). Although the usefulness of regulations should not be overrated, their importance is never greater than where, as here, an agency must interpret a legislative policy which is only broadly set out in the governing statute. See *Cleary* v. *Cardullo's, Inc.*, 347 Mass. 337, 343-344. See also *Environmental Defense Fund Inc.* v. *Ruckelshaus*, 439 F.2d 584, 596-598 (D.C. Cir.)."

The legislative policy against discrimination in public schools is broadly set forth in Chapter 622 and it is reasonable to think that an administrative interpretation of that policy might be useful. Further, issuance of regulations or recommendations under Chapter 622 would be an ordinary and reasonable manner of exercising the Board's duties under G. L. c. 15, § 1G, of seeing that all school committees comply with laws pertaining to the operation of public schools. Of course, such regulations or recommendations would be subject to the promulgation requirements of G. L. c. 30A.

This opinion does not pass upon the validity of any particular regulation the Board may wish to draw up, for

> ". . . it is not the function of this office to draft and pass upon regulations of this kind in advance of actual rights involved thereunder." 1962 *Op. Atty. Gen.* 115, 116.

Nor does this opinion purport to pass upon the power of the Board to promulgate regulations under other statutes.

This opinion does set forth some criteria found in the law governing this subject. The mere fact that a statute does not expressly authorize issuance of regulations does not necessarily bar such regulations.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 2. July 16, 1974

Honorable David J. Lucey
Registrar of Motor Vehicles
100 Nashua Street
Boston, Massachusetts 02114

Dear Mr. Lucey:

You have requested my opinion upon several questions arising as a result of the recent decision of a single judge of the United States District Court for the District of Massachusetts in *Cicchetti, et al.* v. *Lucey,* Civil Action No. 73-3185-F, opinion entered May 21, 1974. There the court declared that Massachusetts General Laws, c. 90C, § 4, being violative of certain due process rights guaranteed by the Fourteenth Amendment to the United States Constitution, is unconstitutional on its face. Specifically, you inquire:

(1) Whether you are correct in refusing to suspend an operator's license pursuant to G. L. c. 90C, § 4;

(2) Whether you should take immediate steps to reinstate all licenses to operate currently under suspension pursuant to the provisions of c. 90C, § 4; and

(3) What effect the declaration of unconstitutionality has upon your actions in suspending licenses pursuant to the provisions of c. 90, §§ 20A and 20C.

Inasmuch as a Notice of Appeal to the United States Court of Appeals for the First Circuit has been filed in *Cicchetti*, the issues presented therein have not been determined with a finality which would warrant addressing the questions which you pose. Accordingly, I respectfully decline to render a formal opinion at this time. Of course, members of my staff are available to confer with you and advise you informally of the steps to be taken pending resolution of the appeal.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 3. July 22, 1974

Honorable Crocker Snow
Director of Aeronautics
Logan Airport
East Boston, Massachusetts 02128

Dear Mr. Snow:

With respect to your duties as Executive Director of the Massachusetts Aeronautics Commission, you have requested my opinion whether vessels come within the definition of structures under St. 1951, c. 799, § 1. The vessels in question are those which have masts or superstructures over a certain length and which pass the approach end of runway 4-R at General Edward Lawrence Logan International Airport (Logan Airport). The height of these vessels is such as to extend into airport approach zones established pursuant to St. 1951, c. 799. You state that if these vessels were restricted from passing within that runway during times of low visibility, a significant increase in the usable length of the runway would be provided. I do not reach the merits of this issue because it is my opinion that St. 1956, c. 465, which created the Massachusetts Port Authority and defined its powers and duties, repealed St. 1951, c. 799 by implication.

The Massachusetts Aeronautics Commission has general regulatory authority over airports in the Commonwealth. G. L. c. 90, §§ 35-52. The particular provision relating to structures within airport approaches specifically provides that "[t]he provisions of this section shall not apply . . . to air approaches to the General Edward Lawrence Logan International Airport." G. L. c. 90, § 35B, as inserted by St. 1960, c. 756, § 1. Any authority which the Commission might have with respect to Logan Airport derives from St. 1951, c. 799, §§ 1-11, entitled, "An Act Establishing Airport Approach Zones for the General Edward Lawrence Logan Airport." Section 3 of c. 799 provides for the establishment of airport approach zones as shown on a map filed in the office of the State Secretary. "[A]ny structure or tree which extends into any airport approach zone" is defined by § 1 as an "[a]irport hazard." Under § 4 the Commission may "take by eminent domain, or acquire by purchase or otherwise, any airport hazard or the land on which it stands, or both."

In 1956 the Legislature established the Massachusetts Port Authority to take over the management, control and operation of Logan Airport. St. 1956, c. 465, §§ 1-35. The Authority was authorized under § 4 to acquire by purchase or to take by eminent domain property which it deemed essential for its operation. In particular, it was authorized to "order the removal or relocation of any surface tracks, and the removal or relocation of any conduits, pipes, wires, poles or other property located in public ways or places, or in or upon private lands, which it deems to interfere with the laying out, construction or operation of any project, and the proper authorities shall grant new locations for any such *structure* so removed or relocated, and the owner thereof shall be reimbursed by the Authority for the reasonable cost of such removal or relocation." (Emphasis supplied.)

The Authority is also authorized to apply for and receive federal grants for the planning, construction or financing of airport facilities. St. 1956, c. 465, § 3(n). One of the conditions to the receipt of such funds under federal law is that the local authority ensure the removal of structures that might constitute airport hazards. 49 U.S.C. § 1718(3); *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965). The establishment of airport approach zones by the Authority would thus also be authorized by that provision which authorizes "all acts and things necessary or convenient to carry out the powers expressly granted in this act." St. 1956, c. 465, § 3(p).

The authority to establish clear zones,[1] which is implicit in St. 1956, c. 465, was made explicit by St. 1963, c. 410, which prohibited the Authority from acquiring, by the exercise of eminent domain, certain land in a westerly direction "except for the purpose of protecting the aerial approaches to runways in accordance with applicable federal standards [and/or] meeting runway clear zone requirements of the federal government."[2] See *Loschi* v. *Massachusetts Port Authority*, 354 Mass. 53 (1968); *City of Boston* v. *Massachusetts Port Authority*, 356 Mass. 741 (1970) (rescript).

The present situation is that both the Massachusetts Aeronautics Commission and the Massachusetts Port Authority are authorized to establish and maintain clear zones for aircraft landings and takeoffs at Logan Airport. The issue is whether the later enactment, St. 1956, c. 465, has repealed St. 1951, c. 799 by implication.

> "Although the principle is one which the court, in deference to the Legislature, does not regard with favor and applies with caution, it has its proper place in judicial construction of legislative enactments. It derives from the basic concept that it is the duty of the court to ascertain the legislative

[1] "A clear zone is an area at the end of a runway from which buildings may be excluded or within which their height may be limited in order to permit safe landings and takeoffs." *Mayer* v. *Boston Metropolitan Airport, Inc.*, 355 Mass. 344, 347 n. 4 (1969).

[2] The Federal Aviation Administration is authorized, under 49 U.S.C. § 1501, to promulgate rules and regulations concerning structures which are considered to be hazards to air commerce. The rules and regulations which have been enacted, 14 C.F.R., §§ 77.1-77.75, provide a procedure whereby the Federal Aviation Administration issues an advisory opinion as to whether a particular structure, such as a vessel which traverses a waterway (14 C.F.R. § 77.23(b)), constitutes an airport hazard. *Illinois Citizens Com. for Broadcasting* v. *F.C.C.*, 467 F.2d 1397, 1401 (7th Cir. 1972).

> intent and to effectuate it. The test of the applicability of the principle of implied repeal is whether the prior statute is so repugnant to and inconsistent with the later enactment covering the subject matter that both cannot stand." *Doherty* v. *Commissioner of Administration*, 349 Mass. 687, 690 (1965).

There are numerous indications that the legislative intent of St. 1956, c. 465 was to repeal St. 1951, c. 799. The provisions of St. 1956, c. 465 are to be liberally construed to effectuate the purposes of the Act. St. 1956, c. 465, § 27; *Massachusetts Port Authority* v. *Clerk of the East Boston District Court*, 350 Mass. 195, 202 (1966). Section 2 provides that the Authority is not "subject to the supervision or regulation . . . of any . . . commission . . . of the commonwealth except to the extent and in the manner provided in this act." In this regard there is no provision for regulation of airport hazards by the Aeronautics Commission. The absence of such regulatory authority is in line with the general legislative concern that, in order to meet business competition from other airports, the Authority was to function as a business without "inflexible and rigid" government control. Report of the Special Commission on the Massachusetts Port Authority, 1956 House Doc. No. 2575, p.10; see *City of Boston* v. *Massachusetts Port Authority*, Mass. Adv. Sh. (1974) 187. Furthermore, § 29 provides: "All other general or special laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this act . . ."

In this legislative context, it is manifest that St. 1951, c. 799, is so inconsistent with St. 1956, c. 465 that both cannot stand and that the later enactment must apply. A sharing of joint responsibility with respect to the establishment of clear zones would diffuse rather than clarify this important responsibility. In fact, St. 1951, c. 799 was enacted subsequently to the issuance of an opinion by one of my predecessors to the effect that the regulation of airport hazards at Logan Airport was the joint responsibility of the Aeronautics Commission and the Airport Management Board. 1949 Op. Atty. Gen. 33 (October 8, 1948). The legislative response indicated that only one entity should be directly responsible for such matters. By enactment of St. 1956, c. 465, the Legislature has squarely placed that authority and responsibility in the Massachusetts Port Authority.

In conclusion, it is my opinion that St. 1951, c. 799 has been repealed, thus making any substantive determination as to the interpretation of any particular provision unnecessary.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 4. September 16, 1974

Honorable Robert L. Meade, Chairman
Department of Public Utilities
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Chairman Meade:

You have requested my opinion regarding the interrelationship between St. 1973, c. 426, §§ 36 and 48. Section 36 amends G. L. c. 25, § 2 by increasing the salaries of the Commissioners of Public Utilities. However, section 48 later provides, "Notwithstanding any provisions of this act to the contrary, the provisions of . . . section two of chapter twenty five . . . of the General Laws . . . in effect immediately prior to the effective date of this act, shall remain in effect and apply to appointments to the offices referred to therein which are made on or after said effective date."

Reading the two sections together, you have observed that they result in a situation where newly appointed commissioners receive a lesser salary than commissioners appointed prior to the act and newly reappointed commissioners receive a decrease in salary. I believe that your observation is an accurate one. It would seem that the intent of the General Court in enacting the two sections was to maintain the salaries of incumbent commissioners at their existing level in terms of *real* dollars, but to bring about a *real* decrease in the salaries of future commissioners. While, for a time, some commissioners might find themselves receiving a lesser salary than others, such a situation is not as inequitable as might first appear, since the effect of the statute is that none will be receiving a salary which is less in terms of *real* dollars than that which he was offered at the time he assumed office. As the terms of commissioners expire, there will eventually have been effected a *real* decrease in the salary of all of the commissioners although the face amount of the salary will remain constant.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 5. September 16, 1974

Ms. Regina Healy, Commissioner
Massachusetts Commission Against Discrimination
120 Tremont Street
Boston, Massachusetts 02108

Dear Commissioner Healy:

With regard to the issue of whether a creditor might properly condition the granting of credit upon a woman's use of her husband's surname, you have asked my opinion on the following question:

> "Whether, upon marriage, a woman must abandon her surname and assume the surname of her husband without an express intent to do so."

The short answer to your question is "No." A person is free to assume any name that he or she chooses so long as he or she does so for non-faudulent purposes. *Buyarsky, Petitioner*, 322 Mass. 335 (1948). The law will regard a person as assuming the name which he or she takes for his or her own use. See generally, *Merolevitz, Petitioner*, 320 Mass. 448, 450; Op. Atty. Gen., 73/74-29.

No Massachusetts statute compels a woman to adopt her husband's surname. Certain statutes were apparently written upon the assumption that a woman will change her surname upon her marriage, e.g., G. L. c. 208, § 23, but this type of legislation is not inconsistent with the view that the name change is *not* compelled, since it has been the prevailing custom, for at least the last two centuries, for a woman to change her surname upon her marriage.

The status of the common law of Massachusetts is less clear. The Supreme Judicial Court has not had occasion to rule on this precise question. In 1926, the Court adopted, without discussion, the New York view of the common law, that a married woman who has made use of her husband's surname assumes his surname as her legal name. *Bacon* v. *Boston Elevated Railway*, 256 Mass. 30 (1926); *Chapman* v. *Phoenix National Bank*, 85 N.Y. 437 (1881). The *Bacon* case, and certain cases restating the law as espoused in *Bacon*, e.g. *Koley* v. *Williams*, 256 Mass. 601 (1929), are of doubtful value as precedent even for the limited proposition that a married woman who makes use of her husband's surname assumes his surname as her own. These cases involved the issue of proper automobile registration and the application of the now defunct "trespasser upon the highway doctrine." (See G. L. c. 90, § 9, as amended by St. 1959, c. 259.) The decisions do not control the case of a woman who has retained the use of her maiden name after her marriage.

The Supreme Judicial Court recently decided a case in which the principal issue involved an application of the common law rule that the domicile of a wife automatically follows that of her husband. The Court ruled against the Commonwealth and held that a married woman might have a domicile apart from that of her husband. The remarks of Mr. Justice Braucher who authored the Court's opinion are instructive:

> "As we have recognized, important changes in popular and legal thinking suggest that 'ancient canards about the proper role of women' have no place in the law. See *Surabain* v. *Surabain*, ——— Mass. ———, n. 7 (1972) Mass. Adv. Sh. (1972) 1461, 1466, n. 7, quoting *Phillips* v. *Martin Morutta Corp.*, 400 U.S. 542, 544-545 (1971)." *Green* v. *Commissioner of Corporations and Taxation*, December 13, 1973, Mass. Adv. Sh. 1549 at 1554.

Finally, the notion that the general "common law" requires that a woman assume the surname of her husband upon her marriage has been significantly deflated by recent scholarly and judicial research on the

subject. There is no universal requirement of the "common law," either in England or in the United States, which compels a woman to change her name upon marriage. See *Stuart* v. *Board of Supervisors of Elections*, 266 Md. 440, 295 A.2d 223 (1972), and authorities cited; MacDougall, "Married Women's Common Law Right to Their Own Surnames," *Women's Rights Law Reporter*, Vol. 1, No. 3, 1972/73, p. 2; see generally, *Opinion of the Attorney General*, 73/74-29.

In summary, a woman who has retained the use of her maiden name after her marriage is not compelled by Massachusetts law to assume her husband's surname for any purpose.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 6. September 27, 1974

Richard Cary Paull, Esquire
First Assistant District Attorney
Southern District
Superior Court House
New Bedford, Massachusetts

Dear Mr. Paull:

You have requested my opinion relative to whether a judge or clerk in a district court of the Commonwealth may issue a search warrant to search a house in a district other than that in which the court is situated. I am of the view that he may.

General Laws, c. 276, § 1 provides, in relevant part:

> "A court or justice authorized to issue warrants in criminal cases may, upon complaint on oath that the complainant believes that any of the property or articles hereinafter named are concealed in a house, place, vessel or vehicle or in the possession of a person *anywhere within the commonwealth* and territorial waters thereof, if satisfied that there is probable cause for such belief, issue a warrant identifying the property and naming or describing the person or place to be searched and commanding the person seeking such warrant to search for [specified articles.]." (Emphasis supplied.)

Thus, a court or justice authorized to issue a search warrant in criminal cases may issue a warrant to search premises located anywhere in the Commonwealth, be they within or without the judicial district served by that court. The word "court," as used in the section, includes "clerks." *Commonwealth* v. *Penta*, 352 Mass. 271, 273 (1967).

The authority to issue search warrants is clearly granted to district court judges through G. L. c. 218, § 35. The same authority is granted to their clerks through G. L. c. 218, § 33. *Penta*, *supra* at 273.

Reading the three sections together, then, the conclusion is compelled that, being authorized to issue search warrants, district court judges and clerks may issue warrants to search premises anywhere in the Commonwealth. Accordingly, I answer your question in the affirmative.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 7. October 2, 1974

Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Mr. Kehoe:

I have your inquiry concerning a truck washing business conducted on Sunday. You request an opinion as to whether the business is exempt from the Sunday law by virtue of § 6(44) of G. L. c. 136. Section 6 of c. 136 exempts from the operation of the Sunday law various businesses and activities including the following:

> "(44) The operation of a car-washing business between eight o'clock in the forenoon and one o'clock in the afternoon, provided that such business may be carried on at any time if not more than a total of two persons are employed therein at any one time on Sunday and throughout the week."

I understand that the basic factual situation is as follows. Because trucks cannot be involved in transportation on Sunday except between stated hours, they stay over at particular terminals in the Commonwealth. The operation of their trucks during the week precludes them from having the trucks cleaned. The problem has been solved by the institution of a mobile truck washing business in which a truck, equipped with a compressor, heating oils and tools affixed to its body and used solely for the purpose of washing trucks is dispatched to one or more terminals during the day on Sunday and engages in the business of washing trucks at these terminals.

From the foregoing, I conclude that a car washing business is involved, within the meaning of § 6(44), and that if it complies with § 6(44), it will be exempt from the operation of the Sunday law.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 8. October 2, 1974

Dr. William G. Dwyer, President
Board of Regional Community Colleges
Custom House Plaza
177 Milk Street
Boston, Massachusetts 02109

Dear Dr. Dwyer:

I have your request for an opinion as to whether St. 1973, c. 1189, § 1, which amended G. L. c. 15, § 39, must be implemented in the coming fall semester.

General Laws, c. 15, § 39 was added by St. 1964, c. 737, § 1, and prior to the enactment of c. 1189, provided as follows:

> "Each regional community college may conduct summer sessions, provided such sessions are operated at no expense to the commonwealth. Each regional community college may conduct evening classes, provided such classes are operated at no expense to the commonwealth."

The Legislature then enacted St. 1966, c. 601, which, as amended by St. 1968, c. 480, authorized the Department of Education to issue a certificate of exemption from tuition at any state institution of higher education to Vietnam veterans, under the conditions therein set forth. The apparent conflict between these two statutes was resolved by an opinion of my predecessor that a regional community college could not admit a Vietnam veteran on a tuition-free basis if to do so required the operation of the summer session or evening classes in such manner as to incur expense to the Commonwealth. That opinion stated, however, that Vietnam veterans could be enrolled in such courses if a sufficient number of tuition-paying students were enrolled therein so that the cost of operation would not be borne by the Commonwealth. 1967 Op. Atty. Gen. p. 174. It is clear that the Legislature intended to remove this limitation on enrollment of Vietnam veterans in such courses by enacting c. 1189, § 1, which added the following two sentences to G. L. c. 15, § 39:

> "Vietnam veterans whose service was credited to the commonwealth may attend such summer sessions and evening classes tuition free, if academically qualified. *The cost of instruction for each Vietnam veteran who attends such sessions and classes shall be borne by the commonwealth.*" (Emphasis supplied.)

The underlined provision unequivocally states that the source for tuition expenses for Vietnam veterans is the Commonwealth (subject to reimbursement by the veteran if he is eligible for federal funds as reimbursement, St. 1973, c. 1189, § 3). General Laws, c. 15, § 32 provides that "the general court shall annually appropriate such sums as it deems necessary for the maintenance, operation and support of each regional community college . . ." By enacting c. 1189, the Legislature has obviously declared such Vietnam veterans' tuition expenses to be "neces-

sary" and, accordingly, recourse must be had to the Legislature for appropriation of the necessary funds. If insufficient funds are appropriated, then expenditures from existing appropriations must be made in the manner provided in G. L. c. 15, § 32.

It follows that St. 1973, c. 1189 must be implemented in the coming fall semester.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 9. October 4, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By a letter dated September 9, 1974, you have asked me whether the following question (or questions identical in all material aspects) is one of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws:

> "Shall the Senator from this District be instructed to vote to approve a resolution memorializing the Congress of the United States in favor of Amnesty for all those who resisted the Vietnam War?"

It is my opinion that the question presented is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19. *See* 1939 Op. Atty. Gen., pp. 99-100; 1955 Op. Atty. Gen., pp. 51-52. *See also*, 8 Op. Atty. Gen. (1928), pp. 490, 491-492; 1965 Op. Atty. Gen., pp. 92-93. Consequently, the question may properly be included on the election ballot in the four Senatorial Districts which you have mentioned, namely: Plymouth-Norfolk; Suffolk and Middlesex; 4th Middlesex; 5th Middlesex.

You have requested further that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the form in which it appears in this letter.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 10. October 4, 1974
Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By letter dated September 9, 1974, you have asked me whether the following question is one of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws:

> "Shall the Representative from this District be instructed to vote to approve the passage of a bill which would prohibit telephone companies from charging long distance rates for telephone calls made within a community?"

It is my opinion that the question presented is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19. *See* 1939 Op. Atty. Gen., pp. 99-100; 1955 Op. Atty. Gen., pp. 51-52. *See also*, 8 Op. Atty. Gen. (1928), pp. 490, 491-492; 1965 Op. Atty. Gen., pp. 92-93.

You have requested further that if I determine the question submitted to be one of "public policy" and therefore properly included on the election ballot in the 5th Plymouth Representative District, that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question as presently stated is in proper form and may be printed on the ballot as such. *See* 1965 Op. Atty. Gen., p. 93.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 11. October 4, 1974
Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

In a letter dated September 9, 1974, you have asked me whether the following question is one of public policy in accordance with G. L. c. 53, § 19:

> "Should the Massachusetts Bay Transportation Authority (MBTA) construct a Rapid Transit station in South Quincy?"

While the proposal involved in the question encompasses a small area geographically, the problem of public transportation is one of great concern to the Commonwealth in general. Therefore, keeping in mind the fact that the term "public policy" should be construed broadly, 8 Op. Atty. Gen., p. 490, 493, I conclude that the question satisfies the requirements of G. L. c. 53, § 19, *see also* 1969 Op. Atty. Gen., p. 37, 1955 Op. Atty. Gen., p. 51. Consequently, the question may properly be included on the election ballot in the Represenatative District which you have mentioned, namely, the 1st Norfolk.

You have further requested that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the following form:

> "Shall the Representative from this District be instructed to vote in favor of the passage of a bill requiring the Massachusetts Bay Transportation Authority (MBTA) to construct a rapid transit station in South Quincy?"

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 12. October 4, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By a letter dated September 9, 1974, you have asked me whether the following question is one of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws:

> "Shall the Representative from this District be instructed to vote to approve the passage of a constitutional amendment which would abolish the Executive Council?"

It is my opinion that the question presented is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19. *See* 1939 Op. Atty. Gen., pp. 99-100; 1955 Op. Atty. Gen., pp. 51-52; Op. Atty. Gen., 1970/1971-10. *See also*, 8 Op. Atty. Gen. (1928), pp. 490, 491-92; 1965 Op. Atty. Gen., pp. 92-93.

You have requested further that if I determine the question submitted to be one of "public policy" and therefore properly included on the election ballot in the 5th Plymouth Representative District, that I supply your office with a suitable statement of the question for presentation

upon the ballot. It is my opinion that the question, as presently stated, is in proper form and may be printed on the ballot as such. *See* Op. Atty. Gen., 1970/1971-10.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 13. October 4, 1974
Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By letter dated September 9, 1974, you have asked me whether the following question is one of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws:

> "Shall the Senator from this District be instructed to sponsor and support a resolution calling for the closing and dismantling of nuclear power plants in Rowe, Massachusetts, and Vernon, Vermont?"

Although the question presented is one of particular interest geographically, it is my opinion that the question is also an "important public question" since it concerns itself with important environmental issues in which "every citizen of the Commonwealth has an interest," and it is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19. *See* 1939 Op. Atty. Gen., pp. 99-100; 1955 Op. Atty. Gen., pp. 51-52; 1969 Op. Atty. Gen., pp. 37-38. *See also*, 8 Op. Atty. Gen. (1928), pp. 490, 491-92; 1965 Op. Atty. Gen., pp. 92-93. Consequently, the question may properly be included on the election ballot in the Senatorial District which you have mentioned, namely: Franklin-Hampshire-Hampden.

You have further requested that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the form in which it appears in this letter.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 14. October 4, 1974
Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By letter dated September 9, 1974, you have asked me whether the

following question is one of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws:

> "Shall the Representative from this District be instructed to vote to approve a resolution memorializing the Congress of the United States in favor of federal land use controls as proposed by the Nantucket Sound Islands Trust Bill?"

Although the question presented is one of particular interest geographically, it is my opinion that the question is also an "important public question," since it concerns itself with important environmental issues in which "every citizen of the Commonwealth has an interest," and it is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19. *See* 1939 Op. Atty. Gen., pp. 99-100; 1955 Op. Atty. Gen., pp. 51-52; 1969 Op. Atty. Gen., pp. 37-38. *See also*, 8 Op. Atty. Gen. (1928), pp. 490, 491-92; 1965 Op. Atty. Gen., pp. 92-93. Consequently, the question may properly be included on the election ballot in the Representative District which you have mentioned, namely: Nantucket Representative.

You have requested further that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the form in which it appears in this letter.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 15. October 4, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By a letter dated September 9, 1974, you have asked me whether the following question is one of public policy in accordance with section 19 of chapter 53 of the Massachusetts General Laws:

> "Shall the Representative from this District be instructed to vote to approve the passage of a bill which would extend the Rent Control Enabling Act indefinitely without limit in time?"

It is my opinion that the question presented is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19. *See* 1939 Op. Atty. Gen., pp. 99-100; 1955 Op. Atty. Gen., pp. 51-52. *See also* 8 Op. Atty. Gen. (1928), 490, 491,94; 1965 Op. Atty. Gen., pp. 92-93. Consequently, the question may properly be included on the election ballot in the Representative District which you have mentioned, namely: 4th Middlesex.

You have requested further that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the form in which it appears in this letter.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 16. October 4, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

In a letter dated September 9, 1974, you have asked me whether the following question is one of public policy in accordance with G. L. c. 53, § 19:

> "Shall your Representative be instructed to vote for the passage of a bill which would prohibit smoking in public places except in designated areas specifically set aside for smokers?"

It is my opinion that the question is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19, *see* Op. Atty. Gen. 1970/71-9; *see also* 1939 Op. Atty. Gen., p. 99, 1955 Op. Atty. Gen., p. 51. Consequently, the question may properly be included on the election ballot in the Representative Districts which you have mentioned, namely, the 19th Middlesex and the 29th Suffolk.

You have requested further that I supply your office with a suitable statement of the question for presentation on the ballot. It is my opinion that the question should be printed on the ballot in the following form:

> "Shall the Representative from this District be instructed to vote for the passage of a bill which would prohibit smoking in public places within the Commonwealth except in designated areas specifically set aside for smokers?"

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 17. October 4, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

In a letter dated September 9, 1974, you have asked me whether the

following question is one of public policy in accordance with G. L. c. 53, § 19:

> "Shall the Representative from this district be instructed to vote for the passage of a comprehensive land use planning bill in order to protect areas of critical environmental concern?"

It is my opinion that the question is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19, *see* Op. Atty. Gen. 1970/71-9; *see also* 1939 Op. Atty. Gen., p. 99, 1955 Op. Atty. Gen., p. 51. Consequently, the question may properly be included on the election ballot in the Representative District which you have mentioned, namely, the 15th Worcester.

You have requested further that I supply your office with a suitable, statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the following form:

> "Shall the Representative from this District be instructed to vote for the passage of a comprehensive land use planning bill in order to protect areas of critical environmental concern within the Commonwealth?"

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 18. October 4, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

In a letter dated September 9, 1974, you have asked me whether the following question is one of public policy in accordance with G. L. c. 53, § 19:

> "Shall the Senator from this District be instructed to vote for the passage of a bill which would prohibit the private ownership of handguns except for collectors, licensed pistol clubs, and security personnel?"

It is my opinion that the question is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19, *see* Op. Atty. Gen. 1970/71-9; *see also* 1939 Op. Atty. Gen., p. 99, 1955 Op. Atty. Gen., p. 51. Consequently, the question may properly be included on the election ballot in the Senatorial District which you have mentioned, namely, the 3rd Middlesex and Norfolk.

You have requested further that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the following form:

> "Shall the Senator from this District be instructed to vote for the passage of a bill which would prohibit the private ownership of handguns within the Commonwealth except for collectors, licensed pistol clubs, and security personnel?"

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 18A. October 23, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

Due to a clerical error, this Department inadvertently failed to consider a word contained in the ballot question which was certified in Op. Att'y Gen'l 74/75-18. As submitted, the question read:

> "Shall the Senator from this District be instructed to vote for the passage of a bill which would prohibit the private ownership of handguns except for collectors, licensed pistol clubs, police and security personnel?"

The question should appear on the ballot in the following form:

> "Shall the Senator from this District be instructed to vote for the passage of a bill which would prohibit the private ownership of handguns within the Commonwealth except for collectors, licensed pistol clubs, police and security personnel?"

Very truly yours,
WALTER H. MAYO, III
Assistant Attorney General
Chief, Administrative Division

Number 19. October 4, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

In a letter dated September 9, 1974, you have asked me whether the following question is one of public policy in accordance with G. L. c. 53, § 19:

> "Shall the Representative from this District be instructed to vote to approve the passage of a bill which would permit a two thirds vote of a city council or town meeting to override a school budget?"

It is my opinion that the question presented is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19, *see* Op. Atty. Gen. 1970/1971-9; *see also* 1939 Op. Atty. Gen., p. 99, 1955 Op. Atty. Gen., p. 51. Consequently, the question may properly be included on the election ballot in the Representative District which you have mentioned, namely, the 5th Plymouth.

You have further requested that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed in the following form:

> "Shall the Representative from this District be instructed to vote to approve the passage of a bill which would permit a two-thirds vote of a city council, board of aldermen, town meeting or similar municipal governing body to override the budget submitted by a municipal school committee?"

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 20. October 4, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

In a letter dated September 9, 1974, you have asked me whether the following question is one of public policy in accordance with G. L. c. 53, § 19:

"Shall the Representative from this District be instructed to vote for the passage of a bill which would prohibit the private ownership of handguns except for collectors, licensed pistol clubs, police and security personnel?"

It is my opinion that the question is an "important public question" in which "every citizen of the Commonwealth has an interest" and is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19, *see* Op. Atty. Gen. 1970/71-9; *see also* 1939 Op. Atty. Gen., p. 99, 1955 Op. Atty. Gen., p. 51. Consequently, the question may properly be included on the election ballot in the Representative Districts which you have mentioned, namely, the 15th Norfolk and 30th Suffolk.

You have requested further that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the following form:

"Shall the Representative from this District be instructed to vote for the passage of a bill which would prohibit the private ownership of handguns within the Commonwealth except for collectors, licensed pistol clubs, police and security personnel?"

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 21. October 4, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

By letter dated September 9, 1974, you have asked me whether the following question is one of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws:

"Shall the Senator from this District be instructed to oppose the building of nuclear power plants in Montague, Massachusetts?"

Although the question presented is one of particular interest geographically, it is my opinion that the question is also an "important public question," since it concerns itself with important environmental issues in which "every citizen of the Commonwealth has an interest," and it is therefore a question of "public policy" within the meaning of G. L. c. 53, § 19. *See* 1939 Op. Atty. Gen., pp. 99-100; 1955 Op. Atty. Gen., pp. 51-52; 1969 Op. Atty. Gen., pp. 37-38. *See also*, 8 Op. Atty. Gen. (1928), pp. 490, 491-492; 1965 Op. Atty. Gen., pp. 92-93. Conse-

quently, the question may properly be included on the election ballot in the Senatorial District which you have mentioned, namely: Franklin - Hampshire - Hampden.

You have requested further that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the form in which it appears in this letter.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 22. October 4, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Davoren:

In a letter dated September 9, 1974, you have asked me whether the following question is one of public policy in accordance with G. L. c. 53, § 19:

> "Do you favor returning streetcars to the Park St.-Watertown line?"

While the proposal involved in the question encompasses a small area geographically, the problem of public transportation is one of great concern to the Commonwealth in general. Therefore, keeping in mind the fact that the term "public policy" should be construed broadly, 8 Op. Atty. Gen., p. 490, 493, I conclude that the question satisfies the requirements of G. L. c. 53, § 19, *see also* 1969 Op. Atty. Gen., p. 37, 1955 Op. Atty. Gen., p. 51. Consequently, the question may properly be included on the election ballot in the Representative District which you have mentioned, namely, the 26th Suffolk.

You have further requested that I supply your office with a suitable statement of the question for presentation upon the ballot. It is my opinion that the question should be printed on the ballot in the following form:

> "Shall the Representative from this District be instructed to vote in favor of the passage of a bill which would require the Massachusetts Bay Transportation Authority (MBTA) to operate streetcars on its Park St.-Watertown line?"

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 23. October 8, 1974

Honorable Robert Q. Crane
Treasurer of the Commonwealth
Chairman, Massachusetts State
Lottery Commission
One Gateway Center
Newton, Massachusetts 02158

Dear Treasurer Crane:

You have requested my opinion regarding the applicability of the second paragraph of St. 1974, § 26 to the members of the State Lottery Commission. The section provides as follows:

> "Notwithstanding any law to the contrary not later than September first, nineteen hundred and seventy-four, each secretariat shall submit to the committee on ways and means (both houses) schedules of their expected allotments to be approved by the secretary of administration and finance for each account for each allotment periods of fiscal nineteen hundred and seventy-five. Thereafter, at the end of each allotment period the secretary shall notify the secretary of administration and finance and the committees on ways and means of any accounts in which the total expended funds, encumbered funds, and other liabilities incurred but not yet encumbered, exceeds fund allotted to that account for the period covered for the year to date. Said total shall be called the total commitments. Starting January first, nineteen hundred and seventy-five, each secretary shall certify at the beginning of each allotment period that the current rate of the said total commitments can be continued without an additional appropriation. Any secretary failing to submit such schedules, notifications, certification and reports as required above or the incurring of a total commitment in any account in excess of available funds will be deemed guilty of neglect and subject to a fine of not more than one thousand dollars or the removal from office. *Any* officer or employee of the commonwealth or the *members of any* departments, board, *commission*, institution or agency *making an expenditure which exceeds an appropriation or an allotment made therefor without the approval of the secretariat, or fails to submit the necessary reports, schedules, notifications, certifications required in this section shall be deemed guilty of neglect and subject to a fine of not more than one thousand dollars or removal from office.*" (Emphasis supplied.)

The first five sentences of the paragraph clearly apply only to secretariats. Additionally, I am of the view that the language "any members of any . . . commission" contained in the sixth sentence encompasses only members of commissions within a secretariat. It appears that the provisions of the sentence were intended only to insure that the

secretaries referred to in the preceding sentences of the paragraph receive adequate information from those under their authority in order that they might comply with the duties outlined for them in the paragraph. As the Lottery Commission is not a secretariat and does not lie within a secretariat, but is instead within the Office of the State Treasurer, pursuant to G. L. c. 10, § 23, I am of the view that none of the provisions of the second paragraph of section 26 is applicable to the Commission.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 24. October 11, 1974

Honorable Malcolm E. Graf, P.E.
Associate Commissioner
Department of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Dear Mr. Graf:

In your letter to me dated September 9, 1974, you state as follows:

> "In compliance with G. L. Chapter 91 Section 11, the City of Boston filed a petition for the dredging of Muddy River which forms a portion of the Boston Back Bay Fens. The funding for this project is authorized by G. L. Chapter 822 of Acts of 1973 titled 'An Act Providing a Special Capital Outlay Program for Shore Protection and Improvement to Rivers and Harbors.'
>
> "We are considering a proposal that this Department enter into a contract with the City of Boston and agree to pay one half of the costs and that the City be required to furnish a dredge and operator to do the work.
>
> "Since this would constitute an award of a contract without competitive bids, I seek your opinion and guidance as to whether this Department is authorized to make such an agreement under the circumstances."

St. 1973, c. 822, § 1 authorizes the Department of Public Works to expend certain sums "for the purpose of projects for the improvement of rivers, harbors, tidewaters, foreshores and shores along a public beach, as authorized by section eleven of chapter ninety-one of the General Laws . . . ; provided, that all expenditures . . . shall be upon condition that at least fifty per cent of the cost is covered by contributions from municipalities or other sources, except that in the case of dredging channels for harbor improvements at least twenty-five per cent of the cost shall be so covered . . . "

G. L. c. 91, § 11 delineates the authority of the Department of Public Works with respect to the "improvement, development, maintenance and protection of tidal and non-tidal rivers and streams, great ponds,

harbors, tide waters, foreshores and shores along a public beach . . . [I]n pursuance of the work authorized, [it] may construct, reconstruct, alter and repair bridges, culverts, conduits, pipes, walls and dams, and may do such other incidental work as may be deemed necessary for the improvement and safety of waterways."

The work involved in dredging Muddy River is obviously a "public work" within the definition of G. L. c. 30, § 39M(a) which requires the Commonwealth or any "county, city, town, district or housing authority," with respect to contracts relating to public works, to require competitive bids if the cost is estimated to be more than certain specified amounts. However, subsection (d) of said § 39M provides:

> "(d) the provisions of this section shall not apply . . . (3) to any transaction between the commonwealth and any of its political subdivisions . . . "

The phrase "political subdivisions" clearly includes a city. Compare G. L. c. 149, § 29 which requires "[o]fficers or agents contracting in behalf of the commonwealth or in behalf of any county, city, district or other political subdivision or other public instrumentality" for the performance of certain work on "public buildings or other public works" to obtain bonds in specified amounts to secure payment by the contractor and subcontractor for labor and materials.

It is my opinion, therefore, that the Department may enter into the contract with the City of Boston under the terms specified without competitive bids.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 25. October 11, 1974

Major General Vahan Vartanian
The Adjutant General
The Commonwealth of Massachusetts
905 Commonwealth Avenue
Boston, Massachusetts 02215

Dear General:

I am answering your letter of June 7, 1974, in which you request my opinion on the matters set forth below, and in which letter you have stated the following facts:

"The office of Major General, Chief of Staff, Massachusetts Air National Guard is presently held by Charles W. Sweeney, Major General, who was appointed to that office on 10 October 1969 by the, then Governor, as Commander in Chief of the 'Armed Forces of the Commonwealth.' Charles W. Sweeney thereafter received his federal recognition on 12 May 1970. He has occupied this office to the present date."

You have asked me to advise (1) whether G.L.c. 33, §26 is applicable to the Massachusetts Air National Guard as well as to the Army National Guard; (2) whether G.L.c. 33, § 26 is specifically applicable to Charles W. Sweeney, Major General, Chief of Staff, Massachusetts Air National Guard; and (3) whether G.L.c. 33, §26 controls the term of office of General Sweeney, as opposed to U.S.C. Title 10, §88852, and thereby limits his term of office to five years from his original date of appointment, by the then Governor as Commander in Chief, on 10 October 1969.

(1) General Laws c. 33, §26 provides, in part, that:

> "The term of office of a major general of the line shall be five years. The term of office of a brigadier general of the line shall be six years. The term of office of a colonel, commanding an organization, except an air medical group or any army medical battalion shall be seven years. The terms of office aforesaid shall commence from the date of appointment. Officers so appointed shall be ineligible for reappointment in the same office . . ."

General Laws c. 33, §10 establishes the Air National Guard and the Army National Guard as components of the "armed forces of the commonwealth." Both §10 and §26 were inserted by St. 1954, c. 590, while §26 was amended by St. 1962, c.226. Clearly, then, both the Air and Army branches of the National Guard were within the cognizance of the legislature at the time that §26 was impliedly reenacted in 1962.

It is a well settled rule of statutory construction that statutes must be construed as they are written, without abandoning reason and common sense. *Brennen* v. *Board of Election Commissioners of the City of Boston*, 310 Mass. 784 (1942). G.L.c. 33, §26, is only exclusive as to branch of service in sentence 3. Otherwise, §26 does not provide a general exclusion of Army or Air National Guard Officers. It has been recognized that there are "line officers of various rank, including major general, within the Army National Guard." 1969-70 Op. Atty. Gen. p. 110,111. The only other tenure statutes in chapter 33 are specifically limited to enumerated officers of the "State Staff," G.L.c. 33, §15 and "Aides-de-Camp" of the Commander in Chief. G.L.c. 33, §14.

For these reasons, then, it is my opinion that G.L.c. 33, §26 is applicable to the Massachusetts Air and Army National Guards.

(2) The answer to your second question depends upon whether Charles W. Sweeney, Major General, Chief of Staff, Massachusetts Air National Guard, is a "major general of the line" as that phrase is used in the first sentence of G.L.c. 33, §26.

The phrase "of the line" or the expression "line officer," has never been defined by the courts or the legislature of our Commonwealth, although it has frequently been employed. See, e.g. G.L.c. 33, §23 ("major general of the line, commanding a division"); St. 1908, c. 604 (93) ("Brigadier general of the line" limited to 5 years of service and barred from reelection); St. 1876, c. 204 (5) ("line officers" shall not serve in commission longer than 5 years); St. 1874, c. 320 (referring to

the election of "officers of the line"); Opinion of the Justices, 132 Mass. 600,601 (1882) (impliedly equating "line officers" as used in St. 1876, c. 204 (5) with the phrase "officers of the militia"); 1969-70 Op. Atty. Gen. 110,111 (acknowledging that the major general, commanding the 26th Infantry Division of the Army National Guard was a "line officer"). I Op. Atty. Gen., 1897, p. 449 (no independent significance attached to use of the phrase "line officer"). However an examination of G.L.c. 33 in its entirety and an analysis of its statutory predecessors, clearly reveals that the legislature imparted a technical meaning, as opposed to any common usage, to the phrase "of the line." *Cf* Opinion of the Justices 313 Mass. 779 (1943). At the time when the phrase "of the line" first appeared in the statutes of our commonwealth, its meaning was well settled. Line officers were considered commanders of combat units of the land and naval forces as opposed to staff officers. 6 Oxford English Dictionary (1961) 380; Websters 3rd New International Dictionary; Dictionary of U.S. Army Terms (Army Reg. 310-25, June 1972); Air Force Dictionary (ed. 1956). Yet the phrase "line officer" is also frequently employed in current regulations of the United States Air Force and the Air National Guard, in the context of combat command and specialty operations. Air Force Regulations [AFR] 35-54 §§23 (b) (1) &24; AFR 36-15 §§2-13 (d) (1) & 3-7(d); Air Naional Guard Regulation [ANGR] 36-02 §§4 (h) & 5(2) & 6(a) (b) (3) & 12(b) (2) & 15 (a) & 16. It is also clear from examining St. 1908, c. 604 (93), St. 1876, c. 204 (5) that G.L.c. 33, §26 was designed by our legislature to insure the succession of command in combat units, such as the 26th Infantry Division. It has been noted that a determination of legislative intent as ascertained from viewing an entire Act, is the best ground for the exposition of a statute. *Cleaveland* v. *Norton* 60 Mass. (6 Cush.) 380 (1850). In this respect, an examination of G.L.c. 33, §23 is enlightening. Section 23 in five places employs the phrase "major general of the line commanding a division;" §23 is clearly referring to the commander of a combat unit (§23(5)); and §23 is the only other section of G.L.c. 33 to employ the phrase "of the line." It should also be noted that prior to December of 1967, the table of organization of the Army National Guard in the Commonwealth provided for only *one* major general who was the commander of the 26th Infantry Division, and who was, thus, clearly a line officer. 1969-70 Op. Atty. Gen. 110,111. However, Charles W. Sweeney, Major General, Chief of Staff, Massachusetts Air National Guard is not a combat division commander. In connection therewith, it must be noted that "statutes do not govern situations not within the reason of their enactment and giving rise to radically diverse circumstances presumably not within the dominating purpose of . . . [their framers]." *Commonwealth v. Welosky*, 276 Mass. 398, 403, cert. den. 284 U.S. 684.

In conclusion, then, it is my opinion that G.L.c. 33, §26 is not applicable to Charles W. Sweeney, major general, Chief of Staff, Massachusetts Air National Guard.

In reply to question three, my answer to question two disposes of the applicability of §26 to Major General Sweeney as to term of office.

Since your question posed the alternative on the basis of applicable federal law, I assume therefore, that U.S.C, Title 10 is controlling.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 26. October 16, 1974

The Honorable Francis W. Sargent
Governor
The Commonwealth of Massachusetts
Executive Department
State House
Boston, Massachusetts 02133

Dear Governor Sargent:

This is in reply to your request for an opinion whether you may appoint, as Medical Examiner in District Eight of Norfolk County (Brookline), a medical doctor who is a resident of Newton Center, in the County of Middlesex, who maintains an office in Brookline, who has staff privileges at four hospitals in Brookline, and who holds an appointive public office in Brookline.

The appointment of medical examiners is controlled by the provisions of G.L.c. 38, § 1, as amended most recently by St. 1973, c. 859, §§ 1, 2. That section provides in part that "[t]he governor, with the advice and consent of the council, shall appoint for terms of seven years able and discreet men, learned in the science of medicine, as medical examiners in and for their respective counties and *as associate medical examiners in and for their respective districts in counties divided into districts,* otherwise in and for their respective counties, in number as follows . . ." The question arises whether the statute establishes a residency requirement for appointment of an associate medical examiner because of the words "in and for their respective districts duties." One of my predecessors ruled that in 1946 the statutory language imported a requirement of residency, and I am in agreement with that conclusion. 1946 Op.Atty. Gen'l. 1113. I therefore answer your question in the negative.

Yours very truly,
ROBERT H. QUINN
Attorney General

Number 27. October 23, 1974

Mr. Edward W. Powers
Director of Civil Service
294 Washington Street
Boston, Massachusetts 02108

Dear Mr. Powers:

You have requested my opinion as to who is in the proper appointing

authority for the position of Woburn City Engineer. You have indicated that a controversy exists as to whether the Mayor or the City Council is the appointing authority for the aforementioned position. I therefore further note that the information you have supplied to me indicates that the Woburn City Council passed an ordinance, dated October 7, 1971, which purports to vest the Woburn Superintendent of Public Works with the authority to appoint the City Engineer.

The Charter for the City of Woburn broadly states, in pertinent part, as follows:

> "The mayor shall have sole power of appointment to all the municipal offices established by or under this act, unless herein otherwise provided." St. 1897, c. 172, §23.

The Charter also established a Board of Public Works and vested the members of said Board with the authority to employ "engineers, superintendents, clerks and such other assistants as they may deem necessary." St. 1897, c. 172, §33. Subsequently, the Charter was amended to abolish the Board of Public Works and to provide that the powers, duties and liabilities conferred on the Board of Public Works were transferred to the City Council with the exception of certain enumerated supervisory duties which were transferred to the Superintendent of Public Works. St. 1897, c. 172, as amended by St. 1914, c. 372, §§ 1, 2.

In *Forbes* v. *Kane*, 316 Mass. 207, 212, the Supreme Judicial Court interpreted the amended Woburn Charter as vesting the City Council rather than the mayor with the authority to appoint the inspector of wires and gas for the City of Woburn. The *Forbes* court examined the enumerated duties delegated to the Superintendent of Public Works and concluded that those duties did not include the supervision of wires. Specifically, the Court stated that "[t]he supervision of wires, as distinguished from poles, was thus given to the council along with the power to employ the assistants enumerated in §33 of the charter." *Id.* at 212. It is unclear from this language whether the *Forbes* court interpreted the Charter amendment as vesting in the City Council the power to appoint all engineers, superintendents, clerks and assistants to position which had previously been filled by appointments by the Board of Public Works or whether the City Council was given power to appoint only to those positions within the Public Works area which were not subject to the supervision of the Superintendent of Public Works, such as the position of Inspector of Wires. In examining the original charter provision, St. 1897, c. 172, §33 and the amendment thereto, St. 1914, c. 372, I observe that all the duties and powers conferred upon the Board of Public Works under the original charter were expressly transferred by the charter amendment of 1914 to the Superintendent of Public Works except for the power to supervise trolley wires and the power to employ engineers, superintendents, etc. Therefore it is evident that since the power to appoint engineers, superintendents, etc., was not enumerated as a power transferred to the Superintendent of Public Works in the Charter Amendment of 1914, that power was thus transferred to the City Coun-

cil. St. 1897, c. 172, §33, as amended by St. 1914, c. 372, §2. Further it is my opinion that the power transferred to the City Council in 1914 encompassed the power to appoint the City Engineer.

In summary, it is my opinion that the Woburn City Charter vests the Woburn City Council with the power to appoint the City Engineer. Any attempt to divest the City Council of that power by ordinance is invalid. See Mass. Const. Art. II, as amended by Art. LXXXIX, §6. See also *Board of Appeals of Hanover* v. *Housing Appeals Committee*, 1973 Mass. Adv. Sh. 491, 506. Further in the absence of a statute, the City Council has no authority to delegate that power to the Superintendent of Public Works or to the Mayor. *Forbes* v. *Kane, supra*. See also *Attorney General* v. *McCabe*, 172 Mass. 417, 420.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 28. October 29, 1974

The Honorable Arnold R. Rosenfeld
Chairman, Criminal History Systems Board
80 Boylston Street
Room 740
Boston, Massachusetts 02116

Dear Chairman Rosenfeld:

You have requested my opinion regarding the following question:

> "Do G.L.c. 6, §§167-178 inclusive, in conjunction with G.L.c. 4, §7 and G.L.c. 66, §10 *as amended by* St. 1973, c. 1050, §§ 1 and 3 respectively, prohibit the Registry of Motor Vehicles from disseminating in any manner criminal offender record information as defined in G.L. c. 6, §167 to parties not certified by the Criminal History Systems Board pursuant to G.L.c. 6, §172?"

General Laws c. 6, §172 prohibits the dissemination of "criminal offender record information," as that information is defined by G.L. c. 6, §167, to parties not certified by the Board pursuant to §172. The prohibition clearly applies to the Registry of Motor Vehicles. General Laws c. 66, §10, requiring disclosure of "public records" to any individual seeking such disclosure, does not affect the prohibition of §172, because the definition of "public records" contained in G.L. c. 4, §7 *as amended by* St. 1973, c. 1050, §1 excludes records "specifically or by necessary implication exempted from disclosure by statute."

To the extent that my opinion to the Registry of August 28, 1970 would indicate that disclosure by the Registry of the kind mentioned above is authorized, that opinion has been superseded by the subsequent enactment of St. 1972, c. 805, §1 and the amendment of G.L. c. 4, §7 by St. 1973, c. 1050, §1.

Accordingly, I answer your question in the affirmative.

Yours very truly,
ROBERT H. QUINN
Attorney General

Number 29. October 29, 1974

The Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts

Dear Secretary Davoren:

You have asked my opinion on the following three questions, concerning proper implementation of G.L. c. 46, § 1 relating to the recording of births:

(1) May the birth of a legitimate child be recorded under the hyphenated combination of the maiden name of the mother and the surname of the father upon request of both parents?

(2) If the answer to the above question is "yes," then in which order should the surnames appear?

(3) Since our present standard certificate of birth asks for the first, middle, maiden and present name of the mother and it is the mother's contention that her legal name is her maiden name since she did not take on her husband's surname upon marriage, may the maiden name of the mother, rather than the surname of her husband, be recorded on this birth record as her present surname without the necessity of her petitioning a probate court for a legal change of name from her married name to her maiden name?

For the reasons which follow, the answer to your first question is "yes." The birth of a legitimate child may be recorded under the hyphenated combination of the maiden name of the mother and the surname of the father upon request of both parents. The answer to this question is largely determined by the prior Opinion of the Attorney General rendered to you on January 24, 1974.

The Opinion held that the birth of a legitimate child to a married woman who had retained her maiden name through legal proceedings could be recorded with the mother's surname as the baby's surname. That Opinion noted that G.L. c. 46 § 1 simply requires that the "names" of the baby be put on the birth record, and does not contain any requirements as to what those "names" should be. The Opinion stated that it was by custom and not by law that a baby is usually given its father's surname and that it was not inconsistent with the law of names for a legitimate child not to bear its father's surname.

The Opinion stated "Massachusetts law does not require parents to hold a common surname and cannot, consequently, be said to have expressed a strong interest in requiring a baby, as a matter of law, to share

its father's surname." In the situation you present the baby would have a surname held in common with its parents insofar as its surname is composed of a combination of the parents' surnames. In the prior Opinion you were advised that a baby could be named with its mother's rather than its father's last name.

It would also be consistent with the common law of names for a baby to be named with the hyphenated surnames of its parents. Massachusetts recognizes a common law right in a person to change his or her name provided the change is not motivated by fraud. *Buyarsky, Petitioner*, 322 Mass. 335, 338 (1948); *Merolevitz, Petitioner*, 320 Mass. 448, 450 (1946); *Mark v. Kahn*, 333 Mass. 517, 520-521 (1956). It is consistent with such a right that parents retain the right to name their child as they choose so long as there is no intent to defraud. The fact that parents wish to name their child with a surname which is a hyphenated combination of the parents' surname certainly does not indicate any intent to defraud.

In summary, under G. L. c. 46, § 1 town clerks must record information concerning births, including the "names" of the child. Neither that statute nor any other statute requires that a baby be named in any particular way. The naming of a baby is a matter for parents, to be exercised in compliance with the law. The common law would allow both parents to name their child with a surname which combines the surname of the two parents. There is no power in a town clerk to refuse to record a birth name which complies with the principles of law set forth in this Opinion and the prior Opinion. However, this Opinion does not determine any questions arising out of a dispute between parents over the name of the child.

For the reasons stated above, the answer to your second question is that the surnames should appear on the birth record in the sequence which the parents establish in naming the child.[1]

The answer to the third question is "yes." A woman does not upon marriage abandon her surname and assume her husband's surname without an express intent to do so. See Opinion of the Attorney General to the Commissioner of the Massachusetts Commission Against Discrimination, September 16, 1974, a copy of which is attached hereto.

Very truly yours,
ROBERT H. QUINN
Attorney General

[1]The Registrar of Vital Statistics and the various City and Town Clerks may wish to utilize their powers by cross-indexing such births under both surnames, in the interest of avoiding confusion and ensuring a minimum of problems in searching for birth records.

Number 30. November 6, 1974

Honorable Gregory R. Anrig
Commissioner of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Commissioner Anrig:

I have your letter of September 23 in which you have requested my opinion as to whether the Board of Education may lawfully refuse to fund a certain request of the City of Newton for proposed site work at Newton North High.

Certain facts are pertinent:

1. Prior to May 27, 1969, the City of Newton submitted preliminary plans to the Board of Education in connection with their application for state assistance for a proposed construction project at Newton North High School.

2. These preliminary plans did not include a site development plan. The City has never submitted a site development plan despite numerous requests of the Board that it do so.

3. On May 27, 1969, the Board of Education approved a school plan project proposal for the Newton North High School on the basis of the preliminary plans.

4. The City of Newton has recently requested funding approval by the Board of Education for proposed site work at Newton North High.

These facts must be considered in light of the express language of the controlling statute, St. 1948, c. 645, as amended. This law describes the Commonwealth's school building assistance program and the duties and responsibilities of the various parties.

I assume that the approval of the City's proposed project entered by the Board on May 27, 1969, is the same approval contemplated by section 8 of c. 645, as amended. Once notice of this section 8 approval has been issued by the Board, there is no express provision of the statute which would allow the subsequent recision of that approval. The Legislature has required that the Board adhere to a strict procedure in acting upon applications for school building assistance. See St. 1948, c. 645, as amended, § 8 (second paragraph). A Board refusal to honor a request for funds for an *approved* project would so contradict the express direction of the Legislature that the Board take prompt action upon all applications for assistance, that it would be unlawful. Furthermore, approval by the Board is a significant event; when a locality receives notice of approval, substantial legal consequences immediately ensue: the city then possesses the authority to borrow an amount equal to the estimated grant. See St. 1948, c. 645, as amended, § 8 (fourth paragraph). Therefore, I must answer your question in the negative.

This opinion should not be construed to in any way limit the Board's power to insist that whatever plans or information it deems necessary accompany a city's application for school building assistance. See St.

1948, c. 645, as amended, § 7 (last sentence). Nor do I imply that the Board's power to review local proposals to determine whether they are in "the best interests" of the community is in any way restricted. See St. 1948, c. 645, as amended, § 8 (first paragraph). See also, the suggestions in Lawrence Kotin, "Equal Educational Opportunity: The Emerging Role of the State Board of Education," 50 BU Law Review 211, especially part 3, "Powers in Directing Construction," at pp. 221-222.

I also reaffirm my position that the Board possesses significant incidental powers in addition to those expressly conferred upon it by this or any other statute. Cf. *School Committee of New Bedford* v. *Commissioner of Education*, 349 Mass. 410, 414. ("The enumeration and grant of the Commissioner's powers in G. L. c. 69, by implication give to him a substantial range of incidental authority to do in an ordinary and reasonable manner those things required for the efficient exercise of the powers and performance of the duties." (citations omitted)). See generally, Op. Atty. Gen., 74/75-1, July 2, 1974.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 31. November 6, 1974

Honorable John F. X. Davoren
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Mr. Secretary:

You have requested my opinion with respect to four questions concerning your powers and duties under G. L. c. 207, §§ 38 and 39, which govern persons authorized to solemnize marriages within the Commonwealth. As background for your questions, you indicate that an influx of new religious groups into the Commonwealth and attendant requests for permission to perform marriages have posed problems for you whether designated persons affiliated with such religious groups or churches may properly perform marriages. Accordingly, you pose the following questions:

> "1. What is considered a church or other religious organization within the meaning of the second paragraph of § 38?
>
> "2. What is the exact role of the state secretary in the statutory scheme of § 38? Is he merely to act as the recipient of information from any groups wanting to deposit information about themselves and their representatives? Or is he to exercise some judgment and discretion as to who may solemnize marriages in Massachusetts and who may not?
>
> "3. If the state secretary has the power to determine who may solemnize marriages, by what standards is that power to be exercised? Are published regulations either permitted or

required by the statute? If so, who is to issue them and need anyone else approve them?

"4. What is the effect of the exclusion from § 39 of the general clause of § 38? Need a non-resident fall under one of the enumerated categories to qualify, or can a non-resident from a minor sect or denomination ever qualify? Or are non-residents from minor sects included in § 38?"

I will treat your questions *seriatim*.

I. With respect to your first question, the Legislature has not provided definitions of the terms "church" and "religious organization" as those terms are used in G. L. c. 207, § 38. In the absence of a specific statutory definition, I decline to provide one myself by way of an opinion for several reasons. It is settled that the Attorney General is not required to express an opinion on any question unless sufficient facts are stated so as to enable him to come to a definite conclusion on the facts stated. 3 Op. Atty. Gen'l 425. Your question does not state facts with respect to a particular group or organization and ask whether that particular organization comes within the meaning of G. L. c. 207, § 38. Rather, it asks in the abstract for a definition of a religious organization. Furthermore, your request intimately involves constitutional considerations, and, as a rule, "the Attorney General does not advise officers . . . upon constitutional questions unless such advice is clearly required to enable such officers . . . to discharge the duties required of them by law." 6 Op. Atty. Gen'l 648, 649. As I will indicate in responding to the other questions propounded by you, I do not believe advice with respect to the constitutional question of "what is considered a church or other religious organization" is "clearly required" to enable you to discharge the duties required of you by § 38. Accordingly, I beg to be excused from answering your first question.

II. Because of the constitutional implications in the area of freedom of religion occasioned by the question of which religious organizations may solemnize marriages, it is my opinion that, absent any express and unequivocal grant of authority to the contrary, you, as Secretary, are not permitted to exercise any substantive judgment or discretion as to who may solemnize marriages in Massachusetts. I can find no legislative grant to that effect. Moreover, the nature of the functions to be performed by the Secretary are administrative or ministerial rather than substantive. Cf. 1968 Op. Atty. Gen'l 51. He may exercise only that kind and degree of discretion and judgment which is expressly delegated to him by statute. General Laws, c. 207, § 38 provides, in pertinent part:

"[A marriage] may be solemnized according to the usage of *any other* church or religious organization which shall have complied with the provisions of the second paragraph of this section." (Emphasis supplied.)

The "second paragraph" referred to above provides:

"Churches and other religious organizations shall file in the office of the state secretary information relating to persons recognized or licensed as aforesaid, and relating to the usages

of such organizations, in such form and at such times as the secretary may require."

Under § 38, the Secretary may properly require the names of those individuals who are recognized by their respective religious organizations as authorized to solemnize marriages, and he may also require some information describing the method or ceremony of solemnization utilized by the particular religious organization. Beyond such information, under § 38, the only other requirements the Secretary may establish for the solemnization of marrages by religious organizations located in Massachusetts are requirements which are purely ministerial or administrative such as the type of form to be used in the recording of vital information and the time by which or the frequency with which such forms must be filed or updated.

As a result of the statutory language involved and the reasons cited above, I conclude that the Legislature did not, under § 38, intend that the Secretary exercise any discretion or judgment in any substantive sense as to who may solemnize marriages.

III. With respect to your third question, there is no need to respond to it since I have already stated that the Secretary does not have the power under § 38 to determine who may solemnize marriages.

IV. Your fourth question essentially asks which non-residents may solemnize marriages within the Commonwealth. Both sections 38 and 39 deal with non-residents in a somewhat overlapping fashion. Section 38 permits non-resident ministers of the gospel of established churches and non-resident Ethical Culture Leaders to solemnize marriages, and section 39, in addition to specifying those two categories of persons, adds non-resident rabbis and non-resident representatives of a Spiritual Assembly of the Baha'is.

Although the concluding clause of the first paragraph of section 38 (which you refer to as the "general clause of section 38") does permit the solemnization of marriages "according to the usage of any other church or religious organization . . . ," that clause, in my opinion, relates primarily to usage and, in any event, only confers rights to solemnize marriages on residents who are associated with "any other church or religious organization . . ." The failure of the Legislature to mention non-residents in the last clause of the first paragraph of section 38 requires me to conclude that non-residents may solemnize marriages only if they come within one of the enumerated categories of persons in sections 38 or 39.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 32. November 20, 1974

Honorable Lewis S. W. Crampton
Commissioner of Community Affairs
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Crampton:

By letter dated this day, you have requested an opinion whether unexpended funds now held by the County Treasurer of the County of Dukes County, for and on the account of the Planning and Economic Development Commission for the County of Dukes County must be turned over to the Martha's Vineyard Commission, the latter organized under the provisions of St. 1974, c. 637. You state in your opinion request that the County Treasurer now holds approximately nineteen thousand dollars of state funds and fifty-eight hundred dollars of grants from the United States Department of Housing and Urban Development, and the Treasurer is apparently uncertain whether such funds may properly be turned over to the new Commission.

The funds presently held by the County Treasurer are in the nature of "public" contributions, which the Planning and Economic Development Commission was authorized to accept by virtue of the provisions of St. 1966, c. 690, § 3. Such funds are clearly within the classification of "monies heretofore received from any source by the Dukes County Planning and Economic Development Commission for the performance of its duties and remaining unexpended on the date of the [expiration of the old Commission]." St. 1974, c. 637, § 19.

Accordingly, it is my opinion that the funds which you have described which are presently held by the County Treasurer of the County of Dukes County should be turned over to the new Martha's Vineyard Commission on November 21, 1974, the date on which the latter is to organize.

Yours very truly,
ROBERT H. QUINN
Attorney General

Number 33. December 2, 1974

Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have requested my opinion as to the scope of your duties and responsibilities under St. 1972, c. 802 and subsequent legislation which amended various sections of the General Laws in establishing the State Building Code Commission. You have referred specifically to G. L. c.

22, § 4A, as amended by St. 1974, c. 541, § 1, and this opinion is addressed only to the specific questions which you have raised with regard to the proper interpretation of that statute. Accordingly, my opinion is limited to consideration of the following three questions:

(1) What actual responsibility does the Commissioner of Public Safety have over local building inspectors?

(2) Would the Commissioner be held responsible for a lack of proper inspections by local building inspectors?

(3) What, if any, authority does the Commissioner have over local building inspectors?

With regard to question one (1), G. L. c. 143, § 3, as amended by St. 1973, c. 1152, § 1, clearly contemplates that primary responsibility for administering and enforcing the State Building Code rests with local authorities. However, the Commissioner of Public Safety is responsible, pursuant to G. L. c. 22, § 4A, as amended by St. 1974, c. 541, § 1, for making periodic reviews of all local inspection practices, for providing technical assistance and advice to local inspectors in implementing the State Building Code, and for supervising the enforcement of the Code through the Division of Inspection. The Commissioner's authority is further statutorily defined by G. L. c. 22, § 4A, as amended by St. 1974, c. 541, § 1, the statute to which you have made specific reference, as follows:

> "The commissioner may review, on his own initiative or on the application of any inspector, any action or refusal or failure of action by any local inspector the result of which does not comply with the uniform implementation of the state building code; and may reverse, modify or annul, in whole or in part, such action . . . "

It is a fundamental principle of statutory construction that two statutory provisions, if reasonably possible, must be read together so as to make the section of the statute containing them a consistent and harmonious whole. *Real Properties, Inc.* v. *Board of Appeal,* 311 Mass. 430, 436; *DeBlois* v. *Commissioner of Corporations and Taxation,* 276 Mass. 437, 438.

Consistent with this principle, it is my opinion that G. L. c. 22, § 4A, as amended by St. 1974, c. 541, § 1 does not provide the Commissioner of Public Safety with any direct responsibility for the conduct of local building inspections by local inspectors. Responsibility for local inspections in the first instance lies with local authorities. G. L. c. 143, § 3, as amended by St. 1973, c. 1152, § 1. However, it is my opinion that G. L. c. 22, § 4A, as amended by St. 1974, c. 541, § 1, does permit the Commissioner of Public Safety, in the exercise of his supervisory authority, to independently override any action or refusal to act on the part of local authorities and to independently enforce the State Building Code through use of state inspectors whenever he deems it necessary to ensure implementation of the Code. See also, G. L. c. 143, § 3A, as amended by St. 1974, c. 541, § 12.

With regard to question two (2), it would be inappropriate for me to speculate as to the ultimate legal liability, if any, of the Commissioner for the failure of local inspectors to conduct proper inspections. Accordingly, I must decline to render my opinion at this time with respect to question two (2).

With respect to question three (3), it is my opinion that the Commissioner of Public Safety has no direct authority over local inspectors. General Laws, c. 143, § 3, as amended by St. 1973, c. 1152, § 1, provides that local inspectors shall be employed by the various cities and towns within the Commonwealth and that the local building commissioner or inspector of buildings who shall be appointed by the chief executive officer of each city or town, "shall report directly and be solely responsible to the person or public body that appointed him." In the face of this clear statutory language, I must conclude that local inspectors are not subject to the direct authority of the Commissioner, although, as noted, *supra*, decisions of local authorities regarding implementation and enforcement of the State Building Code may be independently overridden by the Commissioner of Public Safety pursuant to G. L. c. 22, § 4A, as amended by St. 1974, c. 541, § 1.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 34. December 2, 1974

Honorable Thaddeus Buczko
State Auditor
State House
Boston, Massachusetts 02133

Dear Auditor Buczko:

You have requested my advice as to whether G. L. c. 150E, the newly enacted Public Employee Bargaining Law, applies to the employees of the Department of the State Auditor. I further understand that if my answer to your first question is in the affirmative, then you request my opinion as to whether the Commissioner of Administration has the right to represent himself as the "Employer" in questions relating to the employees of the Department of the State Auditor.

In order to respond to your first question, it is necessary that I examine the statutory definition of employee, as that term is used in Mass. G. L. c. 150E. The definition of "employee," for purposes of the Collective Bargaining Law, is contained in G. L. c. 150E, § 1 which states, in pertinent part, as follows:

> " 'Employee' or 'public employee,' any person employed by a public employer except elected officials, appointed officials, members of any board or commission, representatives of any public employer, including the heads, directors and

> executive and administrative officers of departments and agencies of any public employer, and other managerial employees or confidential employees, and members of the militia or national guard and employees of the commission . . . "

My predecessor has interpreted the statutory definition of "employee" which was in force prior to the adoption of Mass. G. L. c. 150E, as a broad and comprehensive definition which indicated a legislative intention to include within its scope all employees of the Commonwealth except those specifically excluded. 1968-69 Op. Atty. Gen. pp. 76, 78. The statutory definition of employee as set forth in Mass. G. L. c. 150E, § 1 by its own terms applies to "any person employed by a public employer." This statutory language indicates an even clearer legislative intent than its predecessor to include within its scope all employees of the Commonwealth except those employees who are specifically exempted or excluded. Further, to interpret the statute as excluding significant numbers of state employees would completely frustrate the legislative intent and such a construction should be avoided. See 1969 Op. Atty. Gen. pp. 86, 88. See also *Board of Assessors of Newton* v. *Pickwick, Ltd., Inc.*, 351 Mass. 621, 625.

I recognize that G. L. c. 11, § 6 provides that the "state auditor may appoint and remove such employees as the work of the department may require." However, it is my opinion that the broad definitional language of G. L. c. 150E, § 1 can be interpreted in a manner consistent with the powers of the State Auditor as set forth in G. L. c. 11, §§ 5, 6, to allow for the application of the new Collective Bargaining Law to at least some of the employees in the Department of the State Auditor. Obviously, many of the employees within the Department will be exempt from G. L. c. 150E because their duties and responsibilities place them within the specific exclusions for appointed officials, managerial employees, confidential employees, etc. However, the determination as to which employees may be properly excluded from the application of G. L. c. 150E is committed in the first instance to the Commonwealth's Labor Relations Commission. See G. L. c. 150E, § 3. Accordingly, my answer to your first question is that G. L. c. 150E can be applied to an undetermined number of employees within the Department of State Auditor.

In regard to your second question, G. L. c. 150E, § 1 also defines the term "employer" as that term is used throughout G. L. c. 150E. As far as employees of the Commonwealth are concerned, the "employer" is the "commonwealth, acting through the commissioner of administration." G. L. c. 150E, § 1. Thus, the Commissioner of Administration is the only person who is authorized to represent himself as the employer when bargaining with those employees of the Commonwealth who are covered by G. L. c. 150E.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 35. December 2, 1974

Honorable Louis J. Restighini, Director
Division of Registration
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Restighini:

You have requested my opinion on the following question:

> "Must a person be licensed as a master plumber or journeyman plumber in order to give, or to file, a bid for a plumbing installation?"

Your question must be considered in light of the statutory language in G. L. c. 142, § 3, which states in pertinent part:

> "No person shall engage in the business of a master plumber or work as a journeyman or as an apprentice, nor solicit, by sign, listing or any other form of advertisement, work regulated or controlled by this chapter or by any ordinance, bylaw, rule or regulation made hereunder, unless he is lawfully registered, or has been licensed by the examiners as provided in this chapter."

In summary, the answer to your question is a qualified "no."

The only limitation on such an unlicensed person is that he may not perform the work of a journeyman, *Power* v. *Board of Examination of Plumbers*, 281 Mass. 1 (1932), or of a master plumber, *Attorney General* v. *Union Plumbing Co.*, 301 Mass. 86 (1938). This restriction means that one not licensed as a journeyman may not advertise, bid, and then perform the actual physical task, and one not registered as a master plumber may not do the actual labor or hire a journeyman plumber to work for him in performing the task. This limitation, however, does not mean that a non-licensed person may not bid on a plumbing installation. One of my predecessors stated that, "the aforementioned case [*Attorney General* v. *Union Plumbing Co.*, supra] recognizes, however, that a corporation may enter into a contract for the performance of such plumbing work, provided that the corporation contracts with a registered or licensed plumber to perform the work and does not itself enter into the business of a master plumber." 1960 Op. Atty. Gen., p. 40, 41.

A master plumber is defined as a "plumber having a regular place of business and who, by himself or journeyman plumbers in his employ, performs plumbing work." G. L. c. 142, § 1.

The person performing the actual installation, whether he is a journeyman or master plumber, must be an independent contractor and not an employee of the bidder. If he is an employee of the bidder, the employer is considered to be in "the business of a master plumber," *Attorney General* v. *Union Plumbing*, *supra*, at 89, and therefore in violation of G. L. c. 142, § 3.

The defendant corporation in the *Union Plumbing* case, *supra*, was itself taking contracts for plumbing work, performing plumbing work by journeymen in its employ and committing the supervision of the work to a master plumber in its employ:

> "[T]he defendant does not limit itself to ownership of the business, but through persons wholly under its immediate control actually performs the work of plumbing as a master plumber would perform it." 301 Mass. at 89.

It was therefore in violation of G. L. c. 142, § 3.

Subject to the limitations discussed, an unlicensed person or business may bid for a plumbing installation job.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 36. December 2, 1974

Honorabte Charles J. Dinezio
Executive Director
State Building Code Commission
141 Milk Street
Boston, Massachusetts 02109

Dear Mr. Dinezio:

You have requested my opinion on the following question:

> May the State Building Code Commission amend the State Building Code without holding a public hearing in accordance with G. L. c. 30A, § 2 or § 3?

The Commission's power to amend the Code is derived from G. L. c. 23B, § 20, *as amended*, by St. 1974, c. 541, § 4. By the terms of G. L. c. 23B, § 17, violation of the Code, including such amendments, is an offense punishable by fine or imprisonment, or both. General Laws, c. 30A, § 2 requires notice and a public hearing before making an amendment to any regulation so punishable. Accordingly, § 2 would require a public hearing before the Commission could amend the Code. As G. L. c. 30A, § 3, by its own terms, applies only to amendments not governed by § 2, the Commission need not follow the procedure outlined in § 3.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 37. December 4, 1974

Honorable W. Norman Gleason, Director
Office of Campaign and Political Finance
8 Beacon Street
Boston, Massachusetts 02108

Dear Mr. Gleason:

General Laws, c. 55, the Commonwealth's "Election Campaign

Law," was amended extensively during the legislative session of the year 1973 by the enactment of St. 1973, c. 1173, which became effective on January 1, 1974. Among the various provisions enacted by c. 1173 is a new section, namely, § 2A of G. L. c. 55. Section 2A provides for the creation of the position of Director of Campaign and Political Finance and authorization for staff.

Chapter 1173 of the Acts of 1973 also amended various sections of G. L. c. 55 to place the custody of nearly all records concerning campaign expenditure reporting on the part of all candidates and political committees in the hands of the Director, for the most part removing the filing from the Office of the State Secretary.

At the state election on November 5, 1974, Question No. 5 on the ballot resulted from the filing in 1973 of an initiative petition for a law effecting amendments of the above-mentioned G. L. c. 55. The initiative petition (House Document 5300 of 1974), filed before the enactment of St. 1973, c. 1173 and therefore making no reference to the changes in G. L. c. 55 brought about by such enactment, adds to c. 55, as it existed in August, 1973.

As a result of the affirmative vote on the initiative petition, several questions have arisen concerning the operation of the Office of the Director of Campaign and Political Finance, which has been funded by the General Court by St. 1974, c. 313, c. 423, c. 431, Item No. 0531-0100 until the end of the present fiscal year. Specifically, you have requested my opinion on the following questions:

(1) Does the adoption by the voters on November 5, 1974, of the initiative measure creating a Corrupt Practices Commission impliedly repeal the provisions of G. L. c. 55, § 2A, which created the Office of the Director of Campaign and Political Finance?

(2) Does such adoption of the initiative measure restore custody of the records referred to in St. 1973, c. 1173 to the Office of the Secretary of the Commonwealth?

(3) Does the appropriation of funds by the General Court for the implementation of the Office of the Director of Campaign and Political Finance cease to be effective as of the date upon which the provisions of the initiative measure become operative?

The initiative measure does not expressly provide for the elimination of the Office of the Director of Campaign and Political Finance, for the removal of records from the custody of the Director, or for the cessation of funding for the Office. The answer to your questions therefore turns on the application of the principle of implied repeal. The Supreme Judicial Court, in *Doherty* v. *Commissioner of Administration*, 349 Mass. 687, at 690 (1965), has described that principle as follows:

> "Although the principle is one which the court, in deference to the Legislature, does not regard with favor and applies with caution, it has its proper place in judicial construc-

> tion of legislative enactments. It derives from the basic concept that it is the duty of the court to ascertain the legislative intent and to effectuate it. The test of the applicability of the principle of implied repeal is whether the prior statute is so repugnant to and inconsistent with the later enactment covering the subject matter that both cannot stand. *Commonwealth* v. *Bloomberg*, 302 Mass. 349, 352. Repugnancy and inconsistency may exist when the Legislature enacts a law covering a particular field but leaves conflicting prior prescriptions unrepealed. *Homer* v. *Fall River*, 326 Mass. 673, 676, and cases cited. *Bond Liquor Store, Inc.* v. *Alcoholic Beverages Control Commn.* 336 Mass. 70, 74. Where such a conflict does appear it is the court's duty to give effect to the Legislature's intention in such a way that the later legislative action may not be futile. The earlier enactment must give way. *Sullivan* v. *Worcester*, 346 Mass. 570, 573, and cases cited."

Wherever possible statutes should be construed to be harmonious, *Walsh* v. *Commissioners of Civil Service*, 300 Mass. 244, 246 (1938).

After analyzing in detail every section of the initiative measure in conjunction with the present sections of G. L. c. 55 as well as the sections of c. 55 as they existed in August of 1973, I have concluded that there is no repugnancy in the sections of relevance to your request. It is true that the measure will create a certain amount of overlap between the duties of the Director and those of the Corrupt Practices Commission as well as the Secretary of State. However, mere overlap of duties does not constitute repugnancy justifying a conclusion of implied repeal, Op. Atty. Gen. 1954/55, p. 84.

In fact, were the initiative petition be seen to have repealed the Director's position, then the measure drafted and voted upon by the people to assure integrity in campaign financing and expenditures would have the practical effect of eliminating altogether any sanctions regarding campaigns of 1974. This would be an absurd conclusion to draw. Accordingly, I answer your first question in the negative. The position of Director, with duties attached thereto, persists, at least as to matters occurring before the effective date of the initiative petition. What power the Director has as to campaign acts subsequent to the effective date is altogether another question and one much more difficult to resolve. It is a question which would be better resolved by the Legislature. Since the Legislature will convene well before any substantial campaign activity is likely to occur, it is my hope that this branch will address itself to any inefficiency, confusion and overlapping which occurs as a result of passage of both c. 1173 by the Legislature in 1973 and referendum petition number five by the voters on November 5, 1974.

I reply to your second question by saying that no class of records currently in the custody of the Director is removed therefrom, although some classes may be placed in the custody of the State Secretary as well as the Director and other new classes of records may be placed in the

exclusive custody of the Secretary. I answer your third question in the negative.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 38. December 6, 1974

Honorable Freyda Koplow
Commissioner of Banks
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Koplow:

You have asked my opinion as to whether a trust company chartered under the laws of Massachusetts may accept deposits of cash and checks at a table set up for that purpose on a university campus. The question must be considered in terms of the powers conferred upon trust companies by statute, (G. L. c. 172); certain sections of G. L. c. 167, (the chapter which includes laws relating to all banking operations), are also instructive.

The Legislature defined the scope of the powers attaching to trust companies in its revision of the trust company law. St. 1961, c. 493. The controlling provision now appears as G. L. c. 172, § 4:

> "A trust company shall have all the powers and privileges specified in this chapter and whatever further incidental powers may fairly be implied from those expressly conferred and such as are reasonably necessary to enable it to exercise fully those powers according to common commercial banking customs and usages."

A trust company shall therefore have (1) express powers, (2) incidental powers as they may be fairly implied from those express powers, and (3) such powers as may be reasonably necessary to exercise its express and implied powers according to common commercial banking practice. The trust company's activity of receiving deposits on a university campus is only lawful if authorized by reference to one of these enumerated categories of powers.

No express provision of the General Laws gives a trust company the power to solicit and accept deposits in the manner which you have described. The Legislature has determined that:

> "Every trust company, in its banking department, shall, . . . have the following powers:
>
> 1. To receive demand, time, and savings deposits upon such terms and conditions as may be agreed upon between the depositors and such corporation . . . " G. L. c. 172, § 48.

There is nothing about the nature of this power to receive deposits which makes its exercise at a location apart from a trust company's ap-

proved offices a necessary incident to it. Compare *Chicopee Co-op. Bank* v. *Board of Bank Incorporation*, 347 Mass. 744, 752-753 (1964) with *First National Bank* v. *Missouri*, 263 U.S. 640, 659 (1923).

General Laws, c. 172, § 11(a), as amended by St. 1973, c. 1149, § 18, authorizes trust companies to operate branch offices if approved by the Board of Bank Incorporation and subject to certain limitations. This section does not confer a right upon a trust company to exercise its banking functions wherever it chooses, rather, it sets forth the circumstances in which the Board of Bank Incorporation *might* authorize a trust company to operate a branch office. The statute confers considerable power on the Board, and no power on a trust company, to determine whether the trust company shall be permitted to operate a branch office. Cf. *First National Bank of Cape Cod* v. *Board of Bank Incorporation*, (1972) Mass. Adv. Sh. 537.

The whole system of statutory law which regulates the banking industry begins with the proposition that the honest and efficient management of banks is so vital to the public interest that their operation is made subject to the close and careful supervision of the Commissioner of Banks. See, e.g., G. L. c. 167, §§ 1-10; G. L. c. 168, §§ 21-33; G. L. c. 172, §§ 26, 48-68. The unauthorized acceptance of deposits at temporary quarters on a unversity campus is a departure from that policy of public oversight of the banking business and therefore inconsistent with the statutory scheme. "Statutes are to be interpreted, not alone according to their simple, literal, or strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, prior legislation, contemporary customs and conditions and the system of positive law of which they are a part . . . " *Commonwealth* v. *Welosky*, 276 Mass. 398, 401 (1931).

To answer your question: I find no power which might be fairly implied or necessarily incidental to a power conferred on a trust company by the statute, (G. L. c. 172), which would authorize a trust company to accept deposits on a university campus without your approval. It is therefore my opinion that the trust company has acted unlawfully and exceeded the powers conferred upon it by the banking statutes of the Commonwealth. I express no opinion as to whether or not you might authorize this kind of banking activity by a Massachusetts trust company. But see G. L. c. 167, § 60.

I should also note that in 1922, Attorney General Allen issued an opinion to the Commissioner of Banks on a similar question concerning the power of a trust company to institute a savings system at neighboring schools. 6 Op. Atty. Gen. (1922), p. 657. That opinion proceeded from the premise that since the law required that a savings bank carry on its usual business at its banking house only, with certain notable exceptions, (G. L. c. 168, § 25, now see G. L. c. 168, §§ 6, 24), and since the law regulating trust companies lacked a similar restriction then a trust company must be free to accept deposits at locations apart from its main office. Attorney General Allen's opinion was written long before the reorganization of the trust company law, (St. 1961, c. 493), and the addi-

tion of G. L. c. 172, § 4, on which I have principally relied. I therefore find it not controlling.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 39. December 11, 1974

Honorable Robert Q. Crane
Treasurer and Receiver General
Chairman, State Board of Retirement
73 Tremont Street
Boston, Massachusetts 02108

Dear Treasurer Crane:

You have requested my opinion as to the proper interpretation of G. L. c. 32, § 10(2) (b). Specifically, you seek advice in determining whether the statutory language of G. L. c. 32, § 10(2) (b), which refers to "members . . . who . . . fail of reappointment," pertains only to individuals appointed by the Governor or to any individual failing of reappointment.

General Laws, c. 32, § 10, on its face, evidences no legislative intent to restrict its application only to individuals who fail of reappointment by the Governor. Further, G. L. c. 32, § 1 defines the term "member" as, *inter alia,* "any employee included in the state employees' retirement system." Most importantly, the Supreme Judicial Court has clearly interpreted G. L. c. 32, § 10 to apply to persons who fail of reappointment by constitutional officers other than the Governor. *Howard* v. *State Board of Retirement,* 325 Mass. 211, 213. In *Howard,* the Court stated that reappointment to the position of First Deputy Secretary of the Commonwealth is made by the Secretary and that a person holding such a position who is not reappointed "comes within the category of those who fail of reappointment for whom retirement allowances are provided by c. 32, § 10 . . ." *Id. at 213.*

In light of the clear statutory language of G. L. c. 32, § 10 (2) (b) as well as the Supreme Judicial Court's interpretation of that language in *Howard* v. *State Board of Retirement, supra,* it is my opinion that G. L. c. 32, § 10 (2) (b) applies to all members of the state employees' retirement system who fail of reappointment and not merely to individuals failing of reappointment by the Governor.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 40. December 11, 1974

William J. White, Executive Director
Massachusetts Housing Finance Agency
Old City Hall
45 School Street
Boston, Massachusetts 02108

Dear Mr. White:

You have asked my opinion whether under the provisions of G.L.c. 23A App. you can continue to commit and close on projects on the assumption that not only those eligible for local city or town public housing but also those eligible for the federal government's 236 interest subsidy program will receive the benefit of MHFA's interest subsidy program.

For the following reasons, my answer to your question is in the affirmative.

Prior to 1973, the definition of low income persons contained in G.L.c. 23A App., §1-1 was:

> ". . . those persons and families whose annual income is less than the amount necessary to enable them to obtain and maintain decent, safe, sanitary housing without the expenditure of over twenty-five percent of such income for basic shelter rent plus the additional cost, if any, of heat and hot water."

As you correctly indicate, this definition was broad enough to include, in most instances, those eligible for FHA's 236 interest subsidy program.

In 1973, the Legislature amended this definition by providing that:

> " 'Low income persons or families' shall mean those whose annual income is equal to or less than the maximum amount which would make them eligible for units owned or leased by the housing authority in the city or town in which the project is located or, in the event that there is no housing authority, that amount which is established as the maximum for eligibility for low-rent units by the Department of Community Affairs." St. 1973, c.1215, §15.

It is important to note, however, that the preamble to this amendment states:

> "As used in this act the following words and terms shall have the following meaning *unless a contrary intent is clearly indicated.*" (Emphasis supplied)

A contrary intent is clearly indicated in the provisions of G.L.c.23A App., §1-13A, the second sentence of which commences:

> "Such program [interest subsidy] shall, *pursuant to regulations adopted by the MHFA*, provide, on behalf of the low income persons and families living in projects under this act . . ." (Emphasis supplied)

The Legislature, thus provided that MHFA, utilizing its expertise in the area, would establish the terms of its own interest subsidy program. I am aware that MHFA has done so by regulation and that FHA 236 eligible tenants as well as public housing eligible tenants come within the ambit of the definition of low income persons and families provided in Section 13A 2(d) of these regulations. It is well understood that interpretation by the agency charged with responsibility of an administrative statute is entitled to great weight, *Pangburn* v. *C.A.B.*, 311 F.2d 349; *Op. Atty. Gen.*, Oct. 10, 1966, p. 95.

I am also aware that, as you indicate, the structure of MHFA's interest subsidy program was modeled upon that of FHA's 236 program. It would be an absurd and unreasonable result if those eligible for the very program upon which the Legislature modeled G.L.c. 23A App., §1-13A were to be declared ineligible to receive the benefit of its interest subsidy. Such a result should not be attributed to the Legislature. *McCarthy* v. *Woburn Housing Authority*, 341 Mass. 539; *Berube* v. *Selectmen of Edgartown*, 336 Mass. 634.

Accordingly, for the reasons herein outlined, I am of the opinion that the Legislature did not intend to prevent MHFA from continuing, through its interest subsidy program, to aid those of the Commonwealth's needy who meet FHA's 236 eligibility criteria.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 41. December 26, 1974

Mr. Arthur H. MacKinnon
Comptroller of the Commonwealth
Executive Office for Administration and Finance
State House
Boston, Massachusetts 02133

Dear Comptroller MacKinnon:

You have requested my opinion as to the scope of St. 1974, c. 554 which concerns authorizing the Department of Public Works and the Metropolitan District Commission to make price adjustments for certain increases in the cost of liquid asphalt in construction contracts. Specifically, you have sought my opinion as to the following question:

> "Is this legislation [St. 1974, c. 554] retroactive and retrospective in nature to the extent that it would permit adjustments in the unit prices for liquid asphalt as referred to above for the period beginning December 31, 1973, which date is referred to in the act, and July 18, 1974, the effective date of the act?"

The act to which you refer, St. 1974, c. 554, provides, *inter alia*, as follows:

> "Notwithstanding the provisions of any law to the contrary, the department of public works and the metropolitan district commission, . . . may adjust unit prices for liquid asphalt used in bituminous concrete in construction contracts awarded on or before December thirty-first, nineteen hundred and seventy-three; provided, that the cost f.o.b. the supplier has increased more than twenty-five per cent between the date the bids were publicly opened and read and the date the liquid asphalt was purchased, and that the increase in cost of said asphalt was the result of the energy crisis, so-called."

I understand your opinion request as concerning itself with purchases of liquid asphalt made by contractors between the dates of December 31, 1973 and July 18, 1974. The language to which you refer on its face appears to apply to all contracts awarded prior to December 31, 1973 and to all purchases of liquid asphalt made subsequent to that date. St. 1974, c. 554 was obviously enacted with the intent of making equitable adjustments in public contracts to reflect increases in the price of liquid asphalt as a result of the energy crisis. Accordingly, it is my opinion that St. 1974, c. 554 allows price adjustments for all purchases of liquid asphalt which were made subsequent to December 31, 1973 pursuant to contracts awarded prior to that date.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 42. December 30, 1974

Honorable Robert Q. Crane
Treasurer and Receiver General
Chairman, State Lottery Commission
One Gateway Center
Newton, Massachusetts 02158

Dear Treasurer Crane:

You have provided me with the following facts: An employee of the Massachusetts State Lottery Commission, now serving in a position of job group thirty-two, step seven, is, at your request and direction, to assume a position in job group thirty. The employee has been in his present job group for nearly three years. Prior to that time, he had served approximately three years as Third Deputy Treasurer, a classified position. Before that, he had served for two years as the Administration Assistant to the Treasurer, also a classified position. At all times he has served in positions falling within the Office of the State Treasurer.

On the basis of the above facts, you have requested my opinion whether, in determining in which step the subject employee should be placed in his new job group, he should be credited for his total prior service (eight years), rather than only such of his service as was rendered in the higher job group.

General Laws, c. 30, § 46(8) provides:

> "An employee who is demoted to a position in a lower job group shall receive the salary to which his period of service would entitle him if his service had been rendered in such position in the lower job group, but not less than the employee would have been entitled to had his service been continuously in such position in the lower job group."

It is my view that § 46(8) clearly commands that the subject employee be credited for his total prior service.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 43. January 8, 1975

Honorable Gregory R. Anrig
Commissioner of Education
Teachers' Retirement Board
182 Tremont Street
Boston, Massachusetts 02111

Dear Dr. Anrig:

You have advised me of the following Resolution of the Teachers' Retirement Board passed at a meeting held by the Board on October 17, 1974:

> "VOTED: To request the Attorney General for the Commonwealth of Massachusetts for his opinion as to whether *monies* or *benefits* received from the Social Security System are to be equated with the words, used in the Massachusetts General Laws, Chapter 32, Section 4 (1) (p), 'retirement allowance, annuity or pension from any other source,' thus prohibiting the certain members, of contributory retirement systems referred to in said Section 4 (1) (p), from obtaining credit for certain periods of service if they are entitled to receive *monies* or *benefits* from the Social Security System for the same periods of service."

You have further advised me:

> "The Teachers' Retirement Board has before it five (5) specific requests to obtain the credit referred to in said Chapter 760, and in each case the individual did make contributions to the Social Security System together with their employer, Lesley College, Cambridge, Massachusetts, 02138, which operates a private laboratory school known as the Carroll Hall School, in which school each of the five persons were employed."

The Social Security System excludes from its coverage service in the employ of a state, or political subdivision or any instrumentality which is wholly owned by the state or political subdivision (I.R.C. § 3121 (b) (7)) with certain exceptions not applicable to teachers in the public school system of Massachusetts.

St. 1973, c. 760 added paragraph (p) to subdivision 1 of § 4 of G. L. c. 32. It permits a member of the Teachers' Retirement System to tack on to his creditable service as a teacher in the public school system of the Commonwealth, under certain conditions, his service as a teacher in "any non-public school in the commonwealth, if the tuition of all . . . pupils taught was financed in part or in full by the commonwealth . . . ; provided that no credit shall be allowed and no payment shall be accepted for any service for which the member shall be entitled to receive a *retirement allowance, annuity or pension* from any other source . . ." (Emphasis supplied.)

In my view, this statutory provision appears to be an effort on the part of the Legislature, as in many other instances amending c. 32, to fill a gap in the pension laws for public service rendered but not otherwise credited. The proviso denying credit for any service for which a member is going to receive "a retirement allowance annuity or pension from any other source" is aimed at precluding any unjust double credit.

The issue, therefore, is whether Social Security benefits constitute "a retirement allowance, annuity or pension from any other source" so as to prevent prior service in a non-public school from being counted as creditable service.

The Legislature, in the proviso clause above referred to, employed language similar to language it has employed in other like situations. Thus, G. L. c. 32, § 3(4) under certain conditions permits the allowance of credit for service in the public schools of another state "provided that no credit shall be allowed and no payment shall be accepted for any service for which the member shall be entitled to receive a retirement allowance from any other state."

This proviso, referred to in the request for opinion, is less sweeping in its language than that in c. 760. However, analysis of the total act gives helpful guidance to the present issue. The subsection as drafted referred to teaching in another state and recognized a benefit to the Commonwealth to be honored under c. 32 so long as no recognition had been forthcoming from the other state. So here reference is limited to service in non-public schools where tuition is financed by the Commonwealth. The question thus reduces itself to what reading should be given the language in question within this limited context?

"Retirement allowance," "annuity" and "pension" are words and phrases defined in c. 32, § 1, with reference to the state system therein established. On the other hand, the Social Security System sounds in the tenor of "Old Age, Survivors and Disability Insurance Benefits" (see 42 U.S.C.A. §§ 401, *et seq.*), yet no reference is made in c. 760 to "insurance benefits" or directly to the Social Security System itself. Obviously any employment in a non-public school is such as would be covered by the Social Security Act. The Legislature has declared hereby to exist a public service deserving of recognition under c. 32 by virtue of employment in a non-public school, so long as funding for tuition came from the Commonwealth. To say that Federal Social Security coverage

excludes service from being considered would be to render c. 760 a nullity and frustrate the legislative intent. Such a construction, in my view, is unwarranted.

Accordingly, it is my opinion that credit should be given for employment in the situations now before the Teachers' Retirement Board notwithstanding the fact Social Security benefits are payable for the service in question.

Accordingly, I answer your question in the negative.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 44. January 9, 1975

Dr. Robert Wood, President
University of Massachusetts
Office of the President
One Washington Mall
Boston, Massachusetts 02108

Dear President Wood:

You have requested my opinion on the following question:

> "Does the University of Massachusetts have the autonomous authority under Mass. G. L. c. 75 to adopt rules and regulations, notwithstanding the provisions of Mass. G. L. c. 30A?"

Prior to St. 1974, c. 361, § 1, the procedural and other provisions of G. L. c. 30A, §§ 2-9 did not apply to the University by virtue of the definition set forth in G. L. c. 30A, § 1(5), which excluded from the meaning of "regulation":

> "(c) regulations concerning the operation and management of state . . . educational . . . institutions . . ."

The repeal of this specific language by St. 1974, c. 361, § 1 raises for the first time the question whether the University is subject to G. L. c. 30A, §§ 2-9 by virtue of the autonomy granted the University by St. 1962, c. 648, as set forth in G. L. c. 75.

G. L. c. 30A, commonly known as the State Administrative Procedure Act, was enacted by St. 1954, c. 681. The "broad remedial purpose of the State Administrative Procedure Act . . . [was] to provide comprehensively for procedural due process in administrative proceedings." *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491, 500.

Subsequent to the enactment of this legislation, however, the Legislature enacted St. 1962, c. 648, which " 'significantly amended G. L. c. 75 and expanded the authority of the Board of Trustees of the University of Massachusetts.' " *Op. Atty. Gen.*, July 19, 1972, at 3.

As amended, G. L. c. 75, § 1 provides:

> "There shall be a University of Massachusetts *which* shall continue as a state institution within the department of education but not under its control and *shall be governed solely by the board of trustees* established under section twenty of chapter fifteen. In addition to the authority, responsibility, powers and duties specifically conferred by this chapter, the board of trustees shall have all 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 the university be subject to, or superseded in any such authority by, any other state board, bureau, department or commission, except as herein provided." (Emphasis supplied.)

General Laws, c. 75, § 3 provides, in pertinent part:

> "*Notwithstanding any other provisions 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 university, 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. The trustees shall publish such rules and regulations and shall file copies thereof with the governor, the commission on administration and finance, and the joint committee on ways and means." (Emphasis supplied.)

General Laws, c. 75 was adopted pursuant to the recommendations of a Special Commission. House Document No. 3350 of 1962, *Report of the Special Commission on Budgetary Powers of the University of Massachusetts and Related Matters.* In the light of the history of this legislation[1] and its terms, I concluded in an earlier opinion that the provisions of "G. L. c. 75 as a whole make it clear that the Legislature intended that the authority of the Board of Trustees be autonomous with respect to the management and administration of the affairs of the university . . ." *Op. Atty. Gen.*, July 19, 1972, at 5.

Accordingly, I am of the view that the provisions cited above impliedly repealed G. L. c. 30A, §§ 2-9, in so far as the University of Massachusetts is concerned. With respect to the principle of implied repeal, the question is whether G. L. c. 30A is so in conflict with G. L. c. 75 as a whole and with sections 1 and 3 in particular that both cannot stand. "The test of the applicability of the principle of implied repeal is whether the prior statute is so repugnant to and inconsistent with the latter enactment covering the subject matter that both cannot stand." *Doherty* v. *Commissioner of Administration*, 349 Mass. 687, 690. Thus,

" 'the enactment of a statute which seems to have been intended to cover the whole subject to which it relates, impliedly repeals all existing statutes touching the subject . . .' " *Sullivan* v. *Worcester*, 346 Mass. 570, 573.

It is clear that by enacting G. L. c. 75, §§ 1 and 3, the Legislature intended to grant full and exclusive authority to the Board of Trustees with respect to the subject of rules and regulations concerning the management, control and administration of its affairs and the regulation of its own body. This broad grant of managerial autonomy conferred by these and other sections set forth in G. L. c. 75, together with all authority necessarily incidental thereto which is given by implication (*Fluet* v. *McCabe*, 299 Mass. 173, 178), cannot be reconciled with the restrictive provisions of G. L. c. 30A, §§ 2-9, which are diametrically opposite in language and intent.[2] I therefore conclude that the provisions of G. L. c. 30A, §§ 2-9, in so far as they might be applied to the University, were impliedly repealed by St. 1962, c. 648, and that such a matter of internal management is reserved to the Board of Trustees. See *Op. Atty. Gen.*, November 13, 1967, at 134 (quorum requirement established by Board of Trustees of then Lowell Technological Institute established under G. L. c. 75A, § 7 not subject to G. L. c. 4, § 6).

My conclusion is reinforced by several opinions which have repeatedly reaffirmed the broad autonomous authority delegated by the Legislature to the Board of Trustees under G. L. c. 75, as well as to other public institutions of higher education within the Commonwealth. See, e.g., *Opinion of the Justices*, Mass. Adv. Sh. (1973) 535 (University of Massachusetts authorized to enter into leases and tenancies-at-will, notwithstanding G. L. c. 8, § 10A) and *Op. Atty. Gen.*, July 19, 1972 (same). *Op. Atty. Gen.*, April 8, 1974 (non-professional employees of University of Massachusetts paid from grants and trust funds subject to G. L. c. 75, § 11 and not the classification and pay plan set forth in G. L. c. 30, § 45). *Op. Atty. Gen.*, June 1, 1970, at 107 (leave policy of professional employees at State Colleges subject to rules and regulations of Board of Trustees of State Colleges under G. L. c. 73, § 1 and not to rules and regulations promulgated by the Director of Personnel and Standardization). *Op. Atty. Gen.*, October 14, 1968, at 47 (Board of Trustees of Lowell Technological Institute authorized to forgive tuition for graduate student teachers and the sons and daughters of professional staff). *Op. Atty. Gen.*, October 7, 1966 (Board of Trustees of then Southeastern Massachusetts Technological Institute authorized to establish salary of President under G. L. c. 75B, § 10, and State Comptroller required to pay same). *Op. Atty. Gen.*, November 25, 1964, at 129 (Board of Trustees authorized to classify business manager under G. L. c. 73, § 16).

In reaching my conclusion, I am not unmindful that one of my predecessors ruled in 1965 that the Board of Trustees of the University was subject to the provisions of G. L. c. 30A, § 11A, the state "open meeting" law. *Op. Atty. Gen.*, July 19, 1965, at 47. I have previously questioned the validity of the conclusion reached in the 1965 Opinion in *Op.*

Atty. Gen., July 19, 1972, at p. 2, but it is still unnecessary to reexamine the question decided there in its entirety. It is sufficient to note that the statutory provisions governing the University, to which I have made reference, expressly refer to the power to adopt regulations, and that the pertinent provisions of c. 30A conflict with those specific statutory provisions.

For the reasons stated above, I answer your question in the affirmative.

Very truly yours,
ROBERT H. QUINN
Attorney General

[1]See *Opinion of the Justices*, Mass. Adv. Sh. (1973) 535, 539-540. *Op. Atty. Gen.*, July 19, 1972, at 6-8.

[2]For example, the requirements for publishing and filing rules and regulations set forth in G. L. c. 75, § 3 are contrary to the requirements set forth in G. L. c. 30A, §§ 5-6B.

Number 45. January 9, 1975

Honorable Nicholas L. Metaxas
Commissioner of Corporations and Taxation
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02204

Dear Commissioner Metaxas:

You have requested my opinion as to whether special justices of the district courts of the Commonwealth and of the Municipal Court of the City of Boston are entitled to retroactive cost-of-living salary increase adjustments for the calendar year 1974. Your letter directs my attention to a number of recent legislative enactments which you have suggested are relevant to the question I am being asked to address. Further, you have included within the materials you have forwarded to me a reference to the case of *Eisenstadt* v. *County of Suffolk*, 331 Mass. 570, which also may be relevant to the issue now before me.

As a threshold matter, I must initially determine whether the legislation to which my attention has been directed evidences an intent on the part of the Legislature that special justices receive cost-of-living salary adjustment increases retroactive to January, 1974. See St. 1974, c. 558; G. L. c. 30, § 46, as amended by St. 1973, c. 428. If my answer to that question is in the affirmative, I must then determine whether the Legislature is empowered to enact such legislation or is precluded from doing so because of the "public purpose" doctrine referred to by the Supreme Judicial Court in *Eisenstadt* v. *County of Suffolk*, 331 Mass. 570.

Initially, I observe that G. L. c. 30, § 46, as amended by St. 1973, c. 428, generally provides that the Director of Personnel and Standardization shall annually determine percentum shifts in the cost-of-living and shall prepare an annual report to the Legislature concerning changes in the cost-of-living. General Laws, c. 30, § 46, as amended by St. 1973, c. 428, further provides, *inter alia*, as follows:

> "Whenever such determination indicates a percentum increase of at least three percentum, . . . such report shall be accompanied by a recommendation of legislation to provide a corresponding percentum increase in the salaries of . . . the justices and special justices of the district courts, including the municipal court of the city of Boston, such increase to take effect as of the beginning of the first payroll period of the year in which such report is submitted."

It is a fundamental principle of statutory construction that the words of a statute are to be given their ordinary lexical meaning unless there be a clear indication to the contrary. *Randall's Case*, 331 Mass. 383. It is obvious that in amending G. L. c. 30, § 46 the Legislature clearly intended to authorize cost-of-living salary adjustment increases for special justices retroactive to the first of the year in any year in which a sufficient increase in the cost-of-living as measured by external criteria, principally the United States Consumer Price Index, occurred.

In 1974, the General Court enacted St. 1974, c. 558 which expressly granted retroactive cost-of-living salary adjustment increases to a number of judicial officers, including special justices. This legislation was specifically made retroactive to January 1, 1974. St. 1974, c. 558, § 20. Accordingly, it is clear that the Legislature intended that special justices receive retroactive cost-of-living salary adjustments for 1974.

Before concluding that special justices are entitled to retroactive cost-of-living salary adjustment increases, it is necessary that I consider the decision of the Supreme Judicial Court in *Eisenstadt* v. *County of Suffolk*, 331 Mass. 570. In *Eisenstadt*, the Court held that a special justice could not recover a retroactive salary increase in an action in contract where the authorizing statute did not specifically refer to special justices but where special justices' salaries were computed with reference to the daily salary of full-time district judges. The *Eisenstadt* court further stated, in support of its decision, as follows:

> "On November 5 he [plaintiff-special justice] had no right to be paid more than compensation at the rate which had been established during the period when the services were rendered. These services have been paid for in accordance with such established rate. There is no suggestion that they were other than those customarily furnished by a learned and conscientious judge or that the compensation was inadequate." *Id.* at 573.

The Court went on to state:

> "[W]hile the Legislature in the present case could fix the salaries of the justices of the court as of September 1, it lacked the right to provide for retroactive payment of compensation for the services of the special justices." *Id.* at 574.

At the outset, I note that the retroactive increase authorized by St. 1974, c. 558 is a cost-of-living salary increase which is measured by means of an external standard, the United States Consumer Price

Index, rather than as in *Eisenstadt*, a mere gratuity. Also, the *Eisenstadt* court, acknowledging that the Legislature could establish the salary of a public officer as of a date prior to the enactment of an establishing statute, nevertheless concluded that a special justice who received pay by the day was not entitled to retroactive compensation presumably on the theory that a special justice was not a public officer. However, subsequent to *Eisenstadt*, the Supreme Judicial Court intimated in the context of a retirement situation that both full-time and special justices are to be treated in a similar manner, expressly stating that "special justice is a judicial office." *Opinion of the Justices*, 1971 Mass. Adv. Sh. 1869, 1870-1871. This language indicates a departure from the earlier distinction between a full-time judge and a special justice which appears to have been the basis for the decision in *Eisenstadt*, *supra*.

Applying the *Eisenstadt* rationale to the legislation I have been asked to interpret, it is my opinion that special justices are entitled to retroactive cost-of-living salary adjustment increases for the calendar year 1974, notwithstanding the language in the decision of the Supreme Judicial Court in *Eisenstadt*. In this regard, I am persuaded by the distinction between cost-of-living salary increases designed to maintain compensation of the judiciary at previous salary levels and a salary increase which takes the form of a gratuity. I am further persuaded by the language to which I referred to earlier in *Opinion of the Justices*, 1971 Mass. Adv. Sh. 1869, 1870-1871, that the Justices of the Supreme Judicial Court, if they were asked to decide this issue in an adversary context, would conclude that the Legislature was empowered to grant retroactive cost-of-living salary increases to special justices.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 46. January 14, 1975

Honorable Bruce Campbell
Commissioner of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Honorable Charles C. Cabot, Jr.
Chairman, Outdoor Advertising Board
80 Boylston Street
Boston, Massachusetts 02116

Gentlemen:

Your respective agencies have raised certain questions as to the power and authority of the Outdoor Advertising Board to remove certain outdoor signs under G. L. c. 93 without obligating the Department of Public Works to compensate the permittee and the property owner on whose property a sign is erected, notwithstanding the provisions of (1)

23 U.S.C. § 131, "The Highway Beautification Act of 1965," approved October 22, 1965 (Public Law 89-285), (2) St. 1971, c. 1070, effective November 23, 1971, inserting c. 93D into the General Laws, and (3) the Agreement dated December 31, 1971 between the United States of America represented by the Secretary of Transportation acting by the Federal Highway Administration and the Commonwealth of Massachusetts, acting by the Massachusetts Department of Public Works, and entitled "FOR CARRYING OUT NATIONAL POLICY RELATIVE TO CONTROL OF OUTDOOR ADVERTISING IN AREAS ADJACENT TO THE NATIONAL SYSTEM OF INTERSTATE AND DEFENSE HIGHWAYS AND THE FEDERAL-AID PRIMARY SYSTEM," (the "Agreement").

Specifically, you ask that "[f]or each question, please assume that the signs involved had been under permit from this Board, that the Board revoked or refused to renew the permits, and that the Board's order was affirmed after the permittees had exhausted all their rights to administrative and judicial review." You then detail the following questions:

> "1. If the Board, acting solely in compliance with G. L. c. 93, §§ 29-33 and the Rules and Regulations adopted pursuant thereto, orders the removal of a sign which is subject to and not in conformity with the requirements of 23 U.S.C. § 131 and St. 1971, c. 1070, do subsections (e) and (g) of 23 U.S.C. § 131 and sections 2 and 4 of Mass. St. 1971, c. 1970 automatically give the permittee and the property owner any rights to amortization[1] or compensation notwithstanding the fact that the Board did not base its order on the requirements of these two statutes?
>
> 2. Please answer the same question if the facts are as stated in question (1) except that the sign is maintained in full conformity with the requirements of 23 U.S.C. § 131 and Mass. St. 1971, c. 1070.
>
> 3. Is your answer to the above questions different when the basis of the Board's order is a finding that
>
> A. the sign was maintained in violation of a municipal ordinance or by-law in effect when the sign first became subject to 23 U.S.C. § 131, or when the State permit for the sign was first issued, whichever occurred later?
>
> B. the sign was maintained in violation of a municipal ordinance or by-law that took effect after the sign first became subject to 23 U.S.C. § 131, or after the State permit for the sign was first issued, whichever occurred later?
>
> 4. May the Commonwealth pay compensation for the removal of signs subject to the Highway Beautification Act and at the same time require the removal of other signs without compensation. For example, if two signs, one of which is within 660 feet of an Interstate or Federal Primary Highway and the other of which is not, are ordered removed by the Board based on a finding that their continued maintenance

would be in violation of the identical municipal by-law or ordinance or the identical provision of the Board's Rules and Regulations, and if the Department of Public Works must await the amortization period and provide compensation for removal of the first sign, would it be a violation of the equal protection provisions of either the U. S. or Massachusetts Constitutions for the Department to decline for any reason to await the amortization period and provide compensation for the second sign?"

General Laws, c. 93, § 29 authorizes the Outdoor Advertising Board to make, amend or repeal Rules and Regulations for the proper control and restriction of certain billboards, signs and other advertising devices "on public ways or on private property within public view of any highway, public park or reservation. Such rules and regulations may require that said billboards, signs or other devices be located in business, commercial, industrial, marketing or mercantile areas . . . ; may prescribe standards of size, set-back and clearance . . . " and may provide for permits. The last sentence of § 29 provides:

"Cities and towns may further regulate and restrict said billboards, signs or other devices within their respective limits by ordinance or by-law, not inconsistent with sections twenty-nine to thirty-three, inclusive, or with said rules and regulations."

Pursuant to the last sentence of § 29, the Board has adopted Rules and Regulations regulating such billboards, signs and other advertising devices and, effective July 23, 1969, adopted Rule § 9(k). The Board revised its Rules and Regulations, effective October 1, 1973, making them more restrictive in several respects, and included substantially the identical language of Rule § 9(k), which became section 4(g) in the revised Rules and Regulations, reading as follows:

"(g) No permit shall be granted or renewed for the location or maintenance of a Sign within a city or town except where such location or maintenance is in conformity with applicable city and town ordinances and by-laws enacted in accordance with Section 29 of Chapter 93 of the General Laws; and no ordinance or by-law shall be deemed inconsistent with the rules and regulations of the Board on the ground that such ordinance or by-law prohibits the location or maintenance of a Sign which in the absence of said ordinance or by-law would be in conformity with the said rules and regulations."

The permits issued under the Rules and Regulations must be renewed annually. The permittee has no vested right in the sign and the permittee cannot compalin if it is not renewed because of a restrictive change in a town by-law, *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Board*, Mass. Adv. Sh. (1972) 1057 (the "Avon Case"), nor in the Board's Rules or Regulations (semble). The *Avon* case involved a change in a by-law of the town of Avon which precluded the maintenance of any "billboard . . . or advertising device . . . within . . . (500)

feet of any church, chapel or synagogue; elementary or secondary school, whether public or private" or certain other buildings, public parks or reservations or memorials, with certain exceptions. The plaintiff's sign which had been in existence for years, did not comply with the new restrictions, and its permit was not renewed by the Outdoor Advertising Board. The *Avon* case was decided May 6, 1972 and no reference is made therein to St. 1971, c. 1070 or the Highway Beautification Act of 1965.

The Highway Beautification Act of 1965, 23 U.S.C. § 131, approved October 22, 1965, provides in part as follows (the quoted portions being in quotation marks):

> "(b) *Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control.*" (Emphasis supplied.)
>
> * * * * *
>
> "(c) *Effective control means that after January 1, 1968, such signs, displays, and devices shall, pursuant to this section, be limited to*" certain directional and other official signs and notices and certain on premise signs, displays and devices." (Emphasis supplied.)
>
> (d) (In substance, this subsection permits the erection and maintenance, within the specified 660 feet, of signs, displays and devices "whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, . . . within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial or industrial areas as may be determined by agreement between the several States and the Secretary." Zoning is left up to the State, and determinations as to "customary use" made by a State, county or local zoning authority are to control.)
>
> "(e) Any sign, display or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming."

* * * * *

"(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices —

(1) those lawfully in existence on the date of enactment of this subsection.

(2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and

(3) those lawfully erected on or after January 1, 1968.

The Federal share of such compensation shall be 75 per centum." (Compensation is to be allocated between the owner of the sign, display or device and the owner of the real estate on which it is located.)

* * * * *

"(k) Nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays and devices on the Federal-aid highway systems than those established under this section."

* * * * *

"(n) No sign, display or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display or device is not available to make such payment."

The "Agreement" executed pursuant to this Act on December 31, 1971 defined zoned commercial or industrial areas and unzoned commercial or industrial areas (1. Definitions B. and C.), among other terms and phrases, and provided:

"II. *Scope of Agreement*

This agreement shall apply to all zoned and unzoned commercial and industrial areas within 660 feet of the nearest edge of the right-of-way of all portions of the Interstate and primary systems within the Commonwealth of Massachusetts in which outdoor advertising signs, displays, and devices may be visible from the main traveled way of said systems."

It provided further in Section III that the Department of Public Works "shall effectively control, or cause to be controlled in accordance with law, the erection and maintenance of outdoor advertising signs, displays, and devices lawfully in existence on or erected subsequent to the effective date of this agreement other than those advertising the sale or lease of the property on which they are located or activities conducted thereon in accordance with the following criteria:" — relating among other things to the size of signs, spacing of sign structures (spacing between signs along each side of certain highways to be a minimum of 500 feet, and 100 or 300 feet on other highways), and lighting of signs.

St. 1971, c. 1070 is entitled "AN ACT PROVIDING FOR THE IMPLEMENTATION OF THE FEDERAL HIGHWAY BEAUTIFICATION ACT OF 1965,"and § 1 inserts into the General Laws a new Chapter 93D entitled "CONTROL OF OUTDOOR ADVERTISING ADJACENT TO THE INTERSTATE AND PRIMARY HIGHWAY SYSTEMS." Section 1 of Chapter 93D defines Primary and Interstate Systems as those terms are understood and defined in the Highway Beautification Act of 1965 and in the Agreement. Section 2 of c. 93D provides in part as follows:

> "*Section 2.* Notwithstanding the provisions of chapter ninety-three, no outdoor advertising shall be erected or maintained within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of a highway in the interstate or primary systems except the following:
>
> * * * * *
>
> (*d*) Signs, displays and devices which are located in areas which are zoned industrial or commercial under authority of law and which have permits issued under the provisions of section three.
>
> (*e*) Signs, displays and devices which are located in unzoned commercial or industrial areas which areas shall be determined from actual land use and defined by regulations to be promulgated by the department and which have permits issued under the provisions of section three."

Subsections (*a*), (*b*) and (*c*) of § 2 relate to certain directional and other official signs and notices and to certain on-premise signs, displays and advertising devices. Section 3 of c. 93D provides:

> "*Section 3.* Under the procedures set forth in chapter ninety-three, the board is authorized to issue permits for the erection and maintenance of signs, displays and devices described in clauses (*a*), (*d*) and (*e*), of section two, provided, however, *that the erection and maintenance thereof would comply with applicable ordinances and by-laws,* with *standards* promulgated by the Secretary of Transportation under Section 131 (c-1), (f) and (h) of Title 23, United States Code, and with agreements between the department and the said Secretary authorized by section seven of this chapter. Nothing in this section shall apply to signs, displays or devices referred to in clauses (*b*) and (*c*) of section two.
>
> "Nothing in this chapter shall be construed to prohibit the board from adopting lawful regulations imposing stricter limitations with respect to signs, displays and devices on the interstate and primary systems." (Emphasis supplied.)
>
> "SECTION 4. Any outdoor advertising, as defined in section one of chapter ninety-three D of the General Laws, inserted by section one of this act, which was lawfully erected and which on the effective date of this act had a permit issued under

chapter ninety-three of the General Laws, was in compliance with by-laws and ordinances, and was otherwise lawful in all respects, shall not be required to be removed as a result of any of the provisions of this act until five years after the effective date of this act."

The "Board" is the Outdoor Advertising Board, and "department" is hereinafter referred to as the Department of Public Works.

Section 7 of c. 93D provides authority for the Department of Public Works to enter into the Agreement. Chapter 1070 then continues with section 2 in which the Department of Public Works

"is authorized and directed to acquire by purchase, gift or otherwise, or take by eminent domain upon payment of just compensation all right, title, leasehold and interest of the owner, in the following signs, displays or devices, and to so acquire from the owner of the real property on which the sign, display or device is located the right to erect and maintain such signs, displays and devices thereon: (*a*) Any sign, display or device which was lawfully in existence on October the twenty-second, nineteen hundred and sixty-five and lawfully maintained thereafter but which does not comply with the provisions of chapter ninety-three D of the General Laws, inserted by section one of this act; (*b*) any sign, display or device lawfully on any highway made a part of the interstate or primary system on or after October the twenty-second, nineteen hundred and sixty-five, and before January the first, nineteen hundred and sixty-eight, but which does not comply with the provisions of said chapter ninety-three D; and (*c*) any sign, display or device lawfully erected on or after January the first, nineteen hundred and sixty-eight and lawfully maintained thereafter but which does not comply with the provisions of said chapter ninety-three D; provided, however, that the department shall not acquire said sign, display or device without receiving prior assurance from the appropriate federal authorities that seventy-five per cent of the cost of said acquisition is available for reimbursement to the commonwealth. *Said signs, displays and devices shall not be subject to any proceeding for abatement as a nuisance, or equitable relief, notwithstanding the provisions of said chapter ninety-three D.*" (Emphasis supplied.)

Chapter 1070 concludes with the following sections:

"SECTION 3. For carrying out the purposes and provisions of this act and of Title 1 of Public Law 89-285, or as amended, the department may expend any funds made available for the laying out, construction, reconstruction, resurfacing, relocation or improvement of highways notwithstanding any provisions of law to the contrary.

SECTION 4. Any outdoor advertising, as defined in section one of chapter ninety-three D of the General Laws, inserted by section one of this act, which was lawfully erected and which on

the effective date of this act had a permit issued under chapter ninety-three of the General Laws, was in compliance with by-laws and ordinances, and was otherwise lawful in all respects, shall not be required to be removed as a result of any of the provisions of this act until five years after the effective date of this act.

SECTION 5. Nothing in this act shall be construed to abrogate or affect the provisions of any *lawful ordinance*, by-law, regulation or resolution, which are more restrictive than the provisions of this act." (Emphasis supplied.)

Implicit in the questions presented is the assumption that without reference to c. 1070 and the Highway Beautification Act, but upon the authority of the *Avon* case cited above, the Outdoor Advertising Board can proceed under G. L. c. 93 and the Rules and Regulations of the Board to refuse to renew a permit for a sign adjacent to the national system of interstate and defense highways in the federal-aid primary system, and to require removal of the sign without compensation. The Secretary of Transportation of the United States has taken the position that unless a state adopts effective control of the erection and maintenance along these systems of outdoor advertising signs, displays and devices, he can withhold ten percent of the amounts which would otherwise be apportioned to the state and that there cannot be effective control, notwithstanding a state system for sign removal consistent with the federal policy, unless just compensation is paid.

The questions presented may be better understood if specific fact situations are posited. The first question asks whether an order for removal of a sign subject to, but "not in conformity" with, the requirements of the Highway Beautification Act and c. 1070 confers amortization or compensation rights upon the permittee and property owner where the order is promulgated by the Outdoor Advertising Board (the "Board") acting "solely in compliance with G. L. c. 93, §§ 29-33 and the Rules and Regulations adopted pursuant thereto." Assuming that in a commercial area subject to the Agreement signs on each side of an interstate highway or freeway primary system are less than the minimum of 500 feet apart required by paragraph 2(a) under the portion of Section III entitled "SPACING OF SIGN STRUCTURES," then such a sign would be nonconforming under either the Highway Beautification Act or c. 1070. Assuming further that the Board, purporting to act under G. L. c. 93 and under its own Rules and Regulations, orders the removal of the sign, the question arises whether the Board can validly take the position that under the *Avon* case there is no vested right in the permit and that the sign can be ordered removed without the payment of compensation. The State of Vermont has taken a similar position, claiming that it could, under its Supreme Court's decisions which had held that there was no substantial property interest in the sign permits, order the removal of signs without compensation and without reference to the Highway Beautification Act, that it had taken effective steps to remove signs subject to the Highway Beautification Act, and that it was not required to provide compensation for such removal.

However, the United States Secretary of Transportation determined that the failure of the State of Vermont to provide for compensation did not constitute "effective control" under the Highway Beautification Act and, pursuant to subdivision (b) of that Act, withheld 10% of federal aid highway funds apportioned to the State in each of such federal aid programs for expenditures in the fiscal year 1972. The final determination of the Secretary was received by the State of Vermont on November 17, 1972. Pursuant to subsection (1) of the Highway Beautification Act, Vermont appealed to the United States District Court for the State of Vermont (Civil Action No. 6809).

I note in passing that the Vermont statute provides for the removal of all outdoor advertising signs subject to the Highway Beautification Act, except those allowed thereunder (10 V.S.A. §§ 321-345), and allows an amortization period of five years (10 V.S.A. § 338), but it provides that there shall be no payment of compensation for removal of signs except:

> "only if, and to the extent federal law, when in effect, requires payment of compensation for the taking or removal of outdoor advertising on state highways as a condition for payment to the state of federal highway funds, and federal funds are available." (10 V.S.A. § 336).

In the Federal action, Vermont filed a Motion for Judgment on the Pleadings and a Brief in which it argued in effect that (1) the withholding of ten percent of highway funds under the Highway Beautification Act, as interpreted by the United States Secretary of Transportation, violated the Tenth Amendment to the Constitution of the United States; (2) that, in order to avoid such a determination of unconstitutionality, the Act should be interpreted so as to impose a penalty only for failure to provide effective control of highway signs and that failure to provide compensation for removal of signs did not itself require a determination that there has been no "effective control;" and (3) that, in any event, Congress did not intend to displace state laws, and that, under Vermont law, the obligation to compensate sign owners and site owners depends on the nature, scope and worth of their right or interest under state law at the time of removal of the sign. These conditions were rebutted by the other parties to the proceeding, the Secretary of Transportation argued that there was no "effective control" under the Highway Beautification Act unless just compensation was paid for the removal of signs and that the Secretary could validly withhold ten percent of the highway aid funds. A decision adverse to the position of the State of Vermont was handed down by the United States District Court on July 17, 1974.

It is my opinion that Vermont's argument even if ultimately upheld on appeal would not apply in this Commonwealth because, unlike 10 V.S.A. § 336, which makes provision for compensation upon removal of signs "only if, and to the extent federal law . . . requires payment of compensation . . . as a condition for payment to the state of federal highway funds . . . " Chapter 1070 of the Acts of 1971 provides in section 2 that "[t]he department of public works . . . is authorized and directed to acquire by pur-

chase, request or otherwise or take by eminent domain upon payment of just compensation the interest of the sign owner and real property owner in any sign, display or device lawfully in existence on specified dates [the same dates provided in subsection (g), the "just compensation" subsection of the Highway Beautification Act], but which does not comply with the provisions of . . . chapter ninety-three D . . . " Moreover, c. 1070 makes clear by its title that the General Court intended to implement the Highway Beautification Act, and this is further emphasized in G. L. c. 93D, inserted by c. 1070, by its title, "AN ACT PROVIDING FOR THE IMPLEMENTATION OF THE FEDERAL HIGHWAY BEAUTIFICATION ACT OF 1965," and in section 2 which provides that "[n]otwithstanding the provisions of chapter ninety-three, no outdoor advertising shall be erected or maintained within six hundred and sixty feet of . . . a highway in the interstate or primary systems . . . " except the signs enumerated therein, which list of permitted signs is virtually identical with the list in subsections (c) and (d) of the Highway Beautification Act.

Thus, it is clear that c. 1070 supplants G. L. c. 93 except as to the permit procedure provided for in section 3 of G. L. c. 93D. Accordingly, the Outdoor Advertising Board cannot act solely under G. L. c. 93, §§ 29-33, or its Rules and Regulations, as to signs subject to c. 1070, but is bound by the provisions of c. 1070 and must provide compensation for removal of signs not in conformity with c. 1070 and the Highway Beautification Act and, in compliance with section 4 of c. 1070, any such sign may not be required to be removed until 5 years after the effective date of that act (November 23, 1971) and, further, in compliance with section 2 of c. 1070, then only if the Department of Public Works has received prior assurance from the appropriate authorities that seventy-five percent of the cost of acquiring the sign is available for reimbursement to the Commonwealth by the Federal government.

The second question raised is the same as the first except that I am asked to assume that the sign ordered to be removed is maintained in full conformity with the requirements of the Highway Beautification Act and c. 1070. An example would be a Regulation of the Board as to the size of a sign which is more stringent than required by the Agreement. The Highway Beautification Act provided for this possibility in subsection (k) thereof which permits a state to impose stricter limitations, and the "Policy and Procedure Memorandum" ("P.P.M.") 80-5.2 of the United States Department of Transportation issued under the Highway Beautification Act also specifically provides for compensation in such cases. Thus, P.P.M. 80-5.2 provides in part as follows:

> "5. *CONTROL AREA AND ZONING*
>
> a. The applicable control distance, 660 feet for advertising signs, shall be measured horizontally from the edges of the right-of-way along lines perpendicular to the centerline of the highway.
>
> * * * * *
>
> d. . . . the zoning of an area will determine applicability of the standards for control of outdoor advertising signs. Similarly,

actual industrial or commercial use at any given time will determine the classification of unzoned commercial or industrial areas.

e. Where State standards are more stringent than Federal control requirements along Interstate and Primary Systems, the Administrator may approve Federal participation in costs of applying the State standards to those systems on a statewide basis."

Consistent with this Federal approach, G. L. c. 93D, § 2, inserted by c. 1070, prohibits outdoor advertising within a 660 foot control area and areas zoned industrial or commercial and in unzoned industrial or commercial areas unless they have permits issued under section 3. Section 3 authorizes the Board to issue permits for signs which "comply with applicable ordinances and by-laws, with standards promulgated by the Secretary of Transportation under Section 131 (c-1), (f) and (h)" of the Highway Beautification Act and with the Agreement, but further provides that "[n]othing in this chapter shall be construed to prohibit the board from adopting lawful regulations imposing stricter limitations with respect to signs, displays and devices on the interstate and primary systems." Thus, c. 93D sanctions stricter regulations by the Board and if such regulations are adopted, then, under section 2 of c. 1070, signs not complying therewith "would not comply with the provisions of said chapter ninety-three D," and compensation would be payable upon removal of such signs and amortization would apply.

You have also asked, in Part A of your third question, whether the requirements of amortization and compensation are applicable to a sign 'maintained in violation of a municipal ordinance or by-law in effect when the sign first became subject to (the Highway Beautification Act) or when the State permit for the sign was first issued, whichever occurred later.'

You have not directly asked for my opinion when a sign became subject to the Highway Beautification Act, but in order to answer your question, it would be necessary for me to make that determination. Such determination, preliminary at least, in the circumstances we are dealing with, is a matter for the executive branch of the Federal government, specifically the Federal Highway Administration. In all the circumstances I think it would be imprudent for me to render an opinion on this question bearing in mind that it is for the Federal government to determine in any given situation whether compensation is payable under Federal law for removal of a sign and bearing in mind further that failure on the part of the Commonwealth to accept such Federal determination could expose the Commonwealth to the risk of the reduction by ten percent of the Federal funds annually contributed to the Commonwealth for highway purposes. As I point out below in my answer to your fourth question, a state which takes the position that compensation is not payable under its law in a situation where the Federal government has determined that compensation is payable under Federal law, subjects itself to the risk of the ten percent reduction. This is essentially what occurred in the State of Vermont as I have pointed out above.

For this reason, therefore, I think it is appropriate for me to decline to answer either Part A or Part B of your third question and to suggest that you obtain from the appropriate Federal authorities a decision whether compensation is payable under the Highway Beautification Act in the circumstances set forth in Parts A and B of your third question.

I do advise you, however, because it is implicit in your third question and because it is a matter of interpretation of State law, that in my opinion any sign subject to the provisions of the Highway Beautification Act and c. 1070 which, on the effective date of c. 1070, i.e. November 23, 1971, had a State permit, was lawfully erected and lawfully maintained and was then in compliance with applicable by-laws and ordinances, cannot be required to be removed under the provisions of c. 1070 until 5 years after the effective date of the act and then only, as provided in section 2 of c. 1070, if the Department of Public Works has received prior assurance of the availability of the specified Federal reimbursement to the Commonwealth in connection with the acquisition of the sign in question.

With respect to your fourth question which asks in substance whether constitutional requirements of due process require the Board and the Department of Public Works to observe the amortization period and to pay compensation for signs located beyond 660 feet of the nearest edge of the right-of-way of an interstate or Federal primary highway and visible from the main traveled way thereof, I have been informed by the Chief of the Scenic Control Branch of the Federal Highway Administration that the Federal government would share in the cost of compensation for removal of such signs based upon the provisions of P.P.M. 80-5.2, 5e, quoted above.

As I have pointed out in my answer to your third question, it seems to me that if the Federal government rules that such compensation is payable, as a practical matter if the Commonwealth were to refuse to participate in the payment of compensation, the Commonwealth would be running the risk of suffering the ten percent reduction in annual Federal contribution provided for in the Highway Beautification Act. Again, and because there is involved a determination, at least preliminary, by appropriate Federal officials, as to the payment of compensation under Federal law, I respectfully suggest that you obtain such determination from the Federal government and be guided accordingly.

Of course, with respect to any question involving interpretation of State law that may arise consequent upon Federal interpretation of Federal law, you should feel free to ask the Attorney General for his opinion on any such State law question.

Very truly yours,
ROBERT H. QUINN
Attorney General

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[1]See discussion of the term "amortization" in the last paragraph of this opinion.

Number 47. January 14, 1975

Honorable Richard M. McGrath
House of Representatives
State House
Boston, Massachusetts

Dear Representative McGrath:

In your capacity as Chairman of the Special Overload Commission established by the General Court, you have requested my opinion on a question arising as a result of the enactment of St. 1974, c. 851. While I have doubts as to my power to render formal opinions to legislative commissions (see G. L. c. 12, Sec. 9), I will nevertheless state my views to you for such use as you wish to make of them.

Chapter 851 accomplishes a revision of the statutes regulating the weight of loads which trucks may carry and establishes a permit system by which vehicles may move loads higher than the statutory maximum. You have advised me that the Commissioner of Public Works, who is vested with certain powers concerning the granting of permits, has stated a policy of not granting permits to carry loads in excess of seventeen percent over the present statutory maximums, thereby disregarding the maximums set in the statute. Accordingly, you have asked whether the Commissioner (or the Department) is entitled to deny a permit for the maximum weights set forth in the statute where the applicant has satisfied all the conditions precedent to applying for such a permit, i.e., registration, inspection and certification.

St. 1974, c. 851, § 3 amends G. L. c. 85, § 30 by inserting four new paragraphs following the first paragraph of Section 30. The amendments made by chapter 851 set out the application procedure for obtaining permits under the provisions of the statute. It is provided that "applications shall be made on forms provided by the commissioner of public works," which forms are to contain certain enumerated information. No criteria for considering the applications are set forth in the statute, although receipt of such application, the commissioner of public works shall notify the applicant of the approval or disapproval of his application."

In view of the legislative history of the statute (see *Report of the Special Commission*, H. No. 6164 of 1974), it is my opinion that the Commissioner is not acting consonant with the legislative intent if he makes no provision for permits for loads that may reach the statutory maximums. The Commissioner of the Department of Public Works is required by Chapter 851 of the Acts of 1974 to grant permits in accordance with the standards set for the exercise of his discretion by that Act. To do otherwise would violate the statutory mandate. The Commissioner should therefore make provision and issue permits applied for under c. 85, Section 30, as amended by Chapter 851 of the Acts of 1974, for the maximum weights permitted, provided the conditions set forth in the statute are met.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 48. February 3, 1975

Honorable Paul H. Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Mr. Secretary:

Your office requested an opinion of my predecessor concerning specific questions of law which have arisen in the course of administration, by your Department, of the provisions of G. L. c. 3, §§ 39-49, as amended by St. 1973, c. 981, §§ 2-12. Specifically, you have sought my opinion with regard to two questions concerned with the proper interpretation of the statutory term, "legislative agent," as defined in G. L. c. 3, § 39, as amended by St. 1973, c. 981, § 2. I will address myself to those two questions before considering your third question regarding the constitutionality of a requirement that voluntary associations employing a legislative agent divulge their entire membership lists in order to comply with G. L. c. 3, § 41, as amended by St. 1973, c. 981, § 4.

The definition of "legislative agent" found in G. L. c. 3, § 39, as amended by St. 1973, c. 981, § 2 includes therein "persons who, as any part of their regular and usual employment and not simply incidental thereto, attempt to promote, oppose or influence legislation or the governor's approval thereof, whether or not any compensation in addition to the salary for such employment is received for such services." You have focused upon the language, "and not simply incidental thereto," and have identified such language as a source of some difficulty in determining the scope of the term, "legislative agent." Specifically, you seek an opinion as to whether an engineer for a public utility company appearing before a legislative committee to testify with respect to air pollution regulations must register under the statute. More generally, you have asked whether the term "incidental thereto" is subject to advance definition of general applicability, or whether an assessment must be made of each individual on a case-by-case basis.

The definition of a "legislative agent" must be read in light of the express intent of the Massachusetts Legislature in amending G. L. c. 3, §§ 39-49. The intent of the Legislature in this regard is recited in St. 1973, c. 981, § 1, which states in pertinent part:

> ". . . [T]o preserve and maintain the integrity of the legislative process, it is necessary that the identity, expenditures and activities of certain persons who engage in reimbursed efforts, *the so-called lobbyists*, to persuade members of the General Court or the executive branch to take specific legislative actions, either by direct communication to such officials, or by solicitation of others to engage in such efforts, be publicly and regularly disclosed." (Emphasis supplied.)

This statement of intent by the Legislature which prefaced the legislative action undertaken in amending G. L. c. 3, §§ 39-49 indicates a continuing intention that those individuals commonly considered "lobbyists" be re-

quired to publicly disclose their employers, and the amount and sources of their compensation. The United States Supreme Court, when confronted with a similar question concerning the scope of the federal lobbying laws, 2 U.S.C. § 261, *et seq.*, limited the scope of the federal laws to "lobbying in its commonly accepted sense." *United States* v. *Harriss*, 347 U.S. 612, 620. While the language of the federal statute differs somewhat from the language found in G. L. c. 3, § 39 as amended by St. 1973, c. 981, § 2, the *Harriss* Court noted the same legislative concern for excluding from the scope of the act contributions and persons having only an " 'incidental' purpose of influencing legislation." *Id.* at 622.

The test ultimately suggested by the Supreme Court in *Harriss* for defining the scope of the federal lobbying laws was essentially one of substantiality. *Id.* It is my opinion that such a test would also establish an appropriate standard for construing the legislative language "and not simply incidental thereto," expressed in G. L. c. 3, § 39, as amended by St. 1973, c. 981, § 2. Therefore, if a person's salary or compensation is in any way substantially attributable to activities enumerated in G. L. c. 3, § 39, as amended by St. 1973, c. 981, § 2, that person falls within the definition of a legislative agent. I recognize that such a definition will result in a great deal of case-by-case analysis of the meaning of "substantial" or "incidental thereto," but it is my opinion that the nature of the activity being regulated is not readily susceptible to any advance definition other than a general definition.

With regard to the specific case you have postulated, it is my opinion that an engineer employed by a public utility who testifies before a legislative committee on air pollution regulations, would not be required to register as a legislative agent unless a substantial amount of the compensation he received from the utility company was attributable to his appearances before legislative committees or to other activities regulated by G. L. c. 3, §§ 39-49, as amended by St. 1973, c. 981, §§ 2-12.

Secondly, you have sought my opinion as to whether within the definition of legislative agent, which includes those who "influence the decision of any member of the Executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule or regulation pursuant thereto," the term "any member of the Executive branch" includes every agency and employee of the government of the Commonwealth excepting the judiciary and the General Court.

By its express terms, the language which concerns you states that it applies to compensated acts to influence the "decision" of any member of the Executive branch. Further, the decision has to concern either "legislation or the adoption, defeat or postponement of a standard, rate, rule or regulation." It is my opinion that this language circumscribes acts influencing "decision-makers" in the Executive branch whenever their decisions would impose or remove a standard, rate, rule or regulation of *general application*. General Laws c. 3, § 39, as amended by St. 1973, c. 981, § 2 would also apply to any act influencing adoption or removal of any general standard imposed by any executive agency pursuant to legislation. In accordance with this analysis, the definition of legislative agent would not normally apply to adjudicatory proceedings before the various state agen-

cies nor would it apply *per se* to the drafting of bills and proposed regulations.

Finally, you have sought my opinion as to whether your construction of G. L. c. 3, § 41, as amended by St. 1973, c. 981, § 4, which would require voluntary associations employing legislative agents to divulge their entire membership lists is constitutionally permissible or is in violation of the First Amendment of the Constitution of the United States or Article 16 of the Declaration of Rights of the Constitution of the Commonwealth. The language which you have so construed states that the docket required to be maintained by you, "shall include the name, business address, and the employer's business interests which may be affected by legislation; the name, business address and business interests which may be affected by legislation in whose behalf the legislative agent is retained or employed if said person is not the direct employer." G. L. c. 3, § 41, as amended by St. 1973, c. 981, § 4. Such information is deemed to be public information by virtue of that same statute.

Although you have not sought my opinion as to whether your construction of the above statutory language is a necessary construction, I should point out that the above language could easily be construed so as not to require that voluntary associations employing a legislative agent divulge their entire membership lists. However, in answering your specific question, my opinion is controlled by the large body of constitutional law enunciated by the Supreme Court of the United States in the area of First Amendment rights of free speech and free association. In *NAACP* v. *Alabama*, 357 U.S. 449 (1958), the Supreme Court held that the disclosure of membership lists of the NAACP would likely have a strong deterrent effect on the rights of individuals to freely associate. *Id.* at 463. In order to justify its requirement that a membership list be divulged, a state must show a controlling justification for the deterrent effect on the free enjoyment to associate which disclosure of membership lists is likely to have. *NAACP* v. *Alabama*, 357 U.S. 449, 466 (1958). See also, *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *Wallace* v. *Brewer*, 315 F. Supp. 431 (M.D. Ala. 1970).

Consistent with the mandate of *NAACP* v. *Alabama*, *supra*, it is my opinion that a general rule requiring all associations who employ a legislative agent to divulge their membership would violate rights of free association guaranteed by both the First and Fourteenth Amendments of the Constitution of the United States and by Article 16 of the Declaration of Rights of the Constitution of this Commonwealth. I intimate no opinion whether in particular cases, a showing that the disclosure of membership lists is essential to insuring the legislative policy of the right of people to have responsible democratic government and to preserve and maintain the legislative process may justify a requirement that a particular association divulge part or all of its membership lists. See, e.g., *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 49. February 3, 1975

Members, Real Estate Review Board
Department of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Gentlemen:

You have addressed the following question to me:

> "Do the provisions of Chapter 556 of the Acts of 1952 and other Special Acts in amendment thereof and in addition thereto establish the members of the Real Estate Review Board as 'employees' of the Department of Public Works, or are the members of the Real Estate Review Board exempt from consideration as 'employees' because of the determination they are required to make in accordance with the provisions of Chapter 556 of the Acts of 1952 and other Special Acts in amendment thereof and in addition thereto?"

In your letter you state that:

> "From its inception the members of the Real Estate Review Board have signed a contract of employment with the Department of Public Works on a fiscal year basis under 03 account (employment and compensation of consultants). A copy of the contract signed by the members of the Board is enclosed herewith together with Form AF-C2, the approved Request for Authorization of Services-Non-Employees, by the Executive Office for Administration and Finance, dated August 14, 1972."

(The "contract of employment" which you referred to is not an *employment contract*, but rather is a contract for services as an independent Appraiser.)

The "03" account is a subsidiary account which appears in the document entitled "Subsidiary Accounts and Expenditure Code Numbers For Budgetary Control" and provides as follows.

> "03 Services — Non-Employees
>
> All services and expenses rendered by non-employees except contractual services classified under other subsidiary accounts.
>
> Professional
> 121 Architects and Engineers
> 122 Appraisers"

The present question has arisen because the Board has been notified by the Department of Public Works that its members are "employees" for income tax withholding purposes and are subject to the provisions of Administrative Bulletin 72-10, the salient provisions of which are as follows:

> "TO ALL AGENCY HEADS:
>
> The Internal Revenue Service has advised us that the Commonwealth is not complying with certain reporting and other require-

ments of Federal law with respect to payments made by state agencies to third persons. I has also come to our attention that we are not complying with similar requirements imposed by the Massachusetts income tax statutes. We have been requested by the IRS and by the Department of Corporations and Taxation to bring about compliance with these requirements as soon as possible. The purpose of this bulletin is to explain these requirements to agencies in the Executive Branch and inform them what must be done to effect compliance.

There are two types of requirements involved. First, the Commonwealth must withhold Federal and Massachusetts income taxes from payments made to certain 03 contractors and report the same to IRS and the Department of Corporations and Taxation. Second, we must file annual reports with both taxing authorities as to certain other payments made by state agencies.

I. WITHHOLDING REQUIREMENTS

1. Under the Massachusetts Expenditure Code Manual, an 03 contractor, by definition, is *not* an employee. There are many instances, however, where *an individual whose services are engaged under an 03 contract has many attributes of an employee – that is, where the state agency engaging his services has the right to direct and control him not only as to the result to be accomplished by his services, but also as to the details and means by which he accomplishes it.* For Federal and Massachusetts income tax purposes, any such 03 contractor is deemed an 'employee' of the Commonwealth. Thus, Federal and Massachusetts income taxes must be withheld from payments made to any such 03 and paid over to the appropriate taxing authorities, as if he were an 01 or 02 employee. In addition, a W-2 form must be prepared and filed at the end of each calendar year as to amounts paid to and withheld from each such contractor during the year.

2. In order to assure prompt and uniform decisions as to which 03 contractors are to be regarded as 'employees' for income tax purposes and therefore subject to withholding, *I have directed the Bureau of Personnel to make that decision at the time each AF-C2 form is processed.* Its decisions will be based on information received from IRS, and the Bureau will remain in direct communication with IRS to assure that each such decision is correctly made. Whenever the Bureau decides that an *03 contractor is an 'employee' for tax purposes, it will insert the symbol 'W-2' in line 7* ('Other Pertinent Information') on each copy of the AF-C2 form.

3. *The Bureau of Personnel is also prepared to determine the status of each 03 contractor engaged by state agencies in the Executive Branch which are not required to submit AF-C2 forms.* In order to enable the Bureau to do so, each such agency must promptly notify the Bureau of the pertinent details of any 03 con-

tract with an individual it proposes to enter into. (No such inquiry need be made as to any 03 contract with a corporation, since payments to corporations are not subject to withholding requirements.) Once the Bureau has communicated its decision to such an agency, it will be the responsibility of that agency to record that decision in such a manner as to permit proper treatment of payments to the contractor thereafter. (Emphasis supplied)

Pursuant to this classification, income taxes are withheld from the compensation paid to each member of the Board (who are on a per diem basis), but the members are in no other respect treated as employees, e.g., they are not members of the State Retirement System nor entitled to workmen's compensation benefits.

The Real Estate Review Board was created by various Special Acts relating to the accelerated highway program and authorizing the Department of Public Works and the Metropolitan Commission to expend specified amounts therefor. Each of the following statutes had identical language in § 6 which is set forth below in pertinent part:

"SECTION 6. The department and the commission may, on behalf of the commonwealth, take by eminent domain under chapter seventy-nine of the General Laws, or acquire by purchase or otherwise, such public or private lands, . . . as it may deem necessary for carrying out the provisions of this act, . . .

There is hereby created within the department of public works a real estate review board consisting of five members, to be appointed by the commissioner from members of the Boston Real Estate Board, from resident Massachusetts members of the American Institute of Real Estate Appraisers, from members of the Massachusetts Board of Real Estate Appraisers or from members of the Massachusetts Real Estate Association. All vacancies in said board shall be filled by said commissioner from a list of five names submitted by the Boston Real Estate Board and five names submitted by the Massachusetts Real Estate Association. Said department shall fix the compensation of the members of said real estate review board.

No payment in excess of twenty-five hundred dollars by way of purchase of real estate or any interest therein shall be made, and no settlement in excess of twenty-five hundred dollars shall be made out of court for damages recoverable under chapter seventy-nine of the General Laws in excess of the amount recommended by said real estate review board.

No settlement in excess of twenty-five hundred dollars and in excess of the recommendation of the real estate review board shall be made by agreement of the parties during or after trial except with the written approval of the court; provided, that settlements in excess of the recommendation of the board may be made without such approval if the settlement does not exceed the amount of any verdict or finding which may have been rendered, together with interest and costs.

The $2,500 limitation with respect to the board established by St. 1956 c. 718, § 6 was raised to $20,000 by St. 1963 c. 822, § 3, St. 1967 c. 616, § 3 and St. 1972 c. 765.

St. 1955 c. 693, § 1, relating to taking of public lands and directing payments mutually agreed upon was amended by St. 1957 c. 657 to require any dispute with the city, town, department, authority or agency whose lands are taken to be referred to the Real Estate Board "created by" St. 1954 c. 403, § 6 "*which shall determine the amount to be paid, and said determination shall be final.*" (Emphasis supplied)

The various Special Statutes creating the Board do not spell out the relationship between the Commissioner of the Department of Public Works and the Real Estate Review Board except with respect to appointment of the members and fixing their compensation and, as an incident, providing space in the Department for meetings. The right to appoint, where no definite term is provided for, carries with it the right of removal. *Adie* v. *Mayor of Holyoke*, 303 Mass. 295, 300. The Federal Income Tax Regulations state that, for income tax withholding purposes, factors characteristic of an employer are the right of discharge and the furnishing of a place to work. Reg. § 31. 3401(c)-1(b). However, these factors are not conclusive for the same Regulation states essentially the common law definition of an employee, as follows:

> "(b) Generally, the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done . . . "

The language of the various statutes which have created the Board make clear that the Board is a separate authority within the Department of Public Works (1965-66 Op. Atty. Gen'l, p. 65), and not subject to the direction or control of the Commissioner. Thus, under § 6 of each of the statutes which create the board, no payment or settlement in excess of $2,500 (later $20,000) can be made by the Department of Public Works unless recommended by the Board. Moreover, under St. 1955 c. 693, § 1, as amended by St. 1957 c. 657, above referred to, the Board is made the final arbiter in the case of disputes with the other public authorities involved. *Revere Housing Authority* v. *Commonwealth,* 351 Mass. 180. This independent right of action vested in the Real Estate Review Board is clearly not a characteristic of an employer-employee relationship.

I conclude, therefore, that the members of the Real Estate Review Board are independent of the Commissioner of the Department of Public Works, and are not employees of the Department for any purpose, including the withholding of income taxes. However, in connection with federal income tax withholding we are dealing with a federal question and I should point out that Reg. § 31. 3401(c)-1(d) provides as follows:

"(d) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case."

Thus, if the federal government has made, or hereafter makes, a factual determination that the members of the Board are employees for income tax withholding purposes, this determination will control, but such determination will not make a Board member an "employee" for any other purpose. It should be noted in this connection that "employer" and "employee" are defined, for purposes of withholding of the Massachusetts income tax, in the same manner as in the United States Internal Revenue Code, G.L. c. 62B § 1.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 50. February 3, 1975

Honorable Frederick A. Centanni
Commissioner of Commerce and Development
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Centanni:

You requested an opinion of my predecessor as to the authority of the Department of Commerce and Development to provide financial assistance to certain qualified public or nonprofit agencies pursuant to St. 1973, c. 1038.

I understand your request to concern itself with whether participating agencies which receive financial assistance pursuant to St. 1973, c. 1038 can expend private funds raised from non-governmental sources for travel expenses, entertainment, salaries, or the purchase of equipment. Quite clearly, St. 1973, c. 1038 prohibits the expenditure of funds provided by the Commonwealth for any of the above enumerated purposes.

St. 1973, c. 1038 authorizes the Department of Commerce and Development to "establish a program for financial assistance to those public or nonprofit agencies which promote or provide services for tourism, conventions, travel and recreation in the Commonwealth." However, the statute contains a proviso which states as follows:

"No funds may be spent for travel, entertainment, salaries or purchase of equipment *under this section*." *Id.* (Emphasis supplied).

Quite clearly, the prohibition against spending funds for travel, etc., extends only to prohibiting the use of public funds appropriated pursuant to St. 1973, c. 1038 for such purposes. There is no indication from the plain language of the statute that the legislature intended to prohibit participating agencies from expending privately raised funds for these purposes. Accordingly, it is my opinion that participating public or nonprofit agencies may use privately raised funds for the purpose of travel, entertainment, salaries and the purchase of equipment and still participate in the financial assistance program established by St. 1973, c. 1038.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 51. February 3, 1975

Honorable Nicholas L. Metaxas
Commissioner of Corporations and Taxation
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Metaxas:

You requested an opinion of my predecessor whether the Department of Corporations and Taxation (hereinafter "Department") may properly purchase "blanket" type bonds for its various officers and employees required to give bond (G.L. c. 14, §§2 and 3) and for registers of deeds (G.L. c. 64D, §3), rather than purchasing the "schedule" bonds provided for in G.L. c. 30, §16 as is presently the practice. You have stated that you believe blanket type bonds in sufficient penal amount and with proper surety would more comprehensively protect the Department because of the inclusion of all employees permanently or temporarily assigned to job positions requiring bond coverage. In contrast, schedule type bonds extend coverage solely insofar as scheduled officers or employees are named and expressly bonded. For the reasons stated herein, I must answer your inquiry in the negative.

The Legislature has not in any of the specific enactments requiring the bonding of certain state officers or employees used any language indicating an intention expressly to forbid the use of blanket type bonds. G.L. c. 30, §15 provides:

> "When state officials or employees are required to give bond in which the amount is not fixed by law, the comptroller shall fix the amount and shall require that such bonds be made uniform so far as possible."

Blanket type bonds might be issued consistently with §15; that section's uniformity requirement presents no obstacle to the use of such bonds; blanket type bonds would allow a maximum of uniformity.

However, General Laws, c. 30, §16, which expressly authorizes the use of schedule bonds, states:

> "State officers and heads of state departments may arrange for such schedule bonds as they deem advisable, which shall take the place of bonds required by law of them or any of their officers and employees. Every such schedule bond shall be a surety company bond with a surety company authorized to do business in the Commonwealth as surety, conditioned that the officers and employees named in the bond shall faithfully perform the duties of their offices and employments, with other conditions or provisions required by law."

That the Legislature considered such an enactment necessary to empower state officers and heads of departments to arrange for schedule bonds suggests that a statutory authorization is required for blanket type bonds as well. Originally enacted as St. 1918, c. 257, §90, the schedule bond authorization has remained unchanged since St. 1920, c. 546, §1.

A distinction which must be observed is a statutory distinction between particular types of Department officers and employees. G.L. c. 14, §2, which defines the duties of the Commissioner of Corporations and Taxation and his associate commissioners, provides in relevant part:

> "The commissioner and associate commissioners . . . each shall give to the state treasurer a bond for the faithful performance of his official duties in a penal sum and with sureties approved by the governor and council."

I am of the opinion that even should the language of §2 allow the commissioner and associate commissioners to utilize blanket bonds for their positions, the approval of the governor and council would be necessary. G.L. c. 30, §18 supports such an interpretation. That section declares that with respect to bonds requiring the approval of the governor and the council:

> "The governor shall appoint a committee of the council which shall annually in March make such examination of bonds required to be approved by the governor or by the governor and council. If the bond is found upon examination to be insufficient, the person who has examined it shall forthwith notify the principal thereof and shall require him . . . to file a new bond in conformity with law."

A power to disapprove blanket type bonds with respect to the commissioner and associate commissioners would inhere in the power of periodic review of the *sufficiency* of the requisite bond granted by c. 30, §18.

In contrast, G.L. c. 14, §3, which concerns the appointment of employees and consultants, provides:

> "[The Commissioner] may from time to time designate such employees of the department as he deems expedient as deputy collectors. Such deputies shall give bond for the faith-

> ful performance of their duties in such sum and in such form and subject to such conditions as he may prescribe . . ." (emphasis supplied).

Section 3 seemingly provides the requisite statutory authorization for blanket type bonds — at least insofar as the bonds of deputy collectors are concerned.

However, I direct your attention to the sample Public Employees Blanket Bond you have provided, which specifically excludes from the definition of *employee* in the insuring agreement those required by law to give bond:

> "The following terms, as used in this Bond, shall have the respective meanings stated in this Section: 'Employee' as used in Insuring Agreements 1 and 2 means a person while in the employ of the Insured during the Bond Period who is *not* required by law to give bond conditioned for the faithful performance of his duties and who is a member of the staff or personnel of the Insured *but does not mean any Treasurer or Tax Collector by whatever title known.*" (Emphasis supplied)

I am of the opinion that this definitional exclusion from the coverage of the Public Employees Blanket Bond would render illusory the blanket type bond coverage of the various officers and employees required to give bond. Since G.L., c. 14 §2 requires the commissioner and associate commissioners each to give a bond for the faithful performance of his official duties, the definitional exclusions of §1 might render illusory Insuring Agreements 1 and 2. Moreover, the employees designated as deputy collectors by the commissioner under G.L. c. 14, §3 might well fall within the definitional exclusion from coverage of a "Tax Collector by whatever title known." The provision of c. 14 §3 that the commissioner may prescribe the sum, form and conditions of the bonds of those designated as deputy collectors does not supersede the requirement that such deputies "*shall* give bond." (emphasis added). The commissioner's discretion to prescribe the sum, form and condition of such bonds cannot sanction illusory bonds in derogation of the statutory command.

Your final inquiry relates to whether blanket type bonds may be utilized with respect to registers of deeds. G.L. c. 64D, §3, which concerns registers of deeds in whose registry there has been installed a metering machine, requires:

> "Each register of deeds . . . shall give to the commissioner a bond, in a penal sum and with sureties approved by the commissioner, conditioned satisfactorily to account for money received by said register in his official capacity from the sale of said stamps."

Unlike G.L. c. 14, §3, G.L. c. 64D, §3 does not empower the Commissioner to approve the *form* of the bond. Moreover, the schedule bond provision of c. 30 §16 would seem equally applicable in the case of registers of deeds. Hence, any argument that the Legislature's enactment of c. 30, §16 evinces a need for statutory authorization for blanket bonds applies to registers of deeds as well. Finally, since a register of deeds

may also fall within the definitional exclusion of "employee" contained in the Public Employees Blanket Bond described above, the bond might well be illusory and hence contrary to the command of c. 64D, §3.

Based upon the sample Public Employees Blanket Bond, the facts you have provided, and the relevant statutes, I am of the opinion that the Department may not place blanket type bonds for its various officers and employees required to give bond, nor for registers of deeds.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 52. February 26, 1975

Gasper Caso, Esquire
Chairman
Records Conservation Board
Archives and Records Building
State House
Boston, MA 02133

Dear Mr. Caso:

On behalf of the Records Conservation Board, you asked for an Opinion of the Attorney General to determine whether the Records Conservation Board has the authority and power to permit the loan of state records to a private institution.

Your request for an Opinion of the Attorney General indicates that certain historical records of the Department of Youth Services pertaining to the Lancaster and Lyman Schools, which are now closed, are deposited at the Arthur and Elizabeth Schlesinger Library at Harvard University because, although the Records Conservation Board believes that the documents properly belong in the state archives, the archives are presently overcrowded and could not hold the documents in a manner which would assure their safekeeping. The Schlesinger Library is willing to hold the documents until such time as arrangements can be made for their transfer to the archives. I believe that such authority does reside within the statutory duties of the Records Conservation Board.

The statutory responsibilities of the Records Conservation Board are set out in G.L. c. 30, § 42, which reads in relevant part as follows:

> "The Board shall have power to require all departments of the Commonwealth to report to it what series of records they hold, to set standards for the management and preservation of such records, and to establish schedules for the destruction, in whole or in part, and transfer to the archives, in whole part, of records no longer needed for current business."

In addition, the Records Conservation Board has the power, by the same statute to order the sale or destruction of old records. However,

"until such action shall have been taken, all such records . . . shall remain the property of the Commonwealth . . ." G.L. c. 30, § 42. See also G.L. c. 66, § 8, as amended by St. 1974, c. 141.

I believe that the Records Conservation Board may authorize the loan of these Department of Youth Services records to the Schlesinger Library pursuant to its powers to set management and preservation standards for state records. Since neither a sale nor destruction of the records has been authorized by the Board, title to the documents clearly remains with the Department of Youth Service. A future sale, transfer to the archives, or destruction of these records must be approved by G.L. c. 30, § 42.

Sincerely,
FRANCIS X. BELLOTTI
Attorney General

Number 53. March 3, 1975

Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

Article CI of the Articles of Amendment to the Constitution of Massachusetts, adopted by the voters in November, 1974, requires that a census of the inhabitants of each city and town in the Commonwealth be taken in 1975. The census will be used, among other things, for legislative redistricting and distributing government funds to local communities. In order to effectuate the provisions of Article CI, the General Court has enacted St. 1975, c. 10 which, among other things, amends G. L. c. 9, § 7 to provide for the manner in which the 1975 census shall be taken. Specifically, the new section 7 provides, "Such census shall be compiled and reported upon forms provided by the secretary and in accordance with his instructions . . . " Pursuant to that statutory provision, you have prepared and forwarded to me the following forms and instructions for compiling and reporting the census:

(1) A "Census Card";
(2) "Instructions for Census Takers";
(3) A "Census Supervisor's Manual";
(4) A "Guide for Training Census Takers." (Page 4 of this document contains a notation to correct a provision on page 2 of the "Instructions for Census Takers" dealing with the counting of persons dying after midnight on the census day.) You have requested my opinion as to whether such forms and instructions are consistent with the law pertaining to the definition and counting of inhabitants.

The Supreme Judicial Court has only recently stated:

> "The [word] . . . 'inhabitant' in constitutional and statutory provisions relating to voting [has] long been construed to require that the voter have his 'domicil' in the appropriate city or town," *Hershkoff* v. *Board of Registrars of Voters*, Mass. Adv. Sh. (1974) 2427, 2435 (citations omitted).

Previously, the Court had affirmed that rule in the specific context of provisions involving the taking of the census, *Opinion of the Justices*, Mass. Adv. Sh. (1974) 819, 820-821. Thus, an individual is an "inhabitant" of a community for census purposes if he has his "domicile" there. The meaning of the word "domicile" has received extensive treatment by numerous authorities, *see e.g., Hershkoff, supra*, at 2436, 2439, 2440-2441 and authorities cited. The meaning which was adopted by the Court in *Hershkoff*, and which therefore is the law of this Commonwealth, is that one's "domicile" is the place where he resides with the intention to make it his home for the time at least. Thus, it follows that one is an "inhabitant" of a community if he lives there with the intention of remaining for the time at least.

While the documents which you have forwarded to me relative to the definition and counting of inhabitants for the 1975 census are too extensive for me to recite their contents here, I am of the view that they treat such definition and counting consistently with the aforementioned principles.

Accordingly, I answer your question in the affirmative.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 54. March 6, 1975

Mr. George H. Tully
Director of Administrative Services
Executive Office for Administration and Finance
State House, Boston, Mass. 02133

Dear Mr. Tully:

You have sought my opinion as to whether St. 1974, c. 180, which generally provides that "Patriots Day shall be celebrated as a legal holiday on April nineteenth, twentieth and twenty-first in the year nineteen hundred and seventy-five," requires that "holiday rights" must be given to state employees for all three days.

The "holiday rights" granted to state employees by the legislature are set out in G. L. c. 30, § 24A which provides in pertinent part:

> "If any person employed by the commonwealth is required to work on any legal holiday, *as listed in the first sentence of clause Eighteenth of section seven of chapter four*, he shall be given an additional day off or, if such additional day off

cannot be given by reason of a personnel shortage or other cause, he shall be entitled to additional day's pay." (emphasis supplied).

A predecessor of mine has declared that the intent of the legislature in enacting G. L. c. 30, § 24A was "to make good to a State employee either by giving him a 'replacement' holiday or an extra day's pay, any of the designated holidays which he was not able to enjoy because of being required to work." 1955 *Op. Atty. Gen.* 70 at 71. It is completely immaterial, for the purposes of said § 24A, whether the holiday on which the employee works falls on a Saturday or on some other day of the week. *Id.*

Initially, I note that since G.L. c. 4, § 7 (18) specifically enumerates the third Monday of April, in this case April 21, as a legal holiday, state employees required to work on that day are entitled to "holiday rights." I understand your question to concern itself with whether St. 1974, c. 180 also extends holiday rights to employees required to work on April 19 and April 20.

The legislature in enacting St. 1974, c. 180 declared a three day Patriots' Day holiday for the year nineteen hundred and seventy five. The legislature, however, did not amend G. L. c. 4, § 7 (18) to include April 19 and April 20 within the legislative definition of a legal holiday and, consequently, G. L. c. 30, § 24A does not specifically operate to extend holiday rights for April 19-20, 1975.

In view of the legislature's failure to amend G.L. c. 4, § 7 (18) and its failure to specifically provide in St. 1974, c. 180 for the extension of holiday rights to state employees for April nineteenth and April twentieth nineteen hundred and seventy-five, I am of the opinion that the legislature did not intend to extend holiday rights to state employees on these dates.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 55. March 19, 1975

Mr. W. Norman Gleason
Director of Campaign and Political Finance
8 Beacon Street
Boston, Massachusetts

Dear Mr. Gleason:

On December 4, 1974 my predecessor in office, Robert H. Quinn, forwarded to you an opinion concerning the powers and duties of the Office of Campaign and Political Finance. That opinion proceeded from a recognition of the fact that the provisions of Chapter 1173 of the Acts of 1973 (passed by the legislature and effective on January 1, 1974) conflict with those of Chapter 859 of the Acts of 1974 (passed by the voters

by initiative petition and effective December 5, 1974). The opinion called for a legislative clarification of Chapter 55 of the General Laws as amended by those acts, but as you are aware, the legislature has not yet completely responded to the problem and has not eliminated the conflicting provisions of law. A question has now arisen about the propriety of your releasing to the press the names of persons found by your office to be in violation of the provisions of G.L. c. 55. In this regard, you have asked the following specific questions:

1. Would the release of the names prejudice later proceedings against the individuals who have failed to file required reports?
2. Would the release of names prejudice later proceedings against individuals found in violation of various other requirements of the Chapter?
3. Since, under Section 2A, I may not forward such names to you until ten days after receipt of my notice of intention, what further action is open to me or required of me upon the return to me by postal authorities of the said notice of intention, unopened and unclaimed?

This opinion will treat each of these three questions separately and in the order you pose them. It is significant to note, however, that there are issues and areas of concern common to all three questions. An examination of these issues and areas of concern leads me to answer your first question in the negative. It is my conclusion that making available the list of names of candidates who have failed to file the reports required by Chapter 55 would not prejudice or preclude appropriate later proceedings against the alleged violators. In reaching this conclusion I have balanced the named individuals' fundamental rights to due process of law and to privacy against the public's statutory right of access to such material and against the policies embodied in the First Amendment's guarantee of Freedom of the Press.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution has at its very core the proposition that the verdict of the trier of fact shall be based only on evidence received in open court, not from outside sources. As Mr. Justice Holmes expressed this rule over half a century ago:

> "The theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907).

With the development in the twentieth century of an interlocking media system touching the lives of virtually the entire populace, courts have come to balance the requirement of a fair trial against the rule of freedom of discussion. Where the pre-trial publicity attendant on a particular case is massive, pervasive and prejudicial, so that the possibility of a fair trial is foreclosed, the balance is consistently struck in favor of the individual's right to a fair trial. Thus, in *Estes* v. *Texas*, 381 U.S.

582 (1965) the United States Supreme Court held that televising and broadcasting preliminary proceedings in which there was widespread interest and nationwide notoriety was inherently invalid as infringing the petitioner's fundamental right of due process. In that case the Court reversed the petitioner's conviction without a showing of demonstrable prejudice. Similarly, reversing the murder conviction in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966) the Court noted that where the totality of the circumstances raises the probability of prejudice arising from pretrial publicity, the accused need not show identifiable prejudice.

None of the cited cases erects an absolute rule prohibiting pre-trial publicity of any kind. Instead the Courts therein were called upon to make ad hoc determinations of whether or not on the facts of each particular case, the pre-trial publicity was so massive and pervasive that the defendant had been denied a fair trial. In both the *Sheppard* and *Estes* cases the Court found the pre-trial publicity to be so inherently prejudicial that a fair trial was impossible. It is highly unlikely that the publicity resulting from your release of the list of names would approach in impact or scope the publicity of the Sam Sheppard and Bill Sol Estes cases. I would, therefore, conclude that the release of names in this case would not violate principles of fundamental fairness and would not preclude future prosecution.

A balancing test is also used in evaluating the right of privacy of the involved individuals and the effect of that right on the pre-trial and preindictment release of names of alleged violators. In a recent case involving the availability for discovery purposes of a list purporting to identify taxpayers who failed to file federal income tax returns, Lord, C. J. wrote:

> "While the privacy of individuals should be zealously protected, it must be balanced against the interest of the defendant in adequately preparing his defense . . . in balancing the interest of the individuals whose names appear on the list against the interest of the defendant-taxpayer, the balance is heavily in favor of the defendant-taxpayer." *United States* v. *Liebert*, — F. Supp. —, 43 USLW 2180 (ED Pa., 1974).

It is my conclusion that the right to privacy of the candidates on your list must give way to the public's need for information in the intelligent exercise of the right to vote. This conclusion is supported by such cases as *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) which encouraged public disclosure regarding the conduct of public officials, and *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), which further elucidated the fundamental nature of the public's so-called "right to know." In *Fritz* v. *Gorton*, 83 Wn.2d 275, 517 P. 2d 911 (1974) and in *County of Nevada* v. *MacMillen*, 11 Col. 3d 662, 522 P.2d 662 (1974), the highest courts of Washington and California respectively have balanced the privacy rights of candidates against the public's right to know. Both cases involved constitutional challenges to state disclosure laws similar to Chapter 55. In both of these state cases the *New York Times* and *Rosenbloom* cases were cited with approval, and in both the balance

was struck in favor of the policy of disclosure. It is, therefore, my opinion that the right of privacy of the individuals on the list of alleged violators does not erect a constitutional bar to the publication of that list.

It is also my opinion that there is no statutory bar to the publication of a list of names of those who have failed to file reports. Section 2A of Chapter 55 states that "the same provisions with reference to secrecy which govern proceedings of a grand jury shall govern all proceedings before the director."

The secrecy provisions of Section 2A must be read in conjunction with Section 13 of Chapter 277 which provides:

> "No grand juror shall be allowed to state or testify in any court in what manner he or any other member of the jury voted on any question before the grand jury, or what opinion was expressed by any juror relative thereto. In charging the grand jury, the court shall remind them of the provisions of this and the preceding sections."

It is my opinion that Section 2A therefore only prohibits you from disclosing the testimony and opinions expressed in the hearings you conduct.

I further call your attention to the requirement of Section 2A that you respond with reasonable promptness to requests for information from members of the public and to the new definition of the phrase "public record" contained in General Laws Chapter 4, Section 7.

Because it would be impossible for me to undertake the required balancing test without specific knowledge of the violations involved, I may not respond categorically to your second question. I can envision cases in which a premature release of information would not only result in a denial of fundamental fairness and violate one's right to privacy, but would also invoke the privacy exception to the public records rule embodied in Chapter 4, Section 7(c), and possibly violate the secrecy provisions of Chapter 55, Section 2A. I therefore conclude that determinations of the wisdom of pre-trial and pre-indictment release of information must be dealt with on a case-by-case basis, and the better practice would be to seek an opinion at the time of said investigation.

In response to your third question, I cite to you the language of Chapter 55, Section 2A, concerning the powers of your office:

> "The director shall have the power and authority to investigate the legality, validity, completeness and accuracy of all reports and actions required to be filed and taken by candidates, treasurers, political committees and any other person pursuant to this chapter and any other laws of the commonwealth pertaining to campaign contributions and expenditures. He may require, by summons, the attendance and testimony under oath of witnesses and the production before him of books and papers relating to any matter being investigated by him . . ."

There is no conflict between this language and the provisions of Chapter 859. The investigatory and summonsing powers conferred upon your office by Chapter 1173 are clearly still in existence and provide an internal method whereby you may compel the filing of reports.

Furthermore, I interpret the last paragraph of Section 2A to mean that you may refer matters to the Attorney General, even without proof that the alleged violators actually received notice. Failure to file is governed not only by Section 2A but also by Sections 23 and 24 of Chapter 55. The manifest intent of all three sections is to erect statutory machinery to compel the filing of reports. Individual candidates and treasurers are protected from undue publicity and unnecessary prosecution by the availability of a hearing before the director. That hearing is not a mandatory step in bringing violators to justice, but provides instead an optional opportunity for those charged with violations to avoid further prosecution.

The hearing before the director is in many respects analogous to a clerk's hearing prior to the issuance of a complaint in district court. See General Laws, Chapter 218, Section 35A. In both instances a hearing is not a prerequisite to a valid prosecution. In both instances, however, once a hearing is properly requested a prosecution should not commence until the hearing has been completed. I, therefore, conclude that alleged violators of the filing requirements of Chapter 55, Section 16, may not avoid the sanctions of the law by failing to accept their mail. Thus, you may refer these violations to the Attorney General without a formal proof of receipt.

At the start of this opinion, I referred to an opinion of the Attorney General issued to you on December 4, 1974. As that opinion noted, the conflicting provisions of existing election laws can only be reconciled by the legislature. Although you can issue clarifying rules and regulations, and I can respond to your specific questions in opinion form, the public interest will only be served when Chapter 55 is rewritten in a fashion incorporating the sweeping reforms of both Chapter 1173 and Chapter 859.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 56. March 26, 1975

Mr. Howard N. Smith
Secretary
Executive Office of Manpower Affairs
Charles F. Hurley Building — 4th Floor
Boston, MA 02114

Dear Secretary Smith:

On December 30, 1974, the Secretary of Manpower Affairs requested an Opinion of the Attorney General concerning a computerized management information system which the Executive Office of Manpower

Affairs proposed to establish to implement the Comprehensive Employment and Training Act of 1973 (CETA), P.L. 93-208, 87 Stat. 839. Specifically, the Secretary wanted to know:

(a) whether it was permissible to ask if applicants for CETA positions have criminal records, and

(b) whether applicants could be required to furnish their Social Security numbers, so that the Executive Office could easily examine records of the Department of Public Welfare and the Division of Employment Security.

With regard to offender status, I am of the opinion that the Executive Office may ask applicants for CETA positions whether they have criminal records but it must inform such applicants that certain Massachusetts statutes permit them to decline to furnish certain types of information. In addition, if the Executive Office of Manpower Affairs wishes to corroborate information concerning criminal histories, it must have been deemed eligible to gain access to criminal offender record information pursuant to Massachusetts statutes, detailed below.

With regard to requesting the Social Security Number (SSN), the Executive Office is seeking the SSN in order to check records of the Department of Public Welfare and the Division of Employment Security. I am of the opinion that the SSN may be required of persons hired under CETA, but that it may not be required of applicants. Additionally, it is legal for the Executive Office of Manpower Affairs to examine client records of the Division of Employment Security and the Department of Public Welfare.

The basis for my conclusions are set forth below:

1. *Criminal Records*

The Executive Office of Manpower Affairs has good reason to inquire whether applicants for CETA position have criminal histories because offenders, as defined in the federal regulations, are a "Special Manpower Target Group" for purposes of providing employment and job training pursuant to Title I and II of CETA and Title VI of CETA, as added by the Emergency Jobs and Unemployment Assistance Act of 1974, P.L. 93-567, 88 Stat. 1845. See 29 C.F.R. 94.4 (bb), 39 Fed. Reg. 19886, 19888 (June 4, 1974). There is nothing in Massachusetts Law which forbids a potential employer from seeking information concerning criminal histories of applicants. However, forms for employment are required to contain a specific statement that applicants with sealed records do not have to reveal the existence of such criminal histories. G.L. c. 276, §§ 100A and 100C. Thus, the Executive Office must amend its application form to incorporate this required statement in order that applicants for CETA position may elect whether or not to reveal the existence of sealed records. In addition, G.L. c. 151B, § 4, clause 9, as amended by St. 1974, c. 531, forbids employers from seeking information from applicants concerning arrests for which no conviction resulted, certain first convictions for minor offenses and for any misdemeanor where the date of conviction or the termination of incarceration,

whichever occurred later, happened more than five years before the application for employment; provided that the applicant was not convicted of any other offense within the preceding five year period. Because the federal CETA regulations define an offender as an individual who is "subject to any stage of the judicial, correctional, or probationary process," there is no conflict between federal and state laws. Mass. G.L. c. 151B, § 4, clause 9, forbids inquiry concerning conduct where the criminal justice process will have ceased long before the application for CETA employment. Thus to satisfy the federal goal of hiring offenders while preserving the individual's privacy contemplated in state law, the Executive Office of Manpower Affairs need only make clear to applicants that it is seeking only active criminal histories and not old minor offenses such as enumerated in G.L. c. 151B, § 4, which have no relationship to the definition of an "offender" in the federal regulations. See 29 C.F.R. 94.4 (bb); 39 Fed. Reg. 19886, 19888 (June 4, 1974). Finally, if the Executive Office of Manpower Affairs desires to corroborate information furnished by applicants concerning criminal histories, it must first receive certification for such access pursuant to G. L. c. 6, § 172(b) and Regulation 2.16 of the Criminal History Systems Board.

2. *Social Security Number*

The Executive Office of Manpower Affairs may not require applicants for CETA positions to furnish their Social Security Number because of the restrictions contained in Section 7 of the Privacy Act of 1974, P.L. 93-579, 88 Stat. 1896, 5 U.S.C. 552a (7), which reads as follows:

A.(1) It shall be unlawful for any Federal, State, or local government agency to deny any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security number.

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to —

(a) Any disclosure which is required by Federal statute,

or

(b) The disclosure of a social security number to any Federal or State or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

B. Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform the individual whether the disclosure is mandatory or voluntary, but what statutory or other authority such number is solicited, and what uses will be made of it.

Section 6109 of the Internal Revenue Code and the regulations interpreting it require *employees* to furnish their SSN to their employers since the SSN is the personal identifier for income tax purposes. Internal Revenue Code of 1954, Sec. 6109, 26 U.S.C. 6109; as amended by P.L. 87-361; I.R.S. Regs. 1.6109-1; 26 C.F.R. 6109. Pursuant to this

section, the Executive Office of Manpower Affairs may require persons actually employed under CETA to furnish their SSN. However, there is nothing in the Internal Revenue Code nor anywhere else in state or federal statute or regulation which requires *applicants* for employment to furnish their SSN. Therefore, although the Executive Office may seek the SSN from applicants, it must inform them that giving the SSN is voluntary and that, if given voluntarily, the SSN will be used to check Division of Employment Security and Department of Public Welfare records. No person otherwise eligible for CETA employment can be denied such employment on account of refusal to furnish the SSN.

Statutory authority does exist to permit the Executive Office of Manpower Affair to have access to the records of clients of the Division of Employment Security and the Department of Public Welfare. G. L. c. 151A, § 64, authorizes the Director of the Division of Employment Security to furnish information concerning recipients of unemployment compensation to "any agency of the Commonwealth . . . charged with the . . . administration of assistance through public employment . . ." I interpret this statute together with the role of the Executive Office of Manpower Affairs under CETA as permitting the exchange of client information between the Division of Employment Security and the Executive Office for the purposes of implementing CETA.

I also conclude that officials of the Executive Office may have access to client records of the Department of Public Welfare. G. L. c. 66, § 17A permits such records to be:

> "open to inspection only by public officials of the Commonwealth, which term shall include members of the general court, representatives of the federal government, and those responsible for the preparation of annual budgets for such public assistance, the making of recommendations relative to such budgets, or the approval or authorization of payments for such assistance, or for any purposes directly connected with the administration of such public assistance . . ."

There are criminal penalties for illegal disclosure of such records. G. L. c. 271 § 43. The Secretary of Manpower Affairs is eligible to receive information concerning welfare recipients as a public official of the Commonwealth. The list of public officials enumerated in the statute is suggestive rather than exclusive consistent with the common meaning of the word "include." see *Schluckebrier* v. *Arlington Mutual Insurance Company*, 8 Wis. 2d. 480, 99 N.W. 2d. 705, 707 (1959). In order to follow Massachusetts principles of statutory construction and give each word its ordinary meaning, the statute must be read to give all public officials employed by the Commonwealth and certain employees of the federal government access to Department of Public Welfare recipient files. See *Finance Committee of Falmouth* v. *Falmouth Board of Public Welfare*, 345 Mass. 579, 188 N.E. 2d 848 (1963); cf. 1956 Op. Atty. Gen. 70.

Sincerely,
FRANCIS X. BELLOTTI
Attorney General

Number 57. April 25, 1975

Honorable Vite J. Pigaga, Director
Health, Welfare and Retirement
Trust Funds Board
22 Batterymarch Street
Boston, Massachusetts 02109

Dear Mr. Pigaga:

General Laws, c. 31, § 461 provides, in part:

> "Whenever a person is separated from the official or labor service for layoff due to lack of work or lack of money or for abolition of position, his name shall be placed by the director on the reemployment list; and if a person is separated from such service because of resignation on account of illness his name shall be placed thereon upon his request in writing made within two years from the date of such separation. The name of any person so placed on the re-employment list shall remain thereon until he is appointed to a position after certification from such list or reinstated to a civil service position, but in no event for longer than two years. This section shall not apply to persons originally employed on requisition for temporary service or to provisional appointees. Thereafter, on requisition to fill any position which, in the judgment of the director, can be filled from such re-employment list, the director, before certifying from the regular list, shall certify from such re-employment list, in accordance with the rules relative to certification, the names of persons then standing thereon in the order of the dates of their original appointment."

Effective July 1, 1975, the word "administrator," meaning "Personnel Administrator" as established by St. 1974, c. 835, § 4, will replace the word "director" in the above paragraph, meaning Director of the Division of Civil Service. Otherwise, the language of the paragraph will remain the same.

Relative to the above provisions, you have informed me that funding of the operations of the Board will cease on July 1, 1975. As a result, the Civil Service employees of the Board will be separated from service "for lay-off due to lack of work or lack of money or for abolition of position" and will be eligible for re-employment under the section.

On the basis of the above facts, you have requested my opinion on the following questions:

1. May the above-described employees who are placed on the re-employment list be certified to any position for which they are generally qualified, regardless of the nature of their previous position with the Board?
2. May the above-described employees be placed on the re-employment list prior to July 1, 1975?

With respect to your first question, I find no restriction on the certification of individuals from the re-employment list under section 461 other than that, in the judgment of the Director/Administrator, a given individual be generally qualified for the position to which he is certified, and that individuals be certified for re-employment in the order of dates of their original appointment. Accordingly, I answer your first question in the affirmative.

With respect to your second question, I believe that the language of section 461 makes it clear that no employee is eligible to be placed on the re-employment list until he is actually separated from service. As the Civil Service employees of the Board will not be so separated until July 1, 1975, I answer your second question in the negative.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 58. May 8, 1975

Honorable David M. Bartley
Speaker of the House
House of Representatives
Room 356, State House
Boston, Massachusetts 02133

Dear Mr. Speaker:

By Resolution No. 5828 of April 16, 1975, the House of Representatives has asked whether the Secretary of the Executive Office of Manpower Affairs constitutionally may refuse to expend funds which have been appropriated in accordance with the expressed intent of the General Court. Additionally, I have been asked whether the Secretary has the constitutional authority to refuse to expend a particular item which was appropriated for Fiscal Year 1975, to carry out the provisions of chapter 1038 of the Acts of 1973.

It is my opinion and the House of Representatives is so advised, that the Secretary of the Executive Office of Manpower Affairs does not have the constitutional right to refuse to expend funds appropriated by the General Court, except insofar as that refusal to expend funds is in furtherance of such legislative purposes as may be contained in the duly-enacted laws of this Commonwealth.

In particular, it is my opinion and the House of Representatives is so advised, that the Secretary does not have the constitutional authority to refuse to spend the $500,000 which was appropriated by the General Court to fund chapter 1038 of the Acts of 1973, for reasons which are unrelated to the purposes of that legislation, to wit, "to establish a pro-

gram for financial assistance to those public or nonprofit agencies which promote or provide services for tourism, conventions, travel and recreation in the commonwealth."

Part II, c.l, §1, art. 4 of the Massachusetts Constitution and art. 63, §3 of the Amendments thereto, place the power to issue and dispose of revenues in the General Court. The appropriation of funds is an exclusively legislative function. *Opinion of the Justices*, 302 Mass. 605, 612-13, 19 N.E. 2d 807, 813 (1939).

> "The power to appropriate public funds for the payment of expenses incurred in maintaining the State government is vested in the Legislature . . ." *Baker v. Commonwealth*, 312 Mass. 490, 493, 45 N.E. 2d 470, 472 (1942).

The power of the Executive Branch to control appropriations is placed in the Governor, who may recommend expenditures in his proposed budget (Mass. Const., Amendments art. 63, §2), may veto a bill (Mass. Const., Part II, c.l, §1, art. 2), or may veto one or more items of a money bill (Mass. Const., Amendments, art. 63, §5). Inasmuch as the Governor's power to control appropriations is limited to making recommendations to the Legislature or exercising a veto which may be overridden by the Legislature, the power to apppropriate funds remains solely in the hands of the Legislature.

A bill which is signed by the Governor, or which is passed over his veto, becomes the law of this Commonwealth. Mass. Const., Part II, c.l, §1, art. 2. Similarly, if an item in a money bill has been vetoed by the Governor, but the veto has been overridden by the General Court, that item "shall have the force of a law." *Id.* Thus, duly-enacted appropriations are laws of this Commonwealth.

It is, of course, the constitutional duty of the Governor and his councilors to direct the affairs of the Commonwealth, "agreeably to the constitution and the laws of the land." Mass. Const., Part II, c.2, §1, art. 4.

> "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for." Mass. Const., Part I, art. 20.

The power to enact laws and the power to suspend those laws, in whole or in part, has been placed solely in our Legislature, insofar as those laws are constitutional. Any doubt as to this point has been resolved by Part I, art. 30 of the Massachusetts Constitution, which states:

> "In the government of this commonwealth . . . the executive shall never exercise the legislative and judicial powers, or either of them . . . to the end it may be a government of laws and not of men."

The power to enact laws for the expenditure of public funds has been placed in the Legislature by our Constitution. The role which the Executive Branch can play, in the determination of what funds will be spent on

what programs and in what amounts, has been constitutionally subjugated to the will of the Legislature. The general principle with which we are concerned was well-stated by Chief Justice John Marshall, speaking of the federal constitutional scheme* which was derived from that of Massachusetts.

> "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law . . ." *Wayman* v. *Southard*, 23 U.S. (10 Wheaton) 1, 44 (1825).

If an expenditure is lawful and constitutional, it is the duty of the Executive Branch to take the necessary steps to secure the expenditure of the funds. *Opinion of the Justices*, 309 Mass. 609, 625, 35 N.E.2d 5, 15 (1941); Mass. Const., Part II, c. 2, § 1, art. 11. The Governor and his Council may question whether an expenditure is in accord with the applicable legislation, but they may not question whether the expenditure should be made, since that is a legislative function. It is the duty of the Executive Branch, "if such payment is 'in accordance with the law,' to issue a warrant accordingly." *Opinion of the Justices*, 309 Mass. 609, 625, 35 N.E.2d 5, 15 (1941). Insofar as an expenditure is lawful and constitutional, "the Governor and the Council have no right to refuse to honor such obligations or liabilities even though they may doubt the wisdom or expediency of incurring such obligations or liabilities." *Id.* at 627, 35 N.E.2d at 16.

The direct question which is answered herein, concerning the constitutional authority of the Secretary of the Executive Office of Manpower Affairs, does not appear to have been answered in prior decisions in this Commonwealth. However, the conclusions I reach are at least consistent with, if not dictated by, opinions of my predecessors in office and a very recent decision by Justice Moriarity, of the Superior Court. *Trustees of the Stigmatine Fathers* v. *Marchand*, Equity No. 36050 (1974); 13 *Opinions of the Attorney General* 143 (Nov. 26, 1963); 11 *Opinions of the Attorney General* 15 (August 9, 1949); 3 *Opinions of the Attorney General* 226 (April 26, 1909).

> "The Governor and Council have no right to withhold an appropriation by refusing to draw a warrant therefor merely because such appropriation is thought by them to be unwise. The time for the Governor to object to an appropriation is when the act or resolve comes before him for signature after it has been enacted by the Legislature. That power is always open to him, and should be exercised when in his judgment an expenditure is thought by him to be unwise or unwarranted." 3 *Opinions of the Attorney General* 226, 228 (April 26, 1909).

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*In the past three years, more than 50 U.S. District Courts, several U.S. Courts of Appeals and the U.S. Supreme Court have all rejected the proposition that the federal Executive could impound funds appropriated by Congress, where the impoundment was for non-program related reasons. *E.g.*, *Train* v. *City of New York*, 43 U.S.L.W. 4209 (U.S. Feb. 18, 1975).

I turn now to the first question asked, with respect to the Secretary's general constitutional authority to refuse to spend appropriated funds. The Secretary is bound to abide by the laws of this Commonwealth, as declared by the Legislature. Because appropriations are laws of the Commonwealth, the Secretary is bound to respect those laws and may not act in a manner contrary to the appropriation law, as supplemented by the underlying legislation which concerns each program and any other relevant legislation. Insofar as a refusal to spend appropriated funds is contrary to "the expressed intent of the general court," as stated in the question posed by the House of Representatives, that refusal would be unlawful.

Second, the specific question has been asked as to whether the Secretary may refuse to spend $500,000 appropriated to fund chapter 1038 of the Acts of 1973, during Fiscal Year 1975. Initially, I note that chapter 1038 (G.L. c.23A, §14) apparently is to be implemented by the Department of Commerce and Development, rather than the Secretary of the Executive Office of Manpower Affairs. However, the Secretary has been directed to "establish guidelines in which to regulate the dispersal of funds under this section," so that he seems to have at least some supervisory authority concerning implementation of the program.

My conclusion with respect to the hypothetical* refusal to spend $500,000 for chapter 1038 is that such action would, at least on its face, be unlawful. The language of chapter 1038 is mandatory, with the verb "shall" used repeatedly; there is nothing in the Fiscal Year 1975 appropriation act to indicate further discretion not to spend these monies; and the refusal to spend any part of the sum appropriated ordinarily would seem not to be in furtherance of the legislative purpose in appropriating the funds.

I trust that this opinion has been responsive to the inquiry by the House.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

*By letter of May 2, 1975, Secretary Smith directed the Acting Commissioner of the Department of Commerce and Development to implement chapter 1038 "in accordance with the requirements established by law."

Number 59. May 27, 1975

Mr. John A. York
Deputy Director
Office for Children
120 Boylston Street
Boston, Massachusetts 02116

Dear Mr. York:

You have requested my opinion regarding the interpretation of certain sections of Chapter 119 of the Massachusetts General Laws. You have informed me that the specific questions which you have posed to me were the result of concerns orally communicated to members of your staff by officials of the Department of Health, Education and Welfare with respect to the Commonwealth's eligibility for federal funding under the Child Abuse Prevention and Treatment Act (P.L. 93-247). You have further informed me that these questions were raised orally by the Department of Health, Education and Welfare subsequent to the receipt of the Commonwealth's application for funding and that the Department has requested that your office seek my opinion as to five specific matters concerning the "intent and practice" under G. L. c. 119, §§ 51A-51G. I will address these five issues separately.

First, you have sought my opinion concerning use of the adjective "serious" in G. L. c. 119, § 51A. Section 51A generally *requires* that certain enumerated professionals, i.e. physicians, nurses, teachers, policemen, etc., who in their professional capacity "shall have reasonable cause to believe that a child under the age of sixteen years is suffering serious physical or emotional injury resulting from abuse," report such condition to the Department of Public Welfare immediately. Section 51A also provides that any other person may make a report to the Department "if any such person has reasonable cause to believe that a child is suffering from or has died as a result of such abuse or neglect." Significantly, the term "serious physical or emotional injury" is deleted from that portion of Section 51A which deals with permissible reports of child abuse as opposed to mandatory reports of child abuse.

It is my opinion that the term "serious physical or emotional injury" applies only to those instances in which certain enumerated professionals are required, as a matter of law, to make reports to the Department of Public Welfare. Section 51A, however, permits and, in fact, encourages the reporting of all instances of child abuse without limitation and without regard to the seriousness of the injury. Moreover, I have been informed that it is the practice and policy of the Department of Public Welfare not to refuse to accept any report of an injury. In practice, the Department of Public Welfare will accept and investigate any report of an injury to determine whether a child has any symptoms of abuse and neglect. Accordingly, I must conclude that the intent and practice under Chapter 119 of the Massachusetts General Laws is to assure the protection of every child and not to restrict access to protective services or to

limit the reporting of cases to instances of "serious injury." Seriousness is one criterion in determining when a report is mandated rather than permitted, but the reporting of injury and access to services is in no manner restricted under Chapter 119 to "serious injury."

Secondly, you have sought my opinion as to whether parents who fail to provide medical services to children on the basis of religious beliefs will be subject to prosecution for such failure. Also, you have restated a concern of the Department of Health, Education and Welfare as to whether services will be available to children who are unable to obtain medical assistance because of their parents' religious beliefs.

The Massachusetts child abuse reporting law does not specifically address itself to the relationship between the religious beliefs of the parent and failure to provide medical care. However, G. L. c. 273, § 1 does address itself to that precise issue. General Laws, c. 273, § 1 provides, *inter alia*, as follows:

> "A child shall not be deemed to be neglected or lack proper physical care for the sole reason that he is being provided remedial treatment by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof."

General Laws, c. 273, § 1 is a criminal statute and it expressly precludes imposition of criminal liability as a negligent parent for failure to provide medical care because of religious beliefs. However, the intent of Chapter 119 is, clearly, to require that children of such parents be provided services whenever the need arises. Clearly under Chapter 119 children may receive services notwithstanding the inability to prosecute parents in such cases.

Thirdly, you have stated the term "reasonable cause to believe," as used in G. L. c. 119, § 51A, has raised questions as to whether professionals, required to make reports, will be further required to document their reasons for believing a child is abused or neglected and as to whether the term restricts the acceptance of reports by the Department. The statutory language of G. L. c. 119, § 51A is clear and unmistakeable. Section 51A requires that a professional immediately report by oral communication any instance of serious injury. A requirement of documentation of reasonable cause would be totally inconsistent with the clear intent of Section 51A to protect any child who may be the subject of abuse and neglect. Accordingly it is my opinion that the phrase "reasonable cause to believe" is not intended to restrict reporting of cases of abuse or neglect or acceptance of such reports. Similarly, Section 51A does not require written documentation of "reasonable cause" nor does the Department of Public Welfare require such documentation as a matter of practice.

Fourthly, the Department of Health, Education and Welfare has requested that you seek my opinion as to whether the Massachusetts child abuse statutes are intended to apply to threatened harm to children as

well as actual harm. I note that Section 51A addresses itself to both physical and emotional injury. Thus, in answer to your fourth question, I must conclude that Section 51A is intended to protect children from the emotional harm of threatened injury as well as from the physical harm of actual injury.

Finally, you have requested my opinion as to the confidentiality of all records and reports of child abuse. General Laws c. 119, § 51F expressly provides for the confidentiality of abuse and neglect reports. That Section, in pertinent part, provides:

> "Data and information relating to individual cases in the central registry shall be confidential and shall be made available only with the approval of the commissioner or upon court order."

My understanding is that the Department of Health, Education and Welfare is concerned that the parents of a child, reported as an abused child pursuant to Section 51A, will have access to the name of the complainant. I have been informed that the Commissioner of Public Welfare will deny a parent's request for the name of a complainant where granting the request is clearly contrary to the best interests of the child. However, Section 51F does permit disclosure "upon court order" and presumably there would be instances in which a parent could obtain access to a complainant's name in the context of the particular legal issue which is before the court. It would be inappropriate for me to speculate as to those instances in which a court might deem it appropriate to order that a parent obtain access to the name of the complainant. However, I do conclude that, consistent with the mandate of Section 51F that "child abuse" reports be confidential, the names of complainants must not be disclosed unless the Commissioner concludes that such disclosure is in the best interests of the child or unless the Commissioner is ordered to make disclosure pursuant to a court order.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 60. May 23, 1975

Gregory R. Anrig
Commissioner of Education
Department of Education
182 Tremont Street
Boston, Mass. 02111

Dear Mr. Anrig:

You have requested an opinion in response to the following questions arising under the School Building Assistance Act, Chapter 645 of the Acts of 1948, as amended.

1. Whether the Board of Education may elect to make bond or note reimbursement payments to local authorities according to the following two alternative payment schedules:

(a) a schedule delaying the initial reimbursement until the assignment of a project number and dividing the total amount of the grant by the number of years remaining in the bond issue, a method equalizing the annual payments over the remaining life of the bond;

(b) a schedule of payments commencing at the time of assignment of a project number and equaling the number of years of the bond issue.

2. Whether multi-project bond issues yield an answer different from the one to your initial question.

1. *THE STATUTE*

Chapter 645 of the Acts of 1948 implements the policy of state financial assistance to cities and towns in the construction of school buildings. With various amendments since enactment, it remains the primary statute for this purpose.

Briefly, each school building project undergoes the following chronology of development and financing. A need for the project is established and plans developed. The Board of Education approves the project. The locality issues bonds, usually of 20-year duration. The locality builds the project, with payment to contractors for work accomplished. The locality accepts the completed project and the Board of Education approves the final cost. The locality repays the bonds and the Commonwealth, by the Board of Education, reimburses a percentage of the cost.

The statutory language controlling the schedule of bond or note reimbursement payment appears in Section 9(d) of the Act, second paragraph.

> In the case of any approved school project to be financed in whole or in part from the proceeds of any sale of bonds or notes, the total construction grant shall be paid annually in equal parts to be determined by dividing the total grant by the number of years during which any indebtedness incurred for such project shall remain outstanding; provided, that if such number of years is less than five, the total grant shall be paid annually in five equal parts; *and the payments hereinabove provided for shall begin in the calendar year in which the first payment of principal on account of such indebtedness shall become due and payable.* In the case of any approved school project which is not to be financed from the proceeds of any sale of bonds or notes, the total grant shall be paid annually in five equal parts beginning in the calendar year in which the construction of such project has been commenced [emphasis supplied].

The third paragraph adds a pertinent provision regarding projects using the appropriation of funds from city, town or regional stabilization funds. Providing for reimbursement for such projects, it reads:

> . . . ; and in the case of a project for which indebtedness is incurred, *the annual payments hereinabove provided for shall begin in the calendar year in which the first payment of principal on account of such indebtedness shall become due and payable*, and in the case of a project which is *not* to be financed from the proceeds of any sale of bonds or notes, *in the calendar year in which the construction of such project has been commenced* [emphasis supplied].

These provisions, for annual reimbursement payments to begin in the calendar year in which the first payment of principal and interest become due and payable, stem from such a provision in the fifth paragraph of the original Act. See Ch. 645 of the Acts of 1948. A policy of such a reimbursement schedule has endured the intervening 27 years of statutory amendment.

II. *PRESENT PRACTICE*

In your request for an opinion you describe the Board's actual practice under the statute. "In practice the School Building Assistance Bureau makes no payment prior to the commencement of construction and a subsequent project number award."

The reasons for this practice are apparently the following: Early in the life of the statute the Bureau adopted a policy conditioning payments on the filing of a project number of a locality. The request for a project number requires the locality to inform the Bureau of an executed construction contract for the project for which the indebtedness has been incurred. In this manner the Bureau in the spirit of caution, assures itself of a contract award before commencing reimbursement. In a number of cases the Bureau does not receive from the locality requests for a project number in time to make the first annual payments due on the indebtedness. When the request is received at a later date, the Bureau makes a multiple payment consisting of a total of all the annual payments due when the request for the project number is received.

In recent years these initial multiple payments have become burdensome, especially in the case of Boston. Also, the multiple payment system can result in excess reimbursement to a locality slow to begin construction. Before construction it may invest and profit on its bond revenues. The Commonwealth by initial multiple payment then reimburses the locality the requisite percentage of accumulated principal and interest due and payable to bondholders. Finally, your General Counsel informs this office that the Department of Administration and Finance will now not recommend appropriations to cover the multiple payments.

III. *CONTROLLING LAW*

In this setting I come to your precise questions. I begin with the governing language of the statute, underscored above. A number of canons of statutory construction are relevant.

The literal meaning of the words employed is the starting point. *United States* v. *New England Coal & Coke Co.*, 318 F. 2d 138, 142 (1st Cir. 1963). It constitutes the principal source of insight into legislative purpose. *Commissioner of Corporations and Taxation* v. *Chilton Club*, 318 Mass. 285, 288 (1945). The words chosen by the Legislature must be given their plain meaning. G.L. c. 4, § 6, Third; *Continental-Hyannis Furniture Co.* v. *State Tax Commission*, 1974 Mass. Adv. Sh. 2015, 2016; *Commonwealth* v. *Thomas*, 359 Mass. 386, 387 (1971); *Tilton* v. *Haverhill*, 311 Mass. 572, 577 (1942). When the language and meaning of a statute are unambiguous, they must be respected and effectuated. *In re Chouinard*, 358 Mass. Adv. Sh. 780, 782 (1971). *Op. Atty Gen.*, Dec. 1, 1965, p. 191. I find the pertinent language of Chapter 645 to be plain and unambiguous. It does not require elaborate or literally inexact interpretation to accomplish the legislative policy. Cf. *Medeiros* v. *Board of Election Commissioners of Fall River*, 1975 Mass. Adv. Sh. 862, 869-870; *Price* v. *Railway Express Agency, Inc.*, 322 Mass. 476, 484 (1948); *Cullen* v. *Mayor of Newton*, 308 Mass. 578, 583-584 (1941).

Very simply, Chapter 465, § 9(d), second paragraph, provides that reimbursement of bond or note indebtedness "shall begin in the calendar year in which the first payment of principal on account of such indebtedness shall become due and payable." The language, of course, is mandatory. Its plain meaning draws support from the emphasized provision of the third paragraph which emphasizes the distinction between general indebtedness and bonded indebtedness, reimbursement of which, again, "shall begin in the calendar year in which the first payment of principal on account of such indebtedness shall become due and payable, ..." A provision for such calendar year reimbursement has remained in force since enactment and throughout many amendments. The statutory language has generated no contradictory case law.

Because the statutory language is plain, I must answer in the negative your question whether the Board of Education may choose alternative reimbursement schedules. The specific alternatives which you pose (listed above as subsections (a) and (b) of your question) would not comply with the mandatory procedure of the statute.

In answer to the second part of your question, upon the facts presented, I see no grounds on which a multi-project bond issue would produce an answer different from the one to your initial question. Again, the statute mandates one schedule of reimbursement. It neither expresses nor intimates any distinction between single project and multi-project bond issues. Here, too, the answer is in the negative.

Also, the controlling statutory language calls into question the deferred or multiple-payment system developed by the School Building Assistance Bureau. Because you have not requested an opinion as to its validity and because you might wish to submit additional information or law in the event of such a request, I do not now render a formal opinion on that point.

Finally, as discussed above, I understand the practical advantages underlying your interest in the alternate reimbursement schedules posed by your request. I do not express any view as to the value or wisdom of those alternatives. I simply conclude that the controlling law presently does not permit them and therefore that they must come, if at all, through legislative change.

Conclusion

For the foregoing reasons, I answer all parts of your question in the negative.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 61. June 2, 1975

Gregory R. Anrig
Commissioner of Education
Department of Education
182 Tremont Street
Boston, Mass. 02111

Dear Commissioner Anrig:

You have requested an opinion defining the respective authority of the Board of Education and of the Board of Library Commissioners over the personnel and affairs of the Bureau of Library Extension. This opinion requires consideration and construction of G.L. c. 15, § 9.

> The bureau of library extension shall operate under the direction of the board of library commissioners and subject to the supervision and control of the board of education. The board of library commissioners shall consist of five persons, residents of the commonwealth, one of whom shall be annually appointed by the governor, with the advice and consent of the council, for five years.

I read G.L. c. 15, § 9 in the setting of several related provisions. See, *e.g.*, *Marshal House, Inc.* v. *Rent Control Board of Brookline*, 358 Mass. 686, 698-699 (1971); *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 202 F. Supp. 297 (1962), opinion amended 210 F. Supp. 822, aff'd 312 F.2d 214, aff'd 377 U.S. 235 (1964).

The first is G.L. c. 15, § 10.

> No member of the board of library commissioners shall receive any compensation, but said board may annually expend not more than the amount appropriated for clerical assistance and for other necessary expenses.

The second is G.L. c. 15, § 11.

> The board of library commissioners, with the approval of the board of education, may appoint a director and such other assistants as may be required, and with like approval may

> remove them. They shall be paid from the appropriation authorized in section ten.

The third is G.L. c. 78, § 14.

> The commissioner of education shall make an annual report of the acts of the board of library commissioners, including therein a full detail of expenditures under [G.L. c. 78], section 19.

Finally, G.L. c. 78, § 19, authorizes the Board of Library Commissioners to expend appropriated sums for the extension and encouragement of library services, to deal with the federal government in the formulation of state plans for federal grants, to contract with public and private bodies to improve library services in particular areas, and to receive and disburse funds from private sources for library services.

These provisions are to be read as an integral and consistent statutory scheme. *Commonwealth* v. *Lamb*, 1974 Mass. Adv. Sh. 713, 717; *Mathewson* v. *Contributory Retirement Appeal Board*, 335 Mass. 610, 614-615 (1957). None of the foregoing provisions have produced relevant decisional law.

G.L. c. 15, § 9 alone directly defines the relationship of the Board of Education and Board of Library Commissioners over the Bureau of Library Extension. Its language is the first source of statutory construction. *Commissioner of Corporations and Taxation* v. *Chilton Club*, 318 Mass. 285, 288 (1945). No portion of the statutory language may be deemed superfluous. *Commonwealth* v. *Woods Hole, Martha's Vineyard & Nantucket S.S. Authy*, 352 Mass. 617, 618 (1967). In this light the first sentence of § 9 becomes crucial. "The bureau of library extension shall operate under the direction of the board of library commissioners and subject to the supervision and control of the board of education." The language allocates one sphere of authority, under the heading of "direction," to the board of library commissioners, and another sphere of authority, under the heading of "supervision and control," to the board of education. The language, of course, should receive its common meaning. G.L. c. 4, § 6. Resort to dictionaries alone is not helpful. The terms are often defined by one another. Little is added to their common and approved meaning.

The relationship of the terms within the statute is more helpful. The "direction" of the board of library commissioners is made "*subject to*" the "supervision and control" of the board of education [emphasis supplied]. Clearly this phrase subordinates the authority of the board of library commissioners to that of the board of education. "Supervision and control" further imply an overriding authority. In particular, the comprehensive term "control" is unqualified.

The statute reads harmoniously if one construes the "direction" of the board of library commissioners to encompass the on going and practical operations of the bureau, and the "supervision and control" of the board of education to include the powers of review and approval.

This construction draws support from a functional analysis of the language in the setting of the related statutes. If the words failed of any

obvious meaning, the courts would, of course, look to the operation of the bureau for guidance. See, *e.g.*, *Liberty Mutual Ins. Co.* v. *State Tax Commission*, 1974 Mass. Adv. Sh. 895, 896-899; *Industrial Finance Corp.* v. *State Tax Commission*, 1975 Mass. Adv. Sh. 967, 977-978. The related statutes reveal that the board of library commissioners is empowered to appoint and remove a bureau director and other assistants (G.L. c. 15, § 11), to expend appropriated sums, to create state plans for federal grants, to contract with public and private bodies, and to receive and disburse funds from private sources (G.L. c. 78, § 14).

By contrast the Board of Education is to exercise the power of approval over the appointment and removal of personnel (G.L. c. 15, § 11). Also, the Commissioner of Education must make an annual report accounting for the acts of the Board of Library Commissioners and in full detail for expenditures of the latter body. Such a comprehensive responsibility, especially for fiscal matters, implies a commensurate authority on the part of the Board of Education.

Finally, I find no statutory language countervailing the conclusion that the authority of the Board of Library Commissioners is subordinate to that of the Board of Education. In this connection I have examined all materials submitted to this office by the interested bodies. Nothing therein persuades me that the authority of the Board of Library Commissioners is competitive with, or greater than, the authority of the Board of Education. The Board of Library Commissioners does enjoy a legitimate sphere of authority. Nonetheless, that authority is subordinate to that of the Board of Education. Conceivably the Board of Education may abuse its overriding authority in particular instances. No such instance is charged here. Meanwhile, the hypothesis of abuse is no ground for the invalidation of otherwise legitimate authority.

The present request for an opinion presents no more specific dispute than the need for a general definition of relative powers. This opinion is limited to such a general definition.

CONCLUSION

For the foregoing reasons, I conclude that overriding authority for the governance of the Bureau of Library Extension rests with the Board of Education and not with the Board of Library Extension.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 62. May 28, 1975

The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

On May 7, 1975, you requested an Opinion of the Attorney General

concerning amending the birth records of transsexuals pursuant to Chapter 46, section 13 of the General Laws. Specifically you wanted to know:

a) whether town clerks and registers of vital statistics are required under Chapter 46, section 13 of the General Laws to correct facts not correctly stated in the birth records of a person who has been granted a legal name change and who has completed surgical sex reassignment upon proof beyond a reasonable doubt of those facts as required by Chapter 46, section 13; and

b) what proof is relevant to establishing the correctness of facts respecting a person's sex and name.

With regard to the first of these questions, I am of the opinion that, in certain circumstances, town clerks and registers of vital statistics are required to correct facts, as to sex and name, in the birth records of post-operative transsexuals. Chapter 46, section 13 states:

> "if the record relating to a birth . . . does not contain all the required facts, or *if it is claimed that the facts are not correctly stated therein*, the town clerk *shall receive an affidavit* containing the facts required for record, accompanied by documentary evidence substantiating such facts beyond reasonable doubt, if made by a person required by law to furnish the information for the original record . . . He (the town clerk) *shall file* any affidavit . . . submitted under this section, and record it in a separate book kept therefor, with the names and residence of the deponent . . . and the date of the original record, and shall thereupon draw a line through any statement, or statements, sought to be corrected or amended in the original record, without erasing them, shall enter upon the original record the facts required to correct, amend or supplement the same in accordance with such affidavit . . . and forthwith, if a copy of the record has been sent to the state secretary and such city or town clerk a certified copy of the corrected, amended or supplemented record upon blanks to be provided by the state secretary, noting thereon the documentary evidence submitted to substantiate the affidavit, and the state secretary and the city or town clerk shall thereupon correct, amend or supplement the record in his office." (emphasis added)

The language of the statute is mandatory in requiring clerks to make the changes if two conditions are met. (cf. Section 13A of Chapter 46, allowing clerks wide discretion in making records of past births where no record exists at present.) First, the affidavit must be made by "a person required by law to furnish the information for the original record." Persons required to furnish information as to births taking place in or en route to Massachusetts (all pursuant to Chapter 46) are:

a) Parents of the child (section 6, and, in the case of mothers, section 4)

b) Doctors attending the birth (sections 3 and 3B)

c) Hospital administrators, where the birth took place in a hospital (section 3 and 4)

d) Householders, where the birth took place in a house (section 6)

e) Ship captains, where the birth took place at sea (section 7)

f) Airplane pilots, where the birth took place on the plane (section 7A)

No person is required to furnish information as to births which did not take place in or en route to Massachusetts.

It should be noted that, for each birth, several people will most probably be required to furnish all the information needed for the record, so far as it is obtainable. It is also the case that if a person not required to supply the information for the original record seeks to file an affidavit, accompanied by the documentary evidence discussed below, it may be accepted by the clerk, at his discretion.

The second condition which must be met before clerks are required to make the requested correction is that the affidavit must be "accompanied by documentary evidence substantiating such facts beyond reasonable doubt." Your second question asks what proof is relevant to establishing the facts respecting a person's sex and name and I answer as follows:

Transsexualism is a phenomenon which has only been recognized recently and which is not yet completely understood by the medical or scientific community. Based on present medical knowledge, proof that the sex recorded on a birth certificate is not correct should consist of two items:

(1) A sworn statement from a physician certifying that the person named in the birth record has completed sex reassignment surgery; and

(2) A sworn statement from a physician certifying that the person named in the birth record is not of the sex listed on the birth record.

Since the name recorded on the birth record is the name at birth and not the legal name of the individual (which can change many times), in general the only proof relevant to establishing the incorrectness of the name listed would be sworn statments from the person or persons who supplied the information for the original record certifying that the name as it appears on the record is inconsistent with the information supplied. However, since it is a matter of common knowledge that names are assigned to children on the basis of their sex, the transsexual is an exception to this general rule. When an individual presents the documentary evidence, discussed above, demonstrating that the sex listed on the birth record is incorrect, a logical inference attaches which, in my opinion, demonstrates beyond a reasonable doubt that the "christian", or nonfamilial, name or names listed on the record are also incorrect. The affidavit submitted should contain the name which corresponds with the individual's true sex. This should be accompanied by a certified copy of a court order establishing a new name.

I would just say, in conclusion, that my opinion contained herein is limited to cases involving transsexuals and no analogies ought be drawn concerning other situations.

Sincerely,
FRANCIS X. BELLOTTI
Attorney General

Number 63. June 6, 1975

Honorable Paul H. Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

On April 29, 1975, you asked for an Opinion of the Attorney General on the following two questions:

1) May the State Secretary lawfully permit a private company to microfilm records on file in the office of the State Secretary in return for a copy of such microfilms to be supplied by the company at cost not including labor?

2) If so, would any such arrangement be subject to laws relating to competitive bidding?

My answer to the first question is yes. You have informed me that the records to be microfilmed are public records. The statutory definition of a public record makes clear that a record remains public "regardless of physical form or characteristics." G.L. c. 4, § 7, Paragraph twenty-six. When a person seeks a public record, he must request the government official to permit him to inspect the record and to furnish a copy upon payment of a reasonable fee, G.L. c. 66, § 10. The intent of the broadened public records law, Chapter 1050 of 1973, has been to make citizen access to public records easier. It is consistent with the intent of this law to permit a private company to microfilm records which have been maintained in paper form. The Secretary may charge a reasonable fee for this service, G.L. c. 66, § 10.

In addition, the Secretary of State may properly determine that he needs to maintain microfilm as well as paper records and may contract for such microfilming. Microfilming of old or obsolete records has long been permitted by the Records Conservation Board for reasons of preservation. There is no reason why presently needed records may not also be microfilmed. The contract price should reflect both the cost which the Secretary will pay for microfilming his own paper records and the reasonable fee to the company of its being furnished a copy of the desired public records. The difference between the cost of microfilming and the reasonable fee is the contract price to be paid by the Secretary of State.

Your second question is whether such an arrangement would be subject to competitive bidding laws.

G.L. c. 7, § 22 provides, in part, "The commissioner of administration shall . . . make rules, regulations and orders which shall regulate and govern the manner and method of the purchasing, delivery and handling of, and the contracting for, supplies, equipment and other property for the various state departments, offices and commissions . . . such rules . . . shall include provision for the following: (1) The advertisement for and the receipt of bids for supplies and other property and the stimulation of competition with regard thereto;"

While the microfilm copies may not be "supplies" or "equipment", I feel that they would fall within the category of "other property." Certainly, their acquisition would come within the intent of section 22 and should be governed by advertisement for bids and competitive bidding.

I would recommend that the Secretary of State draw his specifications and bid proposal and contact the Purchasing Agent who will process the bidding procedure.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 64. June 6, 1975

Mrs. Evvajean Mintz
Director of Registration
Division of Registration
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Ms. Mintz:

The Board of Registration in Pharmacy has requested, through your office, that I render an opinion as to the constitutionality of G. L. c. 112, § 24 insofar as that statute prohibits the registration as pharmacists of persons who are not citizens of the United States. For the reasons stated hereinafter, it is my opinion that G. L. c. 112, § 24 is unconstitutional in that it effectively prohibits persons who are not citizens of the United States from being registered to engage in the practice of pharmacy in the Commonwealth of Massachusetts.

General Laws c. 112, § 24 provides, in pertinent part:

> "No certificate [of registration as a pharmacist] shall be granted under this section unless the applicant shall have submitted evidence satisfactory to the board that he is a citizen of the United States; provided, however, that an alien may be examined by the board of registration in pharmacy if he first offers evidence which is satisfactory to said board that he has filed his declaration of intention to become a citizen of the United States, and a certificate may be granted, if he passes such examination. In case such applicant is subsequently registered, his certificate of registration shall be re-

> voked and his registration cancelled, unless he shall present to the board, within five years following the issuance of said certificate, his naturalization papers showing that he is a citizen of the United States."

Initially, I note that the statute does not present an absolute prohibition against the registration of aliens as pharmacists. An alien who declares an intention to become a citizen may be registered as a pharmacist if he or she passes the board's certifying examination. However, the proviso of G. L. c. 112, § 24 which permits the registration of non-citizens of the United States as pharmacists is itself subject to the limitation that any non-citizen who does not become a citizen within five years of registration as a pharmacist, shall have his certificate of registration revoked and his registration cancelled. Thus, G. L. c. 112, § 24 limits the right to engage in the practice of pharmacy in the Commonwealth to citizens or to those who become citizens shortly after registration.

The United States Supreme Court has recently decided two cases which concerned the constitutional validity of citizenship requirements as pre-conditions, in one instance, to obtaining public employment and, in the other instance, to obtaining admission to the practice of law. *Sugarman* v. *Doucall*, 413 U.S. 634 (1973); *In Re Griffiths*, 413 U.S. 717 (1973). In both cases, the Court held that the citizenship requirement violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In *In Re Griffiths, supra*, the Court was presented with a challenge to the constitutionality of a Connecticut Supreme Court rule which required that all members of the Connecticut bar be citizens of the United States. The *Griffiths* Court cited *Graham* v. *Richardson*, 403 U.S. 365 (1971) for the following proposition:

> " '[C]lassifications based on alienage, like those based on nationality or race, are *inherently suspect* and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate.' " 413 U.S. at 721, citing 403 U.S. at 372 (emphasis supplied).

The citizenship requirements of G. L. c. 112, § 24 are, thus "inherently suspect"; consequently, the Commonwealth bears a heavy burden of justification to sustain the constitutional validity of the statute. *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). In *In Re Griffiths, supra*, Connecticut did not carry its burden of justifying its exclusion of aliens from the practice of law as a means of protecting Connecticut's acknowledged interests in maintaining high professional standards for attorneys. 413 U.S. at 727. It is my opinion, that G. L. c. 112, § 24, similarly, cannot be justified as *necessary* to maintaining high standards of professionalism among pharmacists. Accordingly, it is my conclusion that G. L. c. 112, § 24 is an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment and that the Board of Registration in Pharmacy should in the future refrain from enforcing the

citizenship requirements of G. L. c. 112, § 24 with respect to the certification and registration of pharmacists. See Op. Atty. Gen. 1972/1973-11.

Finally, I should emphasize that the Board of Registration in Pharmacy may in its discretion refuse to register as a pharmacist any person including an alien whom the Board deems to be unqualified to be registered on the basis of uniform standards of qualification which are applicable to all candidates.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 65. June 12, 1975

Gregory R. Anrig
Commissioner of Education
Department of Education
182 Tremont Street
Boston, Mass. 02111

Re: Request for opinion as to the Constitutionality of Chapter *1196 of the Acts of 1973.*

Dear Commissioner Anrig:

You have requested an opinion as to the constitutionality of Chapter 1196 of the Acts of 1973, amending G.L. c. 71, § 48, and authorizing local school committees to make free loans to private school pupils of text books purchased by the committee for use in the public schools.

1. The Occasion for an Opinion.

You first requested such an opinion in October 1974. In response by letter of November 4, 1974, Assistant Attorney General Walter H. Mayo III declined to render an opinion on the grounds that the question did not concern the performance of your duties [with citation to II Op. Atty. Gen. 100 (1899)].

By letters of February 5 and March 18, 1975, you have asked that the Attorney General reconsider this position. In particular you point out that local school committees have sought the view of the Board of Education (letter of February 5, 1975); that the Commissioner, under G. L. c. 70, § 4 defines "reimbursable expenditures" to be remitted from the Commonwealth to local school committee, a duty which may require it to determine the constitutionality of text book programs (letter of March 18, 1975); that under G. L. c. 15, § 1G, the Board has a duty to take care that public schools comply with all laws governing education (*Id.*); and, finally, that the Anti-Aid Amendment, Mass. Const. Amend. Art. XVIII, has implications for other issues, such as Chapter 766, the Special Education law (*Id.*).

Of all these grounds, only one seems to require the requested opinion for the performance of your duties: the need to determine whether local

text book programs generate "reimbursable expenditures" under G. L. c. 15, § 1G. The policy of the Attorney General must be to limit advisory opinions to instances of genuine need because of finite resources and other primary responsibilities.

Additionally, the very process of advisory opinion is difficult insofar as it requires the hazard of a prediction about the law in a factual vacuum, a feature which discomforts even the Supreme Judicial Court and causes it to withhold precedential status from Opinions of the Justices. See, *e.g.*, *Opinion of the Justices*, 1974 Mass. Adv. Sh. 1015, 1029, and *Opinions* there cited; *Ierardi, Petitioner*, 1975 Mass. Adv. Sh. 93, 106.

However, one of your stated grounds does set out the need for an opinion. In addition, I am mindful of the practice of the Supreme Judicial Court to render decisions not strictly necessary when they will assist an agency in the performance of its duties, *Pierce's Case*, 325 Mass. 649, 653 (1950), when the issue has been adequately presented or developed by the parties, *Bob Ware's Food Shop, Inc.* v. *Brookline*, 349 Mass. 385, 389 (1965), and especially when a decision will dispose of further unnecessary proceedings and delay. See, *e.g.*, *Ciszenski* v. *Industrial Accident Board*, 1975 Mass. Adv. Sh. 635, 645; *School Committee of Springfield* v. *Board of Education*, 1974 Mass. Adv. Sh. 2031. With these purposes in mind, I turn to the merits of your question.

II. The Constitutionality of Chapter 1196.

Chapter 1196 added the following provision to G.L. c. 71, § 48:

> The committee, at the individual request of a pupil in a private school which has been approved under section one of chapter seventy-six, shall lend free of charge to him text books which shall be the same as those purchased by the committee for use in the public schools. Such text books shall be loaned free to such pupils subject to such regulations as the committee may prescribe.

A. The First Amendment Question

Until most recently, the constitutionality of such text book loan programs appeared to have been settled by the Supreme Court's decision in *Board of Education* v. *Allen*, 392 U.S. 236 (1968). The Court upheld a New York statute requiring local school boards to lend without charge to all children enrolled in grades seven to twelve of a public or private school (complying with the compulsory education law) text books designated for use in any public schools or approved by any boards of education. The Court sustained the statute on the ground that it furthered generally the educational interest of all children and conferred a financial benefit on parents and children, not on schools. The Court assumed the absence of religious books and of the religious use of secular books.

You indicate that your concern about Chapter 1196 stems, at least in part, from the decisions of the kind in *Public Funds for Public Schools of New Jersey* v. *Marburger*, 358 F. Supp. 29 (E.D.Pa. 1973). There a New Jersey statute provided that the state's Commissioner of Education shall reimburse the parents of non-public school children for money

spent to purchase "secular, non-ideological text books, instructional materials and supplies." The reimbursement was limited to per pupil allowances. The cost of the text books was reimbursable only if they had been in use within the last five years in a public school in New Jersey or if they had been approved by the Commissioner of Education for compliance with the provisions and purposes of the statute. The three-judge district court held that this provision violated the Establishment Clause because it was directed exclusively to parents of non-public, predominantly religiously affiliated, school children and therefore had the primary effect of advancing religion.

Most recently the Supreme Court sustained the Pennsylvania text book loan program in *Meek* v. *Pittenger*, 43 U.S.L.W. 4596, 4599-4600, 4608 (May 19, 1975). The relevant legislation authorized the State Secretary of Education, either directly or through intermediate units, to lend text books without charge to children attending non-public elementary and secondary schools meeting Pennsylvania's compulsory attendance requirements. The books to be loaned were limited to those acceptable for use in any public, elementary or secondary school in the state. The Court found this scheme indistinguishable from the New York program in *Allen* and stressed the features of its constitutional validity: the secular character of the text books; their presumably secular use; and their general, undifferentiated availability to public and private school children alike.

Before judging Chapter 1196 by these decisional criteria, I stress certain principles of constitutional challenge to statutes. A statute enjoys a presumption of constitutional validity and should be interpreted to avoid both unconstitutionality and substantial constitutional questions and doubts. See, *e.g.*, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (Brandeis, J. Concurring); *Commonwealth* v. *Lamb*, 1974 Mass. Adv. Sh. 713, 717-718; *Board of Appeals of Hanover* v. *Housing Appeals Committee in the Department of Community Affairs*, 1973 Mass. Adv. Sh. 491, 512; *Chipman* v. *MBTA*, 1974 Mass. Adv. Sh. 1447, 1453. One assailing a statute on constitutional grounds has the burden of proving the absence of any conceivable grounds upon which the statute may be supported. *Anton's of Reading, Inc.* v. *Reading*, 346 Mass. 575, 576 (1964); *Merit Oil Co.* v. *Director of the Division on the Necessaries of Life*, 319 Mass. 301, 305 (1946). Statutes which burden fundamental constitutional rights may reverse the presumption of constitutional validity and receive strict judicial review shifting to the state the burden of proving a compelling justification. This standard of strict judicial review does operate in favor of religious freedom under the Free Exercise Clause. *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963). However, it has not been applied to Establishment Clause challenges to state programs. In light of these principles and the leading cases above, then, Chapter 1196 is constitutionally valid so long as its purpose and primary effect is the advancement of education generally and not of religion or religious education particularly.

I conclude that Chapter 1196 is constitutional. Its essential features are far closer to the loan programs sustained in the *Allen* and *Meek* deci-

sions than to the reimbursement scheme of the *Marburger* decision. Under it the text books are secular and will be put to secular use, as evidenced by the fact that they must be "the same as those purchased by the committee for use in the public schools." The feature of their general, equal availability by loan to public and non-public students alike could be more explicit. Constitutional safety weighs in favor of express language to this effect. However, construing the statute in its most favorable constitutional light, I view the fact of the purchase of these books in the first instance for public students as an indicium of their equal availability, by regular school use or loan, to public students.

B. The Anti-Aid Amendment to the Massachusetts Constitution: Amendment XVIII.

You ask also whether Chapter 1196 complies with Amendment XVIII of the Commonwealth's Constitution. Its most pertinent language, corresponding to the First Amendment's Establishment Clause, provides that "no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society."

More importantly, I must read the Massachusetts Anti-Aid Amendment in harmony with the Free Exercise Clause of the First Amendment of the United States Constitution. Federal constitutional law remains supreme. The leading decisions under the Free Exercise Clause emphasize the requirement of neutrality by state law toward the exercise of religion. See, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 402-403 (1963). Therefore, the Anti-Aid Amendment must operate neutrally, without hostility, toward religious interests. If the Anti-Aid Amendment were applied to strike down the program of Chapter 1196, a program substantially similar to those sustained under Establishment Clause attack by the Supreme Court in *Allen* and *Meek*, a danger could arise that the Anti-Aid Amendment of the State Constitution violated the Free Exercise Clause of the Federal Constitution.

In addition, the decisional law under the Anti-Aid Amendment is far less developed than that under the Establishment Clause, and suggests no such conflict of results. In these circumstances I will read the state and federal constitutional law to be in harmony.

Finally, the available case law under the Anti-Aid Amendment suggests the permissibility of Chapter 1196. In particular, a consistent line of opinions of this office has approved of the extension of general benefits to non-public schools. See, especially, Op. Atty Gen., March 26, 1951, p. 38 (school lunch program); Op. Atty. Gen., January 9, 1947, p. 66 (federal money); Op. Atty. Gen., February 17, 1936, p. 40 (free transportation).

Consequently, I conclude that the Anti-Aid Amendment does not invalidate Chapter 1196.

CONCLUSION

For the foregoing reasons, it is my opinion that Chapter 1196 of the

Acts of 1973 is constitutional within the meaning of both the Establishment Clause of the First Amendment of the United States Constitution and Amendment XVIII to the Massachusetts Constitution.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 66. June 16, 1975

Mr. Elton B. Klibanoff
Director
Office for Children
120 Boylston Street
Boston, Massachusetts 02116

Dear Mr. Klibanoff:

You have requested my opinion regarding the interpretation of G. L. c. 119, § 51A. Specifically, you have asked for an interpretation of the terms "serious injury" and "reasonable cause to believe," as used in G. L. c. 119, § 51A. As you know, on May 27, 1975 I issued an opinion to your office concerning this same statute, in response to concerns expressed by officials of the Department of Health, Education and Welfare with respect to the Commonwealth's eligibility for federal funding under the Child Abuse Prevention and Treatment Act (P.L. 93-247). Your letter of June 6, 1975 informs me that these officials have raised additional questions which require clarification.

The term "serious physical or emotional injury" in the context of § 51A includes all but the most negligible or *de minimis* injuries to children. This standard applies to those instances in which certain enumerated professionals are required to make reports to the Department of Public Welfare. Those cases which do not even meet this standard can, of course, still be reported under the permissive reporting provisions of § 51A.

The practice of the Department of Welfare in notifying reporters of their duties, accepting reports and delivering services is consistent with this interpretation.

The phrase "reasonable cause to believe" should be construed in light of the clear intent and purpose of § 51A to protect any child who may be the subject of abuse or neglect. It is my opinion that this phrase is the equivalent to "known or suspected instances of child abuse and neglect" used in the federal regulations (45 C.F.R. 1340.3-3(d) (2) (1)). "Reasonable cause to believe," of course, refers to the standard to be applied by those persons reporting to the Department, and no opinion is expressed as to the proper standard to be used in any criminal or civil action instituted by the Department. Cf. *Commonwealth* v. *Certain Lottery Tickets*, 59 Mass. 369 (1850).

Very truly yours,
Francis X. Bellotti
Attorney General

Number 67. June 18, 1975

Honorable Nicholas L. Metaxas
Commissioner of Corporations and Taxation
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02108

Dear Commissioner Metaxas:

By letter dated January 31, 1975 you requested my opinion as to whether

> " . . . legal expenses incurred by the Middlesex County Treasurer in the amount of $8,750 for attendance by a lawyer at arbitration hearings, such arbitration being under the jurisdiction of the Middlesex County Commissioners, [are] 'reasonable expenses' which may be paid upon certification by the Director of Accounts as set forth in Chapter 35, Section 11, General Laws."

It is my opinion that the expenses in question were incurred by the Treasurer as a party representing the County and that there was a reasonable basis for the County Treasurer to secure outside counsel, but that a final determination of the reasonableness of the specific expenses rests with the Director of Accounts.

Your question was considered in light of the materials which accompanied it, the relevant law, and additional information obtained from you and Edward M. Ginsburg, Esq., who represented the Treasurer at the hearings (and whose bill for $8,750 gave rise to your request). In addition, I obtained various public records from state and federal courts as well as copies of certain relevant correspondence received by the Director of Accounts.

General Laws, c. 35, § 11, to which you refer, provides that:

> "[n]o payments, except payment . . . of reasonable expenses incurred by the treasurer as a party in representing the county which have been certified by the director of accounts . . . shall be made . . . "

This language gives rise to two questions. First, were the expenses incurred by the Treasurer as a party in representing the county; and second, were they reasonable.

The relevant court records reveal that the arbitration proceedings involved here arise out of the consolidation of several court cases including *Western Waterproofing Company, Inc.* v. *Gevyn Construction Corp.*, Suffolk Superior Court Equity No. 93412, which named as additional defendants the County of Middlesex, the Treasurer of Middlesex County and the Commissioners of Middlesex County. In fact, even if he had not been specifically named, the Treasurer is probably a necessary part by virtue of G. L. c. 35, § 20, which provides that "The Treasurer shall be joined as a party in all legal proceedings brought against the county." Thus, it seems clear that the Treasurer was not only a party to

this action but that by representing the interests of the Treasury, the repository of county funds, he was representing the interests of the County.

The second question, whether these were "reasonable expenses," pursuant to G. L. c. 35, § 11, involves two considerations. First, were the interests of the Treasurer so different from those of the County or the Commissioners as to require separate representation and, second, assuming they were sufficiently different, were the expenses incurred reasonable. A satisfactory answer to this first question is contained in a letter dated February 24, 1975, addressed to the Director of Accounts, Gordon A. McGill, from Mr. R. Robert Popeo, counsel for the County Commissioners and the County of Middlesex. In that letter, Mr. Popeo stated that "there have been frequent occasions where the positions or interpretations of the County Treasurer have been at variance with those of the County Commissioners." Thus, said Mr. Popeo, "if the separate interests of the County Treasurer are to be protected, separate representation by counsel is necessary." Those statements make clear that the Treasurer had a reasonable basis for believing that he required separate representation in order to zealously protect his interests. See Supreme Judicial Court Rule 3:22, Disciplinary Rule 5-105.

The question of whether the amount of the expenses was reasonable is properly answered by the Director of Accounts rather than the Attorney General. However, in order to assist him in making that determination, I have forwarded to him (and to you) a copy of the breakdown of time submitted by Mr. Ginsburg. I would also suggest you refer to Supreme Judicial Court Rule 3:22, Disciplinary Rule 2-106; *also see, Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, (5th Cir. 1974).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 68. June 18, 1975

Mr. Charles V. Barry
Secretary of Public Safety
Executive Office of Public Safety
18 Tremont Street
Boston, Massachusetts 02108

Dear Secretary Barry:

By letter dated April 11, 1975, you have directed to me a number of questions concerning the definitions contained in c. 528 of the Acts of 1974 which established the Architectural Barriers Board. You indicated that this Board is now in the process of promulgating rules and regulations relevant to its functions.

It is my opinion that many of the issues you raise may properly be resolved by the board in the course of promulgating its regulations.

Chapter 22, § 13A states that the Architectural Barriers Board "shall make, and from time to time, alter, amend, and repeal, in accordance with the provisions of Chapter thirty A, rules and regulations designed to make public buildings accessible to, functional for, and safe for use by, physically handicapped persons . . . " The authority granted by c. 30A includes by its terms those regulations intended to "*interpret* the law enforced or administered . . . " by the agency or board in question. Thus, insofar as you request detailed determinations of the legal significance of certain fact situations, it is my opinion that many of these interpretations should properly be made by the Board itself in the course of promulgating the regulations in question. Of course, the regulations you promulgate must not conflict with other laws of the Commonwealth. With these principles in mind, I am providing the following information for your guidance. For your convenience I have substantially restated each question before answering.

In question (1) (a) you inquire as to whether "the Board's regulations [may] apply to that portion of a government building which contains private offices or power and maintenance areas that the public does not ordinarily use." As you note, c. 22, § 13A provides that your regulations are applicable to public buildings. Section 13A defines public buildings as "buildings constructed by the Commonwealth or any political subdivision thereof with public funds and open to public use . . . and privately financed buildings that are open to and used by the public." Given this definition, it is clear that the dispositive factor in determining whether a building is public is whether it is "open to public use."

If the building you refer to as a "government" building is, in the opinion of the Board, open to public use, (i.e., open to all who choose to enter), *Peachey* v. *Boswell,* 240 Ind. 604, 167 N.E.2d 48 (1960), *Austin* v. *Soule,* 36 Vt. 645 (1864) *Cf. Opinion of the Justices,* 313 Mass. 779, 47 N.E.2d 260 (1943), it is a public building to which the Board's regulations apply. Whether certain portions of such a building may be excluded from the operation of those regulations because they are private offices or power and maintenance areas depends initially on whether or not those areas are, in the opinion of the Board, normally open to public use. If the Board decides that such areas are normally not open to public use, the question then becomes whether there is any basis for excluding such areas from coverage despite their being within a public building. An examination of c. 22, § 13A reveals no such basis. Nonetheless, it is significant that the regulations issued pursuant to the Federal Architectural Barriers Act, (P.L. 90-480) have resolved the problem of private areas in an otherwise public building by excluding from the requirement of that Act "the design, construction, or alteration of any portion of a building which need not, because of its intended use, be made accessible to or usable by, the public or by physically handicapped persons." 41 C.F.R. § 101-19. 604(a). This language seems consistent with the intent of c. 22, § 13A, which is to provide handicapped persons, as far as possible, with the same freedom of movement in public places as non-handicapped persons.

For this reason, while the act provides no express authority for excluding certain areas, it is my opinion that the Board's regulations need not encompass those portions of otherwise public buildings not open to public use and which because of their intended use need not be made usable by or accessible to physically handicapped persons. Thus, if in the Board's opinion the private offices in question are not open to the public generally, and would not on occasion be used by a physically handicapped individual (either employed in such office or seeking to conduct private business therein) the Board's regulations should encompass those offices. Similarly, the Board's regulations should encompass power and maintenance areas unless in the Board's opinion the work to be performed therein would not normally be performed by or require the occasional presence of physically handicapped persons.

In question (1) (b) you inquire as to whether "the Board's regulations may apply to a government building that the public does not ordinarily use, such as a fire station, power plant, public works garage or garage for government vehicles." As noted above, the question of whether a building is a "public building" and hence subject to the Board's regulations depends on whether the building is "open to public use," or "open to and used by the public." Given the fact that you expressly state that the buildings about which you inquire in question (1) (b) are not generally open to the public, it seems clear that such facilities are outside the Board's power to regulate.

In question (2) you inquire as to the legality of the Board's regulating various commercial buildings or areas within commercial buildings. As you note, Chapter 578 makes clear that the term "public building" includes commercial buildings exceeding two stories in height in which more than forty persons are employed. You then inquire in question (2) (a) "Does such a commercial building include a building which contains business offices that are open to the business invitees of that office?"

The law defines a business invitee as a person who enters onto the premises of another for the mutual benefit of himself and the other. The benefit need not be of a pecuniary nature, and it need not arise out of a contractual relationship. *Taylor* v. *Goldstein*, 329 Mass. 161, 165, 107 N.E.2d 14 (1952). It must, however, be more than the intangible advantages arising from mere social intercourse. *Id.* Any member of the public entering upon business premises for such a reason is a business invitee and a place of business open to such person has been held to be a public place. *Brooks* v. *State*, 198 Ga. App. 3, 90 S.E. 989. Thus, it is my opinion that the answer to your question (2) (a) is in the affirmative.

In question (2) (b) you inquire:

> b. "If the answer to the preceding is in the affirmative, do the regulations extend to the interior of such offices?"

As I stated in response to question (1) (a), Section 13A provides no express authority for excluding non-public areas of an otherwise public building. Nonetheless, it is my opinion, again as stated in question (1) (a), that such areas may be excluded if in the Board's opinion the work to be performed therein would not normally be performed by physically

handicapped persons and the occasional presence of such persons could not normally be expected.

In question (2) (c) you inquire "Does such a commercial building include a factory that is open to factory employees only?" Since the effect of admitting only employees of the factory is to exclude the general public, such a building is clearly not open to and used by the public. Thus, the Board's regulations should not extend to such a factory building.

In question (2) (d) you inquire "Does such a commercial building include a retail establishment where merchandise is sold commercially?" The United States Supreme Court has defined "commerce" as the sale or exchange of commodities. *Brennan* v. *City of Titusville*, 153 U.S. 289 (1894). Thus, a commercial building is a building where commodities are sold or exchanged. A retail establishment has been defined as one selling, in individual quantities for personal or household consumption, items that are usually and regularly regarded as consumer's goods. *Armstrong Co.* v. *Walling*, 161 F. 2d 515, 516 (1st Cir. 1947). It is my opinion that the definition of a commercial building is sufficiently broad to encompass the narrower definition of retail establishments. Thus, the answer to your question (2) (d) is that a commercial building does include a retail establishment where merchandise is sold commercially.

In question (3) you note that c. 528 provides that five per cent of the units in lodging or residential facilities for hire, rent or lease, containing twenty or more units, shall be accessible, functional and safe units for physically handicapped persons.

You then inquire as to whether "an apartment building arranged in several suites of connecting rooms, each site designed for independent housekeeping fall(s) within the definition of lodging or residential facilities." It is my opinion that there is no basis for considering such a building to be something other than a lodging or residential facility. Thus, if the building contains twenty or more such suites, five per cent of the units therein should be made accessible, functional and safe for physically handicapped persons.

In question (4) (a) you inquire as to whether the public area of apartments and condominiums includes:

> "(1) The walk, stairs and entrances into said buildings?
> (2) The general public function areas?
> (3) The stairs and corridors leading to the individual apartments."

As to subdivisions (1) and (2), of this question, I believe it is clear that the walk, stairs and entrances as well as any general public function areas are parts of the public area of apartments and condominiums, unless in the opinion of the Board, such areas would not normally be open to and used by the public. As to the public function areas, it is my opinion that such areas are by definition open to and used by the public and are thus public areas. As to subdivision (3) of question (4) (a), whether the stairs and corridors leading to individual apartments are public areas would depend on whether, in the opinion of the Board, such areas are

normally open to and used by the public (as they might be if there are no doors separating them from public areas or if they lead directly to other public areas or if a hallway leads to more than one apartment.) *Cf. State* v. *Nash*, 74 N.J. Super. 510, 181 A.2d 555 (1962).

In question (4) (b) you inquire as to whether the public area of a shopping center or restaurant includes:

> (1) The walks, stairs and entrance into said buildings, or
> (2) the area where the service or product of the establishment is offered to the public.

As to (1), it seems clear that the walks, stairs and entrance into shopping centers and restaurants are normally open to and used by the public and thus are properly considered to be public areas. As to the area where the service or product of the establishment is offered to the public it would appear that to define that area as other than public would be inconsistent with the definition of the area as that where the service or product of the establishment is offered to the public.

In question (4) (c) you inquire as to the definition of a shopping center. Specifically you ask if any of the following constitute a shopping center.

> "(1) A single store standing alone from other stores on a street.
> (2) A row of stores, side by side on a public street.
> (3) A group of stores using a common parking area.
> (4) A group of stores in a shopping mall."

While no Massachusetts case defines "shopping center" a number of cases in other jurisdictions have dealt with the question. For example, the Supreme Court of Florida has defined a shopping center as a group of commercial establishments planned, developed, owned and managed as a unit with off-street parking provided on the property. *Homer* v. *Dadeland Shopping Center, Inc.*, 229 So. 2d 834, 836 (Fla. 1970). See also *Dupont* v. *Planning & Zoning Commission*, 156 Conn. 213, 240 A.2d 899 (1968). Based on this definition, it is my opinion that a single store standing alone from other stores is not a shopping center. As to the other three situations it is my opinion that whether each is or is not a shopping center is contingent on whether *in the opinion of the Board* the groups of stores in question are owned and managed as a unit and provides off-street parking on the property.

In question (5) you inquire as to whether certain buildings are institutional buildings. You then indicate that institutional buildings are, by that fact alone, public buildings within the meaning of the act. Specifically the act provides that "(b) buildings that are open to and used by the public shall include but not be limited to institutional buildings . . ." In *Gangi* v. *Board of Appeals of Salem*, 334 Mass. 183, 134 N.E. 2d 451 (1956) the Supreme Judicial Court defined an institution as "an established corporation especially one of a public character. The term may be applied both to the organization itself and to the place where its operations are conducted." *Id.* at 185, 134 N.E. 2d at 453. Other definitions of institutions are contained throughout the general laws. Thus, c. 118E,

§ 2 relating to medical care and assistance defines an institution as "any licensed hospital, any licensed nursing home, or any public medical institution which meets the requirements of the Secretary [of the United States Department of Health, Education and Welfare]." A broader definition is found in c. 117, § 2 which in the context of public welfare defines an institution as

> "any hospital, sanatorium, boarding or rest home or convalescent or nursing home, for the operation of which a license is required by law, any facility conducted by an agency incorporated under chapter one hundred and eighty or any special act as a charitable corporation and any facility operated by municipal, county, state and federal government."

Chapter 180, referred to in c. 117, § 2, provides for the incorporation of charitable corporations which includes those corporations "formed for any civic, educational, charitable, benevolent or religious purpose . . . " Thus, the definition in c. 117, § 2 encompasses all licensed health facilities, all charitable corporations and all government buildings. This definition seems broad enough to effectuate the purposes of the act while excluding traditional private corporations and, by implication also excluding, for the reasons stated in my response to question (1) (a), those buildings or areas within a building wherein the work to be performed would not normally be performed by physically handicapped persons and the occasional presence of such persons would not normally be expected.

Applying those standards to the various fact situations you raise in question (5) it is my opinion that (a) a school or college constructed with private funds and open only to its tuition paying students, (b) a hospital open to the public, (c) a private hospital or clinic open only to its private patients, and (d) a nursing home open only to board paying patients are all public buildings. However, a medical building containing doctors' offices would not be a public building unless the building itself were owned by a charitable corporation or governmental entity.

In question (6) you inquire as to whether certain structures are public sidewalks or ways and thus public buildings by virtue of the definitions in Chapter 13A. Specifically, in question (6) (a) you inquire as to whether included within this definition are private tennis courts that are not in a building and charge admission. You do not indicate whether you are referring to courts open only to members of a certain club or organization who must pay admission or whether the courts are open to any member of the public who is willing to pay the fee. It is my opinion, however, that this fact, as well as the fact that a fee is charged, becomes irrelevant since a tennis court cannot, in any way, be considered a public sidewalk or way and thus cannot possibly be considered a public building. As numerous courts have made clear, a "way," including a sidewalk, public or otherwise, is a means of passage from one place to another. See e.g., *Dennis* v. *Wilson*, 107 Mass. 581, 593 (1871). Since a tennis court is a place of recreation and cannot in any way be deemed a means of passage from one place to another, it is my opinion that it can-

not be considered a public building by virtue of its being a public sidewalk or way.

The principles outlined above are equally applicable to question (6) (b) wherein you inquire as to whether the terms public sidewalks and ways encompass "private parks or campsites areas that charge admission."

Parks and campsites, while they might occasionally be used as a means of passage from one place to another, are primarily recreational areas. Thus, it is my opinion that the Board's regulations may not apply to such areas whether or not they charge admission unless, in the Board's opinion, the primary purpose of a given area is passage and not recreation.

Finally, in (6) (c) you inquire as to whether the terms public sidewalk or way would encompass a "roadside park constructed with public funds." This question is somewhat more complex than those presented in (6) (a) and (6) (b). In the first place, the wording of your question implies that such a park would be open to all members of the public and not only those who possess the requisite admission fee. Thus, there cannot be any question about the public nature of such a park. Secondly, a roadside park is by definition adjacent to, although not itself, a way. Nonetheless, such a park cannot be considered a public building to which your regulations would extend unless, in the Board's opinion, the primary purpose of the park in question is to provide a means of passage from one place to another.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 69. June 23, 1975

The Honorable W. Norman Gleason
Director, Office of Campaign and Political Finance
Eight Beacon Street
Boston, Massachusetts 02108

Dear Mr. Gleason:

You have asked my opinion on two questions dealing with the relationship between federal and state campaign laws:

(1) Whether candidates for federal office and committees organized in their behalf are exclusively regulated by the Federal Election Commission in reporting requirements, committee organizational requirements, contribution and expenditure limitations, and media expenditure, rather than under the provisions of G. L. c. 55?

(2) Whether the federal requirement that a duplicate of the federal reports be filed with the Secretary of the Commonwealth, fully discharges the reporting requirements for such federal office candidates and their committees?

I answer both of your questions in the affirmative, for the following reasons:

General Laws, c. 55, the Federal Election Campaign Act of 1971, 2 U.S.C. § 431, *et seq.* and 18 U.S.C. § 591, *et seq.* purport to regulate the conduct of candidates for federal office. Where those statutes conflict, the Supremacy Clause of the United States Constitution requires that the state enactment must give way to the federal. Even where the state and federal laws are parallel and reinforcing rather than contradictory, the United States Supreme Court has precluded application of state law when it finds a Congressional intention to preempt the field. *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956). The Court will not examine the intention or purpose of the state statute, but rather the intent of the federal lawmakers. *Perez* v. *Campbell*, 402 U.S. 637 (1971). The intent of Congress to preempt the law relating to federal elections is clear and unambiguous.

Two sections of the Federal Elections Campaign Act Amendments of 1974, P.L. 93-443, make the Congressional intent to preempt clear. Section 104(a), amending 18 U.S.C. § 591 *et seq.* (criminal regulation of federal elections) and section 301, amending 2 U.S.C. § 403 (civil regulation of federal elections) both state that the federal statutes "supersede and preempt any provision of State law with respect to election to Federal office."

Senate Conference Report No. 93-1438 (October 7, 1974) further articulates the Congressional intent concerning section 104 (a):

> ". . . The Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights to prohibit false registration, voting fraud, theft of ballots, and similar offenses under State law."
>
> Equally clear is the conference statement dealing with section 301:
>
> ". . . It is clear that the Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect State laws as to the manner of disqualifying as a candidate, or the dates and places of elections."

I conclude, therefore, that except for those matters referred to in the Conference Report, e.g. voting fraud, the state has no authority to regulate the conduct of federal campaigns and elections.

With respect to your second question, I conclude that federal candidates satisfy the provision of the Federal Election Campaign Act if they file duplicate forms with the Secretary of State, as required by 2 U.S.C. § 439. The Director of Campaign and Political Finance is not an "equivalent state officer" within the meaning of that section since the Com-

monwealth does have a Secretary of State. Since 2 U.S.C. § 439(b) (3) provides for public inspection and copying of such reports, there is obviously no prohibition against your office maintaining a duplicate set of reports.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 70. June 23, 1975

Honorable Edward W. Powers
Director of Civil Service
John W. McCormack Building
1 Ashburton Place
Boston, Massachusetts 02108

Dear Sir:

You have requested my opinion with respect to the following question:

> "Which state agency, the Bureau of Personnel or the Division of Civil Service, has jurisdiction to determine the duties of Mr. James Dallas, whose present title is 'Supervising Sanitary Engineer, Department of Public Health?' "

General Laws, c. 30, § 45(1) provides that the Director of Personnel and Standardization shall have the initial responsibility for ascertaining the duties of each office or position of the Commonwealth and developing specifications therefor. After said specifications and duties have been drafted, in the case of a civil service position, they are sent to the Director of Civil Service for his approval and comments. G. L. c. 30, § 45(2). If the Directors of Personnel and Civil Service are not able to agree on such specifications, the matter is determined by the Commissioner of Administration.

On the facts that have been presented to me, it would appear that the Division of Personnel has promulgated specifications and duties for the civil service position of "Supervising Sanitary Engineer" and that the Division of Civil Service has approved such specifications and duties. Thus, the process provided by G. L. c. 30, § 45 has been completed.

That being the case, any further changes in said specifications, if appropriate, would again be initiated by the Bureau of Personnel and then submitted to the Division of Civil Service pursuant to G. L. c. 30, §§ 45(1) and (2).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 71 June 23, 1975
The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Natural Resources
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Attn: Arthur W. Brownell
Commissioner

Re: Administration of General Laws
c. 40, § 8C and c. 131, § 40

Dear Mr. Brownell:

You have requested my opinion on the authority of the various Conservation Commissions to "adopt rules and regulations in order to discharge their duties under G.L. c. 131, § 40." In the alternative, you have asked whether the Commissioner of Natural Resources "may grant to Conservation Commissions throughout the Commonwealth authority to promulgate regulations for the city or town where the said Commissions are located." I answer that the Conservation Commissions have no such authority and the Commissioner of Natural Resources may not grant such authority.

The city or town Conservation Commissions were established pursuant to G.L. c.40, § 8C, which contains their statutory authority to perform certain limited functions. One of their primary functions is to acquire land by purchase, gift, lease or eminent domain for conservation or recreation purposes. With respect to these acquisitions, the Conservation Commissions:

> ". . . may adopt rules and regulations governing the use of land and waters under its control, and prescribe penalties, not exceeding a fine of one hundred dollars, for any violation thereof." G.L. c.40, § 8C.

The power to adopt rules and regulations is limited to the use of the land and waters which have been acquired under the provisions of G.L. c.40, § 8C.

In addition to the acquisition of land for conservation purposes, the Conservation Commissions are authorized to enforce the provisions of G.L. c.131, §40, with respect to the alteration of natural structures on coastal wetlands and tidal areas. Although the responsibility for administering the statute is placed upon the Conservation Commissions with a detailed procedure to be followed, including hearings and appeals to the Department of Natural Resources, the authority to promulgate rules and regulations is limited to the Commission of Natural Resources.

> "Rules and regulations shall be promulgated by the commissioner to effectuate the purposes of this section." G.L. c.131, § 40

Since there is no express delegation of authority for the Conservation Commissions to enact regulations and in light of the Commissioner of Natural Resources' affirmative duty to issue regulations, the Conservation Commissions may not promulgate their own regulations.

The power to promulgate regulations, as well as the purpose of those regulations, must be within the ambit of the enabling statute. *Commonwealth* v. *Diaz*, 326 Mass 525 (1950); *Bureau of Old Age Assistance of Natick* v. *Commissioner of Public Welfare*, 326 Mass 121 (1950). In addition, one agency may not delegate its duties to another agency without express authority to do so. 5 *Op. Atty. Gen.*, 1920 p. 628.

Therefore, the only individual or agency authorized to promulgate regulations to effectuate the provisions of G.L. c.131, § 40, is the Commissioner of Natural Resources and this authority may not be delegated to the Conservation Commissions.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 72. June 23, 1975

James C. Murphy
Treasurer
Southeastern Massachusetts University
North Dartmouth, Massachusetts 02747

Dear Mr. Murphy:

You have requested my opinion as to whether Southeastern Massachusetts University may expend funds from its legislative appropriation for employee liability insurance. I understand that the insurance policy in question was entered into by the University to insure employees against personal liability for their negligence in the performance of their duties. The need for insurance arises from the fact that any liability incurred by the employees of the University is not reimbursed by the University or the Commonwealth. The insurance policy protects employees from financial loss by providing protection at no cost to them personally.

The letter attached to your request, from Walter R. Smith, Special Assistant Attorney General, to President Walker, indicates that the State Comptroller's Office has refused to approve payment for the insurance policy on the basis of G.L. c.29, § 30, which reads as follows:

> "No officer or board shall insure any property of the Commonwealth without special authority of law."

It is my opinion that insuring employees against personal liability is clearly not equivalent to "insuring any property of the Commonwealth." Therefore, the above-quoted statute does not preclude the type of insurance policy you have executed.

The only other objections to the payment of the policy would arise from the absence of a specific appropriation in the budget or the failure of the University to treat the expenditure as compensation or an increment in the salaries of the employees. For the reasons detailed below, I find these objections inapposite. Accordingly, it is my opinion that the decision of the University to insure its employees was within its statutory authority.

The enabling statute for Southeastern Massachusetts University, G.L. c.75B, § 1, *et seq.* grants broad fiscal authority to the Board of Trustees. Section six provides:

> Notwithstanding any other provision of law to the contrary, the general court shall annually appropriate such sums as it deems necessary for the maintenance, operation and support of the university; and such appropriation shall be made available by the appropriate state officials for expenditure through allotment, transfer within and among subsidiary accounts, advances from the state treasury in accordance with the provisions of sections twenty-four, twenty-five and twenty-six of chapter twenty-nine, or for the disbursement on certification to the state comptroller in accordance with the provisions of section eighteen of said chapter twenty-nine as may from time to time be directed by the trustees or an officer of the University designated by the trustees.

Since you have stated in your request that the expenditure in question is within the appropriation of the General Court, the appropriate state official, the Comptroller, is obligated to disburse the requested funds "as may from time to time be directed by the trustees." In a prior opinion of the Attorney General, this office reviewed the extent of the University's broad authority in relation to the salary of the president. 1967 Op. Atty. Gen. 87. The same analysis of the enabling statutes applies in this case.

> "It is clear from the sweeping language of the statute that the powers of the trustees in this matter are very broad . . . This section (G.L. c.75B, § 6), together with § 10, was apparently intended to free SMTI [SMU] from certain budgetary restrictions imposed on most departments and agencies."

The "department and agencies" referred to in the above quote are governed by G.L. c.29, §§ 27 and 29, which requires a specific appropriation in the subsidiary accounts as set forth in schedules established by the Joint Committee on Ways and Means. However, in 1967 Op. Atty. Gen. 87, it was determined that the specific language of G.L. c.75B, § 6 and § 10, made G.L. c.29, §§ 27 and 29 inapplicable to the University. This opinion was subsequently upheld in Opinion of the Justices, 1975 Mass. Adv. Sh. 535. There the issue was whether the University of Massachusetts had authority to execute a lease without the approval of state agencies as required by G.L. c.8, § 10A. In construing statutory language in G.L. c.75, §§ 1 and 8, identical to c.75B, §§ 6, 10, and relying on the 1962 Report of the Special Commission on Budgetary Powers of the University of Massachusetts and Related Matters, the Court held

that a determination of whether the lease was proper was within the discretion of the Board of Trustees.

I realize that although the expenditure of appropriated funds is within the control of the Board of Trustees, they must nonetheless be used for the "maintenance, operation and support of the university." G.L. c. 75B, § 6. The Opinion of the Justices stated, supra at 537-538, in quoting the legislative report, that the "administrative control and responsibility be placed in the Board of Trustees which is best informed and equipped to make management decisions" and that no "discretionary decisions on the part of state fiscal officers regarding need or desirability of an expenditure would be allowed to interfere with University management." The determination of whether the insurance policies in question fall within the ambit of maintenance, operation and support of the university is for the Board of Trustees to decide in the exercise of their discretion. I do not consider the payment of this premium to be so unrelated to the above criteria as to be an abuse of the Board's discretion. Therefore, in my opinion the refusal of the Comptroller to withhold funds for the payment of employee liability insurance premiums is unwarranted.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 73. June 24, 1975

Mr. Edward B. O'Neill
Clerk of the Senate
Room 334, State House
Boston, Massachusetts 02133

Dear Mr. O'Neill:

I am responding herein to your letter of June 10, 1975 transmitting a Senate order dated June 3, 1975, which asks the following question:

> "Does the governor of the commonwealth or any official within the executive branch have the authority to refuse to expend funds duly appropriated for any budget account for any reason except that the statutory purpose for which such budget account was enacted would be fully achieved without expenditure of all funds so appropriated?"

Official Opinion No. 58 (May 8, 1975), responded to a question from the House of Representatives, as to the constitutionality of a particular refusal by a member of the executive branch to expend specified appropriated funds. Unfortunately, I must respectfully defer responding to the instant question of the Senate until the request has been clarified, for reasons which follow.

Mass. G.L. c.12, §9, states that the Attorney General "shall give his opinion upon *questions of law* submitted to him . . . by either branch of the general court." (emphasis supplied). A similar phrase in the Massachusetts Constitution, Pt. 2, c.3, Art. II, has been applied repeatedly

by the Supreme Judicial Court in declining to respond to abstract questions of law or questions of law which were not stated with sufficient particularity to permit a precise and limited response. *Answer of Justices to the Governor,* 1973 Mass. Adv. Sh. 1253, 302 N.E. 2d 565 (1973); *Opinion of the Justices,* 349 Mass. 802, 212 N.E. 2d 217 (1965); *Opinion of the Justices to the Senate,* 333 Mass. 783, 128 N.E. 2d 563 (1955); *Opinion of the Justices,* 330 Mass. 713, 113 N.E. 2d 452 (1953).

This principle, of responding only to questions based upon specific and actual facts, has also been applied when preparing opinions of the Attorney General.

> "It is traditional that opinions of the Attorney General are rendered solely upon factual situations which actually confront a given State department or agency, and not upon hypothetical questions or general requests for information." *Opinion of the Attorney General* 112, 114 (December 23, 1966).

An underlying purpose of this principle is that opinions are most useful if they relate to a particularized factual situation. For example, either a "yes" or a "no" response to the Senate's question as presently framed would fail to offer the clear guidance which this difficult area deserves.

In order for my response to serve the constructive purpose of Mass. G.L. c.12, §9, and to be of the greatest possible assistance to the Senate, it is essential that the question asked relate to the particular set of facts which gave rise to the question. A response then can discuss all relevant factors, including the particular statute under which the executive branch has acted, the extent of refusal to expend a particular appropriation, the reasons for such refusal to expend appropriated funds, and the impact of such action on the legislative purposes in passing the appropriation and in passing the underlying legislation.

An official opinion of the Attorney General should be as useful as possible. To assist me in reaching that goal, I respectfully request that the Senate clarify its question to specify, if possible: (1) the member of the executive branch whose action is questioned; (2) the appropriated funds which have not been expended; (3) the statutory purpose which the appropriation was intended to fund; and (4) the reasons, if any, which have been given for such refusal to fully expend the appropriation.

Although the question, as propounded, cannot be answered adequately, I will be pleased to give my most careful consideration to a more specific request for my opinion. In that way, this Department can issue a meaningful opinion which will best serve the Senate. Such a request will receive my earliest possible response.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 74. June 24, 1975

Mr. Wallace C. Mills
Clerk of the House
Room 251, State House
Boston, Massachusetts 02133

Dear Mr. Mills:

I am responding herein to your letter of June 11, 1975, transmitting House Order No. 6296, dated June 10, 1975, which asks the following question:

> "Does any official in the Executive Branch of the Government of the Commonwealth, including the Governor thereof, have the legal authority to refuse to spend funds duly appropriated for any budget account for any reason other than that the statutory purposes for which the budget account was enacted will be fully achieved without expenditures of all funds so appropriated."

Official Opinion No. 58 (May 8, 1975), responded to a question from the House of Representatives, as to the constitutionality of a particular refusal by a member of the executive branch to expend specified appropriated funds. Unfortunately, I must respectfully defer responding to the instant question of the House until the request has been clarified, for reasons which follow.

Mass. G.L. c.12, §9, states what the Attorney General "shall give his opinion upon *questions of law* submitted to him . . . by either branch of the general court." (emphasis supplied). A similar phrase in the Massachusetts Constitution, Pt. 2, c.3, Art. II, has been applied repeatedly by the Supreme Judicial Court in declining to respond to abstract questions of law or questions of law which were not stated with sufficient particularity to permit a precise and limited response. *Answer of Justices to the Governor*, 1973 Mass. Adv. Sh. 1253, 302 N.E. 2d 565 (1973); *Opinion of the Justices*, 349 Mass. 802, 212 N.E. 2d 217 (1965); *Opinion of the Justices to the Senate*, 333 Mass. 783, 128 N.E. 2d 563 (1955); *Opinion of the Justices*, 330 Mass. 71, 113 N.E. 2d 452 (1953).

This principle, of responding only to questions based upon specific and actual facts, has also been applied when preparing opinions of the Attorney General.

> "It is traditional that opinions of the Attorney General are rendered solely upon factual situations which actually confront a given State department or agency, and not upon hypothetical questions or general requests for information." *Opinion of the Attorney General* 112, 114 (December 23, 1966).

An underlying purpose of this principle is that opinions are most useful if they relate to a particularized factual situation. For example, either a "yes" or a "no" response to the question of the House as presently framed would fail to offer the clear guidance which this difficult area deserves.

In order for my response to serve the constructive purpose of Mass. G.L. c.12, §9, and to be of the greatest possible assistance to the House, it is essential that the question asked relate to the particular set of facts which gave rise to the question. A response then can discuss all relevant factors, including the particular statute under which the executive branch has acted, the extent of refusal to expend a particular appropriation, the reasons for such refusal to expend appropriated funds, and the impact of such actions on the legislative purposes in passing the appropriation and in passing the underlying legislation.

An official opinion of the Attorney General should be as useful as possible. To assist me in reaching that goal, I respectfully request that the House of Representatives clarify its question to specify, if possible: (1) the member of the executive branch whose action is questioned; (2) the appropriated funds which have not been expended; (3) the statutory purpose which the appropriation was intended to fund; and (4) the reasons, if any, which have been given for such refusal to fully expend the appropriation.

Although the question, as propounded, cannot be answered adequately, I will be pleased to give my most careful consideration to a more specific request for my opinion. In that way, this Department can issue a meaningful opinion which will best serve the House of Representatives. Such a request will receive my earliest possible response.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 75. June 27, 1975.

Mr. Edward W. Powers
Director of Civil Service
294 Washington Street
Boston, Massachusetts 02108

Dear Mr. Powers:

You have requested an opinion as to the constitutionality of Chapter 408 of the Acts of 1974 which permits Carmen Simonelli to be appointed a permanent police officer in the Town of Adams. My opinion is that if you make a factual determination that specific persons will be injured or prejudiced as a result of the special legislation, the statute would be unconstitutional.

Chapter 408 provides as follows:

> "Notwithstanding any general or special law or any rule to the contrary, Carmen Simonelli may be appointed a permanent police officer in the Town of Adams under the provisions of Chapter Thirty-One of the General Laws."

Although you have not articulated the precise constitutional issue which concerns you, I presume that your question is concerned with

whether this special act, which singles out a particular applicant and exempts him from the statutory prerequisites for appointment which apply to all other applicants for the same position, encounters any constitutional obstacle.

Chapter 408 can be implemented only if it meets the standards of constitutionality as recently articulated by the Supreme Judicial Court in *Commissioner of Public Health* v. *Bessie M. Burke Memorial Hospital*, 1975 Mass. Adv. Sh. 253. In *Bessie Burke*, the Court was presented with the issue of whether the legislature could, consistent with Article 10 of the Declaration of Rights of the Constitution of Massachusetts, enact special legislation to exempt a hospital from statutory requirements (for building improvements) which were applicable to all other hospitals in the Commonwealth.

Article 10 provides, *inter alia*, as follows:

> "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."

The Court noted that the Legislature has the power in certain circumstances to enact special (or "private") legislation, which is addressed to a particular situation that does not establish a rule of future conduct with any substantial degree of generality, and may provide ad hoc benefits of some kind for an individual. *Id.* at 261. Such legislation is consistent with Article 10, if the benefit is not accompanied by corresponding injury to another person who can be definitely pointed to. *Id.* at 265. The Court upheld the specific special act challenged in *Bessie Burke*, since it did not "by its operation diminish or defeat an existing property interest of any other individual or do injury to him." *Id.* at 265.

The *Bessie Burke* Court indicated that the constitutionality of a special statute is not affected by a hypothetical injury to a hypothetical party, *Id.* at 267-68; there must be an identifiable individual or entity. *Id.* at 267. That entity can be a class of "competitors" who "might claim specific injury because an otherwise justified determination . . . in its favor was being prevented or excluded by the legislatively imposed determination in favor . . . " of the benefited party. *Id.* at 268.

Whether there is a class of competitors who would be injured by this statute is a factual determination for you to make. For example, if you determine that any person or persons whose names appear on the eligible list for appointment to the Police Department pursuant to the consent decree in *Castro* v. *Beecher*, 365 F. Supp. 655, 660-662 (D. Mass. 1973), would be prejudiced or injured by Chapter 408 of the Acts of 1974, the statute would be unconstitutional. If you determine that there are no such persons on the eligible list or that there would be no injury, then Chapter 408 would be constitutional.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 76. June 30, 1975

Mr. Wallace C. Mills
Clerk of the House
State House
Boston, Massachusetts 02133

Dear Mr. Mills:

In your letter of June 12, 1975 you have transmitted an order, adopted by the House of Representatives on June 11, 1975, which presents the following question:

> Does the Commissioner of Insurance have the constitutional authority to lay off, suspend, discharge or otherwise terminate the employment of permanent employees of the fraudulent claims board when the General Court has appropriated the necessary funds for said board, when General Laws Ch. 26, Section 8B, Chapter 175, Section 113M mandates that said board carry out specific duties and when the termination of said employees would make it impossible to perform said duties?

INTRODUCTION

At the outset I must explain an important principle governing the issuance of an Attorney General's Opinion.

G.L. c. 12, § 9, states that the Attorney General "shall give his opinion upon questions of law submitted to him . . . by either branch of the general court."

Under a similar phrase in the Massachusetts Constitution, Pt. 2, c. 3, Art II, the Supreme Judicial Court has repeatedly declined to respond to questions of law which were abstract or not stated with sufficient particularity to permit a precise and limited answer, *Answer of Justices to the Governor*, 1973 Mass. Adv. Sh. 1253, 302 N.E. 2d 565 (1973); *Opinion of the Justices*, 349 Mass. 802, 212 N.E. 2d 217 (1965); *Opinion of the Justices to the Senate*, 333 Mass. 783, 113 N.E. 2d 563 (1955); *Opinion of the Justices*, 330 Mass. 713, 113 N.E. 2d 452 (1953).

This principle has also governed opinions of the Attorney General.

> It is traditional that opinions of the Attorney General are rendered solely upon factual situations which actually confront a given State department or agency, and not upon hypothetical questions or general requests for information. *Opinion of the Attorney General*, 112, 114 (December 23, 1966).

1. *The Hypothetical Nature of The Question*

In this instance, the question presented by the House of Representatives is hypothetical in character. It assumes that termination of the affected employees would make it impossible for the Fraudulent Claims Board to perform its statutory duties. Upon investigation I have learned that this fact is the very crux of administrative hearings presently being conducted by the Insurance Commissioner as part of a termination pro-

cedure. Considerable evidence has been introduced on both sides of this issue, and its resolution is uncertain. Thus, at this point, I confront a hypothetical question. The futility of such a question is that it reduces an opinion of the Attorney General to the status of a mere guess. An opinion under these circumstances is destructive insofar as it confuses and disrupts the expectations of interested parties. Accordingly, I must respect the long tradition against hypothetical opinions. 3 Op. Atty. Gen. 425, 428 (1911).

II. *The Incomplete Nature of The Question*

Upon further investigation I have learned that the question from the House does not cover the full range of legal issues involved in the subject of termination of Fraudulent Claims Board employees. The full subject requires analysis of statutes and judicial decisions in the areas of (a) civil serice law, (b) veterans' tenure, (c) collective bargaining, (d) and contractual provisions. I cannot fairly address this complex subject by answer to the question in its present partial form.

III. *Pending Litigation*

As I mentioned before, the particular controversy prompting the question from the House is presently the subject of ongoing administrative litigation before the Commissioner of Insurance. Again, the Attorney General does not render opinions upon matters in pending litigation. While the Attorney General's opinion is advisory only, a decision resulting from litigation, judicial or administrative, is compulsory and does bind the parties to it. It would serve no useful purpose for me to render an advisory opinion rendered meaningless subsequently by a compulsory adjudicatory decision in this matter. Again, such an opinion would disserve any useful purpose insofar as it might confuse and mislead interested parties or conflict with a genuinely binding decision.

A further consideration arises from the pending of litigation in the present instance. If appeal is taken to the courts from the present litigation before the Insurance Commissioner, it may well be the function of my office to represent the Commissioner and to defend the result of that litigation in the courts. If my opinion varied from that result, I would have prejudiced my prospective case and client. I would then feel free to renounce any earlier opinion as advisory only and devoid of any binding precedential value. Thus, in the present circumstance, the question of the House puts me to an unfortunate conflict with respect to my duties to the House, on the one hand, and my responsibilities to represent Executive agencies on the other. For this reason alone, I would again have to respectfully decline to respond.

IV. *The Non-Binding or Advisory Nature of an Attorney General's Opinion.*

I have made repeated reference to the non-binding, advisory character of an Attorney General's opinion. A final word of explanation may be in order on this point. Unlike a judicial decision resulting from a lawsuit, a mere advisory opinion (1) does not emerge from the testing process of evidence and fact-finding, and (2) does not rest upon an adversary confrontation of counsel offering a sharpened presentation of opposing legal

arguments. For these reasons opinions are not afforded the same weight and value as decisions. *Opinion of the Justices,* 1974 Mass. Adv. Sh. 1015, 1029; *Opinion of the Justices,* 341 Mass. 738, 749 (1960); *Ierardi, Petitioner,* 1975 Mass. Adv. Sh. 93, 106. For the same reasons, an advisory opinion in this instance may quickly prove valueless as the full facts emerge and the case moves to the courts. Neither the Attorney General nor any affected party would be bound by it or derive any benefit from it.

CONCLUSION

Because the present question from the House presents a question hypothetical, incomplete, subject to pending litigation, and fraught with a conflict of duty on my part, I must respectfully decline to answer.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

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